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I. INTRODUCTION

Despite the animosity that sometimes divides advocates and opponents of gun control, they share one important characteristic: almost unanimously, they are constitutional originalists. Persons who believe that the Second Amendment guarantees a right of individual Americans to own and carry guns claim that the original intent of the Second Amendment was for an individual right. Conversely, persons who believe that the Second Amendment only guarantees the right of state governments to have National Guard (militia) units argue that the original intent supports their own position.

Both sides of the debate cite material from the period when the Constitution and the Bill of Rights were ratified and debated. Both sides also cite materials from English legal history. But surprisingly, neither side has paid significant attention to the interpretive community which first applied the Second Amendment: the United States in the nineteenth century. During that century, the Second Amendment's right to keep and bear arms was discussed in many legal treatises, in Congressional debates, in six Supreme Court cases, in numerous state court cases, and in other legal materials. Yet, except for two of the Supreme Court cases, the history of the Second Amendment in the nineteenth century has been only lightly touched by legal scholarship.

In modern legal scholarship, the "Standard Model" of the Second Amendment maintains that individual Americans have a right to own guns.[1]

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1. *See* SENATE SUBCOMMITTEE ON THE CONSTITUTION OF THE COMMITTEE ON THE JUDICIARY, 97TH CONG., 2D SESS., THE RIGHT TO KEEP AND BEAR ARMS (Comm. Print 1982) [hereinafter SENATE SUBCOMM. ON THE CONST.]; Robert J. Cottrol, *Introduction* to 1 GUN CONTROL AND THE CONSTITUTION: SOURCES AND EXPLORATIONS ON THE SECOND AMENDMENT at ix (Robert J. Cottrol ed., 1993); Robert J. Cottrol & Raymond T. Diamond, *Public Safety and the Right to Bear Arms*, *in* THE BILL OF RIGHTS IN MODERN AMERICA: AFTER 200 YEARS 72 (David J. Bodenhamer & James W. Ely, Jr., eds., 1993); Robert J. Cottrol, *Second Amendment*, *in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 763 (Kermit L. Hall et al. eds., 1992); CLAYTON CRAMER, FOR THE DEFENSE OF THEMSELVES AND THE STATE at xv (1994); 4 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1639-40 (Leonard W. Levy et al. eds., 1986); STEPHEN HALBROOK, A RIGHT TO BEAR ARMS: STATE AND FEDERAL BILLS OF RIGHTS AND CONSTITUTIONAL GUARANTEES (1989) [hereinafter HALBROOK, RIGHT TO BEAR ARMS]; STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT (1984) [hereinafter HALBROOK, THAT EVERY MAN BE ARMED];

Edward F. Leddy, *Guns and Gun Conrtol*, *in* READER'S COMPANION TO AMERICAN HISTORY 477-78 (Eric Foner & John A. Garraty eds., 1991); LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 341 (1988); JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (1994); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992) [hereinafter Amar, *Fourteenth Amendment*]; Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1164 (1991); Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139, 1141 (1996); Bernard J. Bordenet, *The Right to Possess Arms: The Intent of the Framers of the Second Amendment*, 21 U. WEST L.A. L. REV. 1, 28 (1990); David I. Caplan, *The Right of the Individual to Bear Arms: A Recent Judicial Trend*, 1982 DET. C.L. REV. 789, 790; David I. Caplan, *The Right to Have Arms and Use Deadly Force Under the Second and Third Amendments*, 2.1 J. ON FIREARMS & PUB. POL'Y 165 (1990); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991); Brannon P. Denning, *Can the Simple Cite Be Trusted?: Lower Court Interpretations of* United States v. Miller *and the Second Amendment*, 26 CUMB. L. REV. 961 (1995-96) [hereinafter Denning, *Simple Cite*]; Brannon P. Denning, *Gun Shy: The Second Amendment as an "Underenforced Constitutional Norm"*, 21 HARV. J.L. & PUB. POL'Y 719 (1998) [hereinafter Denning, *Gun Shy*]; Anthony J. Dennis, *Clearing the Smoke From the Right to Bear Arms and the Second Amendment*, 29 AKRON L. REV. 57 (1995); Robert Dowlut, *Federal and State Constitutional Guarantees to Arms*, 15 U. DAYTON L. REV. 59 (1989) [hereinafter Dowlut, *Guarantees to Arms*]; Robert Dowlut, *The Current Relevancy of Keeping and Bearing Arms*, 15 U. BALT. L.F. 32 (1984); Robert Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 OKLA. L. REV. 65 (1983) [hereinafter Dowlut, *The Right to Arms*]; Robert Dowlut, *The Right to Keep and Bear Arms: A Right to Self-Defense Against Criminals and Despots*, 8 STAN. L. & POL'Y REV. 25 (1997); Richard E. Gardiner, *To Preserve Liberty—A Look at the Right to Keep and Bear Arms*, 10 N. KY. L. REV. 63 (1982); Alan M. Gottlieb, *Gun Ownership: A Constitutional Right*, 10 N. KY. L. REV. 113 (1982); 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); Stephen P. Halbrook, *Encroachments of the Crown on the Liberty of the Subject: Pre-Revolutionary Origins of the Second Amendment*, 15 U. DAYTON L. REV. 91 (1989); Stephen P. Halbrook, *Personal Security, Personal Liberty, and "The Constitutional Right to Bear Arms": Visions of the Framers of the Fourteenth Amendment*, 5 SETON HALL CONST. L.J. 341 (1995) [hereinafter Halbrook, *Personal Security*]; Stephen P. Halbrook, *Second-Class Citizenship and the Second Amendment in the District of Columbia*, 5 GEO. MASON U. CIV. RTS. L.J. 105 (1995); Stephen P. Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 GEO. MASON L. REV. 1 (1981); Stephen P. Halbrook, *The Right of the People or the Power of the State: Bearing Arms, Arming Militias, and the Second Amendment*, 26 VAL. U. L. REV. 131 (1991); Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to "Bear Arms"*, 49 LAW & CONTEMP. PROBS. 151 (1986) [hereinafter Halbrook, *What the Framers Intended*]; David G. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL'Y 559 (1986); David G. Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J.L. & POL. 1 (1987) [hereinafter Hardy, *Second Amendment*]; Nicholas J. Johnson, *Principles and Passions: The Intersection of Abortion and Gun Rights*, 50 RUTGERS L. REV. 97 (1997); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983) [hereinafter Kates, *Handgun Prohibition*]; Don B. Kates, Jr., *The Second*

Amendment: A Dialogue, 49 LAW & CONTEMP. PROBS. 143 (1986); Don Kates, *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENTARY 87 (1992) [hereinafter Kates, *Self-Protection*]; David B. Kopel & Christopher C. Little, *Communitarians, Neorepublicans, and Guns: Assessing the Case for Firearms Prohibition*, 56 MD. L. REV. 438 (1997); Stephanie A. Levin, *Grassroots Voices: Local Action and National Military Policy*, 40 BUFF. L. REV. 321, 346-47 (1992); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989); Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 GA. L. REV. 1 (1996) [hereinafter Lund, *Past and Future*]; Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103 (1987); Joyce Lee Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q. 285 (1983); Thomas B. McAffee & Michael J. Quinlan, *Bringing Forward the Right to Keep and Bear Arms: Do Text, History, or Precedent Stand in the Way?*, 75 N.C. L. REV. 781 (1997); Thomas M. Moncure, Jr., *The Second Amendment Ain't About Hunting*, 34 HOW. L.J. 589 (1991); Thomas M. Moncure, Jr., *Who is the Militia—The Virginia Ratification Convention and the Right to Bear Arms*, 19 LINCOLN L. REV. 1 (1990); James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287 (1990); L.A. Powe, Jr., *Guns, Words, and Constitutional Interpretation*, 38 WM. & MARY L. REV. 1311 (1997); Michael J. Quinlan, *Is There a Neutral Justification for Refusing to Implement the Second Amendment or is the Supreme Court Just "Gun Shy"?*, 22 CAP. U. L. REV. 641 (1993); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461 (1995); Glenn Harlan Reynolds, *The Right to Keep and Bear Arms Under the Tennessee Constitution: A Case Study in Civic Republican Thought*, 61 TENN. L. REV. 647 (1994) (discussing the Second Amendment as related to the Tennessee Constitution) [hereinafter Reynolds, *Tennessee Constitution*]; Elaine Scarry, *War and the Social Contract: Nuclear Policy, Distribution, and the Right to Bear Arms*, 139 U. PA. L. REV. 1257 (1991); J. Neil Schulman, *The Text of the Second Amendment*, 4 J. ON FIREARMS & PUB. POL'Y 159 (1992); Robert E. Shalhope, *The Armed Citizen in the Early Republic*, 49 LAW & CONTEMP. PROBS. 125 (1986); Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599 (1982); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236 (1994); David E. Vandercoy, *The History of the Second Amendment*, 28 VAL. U. L. REV. 1007 (1994); Eugene Volokh, *The Amazing Vanishing Second Amendment*, 73 N.Y.U. L. REV. 831 (1998); Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998); Scott Bursor, Note, *Toward a Functional Framework for Interpreting the Second Amendment*, 74 TEX. L. REV. 1125 (1996); Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 YALE L.J. 995 (1995) (reviewing JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (1994)); Brannon P. Denning, *Professional Discourse, The Second Amendment, and the "Talking Head Constitutionalism" Counterrevolution: A Review Essay*, 21 S. ILL. U. L.J. 227 (1997) (reviewing DENNIS A. HENIGAN ET AL., GUNS AND THE CONSTITUTION: THE MYTH OF SECOND AMENDMENT PROTECTION FOR FIREARMS IN AMERICA (1996)); T. Markus Funk, *Is the True Meaning of the Second Amendment Really Such a Riddle? Tracing the Historical "Origins of an Anglo-American Right"*, 39 HOW. L.J. 411 (1995) (reviewing JOYCE LEE MALCOM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (1994)); David B. Kopel, *It Isn't About Duck Hunting: The British Origins of the Right to Arms*, 93 MICH. L. REV. 1333 (1995) (reviewing JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (1994)); F. Smith Fussner, Book Review, 3 CONST. COMMENTARY 582 (1986) (reviewing STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A

Standard Modelers differ among themselves over the types of guns which may be kept, the breadth of purposes for which the right to keep a gun is protected, and the permissible restrictions on the "bearing" of arms.

Competing with the Standard Model in the late twentieth century are what this article terms the "anti-individual" theories. The name is appropriate because these theories are linked by their common attempt to show that an individual American citizen has no right to own a gun. The leading anti-individual theorist is Handgun Control's attorney Dennis Henigan, who argues that the Second Amendment protects the state governments' right to be free from federal interference with their militias.[2] According to this view, the Second Amendment limits the Congressional militia powers created by Article I of the Constitution, although Henigan and other

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CONSTITUTIONAL RIGHT (1984)); Joyce Lee Malcolm, Book Review, 54 GEO. WASH. L. REV. 452 (1986) (reviewing STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT (1984)); *cf.* Nicholas J. Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed through the Ninth Amendment*, 24 RUTGERS L.J. 1 (1992) (arguing that the Ninth Amendment supports an individual right to arms).

2. *See* DENNIS A. HENIGAN ET AL., GUNS AND THE CONSTITUTION: THE MYTH OF SECOND AMENDMENT PROTECTION FOR FIREARMS IN AMERICA (1995); 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, 30 (1989) ("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."); Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 VAL. U. L. REV. 107 (1991) [hereinafter Henigan, *Arms, Anarchy*]. Henigan's status as premier writer of the anti-individual school is based on the fact that he has authored two full length anti-individualist law review articles in the last decade, and he is by far the most active spokesman for the view that the individual right to keep and bear arms is a fraud. *See* sources cited *infra* note 12; *see also* ROBERT J. SPITZER, THE POLITICS OF GUN CONTROL 42-43 (1995); George Anastaplo, *Amendments to the Constitution of the United States: A Commentary*, 23 LOY. U. CHI. L.J. 631, 687-93 (1992); Michael A. Bellesiles, *The Origins of Gun Culture in the United States, 1760-1865*, 83 J. AM. HIST. 425 (1996); Carl T. Bogus, *Race, Riots, and Guns*, 66 S. CAL. L. REV. 1365 (1993); Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309 (1998) [hereinafter Bogus, *Hidden History*]; Lawrence Delbert Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. AM. HIST. 22 (1984); Samuel Fields, *Guns, Crime and the Negligent Gun Owner*, 10 N. KY. L. REV. 141 (1982); Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57 (1995); Michael J. Palmiotto, *The Misconception of the American Citizen's Right to Keep and Bear Arms*, 4 J. ON FIREARMS & PUB. POL'Y 85 (1992); Warren Spannaus, *State Firearms Regulation and the Second Amendment*, 6 HAMLINE L. REV. 383 (1983).

states' rights supporters have not specified what those limitations are.[3] But if states' rights theorists are unclear about what the Second Amendment does, they are emphatic about what it does not do: "since privately-owned weapons are no longer used to arm citizen militias, as they were in colonial times, the regulation of such arms should face no Second Amendment barrier."[4]

Another major anti-individual theory might be called the "nihilist Second Amendment." Offered by Garry Wills, this theory argues that the Second Amendment "had no real meaning."[5] According to Wills, only "wacky scholars" and their dupes believe that the Second Amendment affirms a right of individuals to own firearms for protection against tyranny.[6] Evidently, James Madison played a clever trick on the entire United States and wrote an Amendment which amounts to nothing at all. In the period between Madison and Wills, however, no one else seems to have discovered this shrewd ploy.[7]

The term "collective rights" is sometimes used in connection with these anti-individual interpretations of the Second Amendment to indicate a right that belongs to the people collectively (like "collective property" under a Communist government), rather than to any individual, and therefore belongs to the government. Some "collective rights" proponents adhere to a states' rights version Second Amendment, while others propound the nihilist approach.

David Williams offers a third variant on the "anti-individual" approach in a series of innovative articles. First, he

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3. For an analysis of the logical implications of a states' rights Second Amendment theory as propounded by Henigan, see Glenn Harlan Reynolds & Don B. Kates, *The Second Amendment and States' Rights: A Thought Experiment*, 36 WM. & MARY L. REV. 1737 (1995). If the Second Amendment did guarantee state control over the National Guard, then it would be hard to deny the unconstitutionality of President Eisenhower's federalization of the Arkansas National Guard—over the vehement protest of the Governor—during the Little Rock school integration crisis in 1957. *See* Powe, *supra* note 1, at 1385-86.

4. Dennis Henigan, *The Right to Be Armed: A Constitutional Illusion*, S.F. BARRISTER, Dec. 1989, *available online at* ¶ 19 (visited Nov. 30, 1998) <http://www.handguncontrol.org/legalaction/C2/c2rtarms.htm>.

5. Garry Wills, *Why We Have No Right to Bear Arms*, N.Y. REV. BOOKS, Sept. 21, 1995, at 62, 72.

6. *Id.* at 69.

7. *See id.* at 72.

acknowledges that the Second Amendment was intended to preserve the ability of all "the people" to have guns and to know how to use them to maintain order and resist tyranny.[8] But, continues Williams, the Second Amendment is operative only as long as the American people are like "the people" contemplated in the republican theory of the Second Amendment: virtuous, unified, homogenous, imbued with a shared vision of the common good, and trained by their state governments in the use of firearms. Since the American people no longer fit the description of "the people" implicit in the Second Amendment, the argument goes, the Second Amendment is obsolete and of no legal effect. Because Williams's theory is an argument about changed circumstances in the twentieth century, analysis of nineteenth century sources cannot resolve all the issues he raises. But the nineteenth century does provide a good test case for Williams's theory of the Second Amendment. During the period before and after the Civil War, Americans were more disunited, more distrustful of each other, and more thoroughly polarized in their competing visions of the common good than at any other time in American history. It is useful to examine what became of the Second Amendment during these decades when the people of the United States fell far away from Williams's ideal.

The various factions in the modern Second Amendment debate share another trait: they insist that their own interpretation has always been the common understanding of the Second Amendment. The contrary viewpoint, each insists, is a modern fiction, invented by the other faction, and having no support in American legal history. For example, the late Warren Burger, after retiring from the Supreme Court, participated in an advertising campaign for Handgun Control. The former Justice informed Americans that the notion of the Second Amendment as an individual right is a "fraud" perpetrated by the National Rifle Association.[9] The late Erwin

8. *See* David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991) [hereinafter Williams, *Civic Republicanism*]; David C. Williams, *The Militia Movement and Second Amendment Revolution: Conjuring with the People*, 81 CORNELL L. REV. 879 (1996) [hereinafter Williams, *Militia Movement*]; David C. Williams, *The Unitary Second Amendment*, 73 N.Y.U. L. REV. 822 (1998).

9.

Griswold, former Solicitor General of the United States, former Dean of Harvard Law School, and member of the Board of Handgun Control, wrote "that the Second Amendment poses no barrier to strong gun laws is perhaps the most well-settled proposition in American constitutional law."[10] Similarly, the Coalition to Stop Gun Violence (the nation's second largest antigun group, next to Handgun Control) informs us that the notion of the Second Amendment as a barrier to gun prohibition is a "myth."[11] The Coalition's educational arm recommends a recent law review article which, instead of the word "myth," uses words such as "deception," "constitutional false consciousness," "fake," "intentional deception," "fictional," "bogus," and "constitutional charade." The article further accuses law professors holding contrary views of deliberate fraud.[12]

> [O]ne of the frauds—and I use that terms [sic] advisedly—on the American people, has been the campaign to mislead the public about the Second Amendment. The Second Amendment doesn't guarantee the right to have firearms at all. . . . [The People of this country] wanted the Bill of Rights to make sure that there was no standing army in this country, but that there would be state armies. Every state during the revolution had its own army. There was no national army.

Warren Burger, *Press Conference Concerning Introduction of the Public Health and Safety Act of 1992*, FED. NEWS SERVICE, June 26, 1992, *available in* LEXIS, Nexis Library, ARCNWS File (supporting proposal to confiscate handguns).

The United States, under the Constitution, has always had a standing army. If the Second Amendment were meant to prohibit standing armies, it is impossible to explain why the very same Congress that approved the Second Amendment also voted to create a standing army. *Compare* Military Establishment Act, H.R. 50a, *with* Military Establishment Act, H.R. 126a, *both in* 5 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1789-1791, at 1272-1432 (Linda Grant De Pauw et al. eds., 1972).

10. Erwin N. Griswold, *Phantom Second Amendment 'Rights'*, WASH. POST, Nov. 4, 1990, at C7; *see also* Henigan, *supra* note 4 ("That the 2nd Amendment poses no threat to laws affecting the private possession of firearms may well be the most well-settled proposition in constitutional law."). Considering how well-established certain other principles of American law are (such as judicial review, or the prohibition on prior restraints), Griswold and Henigan make a very strong claim.

11. Michael K. Beard & Kristin M. Rand, *The Handgun Battle*, BILL OF RTS. J., Dec. 1987, at 13, 13.

12. 9 FIREARMS LITIG. REP. (Firearms Litig. Clearinghouse), Summer 1995, at 4 (recommending Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. Rev. 57 (1995)); *see also* CENTER TO PREVENT HANDGUN VIOLENCE, THE SECOND AMENDMENT: FRAUD AND FACT (undated pamphlet) (on file with author) ("Fraud[:] . . . each citizen of a state retains a fundamental 'right to keep and bear arms.' Fact[:] . . . the Second Amendment does not guarantee the right of individuals to own and to carry arms."); Dennis Henigan, *Exploding the NRA's Constitutional Myth*, LEGAL TIMES, Apr. 22, 1991, at 22, 22

If Chief Justice Burger and the rest are right, then we should expect that legal materials of the nineteenth century would clearly support their claim. In the period before the founding of the National Rifle Association in 1871, we should not expect to find assertions that the Second Amendment is an individual right.

This article lets the nineteenth century legal community speak for itself by dealing with the treatises and cases—what Duncan Kennedy calls "the mandarin materials"[13]—of the nineteenth century, as well as Congressional and political debates. Newspaper articles, novels, and other mass entertainment materials are not discussed. There is a great deal to learn from what the nineteenth century had to say about the Second Amendment. Most importantly, we can resolve whether the Second Amendment has historically been considered to protect an individual right. Additionally, an examination of the Second Amendment in the nineteenth century provides useful guidance about what types of gun control are constitutionally permissible.

Part II of this article analyzes the Second Amendment scholarship of the three great constitutional treatises of early nineteenth century—St. George Tucker's *American Blackstone*, William Rawle's *A View of the Constitution of the United States of America*, and Joseph Story's *Commentaries on the Constitution of the United States*—as well as some lesser commentators from the 1830s, 1840s, and 1850s. Part II also includes a study of Justice Story's dicta about the Second Amendment in the 1820 case *Houston v. Moore*.

Part III addresses nineteenth century state constitutions and state case law regarding the right to arms. These constitutional texts and their judicial interpretation offer valuable insights into the meaning of the Second Amendment.

(arguing that an individual right to arms is a "constitutional myth, an illusion created by mass advertising to advance a political objective," that the NRA should "no longer pretend that there is some fundamental constitutional liberty at stake," and that "[i]t's time to stop the Second Amendment nonsense") [hereinafter Henigan, *Constitutional Myth*]; Dennis Henigan, *Faulty Interpretation*, WASH. TIMES, Jan. 11, 1998, at B4 ("The constitutional debate is phony.").

13. *See generally* DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM (1983).

The Civil War is the subject of Part IV, which discusses *Dred Scott*, the writings of anti-slavery human rights activists, and the confiscations of arms before and during the War. Part V deals with the aftermath of the Civil War, including Congressional debates about the infringements by unreconstructed Southern states of the freedmen's right to arms; the Fourteenth Amendment; and the Supreme Court's *Cruikshank* decision. Part V concludes with a discussion of the growth in labor unrest, restrictive gun laws aimed at labor agitators, and the Supreme Court's *Presser* decision.

Scholarly commentators of the later nineteenth century are the subject of Part VI. Thomas Cooley is the giant of this period, but there were also more than a dozen other constitutional treatises from the period, as well as the first law review articles on the right to arms.

Part VII brings the article to the *fin-de-siècle*, by looking at two Supreme Court cases mentioning the Second Amendment in dicta; it also peeks ahead into the early twentieth century at the most important Second Amendment "states' right" ruling—the Kansas case of *Salina v. Blaksley*. Part VII also examines the implications that the nineteenth century records have for modern firearms policy, and for the scholarship of David Williams and Carl Bogus.

The Conclusion discusses which modes of the Second Amendment analysis are plausible and which modes are implausible in light of the nineteenth century's Second Amendment interpretation.

II. THE EARLY GIANTS: TUCKER, RAWLE, AND STORY

Part II of this article examines the treatment of the Second Amendment in the first third of the nineteenth century by the three major legal commentators of the era: St. George Tucker, William Rawle, and Joseph Story. This Part also discusses the Supreme Court's first Second Amendment case, the virtually unknown 1820 *Houston v. Moore*. The Part concludes with discussion of other commentators from the 1830s through the 1850s.

A. St. George Tucker: The American Blackstone

The first scholarly analysis of the Second Amendment is found in St. George Tucker's American edition of Blackstone's *Commentaries*, published in 1803.[14]

1. Tucker's background

The law practice of this young Virginia attorney was interrupted by the American Revolution. St. George Tucker threw himself into the cause enthusiastically, heading up a gun-running operation in which his four small ships sent indigo to the West Indies and Bermuda in exchange for firearms for the Patriots.[15] Acclaimed as "one of the great war heroes of Virginia," Tucker was chosen as head of Virginia's delegation to the Annapolis Convention (the precursor to the Philadelphia Convention).[16] There, he served on a commission with James Madison to meet with state officials and determine to what degree the federal government should have the authority to create uniform rules to facilitate interstate commerce.[17]

"[O]ne of the most eminent of Virginia lawyers,"[18] Tucker taught law at William and Mary from 1790 until 1804, when he was appointed a judge of Virginia's High Court of Appeals.[19] He was also "perhaps the most ardent advocate of emancipation in Virginia in the 1790s,"[20] calling it his "dearest wish."[21]

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14. WILLIAM BLACKSTONE, COMMENTARIES (St. George Tucker ed., Lawbook Exchange, Ltd. 1996) (1803).

15. *See* Hon. Armistead M. Dobie, *Federal District Judges in Virginia Before the Civil War*, 12 F.R.D. 451, 459 (1952); WILLIAM S. PRINCE, THE POEMS OF HENRY ST. GEORGE TUCKER OF WILLIAMSBURG, VIRGINIA 1752-1827, at 1 (1977). Like many educated men of his day, Tucker frequently wrote poetry. Although his poems are not particularly memorable, neither is most American poetry from the Early Republic. *See id.* at x.

16. Don Riddick, *The Second Most Powerful Pen in Early Virginia: St. George Tucker*, 4 J. S. LEG. HIST. 71, 71 (1997).

17. *See* JAMES MADISON, JOURNAL OF THE FEDERAL CONVENTION 35-36 (E.H. Scott ed., Albert, Scott & Co. 1893) (1840).

18. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 193 (1973). Tucker was also known to be "as kindhearted a man as ever lived." HENRY ADAMS, JOHN RANDOLPH 166 (M.E. Sharpe 1996) (1882).

19. *See* PRINCE, *supra* note 15, at 5; Paul D. Carrington, *The Twenty-First Wisdom*, 52 WASH. & LEE L. REV. 333, 333 n.1 (1995); Dowlut, *The Right to Arms*, *supra* note 1, at 83-84; Stephen P. Halbrook, *Rationing Firearms Purchases and the Right to Keep Arms: Reflections on the Bills of Rights of Virginia, West Virginia, and the United States*, 96 W. VA. L. REV. 1, 20 (1993).

20. Carrington, *supra* note 19, at 336.

21. RICHARD B. DAVIS, INTELLECTUAL LIFE IN JEFFERSON'S VIRGINIA 1790-1843, at 413 (1964), *cited in* Carrington, *supra* note 19, at 336 n.18. His abolition proposal

President Madison appointed Tucker to the federal bench for Virginia in 1813, where he served until his death in 1827.[22]

2. The central role of Tucker's American Blackstone

Tucker's annotated edition of *Blackstone* quickly became known as the *American Blackstone*.[23] It was the first treatise on common law written for the needs and conditions of the American legal profession. The treatise consisted of Blackstone's four original volumes, annotated by Tucker, plus numerous appendices on American law and the Constitution. The "five-volume [work] was the standard work on American law for a generation."[24] Almost every prospective lawyer began his studies by reading Tucker's *Blackstone*, and some lawyers may never have read anything else.[25] Thomas Jefferson recommended Tucker's *Blackstone* as part of the course of study for aspiring law students, since the Tucker book was the best source for overall mastery of American law.[26] Before the publication of Chancellor Kent's *Commentaries* in the late 1820s, "Tucker's [*Blackstone*] was the only treatise on American law available in the nation. Until 1827, Tucker was the most frequently cited American legal scholar . . . ."[27] In short, Tucker's *Blackstone* is "generally considered the single

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was detailed in ST. GEORGE TUCKER, A DISSERTATION ON SLAVERY: WITH A PROPOSAL FOR THE GRADUAL ABOLITION OF IT IN THE STATE OF VIRGINIA (1796). Tucker ensured the wide circulation of his proposal by making it an appendix to his 1803 treatise. *See* 2 BLACKSTONE, *supra* note 14, app. at 31. Tucker described the disarmed status of free Negroes in Virginia as amounting to civil slavery. But he urged that the law against ownership of arms by freedmen be left in place upon the abolition of slavery, so as to encourage the ex-slaves to settle outside Virginia. *See id.* app. at 57, 68, 78-79.

22. *See* PRINCE, *supra* note 15, at 5.

23. *See* Paul Finkelman & David Cobin, *Introduction* to 1 BLACKSTONE, *supra* note 14 at i.

24. Carrington, *supra* note 19, at 334.

25. *See* Paul D. Carrington, *Law as "The Common Thoughts of Men": The Law-Teaching and Judging of Thomas McIntyre Cooley*, 49 STAN. L. REV. 495, 516 (1997).

26. *See* Elizabeth Gaspar Brown, *A Jeffersonian's Recommendations for a Lawyer's Education: 1802*, 13 AM. J. LEGAL HIST. 139, 141 (1969). Two decades later, Tucker's Blackstone was still "necessary to every student and practitioner of law in Virginia." Daniel Call, *Biographical Sketch of the Judges of the Court of Appeals*, 8 Va. (4 Call) xxvi, xxviii (1827), *reprinted in* JEFFERSON, VIRGINIA REPORTS, 1730-1880, at 627 (Thomas Johnson Michie ed., The Michie Co. 1902).

27. Finkelman & Cobin, *supra* note 23, at xiii.

most important early legal text created by an American scholar."[28]

Alfred Brophy observes: "When Americans set out to remold law books for use in America, as Henry [sic] St. George Tucker did in 1803 with Blackstone's *Commentaries*, their results are extraordinarily illuminating about both the mind of Americans and the state of American law."[29] Tucker did not intend merely to reprint *Blackstone*; he wanted to show how Blackstone's version of the common law had been changed—in the direction of significantly greater civil liberty—by developments in America, especially the ratification of the Constitution and Bill of Rights.[30]

3. *Tucker on the right to arms in* Blackstone

The second volume of Tucker's *American Blackstone* contains Blackstone's commentary on what Blackstone called the five "auxiliary rights of the subject."[31] These were rights (such as the right to seek legal redress in court, and the right to petition) whose main purpose was to safeguard primary rights.[32] Blackstone had written:

> The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence[fn40] suitable to their condition and degree, and such as are allowed by law[fn41]. Which is also declared by the same statute 1 W. & M. st. 2 c. 2, and it is indeed, a public allowance under due restrictions, of the natural rights of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.[33]

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28. Riddick, *supra* note 16, at 73; *see also* Hon. Armistead M. Dobie, *Federal District Judges in Virginia Before the Civil War*, 12 F.R.D. 451, 460 (1952) ("[T]he American Blackstone was unquestionably one of the most important law-books of its day.").

29. Alfred L. Brophy, *"Ingenium Est Fateri Per Quos Profeceris:" Francis Daniel Pastorius' Young Country Clerk's Collection and Anglo-American Legal Literature, 1682-1716*, U. CHI. SCH. ROUNDTABLE 637, 671 n.121 (1996) (citing Robert M. Cover, *Tucker's Blackstone*, 70 COLUM. L. REV. 1475, 1475 (1970); John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547 (1993)).

30. *See* Finkelman & Cobin, *supra* note 23, at ii.

31. 2 BLACKSTONE, *supra* note 14, at 140-42.

32. *See id.* The primary rights were personal security, personal liberty, and property. *See id.* at 121-38.

33. *Id.* at 143 (footnotes added by Tucker).

Blackstone was explaining the English Bill of Rights, which provided: "That the subjects which are protestants, may have arms for their defence suitable to their conditions, and as allowed by law."[34]

Tucker added his own analysis in two footnotes:

> [fn40] The right of the people to keep and bear arms shall not be infringed. Amendments to C. U. S. Art. 4, and this without any qualification as to their condition or degree, as is the case in the British government.[35]
>
> [fn41] Whoever examines the forest, and game laws in the British code, will readily perceive that the right of keeping arms is effectually taken away from the people of England. The commentator himself informs us, Vol. II, p. 412, "that the prevention of popular insurrections and resistence to government by disarming the bulk of the people, is a reason oftener meant than avowed by the makers of the forest and game laws."[36]

Tucker's footnote 40 echoed the language of the Second Amendment. He distinguished the American right to arms from its British antecedent by noting that the American right had none of the limitations that were contained in the British right. Tucker's criticism of the English Bill of Rights paralleled Madison's criticisms in a speech to Congress introducing the Bill of Rights.[37]

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34. 1 W. & M., Sess. 2, ch. 2 (1688). The Parliament enacting the Bill of Rights had rejected an arms guarantee limiting the right only to arms kept "for their common defence." MALCOLM, *supra* note 1, at 117. Although Catholics were excluded, they were allowed by statute to keep guns on their own property for personal defense. *See* 1 W. & M. Sess. 2, ch. 15 (1688); MALCOLM, *supra* note 1, at 122-23.

35. 2 BLACKSTONE, *supra* note 14, at 143 n.40. The citation to "Art. 4" reflects the fact that the Second Amendment was originally the Fourth Amendment and gained its current numbering only when the original first two amendments (controlling House of Representatives apportionment and Congressional pay raises) failed to win speedy ratification by the states. Tucker's numbering system followed the numbering of the amendments as proposed to the States by Congress. *See* 1 *id.* app. at 300.

36. 2 *id.* at 143 n.41 (quotation marks modified to reflect modern usage).

37. "They [the proposed Bill of Rights] relate 1st. to private rights— . . . fallacy on both sides—espec[iall]y as to English Decln. of Rts—1. mere act of parl[iamen]t. 2. no freedom of press—Conscience . . . attainders—arms to Protest[an]ts." James Madison, *Notes for Speech in Congress Supporting Amendments* (June 8, 1789), *in* 12 THE PAPERS OF JAMES MADISON 193-94 (Charles F. Hobson et. al. eds., 1979); *see also* THE ORIGIN OF THE SECOND AMENDMENT 645 (David E. Young ed., 1991) [hereinafter

Tucker's footnote 41 quoted Blackstone's description of the English game laws, with their restriction on the ownership of hunting weapons as having the covert intent of disarming the non-aristocratic population. In his commentary on the game laws section of *Blackstone*, Tucker added his own condemnation of British practice, contrasting it with the robust right to arms in America:

> The bill of rights, 1 W. and M, says Mr. Blackstone, (Vol. 1 p. 143,) secures to the subjects of England the right of having arms for their defence, *suitable to their condition and degree*. In the construction of these game laws it seems to be held, that no person who is not qualified according to law to kill game, hath any right to keep a gun in his house. Now, as no person, (except the game-keeper of a lord or lady of a manor) is admitted to be qualified to kill game, unless he has 100*l*. per annum, &c. it follows that no others can keep a gun for their defence; so that the whole nation are completely disarmed, and left at the mercy of the government, under the pretext of preserving the breed of hares and partridges, for the exclusive use of the independent country gentlemen. In America we may reasonably hope that the people will never cease to regard the right of keeping and bearing arms as the surest pledge of their liberty.[38]

In fact, Tucker was wrong in his dire description of England; after the overthrow of the Stuarts in 1689, the game laws were no longer used to disarm the common people. The law presumed that a commoner's gun was intended for self-defense (a right guaranteed by the 1689 Bill of Rights), unless the circumstances showed that the gun was used for unlawful hunting.[39] But more important than whether Tucker accurately understood English circumstances is what his widely read treatise shows about the state of American law. Tucker's remarks unambiguously described "the right of keeping and bearing arms as the surest pledge of . . . liberty."[40]

ORIGIN].

38. 3 BLACKSTONE, *supra* note 14, at 414 n.3.
39. *See* MALCOLM, *supra* note 1, at 126-30.
40. 3 BLACKSTONE, *supra* note 14, at 414 n.3.

4. Tucker's appendix on the American Constitution

Tucker's *American Blackstone* contained several appendices, including a lengthy appendix analyzing the new American Constitution. This appendix was "the first disquisition upon the character and interpretation of the Federal Constitution, as well as upon its origin and true nature,"[41] and was used as a legal textbook for many decades throughout the United States.[42]

Tucker's constitutional analysis remains powerful in modern times. For example, Tucker was the first scholar to argue that the First Amendment advanced far beyond English common law freedom of press. While freedom of press in England meant only freedom from prior restraints, Tucker argued that the First Amendment left Congress with no power at all to punish newspapers, even after the fact.[43] Justice Hugo Black later observed that Tucker's appendix set forth "the general view held when the First Amendment was adopted and ever since."[44]

Justice Black was right to cite Tucker as the definitive source for original intent. "While Tucker published his [American] edition of Blackstone in 1803, he began writing it in 1790, as he prepared lectures for his courses at William and Mary. The ideas and arguments in his volumes are thus perhaps as contemporaneous to the Founding as it is possible to find."[45]

Because "[g]reat weight has always been attached, and very rightly attached, to contemporaneous exposition,"[46] the Supreme Court has cited Tucker in over forty cases. One can find Tucker in the major cases of virtually every Supreme Court era. In the early nineteenth century Tucker is cited in *Fletcher*

41. St. George Tucker, *The Judges Tucker of the Court of Appeals of Virginia*, 1 VA. L. REG. 789, 794 (1896); *see also* Finkelman & Cobin, *supra* note 23, at i.

42. *See* Tucker, *supra* note 41, at 793.

43. *See* Finkelman & Cobin, *supra* note 23, at ii.

44. New York Times Co. v. Sullivan, 376 U.S. 254, 286, 296 (1964) (Black, J., concurring) (Justice Douglas joined this concurrence).

45. Finkelman & Cobin, *supra* note 23, at v.

46. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 418 (1821).

v. Peck,[47] *Dartmouth College*,[48] *Gibbons v. Ogden*,[49] *Charles River Bridge*,[50] and *Dred Scott*;[51] later in the nineteenth century Tucker appears in the *Slaughter-house Cases*,[52] *Spies v. Illinois* [53](the Haymarket case), and *Pollock v. Farmers' Loan and Trust Co.*[54] (income tax). Tucker also appears in *Dennis v. United States*,[55] *New York Times v. Sullivan*,[56] *Harmelin v. Michigan*,[57] and *U.S. Term Limits v. Thornton*,[58] in the twentieth century.[59]

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47. 10 U.S. (4 Cranch) 87, 121 (1810).
48. Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 607 (1819).
49. 22 U.S. (9 Wheat.) 1, 86, 113, 179 (1824).
50. Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420, 472 (1837).
51. Scott v. Sandford, 60 U.S. (19 How.) 393, 578 (1856).
52. 83 U.S. (16 Wall.) 36, 127-28 (1872).
53. 123 U.S. 131, 152 (1887).
54. 157 U.S. 429, 629 (1895) (White, J., dissenting).
55. 341 U.S. 494, 522-23 n.4 (1951) (Frankfurter, J., concurring).
56. 376 U.S. 254, 286, 296-97 (1964) (Black, J., concurring).
57. 501 U.S. 957, 977 (1991).
58. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995). The Court used Judge Tucker's "two primary arguments" in its holding against the power to add term limits qualifications:

> First, that in a representative government, the people have an undoubted right to judge for themselves of the qualification of their delegate, and if their opinion of the integrity of their representative will supply the want of estate, there can be no reason for the government to interfere, by saying, that the latter must and shall overbalance the former.
>
> Secondly; by requiring a qualification in estate it may often happen, that men the best qualified in other respects might be incapacitated from serving their country.

Id. at 824 n.34.

59. Some other cites: Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 29 (1991) (Scalia, J., concurring in judgment) ("It was thus as a supposed affirmation of Magna Charta according to Coke that the First Congress . . . included in the proposed Fifth Amendment to the Federal Constitution the provision that '[n]o person shall be . . . deprived of life, liberty, or property, without due process of law.' Early commentaries confirm this. *See, e.g.*, 2 W. BLACKSTONE, COMMENTARIES 133 nn.11, 12 (S. Tucker ed., 1803)."); U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 463 n.13 (1978) ("St. George Tucker, who along with Madison and Edmund Randolph was a Virginia commissioner to the Annapolis Convention of 1786, drew a distinction between 'treaties, alliances, and confederations' on the one hand, and 'agreements or compacts' on the other: . . . 1 W. BLACKSTONE, COMMENTARIES, Appendix 310 (S. Tucker ed. 1803)."); Apodaca v. Oregon, 406 U.S. 404, 408 n.3 (1972) ("[T]he unquestioning acceptance of the unanimity rule by text writers such as St. George Tucker indicate that [jury] unanimity became the accepted rule during the 18th century."); Smith v. California, 361 U.S. 147, 157 n.2 (1959) (Black, J., concurring) ("For another early discussion of the scope of the First Amendment as a complete bar to all federal abridgment of speech and press see St. George Tucker's comments on the adequacy of state forums and state laws to grant all the protection needed

5. *Tucker's exposition of the Second Amendment*

Although Tucker had addressed the Second Amendment in his footnotes to *Blackstone*, the constitutional appendix gave Tucker the opportunity for a fuller exposition:

> This may be considered as the true palladium of liberty[60] . . . . The right of self defence is the first law of nature: in most governments it has been the study of rulers to confine this right within the narrowest limits possible. Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction. In England, the people have been disarmed, generally, under the specious pretext of preserving the game: a never failing lure to bring over the landed aristocracy to support any measure, under that mask, though calculated for very different purposes. True it is, their bill of rights seems at first view to counteract this policy: but the right of bearing arms is confined to protestants, and the words suitable to their condition and degree, have been interpreted to authorise the prohibition of keeping a gun or other engine for the destruction of game, to any farmer, or inferior tradesman, or other person not qualified to kill game. So that not one man in five hundred can keep a gun in his house without being subject to a penalty.[61]

Besides asserting that the Second Amendment upholds an individual right essential for liberty, Tucker also argued that even without the Second Amendment, Congress could not

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against defamation and libel."); Barenblatt v. United States, 360 U.S. 109, 151 n.23 (1959) (Black, J., dissenting) ("Cf. St. George Tucker, Appendix, 1 Blackstone Commentaries (Tucker ed. 1803) 299. '[T]he judicial courts of the respective states are open to all persons alike, for the redress of injuries of this nature [libel] . . . . But the genius of our government will not permit the federal legislature to interfere with the subject; and the federal courts are, I presume, equally restrained by the principles of the constitution, and the amendments which have since been adopted.'" (omission and alterations in original)); *id* at 150 n.20 ("Cf. St. George Tucker, Appendix, 1 Blackstone [Tucker ed. 1803] 315, discussing English laws 'for suppressing assemblies of free-masons' and pointing out that similar laws cannot be enacted under our Constitution.").

60. William Rawle's and Justice Story's treatises closely followed this language. *See infra* text accompanying notes 96, 112.

61. 1 BLACKSTONE, *supra* note 14, app. at 300.

disarm "any person" because disarmament could never be "necessary and proper":[62]

> If, for example, congress were to pass a law prohibiting any person from bearing arms, as a means of preventing insurrections, the judicial courts, under the construction of the words necessary and proper, here contended for, would be able to pronounce decidedly upon the constitutionality of these means.[63]

Tucker continued his reasoning, using the example of Congressional disarmament as an illustration for the necessity of judicial power to declare laws unconstitutional.[64]

St. George Tucker appears regularly in Standard Model articles discussing the Second Amendment.[65] It is perhaps significant that *none* of the anti-individual writers even admit Tucker's existence, let alone attempt to address the meaning of the most important law book of the Early Republic.

Suppose that the gun prohibition lobbies' claims were correct and the Second Amendment plainly guaranteed only a state's right to raise a militia. If such were the case, it is indeed strange that not one of the architects of the Constitution offered any objection to St. George Tucker. Most of the framers of the Constitution, including Madison, were alive in 1803 and actively engaged in public affairs. Many were lawyers, and it

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62. U.S. CONST. art. I, § 8, cl. 18.

63. 1 BLACKSTONE, *supra* note 14, app. at 289. For further analysis of this passage, see Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 302-03 (1993) (arguing that prior to adoption of Bill of Rights, all natural rights—including the right to arms—were protected by the Necessary and Proper clause).

64. *See* 1 BLACKSTONE, *supra* note 14, app. at 289.

> But if congress may use any means, which they choose to adopt, the provision in the constitution which secures to the people the right of bearing arms, is a mere nullity; and any man imprisoned for bearing arms under such an act, might be without relief; because in that case, no court could have any power to pronounce on the necessity or propriety of the means adopted by congress to carry any specified power into complete effect.

Id.

65. *See, e.g.*, CRAMER, *supra* note 1, at 69; HALBROOK, THAT EVERY MAN BE ARMED, *supra* note 1, at 53, 90, 99; Dowlut, *The Right to Arms*, *supra* note 1, at 83-84; Gottlieb, *supra* note 1, at 130-31; Halbrook, *supra* note 19, at 20-26; Kates, *Handgun Prohibition*, *supra* note 1, at 241-43; McAffee & Quinlan, *supra* note 1, at 867-68; Powe, *supra* note 1, at 1369-70.

would have been difficult for them to fail to notice the leading lawyer's book in the United States. Tucker presents an interpretation of the Second Amendment that the anti-individualists would find wrong in every respect: the right is individual, not a state's right; it belongs to everyone, not just militia members; its purposes include defense against tyranny and hunting. And yet, not one of the framers stepped forward to correct Tucker's flagitious misunderstanding of the Second Amendment. Is it reasonable to infer that Tucker—far from grossly misunderstanding the Second Amendment—was merely restating a universal understanding?[66] Might Madison's opinion of Tucker's legal scholarship be inferred from Madison's appointment of Tucker to the Federal bench in 1813?

B. Houston v. Moore

The War of 1812 was unpopular in the Northeast, and many people resisted orders to muster for militia service. *Houston v. Moore* grew out of a prosecution under Pennsylvania law for failure to perform federal militia duty.[67]

In 1814, the Pennsylvania legislature enacted a bill providing that "every non-commissioned officer and private of the militia who shall have neglected or refused to serve when called into actual service" by the President should be punished according to the terms of the federal militia law of 1795. The Pennsylvania law specified that persons accused of violating the law would be tried by a state court-martial.[68]

On July 4, 1814, President Madison, acting through the Secretary of War, told the Governor of Pennsylvania to supply militiamen for service in the war against Great Britain. The Pennsylvania militia was to be sent to guard Baltimore and the Delaware River against expected British attack. (Napoleon's recent defeats in Europe had freed the main force of the British army for war against the United States.)

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66. Tucker's *Blackstone* was a five-volume treatise, in parallel with the original *Blackstone*. Only Tucker's additions, not the original *Blackstone*, were new, and therefore potentially controversial. Tucker's writings on constitutional subjects would have been especially likely to draw the attention of the lawyers, including Madison, who had written the Constitution.

67. *See* Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820).

68. *Id.* at 2-3.

Houston refused to serve, was eventually tried by a state court-martial, and fined. He sued in state court to have his fine overturned, lost, and eventually brought the case to the United States Supreme Court.

Houston argued that the Pennsylvania law was unconstitutional because Article I, Section 8, Clauses 15 and 16 of the Constitution make Congress the authority over the militia. Clause 15 gives Congress the power "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."[69]

Clause 16 gives Congress the power "To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."[70] Houston's lawyer reasoned that the Congressional power over the national militia is plenary and, therefore, states could not legislate on the subject.

Pennsylvania's lawyers responded that Congressional power over the militia was concurrent with state power, not exclusive. They pointed to the Tenth Amendment, which reserves to states all powers not granted to the federal government.[71] Further, they said, the Pennsylvania statute punishing militia resisters was consistent with the similar federal statute punishing resisters.[72]

The Supreme Court's opinion was delivered by Justice Bushrod Washington, a nephew of George Washington. Justice Washington concluded that, as a general principle, federal legislation regarding the militia was exclusive. Since Congress had enacted a law punishing militia resisters, the states could not enact their own laws about militia resisters.[73]

But, continued Justice Washington, the instant case was different. Here, the question was whether a Pennsylvania court-martial could enforce the *federal* law. Yes, answered

69. U.S. CONST. art. I, § 8, cl. 15.
70. *Id.* at cl. 16.
71. *See* U.S. CONST. amend. X.
72. *See Houston*, 18 U.S. at 7-12.
73. *See id.* at 21-24.

Justice Washington, since the Congressional law creating federal court-martials for militia resisters did not forbid states from enforcing the federal law. And the Pennsylvania statute did not create a new law, but merely enforced the federal one.[74] Thus, the Pennsylvania conviction was upheld.[75]

Justice William Johnson agreed with the result, but wrote a separate opinion explaining his reasoning.[76] Analyzing both the federal militia law and the particular militia order to which Houston had been subject, Justice Johnson concluded that Houston could not be prosecuted by the federal government for violating the federal militia law. Accordingly, Houston's prosecution by Pennsylvania did not interfere with any federal powers.[77] Justice Johnson's opinion treated the Fifth Amendment double jeopardy clause as enforceable against the state of Pennsylvania; his opinion was the foundation of nineteenth century argument that, *Barron v. Baltimore*[78] notwithstanding, the Bill of Rights did apply to the states.

Justice Joseph Story dissented.[79] Because Congress had enacted extensive militia legislation, including legislation punishing militia resisters, its authority was exclusive.[80] A state could not legislate with regard to militia resisters. Federal militia control began when the President called forth the militia, not when the militiamen mustered at the rendezvous spot.[81]

Part of Justice Story's dissenting opinion addressed a hypothetical: What if Congress, instead of exercising its constitutional power over the militia, neglected the militia? In case of Congressional inaction, wrote Justice Story, the states could act:

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74. *See id.* at 24-31.

75. *See id.* at 32.

76. "It is not very easy," Justice Johnson began, "to form a distinct idea of what the question in this case really is." *Id.* at 32. Indeed, *Houston v. Moore* could supplant *Pennoyer v. Neff*, 95 U.S. 714 (1877), as the ideal case law professors could use to baffle first-day law students—if law professors considered the militia as interesting as *in rem* jurisdiction.

77. *See Houston*, 18 U.S. at 42-45 (Johnson, J., concurring).

78. 32 U.S. (7 Pet.) 243 (1833).

79. This was the only time that Justice Story dissented from a constitutional decision in which Chief Justice Marshall was in the majority. *See* JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION 311 n.161 (1971).

80. *See Houston*, 18 U.S. at 53-54.

81. *See id.* at 60-65.

> If, therefore, the present case turned upon the question,
>
> whether a State might organize, arm, and discipline its own militia in the absence of, or subordinate to, the regulations of Congress, I am certainly not prepared to deny the legitimacy of such an exercise of authority. It does not seem repugnant in its nature to the grant of a like paramount authority to Congress; and if not, then it is retained by the States. The fifth [sic] amendment to the constitution, declaring that "a well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed," may not, perhaps, be thought to have any important bearing on this point. If it have, it confirms and illustrates, rather than impugns the reasoning already suggested.[82]

Justice Story's hypothetical, fifty-two pages into the case, marks the first appearance of the Second Amendment in Supreme Court jurisprudence. Justice Story's main point was that the state exercise of militia power would not be inconsistent with Congressional militia power, since (hypothetically) Congress would be ignoring the militia.[83] After conceding that the Second Amendment (dubbed the "fifth" amendment in a typo) was probably irrelevant, Justice Story suggested that to the extent the Second Amendment was relevant, it supported his position. Justice Story's point was not unreasonable. The entire Bill of Rights, after all, was animated by fear of federal abuse, and several of the Anti-Federalists raised concerns that the federal government might totally neglect the militia and thereby render it useless.[84]

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82. *Id.* at 52-53.

83. In regard to interstate commerce, Justice Story took a different position: the mere existence of a federal power over interstate commerce preempted any state regulation of interstate commerce. *See* New York v. Miln, 36 U.S. (11 Pet.) 102, 157-61 (1837). The *Miln* opinion was quoted, for a different point, in another Supreme Court gun case, *United States v. Cruikshank*, 92 U.S. 542, 553 (1876). See *infra* text accompanying note 365.

84. *See Houston*, 18 U.S. at 7-12. Others were concerned that the federal power to arm and discipline the militia would entirely displace the state power to do so. *See* Patrick Henry, Virginia Convention Debate of June 5, 1788, *reprinted in* ORIGIN, *supra* note 37, at 373-74; Patrick Henry, Virginia Convention Debate of June 9, 1788, *reprinted in* ORIGIN, *supra* note 37, at 380-81; George Mason, Virginia Convention Debate of June 14, 1788, *reprinted in* ORIGIN, *supra* note 37, at 401-02; Patrick Henry, Virginia Convention Debate of June 14, 1788, *reprinted in* ORIGIN, *supra* note 37, at 406, 410.

The leading scholar of anti-individual Second Amendment interpretation, Dennis Henigan, argues that the Second Amendment, rather than guaranteeing an individual right, limits some of the federal powers over the militia granted by Article I, Section 8.[85] If Henigan's theory were true—if the Second Amendment were a guarantee of state control over the militia—then the Second Amendment should have been at the center of *Houston v. Moore*. The precise issue in the case was Pennsylvania's assertion of authority over the militia. Under the state power theory of the Second Amendment, the strongest argument that Pennsylvania's attorneys could have made would have been to point to the Second Amendment. But the Second Amendment never entered their arguments.[86] If the Second Amendment were understood as a right of state governments against federal control of the militia, then the total absence of the Second Amendment in the reasoning of the state's attorneys and the pro-state Justices is inexplicable.

Justice Story's dissent is incongruent with Henigan's theory that the Second Amendment somehow reduces Congress's militia powers. In the paragraph following the Second Amendment hypothetical, Justice Story affirmed that whenever Congress is actually exercising its Article I powers over the militia, the power of Congress is exclusive, and there is no room for any state control, "however small."[87]

Like the writings of St. George Tucker, the *Houston v. Moore* decision is absent from the anti-individual articles.

For federalist reassurances that the states retained concurrent power to arm and discipline the militia, which could be used in case of federal neglect, see *An Impartial Citizen*, VA. GAZ., Mar. 13, 1788, *reprinted in* ORIGIN, *supra* note 37, at 299; Richard Henry Lee, Virginia Convention Debate of June 9, 1788, *reprinted in* ORIGIN, *supra* note 37, at 382-83; John Marshall, Virginia Convention Debate of June 16, 1788, *reprinted in* ORIGIN, *supra* note 37, at 426.

85. *See* Henigan, *supra* note 12, at 22 ("[American colonists] sought in the Bill of Rights a reaffirmation of the right of the states to have their own armed militia, composed of ordinary citizens, as a check on the power of the standing army."); Henigan, *Arms, Anarchy*, *supra* note 2, at 116 ("[T]he Second Amendment did affect some change in the Constitutional scheme; presumably the Framers did not adopt the Bill of Rights in 1791 with the intent to leave things as they were in 1787.").

86. The reporter's text summarizes the arguments presented by each side. *See id.* at 4-12.

87. *Houston*, 18 U.S. at 53. The Supreme Court decided one other militia case during this period. Writing for a unanimous Court, Justice Story held that the President's determination of the need for a militia call-out was not subject to judicial review. *See* Martin v. Mott, 25 U.S. (12 Wheat.) 19, 28-39 (1827).

Unlike the American Blackstone, the 1820 *Houston* case is not contemporaneous with the creation of the Second Amendment, but neither is it far removed from the founding era. And the implications of the case are just as inconsistent with the anti-individual theories of the Second Amendment as are the direct statements made by St. George Tucker.

C. William Rawle

Supplanting Tucker's *Blackstone* as the leading American constitutional treatise was William Rawle's 1825 *A View of the Constitution of the United States of America*.[88] *A View of the Constitution* was used, among other places, at the United States Military Academy at West Point.[89] The treatise enjoyed sufficient popularity for there to be a second edition, and there would have been a third had Rawle not passed away in 1836.[90]

Like Tucker, Rawle was a distinguished attorney long before he became an "influential treatise writer."[91] Elected to the Pennsylvania legislature in 1789, Rawle declined George Washington's repeated offers to serve as the first Attorney General.[92] Rawle accepted Washington's appointment as United States Attorney for Pennsylvania, however, and held the post from 1792 to 1800.[93] A prodigious scholar, Rawle authored many law books in addition to his constitutional treatise, although the treatise is the only one that remains in print today. "[O]ne of the most respected lawyers of the day,"[94] he

88. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA (1825).

89. *See The Rawle Reading Room at Temple University Law Library* (visited Nov. 8, 1998) <http://www.temple.edu/departments/lawschool/II-rawlecollection.htm> [herein-after *Rawle Reading Room*]. Rawle also served as a trustee of the University of Pennsylvania. *See Trustees of the University of Pennsylvania* (visited Nov. 23, 1998) <http://www.upenn.edu/AR/1830/trustees.html>.

90. *See* Charles Sumner Lobinger, *William Rawle*, *in* THE DICTIONARY OF AMERICAN BIOGRAPHY (CD-ROM ed. 1997) [hereinafter DICT. AM. BIO.].

91. Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 75. Like Tucker, Rawle was also a friend and correspondent of Thomas Jefferson. *See* Kates, *Handgun Prohibition*, *supra* note 1, at 241 n.159.

92. *See* D. BROWN, EULOGIUM UPON WILLIAM RAWLE 15 (1837), *cited in* Kates, *Handgun Prohibition*, *supra* note 1, at 242 n.161.

93. In that capacity, he prosecuted the leaders of the Whiskey Insurrections. *See* Lobinger, *supra* note 90.

94. Joel Fishman, *The Reports of the Supreme Court of Pennsylvania*, 87 L. LIBR. J. 643, 653 (1995).

also founded Rawle & Henderson, which is now the oldest law firm in the United States.[95]

Rawle described the Second Amendment at length:

> In the second article, it is declared, that a *well regulated militia is necessary to the security of a free state*; a proposition from which few will dissent. Although in actual war, the services of regular troops are confessedly more valuable; yet, while peace prevails, and in the commencement of a war before a regular force can be raised, the militia form the palladium of the country. They are ready to repel invasion, to suppress insurrection, and preserve the good order and peace of government. That they should be well regulated, is judiciously added. A disorderly militia is disgraceful to itself, and dangerous not to the enemy, but to its own country. The duty of the state government is, to adopt such regulations as will tend to make good soldiers with the least interruptions of the ordinary and useful occupations of civil life. In this all the Union has a strong and visible interest.
>
> The corollary, from the first position, is, that *the right of the people to keep and bear arms shall not be infringed*.
>
> The prohibition is general. No clause in the Constitution could by any rule of construction be conceived to give to congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretence by a state legislature. But if by any blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both.
>
> In most of the countries of Europe, this right does not seem to be denied, although it is allowed more or less sparingly, according to circumstances. In England, a country which boasts so much of its freedom, the right was secured to protestant subjects only, on the revolution of 1688; and it is cautiously described to be that of bearing arms for their defence, "suitable to their conditions, and as allowed by law." An arbitrary code for the preservation of game in that country has long disgraced them. A very small proportion of the people being permitted to kill it, though for their own subsistence; a gun or other instrument, used for that purpose by an unqualified person, may be seized or forfeited. Blackstone, in whom we regret that we cannot always trace the expanded principles of rational liberty, observes however, on this subject, that the prevention of popular insurrections and resistance to

95. *See The Rawle Reading Room*, *supra* note 89.

> government by disarming the people, is oftener meant than avowed, by makers of forest and game laws.
>
> This right ought not, however, in any government, to be abused to the disturbance of the public peace.
>
> An assemblage of persons with arms, for an unlawful purpose, is an indictable offense, and even the carrying of arms abroad by a single individual, attended with circumstances giving just reason to fear that he purposes to make an unlawful use of them, would be sufficient cause to require him to give surety of the peace. If he refused he would be liable for imprisonment.[96]

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96. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA (Leonard W. Levy ed., Da Capo Press 1970) (2d ed. 1829) (citations and footnotes omitted). Not all of Rawle's constitutional analysis was vindicated by history. His final chapter maintained that states have a right to secede from the Union—a reasonable position in 1825, but one which was dealt a serious blow by Joseph Story in the next decade and which, whether rightly or wrongly, was decisively settled by the Union victory in the Civil War. Even when not vindicated by subsequent decades, however, Rawle is still useful for understanding the state of American legal thinking in the 1820s.

The last sentence in the quote cited to 3 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 160 (Garland Publ. 1979) (1628); 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 126 (Garland Publ. 1978) (1716) (explaining that the Justice of the Peace may require surety from persons who "go about with unusual Weapons or Attendants, to the Terror of the People"). *See* RAWLE, *supra* note 96, at 126 n.‡. Hawkins elsewhere explained that the 1328 Statute of Northampton (against wearing arms in public) was limited in its construction, so

> [t]hat no wearing of Arms is within the meaning of this Statute, unless it be accompanied with such Circumstances as are apt to terrify the People; from whence it seems clearly to follow, That Persons of Quality are in no Danger of Offending against this Statute by wearing common Weapons, or having their usual Number of Attendants with them, for their Ornament or Defence, in such Places, and upon such Occasions, in which it is the common Fashion to make use of them, without causing the least Suspicion of an Intention to commit any Act of Violence or Disturbance of the Peace. And from the same Ground it also follows, That Persons armed with privy Coats of Mail to the Intent to defend themselves against their Adversaries, are not within the Meaning of the Statute, because they do nothing *in terrorem populi*.
>
> *Sect*. 10. VI. That no Person is within the Intention of said Statute, who arms himself to suppress Rioters, Rebels, or Enemies, and endeavours to suppress or resist such Disturbers of the Peace or Quiet of the Realm; for Persons who so arm themselves, seem to be exempted out of the general Words of the said Statute, by that Part of the Exception in the beginning thereof, which seems to allow all Persons to arm themselves upon a Cry made for Arms to keep the Peace, in such Places where such Acts happen.

1 HAWKINS, *supra*, at 136. It was not surprising that Rawle used Hawkins as an authority. The Hawkins treatise went through seven editions in the eighteenth century, and one more in the nineteenth. *See* A.W.B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L.

Rawle's analysis of federal powers over the militia noted the value of widespread arms ownership to a good militia:

> In a people permitted and accustomed to bear arms, we have the rudiments of a militia, which properly consists of armed citizens, divided into military bands, and instructed at least in part in the use of arms for the purposes of war. Their civil occupations are not relinquished, except while they are actually in the field, and the inconvenience of withdrawing them from their accustomed labors, abridges the time required for military instruction. [Rawle then explicated how standing armies, with their stronger habits of obedience, usually prove superior to militias in the field.]
>
> . . . .
>
> But notwithstanding their inferiority to soldiers schooled and practised in the field, gallant actions have been performed by our militia collectively. The capture of an entire army under General Burgoyne in 1777, and the celebrated defence of New Orleans in 1814, were chiefly effected by militia.
>
> But however inferior in military estimate to armies regularly trained, the militia constitutes one of the great bulwarks of the nation, and nothing which tends to improve and support it should be neglected.[97]

Rawle discussed *Houston v. Moore* and argued strongly against the "states' rights" position on this issue; he suggested that federal determination of the necessity of a militia call-up was unreviewable by state governments or by the courts.[98]

Rawle's high regard for the militia was typical of his time. He clearly explained that the Second Amendment does not protect only potential militia members, for "[t]he prohibition is general."[99] (Thomas Cooley's treatise, half a century later,

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REV. 632, 653 (1981) (noting that Hawkins sought to interpret the criminal laws based on principles of justice and reasonableness).

Coke's treatise was written to defend civil liberties and the common law against monarchial absolutism. Paraphrasing Ovid, Coke noted that "the laws permit the taking up of arms against armed persons." 3 COKE, *supra*, at 162; *see also* HALBROOK, THAT EVERY MAN BE ARMED, *supra* note 1, at 19 (citing Ovid, *Artis Amatoriae III* (line 492), *in* 2 OVID 118, 152-53 (J. Mozley transl., 1969) ("The laws allow arms to be taken against an armed foe.")).

97. RAWLE, *supra* note 96, at 153-54.

98. *See id.* at 155-61.

99. *Id.* at 125.

would echo Rawle on the Second Amendment, stating "The Right is General."[100])

Writing long before *Barron v. Baltimore* refused to enforce the Bill of Rights against the states,[101] Rawle considered the Second Amendment a limit on state and federal disarmament of the people. And writing a century and a half before the Congressional power "to regulate commerce . . . among the several States" was construed as a power to ban the simple intrastate possession of firearms,[102] Rawle stated that, even putting the Second Amendment aside, Congress would have no power to disarm the people.[103]

Like Tucker's Blackstone, Rawle's *A View of the Constitution* is cited by the Standard Modelers,[104] but is conspicuously absent from law review articles asserting that the Second Amendment is not an individual right.[105]

D. Joseph Story

The American Republic's next major constitutional treatise was the 1833 *Commentaries on the Constitution of the United States*,[106] written by Joseph Story while teaching at the

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100. THOMAS M. COOLEY, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 298 (Andrew C. McLaughlin ed., Little, Brown, & Co. 1898) (1880); *see also infra* note 403 and accompanying text.

101. *See* Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 248-49 (1833).

102. *See generally* David B. Kopel & Glenn H. Reynolds, *Taking Federalism Seriously:* Lopez *and the Partial-Birth Abortion Ban Act*, 30 CONN. L. REV. 59 (1997).

103. *See* RAWLE, *supra* note 96, at 125.

104. *See* CRAMER, *supra* note 1, at 69-70; Amar, *Fourteenth Amendment*, *supra* note 1, at 1203-04; Dowlut, *The Right to Arms*, *supra* note 1, at 84-85; Gottlieb, *supra* note 1, at 131; Kates, *Handgun Prohibition*, *supra* note 1, at 242-43; McAffee & Quinlan, *supra* note 1, at 869-70.

105. The sole anti-individual author to address Rawle is George Anastaplo. *See* George Anastaplo, *Amendments to the Constitution of the United States: A Commentary*, 23 LOY. U. CHI. L.J. 631 (1992). Anastaplo characterizes Rawle as pro-regulation, based on Rawle's statement: "This right ought not, however, in any government, to be abused in the disturbance of public peace." *Id.* at 691. Anastaplo then asserts that the modern "proliferation of weapons" disturbs the public peace. *Id.* Anastaplo thereby confuses concern about the abuse of a right into opposition to the right itself—as if being opposed to speeding were the same as being opposed to the ownership of automobiles. Anastaplo does not address the fact that Rawle's position on the Second Amendment is explicitly inconsistent with Anastopolo's claim that the early republic understood the Second Amendment as guaranteeing no individual right.

106. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (Fred B. Rothman & Co. 1991) (1833).

Harvard Law School. Story was the dominant legal figure of pre-Civil War America.

> No man ever was more steeped in the law, intellectually and interpersonally. Professional study, the common element for bench and bar, attained new levels with Story. He wrote nine important treatises, taught at—virtually created—the Harvard Law School . . . .[107]

President Madison appointed Joseph Story to the Supreme Court in 1811; at age 32, he was the youngest man ever nominated.[108] He served on the United States Supreme Court until 1845. After John Marshall, no Justice of the early Court is considered more influential on Supreme Court jurisprudence.

In 1840, Story authored an expanded version of the *Commentaries*, and also wrote a popularized version, entitled *Familiar Exposition of the Constitution of the United States*. Story's constitutional treatises differed in important ways from their predecessors; he was far more enthusiastic about broad federal powers. Rawle had explicated the authority of states to secede from the Union.[109] But Story almost single-handedly created the doctrine of an indissoluble Union, a doctrine which would carry the day intellectually in the North. Each of Story's treatises was "a major success" and some were still in use in the twentieth century.[110]

1. *The Second Amendment in Story's* Commentaries

Story's commentary on the Second Amendment would later be quoted in numerous Standard Model law review articles. For example, the following Story quotation appeared in Sanford Levinson's 1989 article *The Embarrassing Second Amendment*:

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107. ROBERT COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 238 (1975).

108. *See* MCCLELLAN, *supra* note 79, at 40-41.

109. *See* RAWLE, *supra* note 96, at 295-310.

110. MCCLELLAN, *supra* note 79, at 42. The treatises, which grew out of lectures at Harvard, are PROMISSORY NOTES (1845), BILLS OF EXCHANGE (1843), PARTNERSHIP (1841), AGENCY (1839), EQUITY PLEADINGS (1838), EQUITY JURISPRUDENCE, 2 vol. (1836), THE CONFLICT OF LAWS (1834), ON THE CONSTITUTION, 3 vol. (1833), and BAILMENTS (1832). In the 1997 movie *Amistad*, retired Justice Harry Blackmun plays the role of Joseph Story.

> The right of the citizens to keep and bear arms has justly been considered as the palladium of the liberties of a republic;[111] since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.[112]

In response to Levinson's quotation of Story in his article, Dennis Henigan accuses Levinson of purposely omitting the remainder of Story's passage, which states:[113]

> And yet, though this truth would seem so clear, and the importance of a well regulated militia would seem so undeniable, it cannot be disguised that, among the American people, there is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burdens, to be rid of all regulations. How it is practicable to keep the people duly armed, without some organization, it is difficult to see. There is certainly no small danger that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine all the protection intended by this clause of our national bill of rights.[114]

However, nothing in the second part of the passage (quoted by Henigan) changes the meaning in the first part (quoted by Levinson). In both parts, Story sought to maintain militias as a counterweight to a standing army. He bemoaned the declining interest of the people and their state governments in militia training. Nothing Story said in the second through fourth sentences changes the meaning of Story's first sentence, which asserts that the right to bear arms belongs not to state governments but to "the citizens." The purpose of this right is to deter tyranny and allow popular revolution to unseat a tyrant.

Henigan does some selective quoting of his own. While he chastises Levinson for not quoting a footnote in which Story

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111. Compare this language to Tucker's statement that the militia "may be considered as the true palladium of liberty." 1 BLACKSTONE, *supra* note 14, app. at 300. Justice Thomas quoted Story's language in his concurring opinion in *Printz v. United States*, 117 S. Ct. 2365, 2386 (1997) (Thomas, J., concurring).

112. 3 STORY, *supra* note 106, at 746, § 1890, *quoted in* Henigan, *Arms, Anarchy*, *supra* note 2, at 119, and *in* Levinson, *supra* note 1, at 649.

113. *See* Henigan, *Arms, Anarchy*, *supra* note 2, at 119.

114. 3 STORY, *supra* note 106, at 746-47, *quoted in* Henigan, *Arms, Anarchy*, *supra* note 2, at 119-20.

denounced standing armies,[115] Henigan omits two other Story footnotes[116] citing passages from Tucker and Rawle[117] enthusiastically praising the wide scope of the individual right to keep and bear arms.[118]

115.

> It would be well for Americans to reflect upon the passage in Tacitus, (Hist. IV. ch. 74): "Nam neque quies sine armis, neque arma sine stipendiis, neque stipendia sine tributis, haberi queunt." Is there any escape from a large standing army, but in a well disciplined militia? There is much wholesome instruction on this subject in 1 Black. Comm. ch. 13, p. 408 to 417.

3 STORY, *supra* note 106, at 747 n.1; *see also* Henigan, *Arms, Anarchy*, *supra* note 2, at 120. Henigan mistakenly asserts that the penultimate sentence is a translation of the Tacitus quote. *See* Henigan, *Arms, Anarchy*, *supra* note 2, at 120. Actually, the sentence is Story's own. The Tacitus quote, translated, is: "For the tranquillity of nations cannot be preserved without armies; armies cannot exist without pay; pay cannot be furnished without tribute; all else is common between us."

116. *See* Henigan, *Arms, Anarchy*, *supra* note 2, at 119-20.

117. *See supra* text accompanying note 96.

118. The footnotes appear in support of the text quoted by Levinson. *See* 3 STORY, *supra* note 106, at 746, nn.1-2 (citing "I Tucker's Black. Comm. App. 299" and "1 Tucker's Black Comm. App. 300; Rawle on Const. ch. 10, p. 125; 2 Lloyd's Debates 219, 220"). The last cited source, *Lloyd's Debates*, was a record of discussion in Congress. Justice Story's citation is to the First Congress's debate of August 17, 1789, regarding the Second Amendment. On the cited pages, the House has gone into a Committee of the Whole. The text of the amendment under consideration reads: "A well regulated militia, composed of the body of the people, being the best security of a free state; the right of the people to keep and bear arms shall not be infringed, but no person, being religiously scrupulous, shall be compelled to bear arms." 2 THOMAS LLOYD, THE CONGRESSIONAL REGISTER; OR, HISTORY OF THE PROCEEDINGS AND DEBATES OF THE FIRST HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA 219-21 (N.Y., Hodge, Allen, & Campbell 1789).

Massachusetts Representative Elbridge Gerry began:

> This declaration of rights, I take it, is intended to secure the people against the mal-administration of the government; if we could suppose that in all cases the rights of the people would be attended to, the occasion for guards of this kind would be removed. Now I am apprehensive, sir, that this clause would give an opportunity to the people in power to destroy the constitution itself. They can declare who are those religiously scrupulous, and prevent them from bearing arms.
>
> What, sir, is the use of a militia? It is to prevent the establishment of a standing army, the bane of liberty. Now it must be evident, that under this provision, together with their other powers, congress could take such measures with respect to a militia, as make a standing army necessary. Whenever government mean to invade the rights and liberties of the people, they always attempt to destroy the militia, in order to raise an army upon their ruins. This was actually done by Great Britain at the commencement of the late revolution. They used every means in their power to prevent the establishment of an effective militia to the eastward. The assembly of Massachusetts, seeing the rapid progress that administration were making,

The above passages from Justice Story were quoted by an 1871 Tennessee Supreme Court opinion as authority for the exact point that the Second Amendment, in order to secure a militia, guarantees a general right of individuals to have weapons.[119]

Story concluded by contrasting the strong right in America with the weak one in England:

> to divest them of their inherent privileges, endeavored to counteract them by the organization of the militia, but they were always defeated by the influence of the crown.

Id. at 220. Rep. Seney then asked whether there was an issue before the committee of the whole. Rep. Gerry

> [r]eplied, that he meant to make a motion, as he disapproved of the words as they stood. He then proceeded, No attempts that they made, were successful, until they engaged in the struggle which emancipated them at once from their thraldom. Now, if we give a discretionary power to exclude those from militia duty who have religious scruples, we may as well make no provision on this head; for this reason he wished the words to be altered so as to be confined to persons belonging to a religious sect, scrupulous of bearing arms.

Id. Rep. Jackson moved that an exemption from militia duty be granted "upon paying an equivalent to be established by law." *Id.* at 221 (Lloyd's use of "f" for "s" changed to reflect modern usage). The same material is also in House of Representatives Debates of August 17, 1789, *reprinted in* ORIGIN, *supra* note 37, at 695-96. Lloyd's records of Congressional debates were not full transcripts, but rather his embellished reconstructions of the speeches he thought most interesting; many persons accused Lloyd of inaccurate representations of the debates. *See* Marion Tinling, *Thomas Lloyd's Reports of the First Federal Congress*, 18 WM. & MARY Q. 3D 519, 531-33 (1961).

In following pages (not cited by Story), the House narrowly rejected a motion to delete the entire exemption for the religiously scrupulous and leave exemptions for pacifists dependent on the beneficence of the legislature.

Rep. Gerry then moved to amend the first clause to read "a well regulated militia, trained to arms," in order to ensure that the government would not neglect militia training. The motion failed for lack of a second. Rep. Burke moved for an additional amendment, denouncing standing armies, and requiring two-thirds vote from both houses for a standing army to be raised. The motion was defeated. The House spent the remainder of the day debating the proposals which became the Third, Fourth, Fifth, and Sixth Amendments. *See* 2 LLOYD, *supra*, at 221-29.

As we shall see below, Gerry's view that the Second Amendment's overarching purpose was to guarantee the survival of the state militia was widely shared by nineteenth century courts and commentators. Like Justice Story, most of the courts and commentators saw nothing inconsistent in the Amendment's purpose to protect the militia (extolled by Gerry, Tucker, and Rawle, all of whom were cited by Story) and the Amendment's protection of firearms ownership for personal uses (specifically mentioned by Tucker and Rawle, and cited by Story).

119. *See* Andrews v. State, 50 Tenn. (3 Heisk.) 165, 183-84 (1871), discussed *infra* in text accompanying notes 210-227.

> § 1891. A similar provision in favour of protestants (for to them it is confined) is to be found in the bill of rights of 1688, it being declared, "that the subjects, which are protestants, may have arms for their defence suitable to their condition, and as allowed by law." But under various pretences the effect of this provision has been greatly narrowed; and it is at present in England more nominal than real, as a defensive privilege.[120]

Here, Story closely tracked Madison's notes on the Second Amendment, in which Madison contrasted the Second Amendment with the narrower English right, the latter being unsatisfactory because it was confined to Protestants.[121]

2. *The Second Amendment in Story's* Familiar Exposition

Story's 1840 constitutional law book intended for a popular audience, *Familiar Exposition of the Constitution of the United States*, contains some Second Amendment material not found in the *Commentaries*. The *Familiar Exposition* removes any possible doubt that Story saw the Second Amendment as guaranteeing an important individual right:

> The next amendment is, "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." One of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by disarming the people, and making it an offence to keep arms, and by substituting a regular army in the stead of a resort to the militia. The friends of a free government cannot be too watchful, to overcome the dangerous tendency of the public mind to sacrifice, for the sake of mere private convenience, this powerful check upon the designs of ambitious men.
>
> The importance of this article will scarcely be doubted by any persons, who have duly reflected upon the subject. The militia is the natural defence of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers. It is against sound policy for a free people to keep up large military establishments and standing armies in time of peace, both from the enormous expenses, with which they are attended, and the facile means,

120. 3 STORY, *supra* note 106, at 747 (footnotes omitted).
121. *See* Madison, *supra* note 37.

> which they afford to ambitious and unprincipled rulers, to subvert the government, or trample upon the rights of the people. The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and it will generally, even if these are successful in the first instance, enable the people to resist and triumph over them. And yet, though this truth would seem so clear, and the importance of a well-regulated militia would seem so undeniable, it cannot be disguised, that among the American people there is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burdens, to be rid of all regulations. How it is practicable to keep the people duly armed without some organization, it is difficult to see. There is certainly no small danger, that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine all the protection intended by this clause of our National Bill of Rights.[122]

Can any fair-minded reading of Justice Story support Henigan's position that the federal government has the unquestioned constitutional authority to outlaw the possession of firearms in the United States? Or would Story bemoan Henigan's organization—whose members were never required by their state governments to possess arms and to learn how to use them in militia drill—as fulfilling Story's fears "that indifference may lead to disgust, and disgust to contempt"?

One of Henigan's central errors is his "either/or" view of the militia. Story saw the militia as a defense "against . . . domestic insurrections."[123] Henigan finds this insurrection-suppression view to be "itself inconsistent with the notion that the militia is the armed citizenry poised to engage in domestic insurrection."[124] But Story also exulted that when "citizens" are

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122. JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 264-65 (1842) (quoting U.S CONST. amend. II).

123. Henigan, *Arms, Anarchy*, *supra* note 2, at 120.

124. *Id.*

> How can the militia be a collection of citizens with the constitutionally guaranteed right to engage in armed resistance against their government if the Constitution itself grants Congress the power to call out the militia "to execute the laws of the Union [and] suppress insurrections . . . ."? The Constitution cannot view the militia *both* as a means by which government can suppress insurrection *and* as an instrument for insurrection against the

armed, they can resist usurpation; the right to bear arms allows the "people to resist and triumph over" their oppressors. Indeed, Justice Story explicitly promoted the dispersion of armed force in a society as facilitating needed changes in government.[125] Nor was violent resistance to tyranny an abstract notion to Story; his father had been one of the Indians in the Boston Tea Party.[126] The notion that the American people could be trusted both to suppress illegitimate insurrections *and* to overthrow tyranny may seem self-contradictory to late twentieth-century American antigun lobbyists. But it was an obvious truth to Justice Story.[127]

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government. It must be one or the other.

Id. at 115. Henigan ignores the fact that his state's right theory implies a right of state governments to revolt against the federal government. Henigan's theory (if he actually believed it as a matter of constitutional interpretation, rather than as a defense against the Standard Model) would thereby represent *post hoc* justification for the Confederate theory of secession in the Civil War. *See* Lund, *Past and Future*, *supra* note 1, at 31-32 n.72.

125.

> In the next place, the actual moral and intellectual power, and even physical power, of the state in its present organization, may be so combined in the structure of the government, that they may present insuperable barriers to any change. If, for instance, the whole of the privileged classes should happen to be the only educated persons in the nation; if the whole priesthood should depend upon the government for its influence and support, and its exclusive patronage and privileges; if the whole wealth of the community should be lodged in a few hands, and those few should be the very heads of the government; if the military power should be so organized, that it could scarcely find the means, or possess the power, to act except under the existing arrangements;—in any, and in all of these cases, it is easy to perceive, that there would be immense difficulties in introducing any fundamental and salutary change. It could scarcely take place but upon some general convulsion, which could break asunder all the common ties of society.

Joseph Story, *Natural Law* (1836), *reprinted in* MCCLELLAN, *supra* note 79, at 318-19.

126. *See* MCCLELLAN, *supra* note 79, at 6. Like many other legal analysts of his era, Story believed in a natural-law right to self-defense since "self-preservation" was one of the duties that each man naturally had to himself. "[A] man has a perfect right to his life, to his personal liberty, and to his property; and he may by force assert and vindicate those rights against every aggressor." Story, *supra* note 125, at 314-15.

127. As Alexander Hamilton wrote:

> If the federal government should overpass the just bounds of its authority and make a tyrannical use of its powers, the people, whose creature it [the Constitution] is, must appeal to the standard they have formed, and take such measures to redress the injury done to the Constitution as the exigency may suggest and prudence justify.

THE FEDERALIST NO. 33 (Alexander Hamilton). Hamilton also predicted that if the

3. *The federal militia powers in Story's* Commentaries

Story's treatise also contained an extensive section on the militia powers in Articles I and II of the Constitution.[128] Story extolled the militia and explained that while the *posse comitatus* (the able-bodied males of the county subject to the sheriff's call to enforce the law) would suffice for maintaining law and order in most situations, there were some circumstances in which either a militia or a standing army would be necessary.[129]

Story disparaged anti-federalist fears about granting federal power over the militia. He noted that these fears "produced some propositions of amendment in the state conventions, which, however, were never duly ratified, and have long since ceased to be felt, as matters of general concern."[130] Here, Story directly undermined Henigan's theory of the Second Amendment. Henigan claims that the Second Amendment was a restraint on the federal government's militia powers.[131] Story claims that none of the proposals for restrictions on federal militia powers were ever ratified.

Story then discussed in great detail the division of federal and state powers over the militia. He suggested, "If congress did not choose to arm, organize, or discipline the militia, there would be an inherent right in the states to do it."[132] In support of this proposition, Story cited *Houston v. Moore*, Rawle's treatise, Tucker's *Blackstone*, and various portions of Elliot's *Debates*.[133] While Story's dissent in *Houston v. Moore* had suggested that the Second Amendment, if relevant at all, would also support this proposition, Story did not in his *Commentaries* cite the Second Amendment for support of state militia powers.

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federal government attempted to use the militia to impose tyranny on recalcitrant states, "whither would the militia" march itself "but to the seat of the tyrants, who had meditated so foolish as well as so wicked a project; to crush them in their imagined intrenchments of power and to make them an example of the just vengeance of an abused and incensed people?" THE FEDERALIST NO. 35 (Alexander Hamilton).

128. *See* 3 STORY, *supra* note 106, at 81-95, §§ 1194-1210.

129. *See id.* at 81, § 1196.

130. *Id.* at 82, § 1197 (footnote omitted).

131. *See* Ehrman & Henigan, *supra* note 2, at 7.

132. 3 STORY, *supra* note 106, at 85, § 1202.

133. *See id.* at 85 n.5 & 86 nn.1-2, § 1202.

Story went on to define other state/federal militia boundaries; he noted that when the militias were not in federal service, Congress had no power to discipline and train them, such power being "exclusively vested in the states."[134] For this proposition, Story cited Federalist 29 and the Tucker and Rawle treatises (again, not parts dealing with the Second Amendment).[135] The treatise continued for eight more sections to discuss various state/federal militia issues, such as the power to call the militia into service, to govern the militia, to court-martial, and to command the militia. Never once did Story hint that the Second Amendment had any relevance to these issues.

If, as Henigan claims, Story read the Second Amendment the way Henigan does, it is inexplicable how Story's treatise could minutely dissect the boundaries of state/federal militia powers without once mentioning the Second Amendment. The only plausible interpretation of Story's treatment of the militia in his *Commentaries* is that proposed by the Standard Model of the Second Amendment, in which the Second Amendment does not reduce the scope of the Congressional militia powers in Article I, or the Presidential militia powers in Article II.

E. Other Pre-1850 Sources

1. Henry St. George Tucker

Henry St. George Tucker was the son of St. George Tucker, author of Tucker's Blackstone.[136] The younger Tucker served as U.S. Representative from Virginia (1815-19), as President of the Virginia Supreme Court,[137] and as law professor at the University of Virginia (1841-45).[138] He declined President

134. *Id.* at 87, § 1202.

135. *See id.* at 87 n.1, § 1202.

136. *See* David Cobin & Paul Finkelman, *Introduction* to 1 HENRY ST. GEORGE TUCKER, COMMENTARIES ON THE LAW OF VIRGINIA: COMPRISING THE SUBSTANCE OF A COURSE OF LECTURES DELIVERED TO THE WINCHESTER LAW SCHOOL, at i (The Lawbook Exchange, Ltd. 1998) (3d ed. 1846). Henry St. George Tucker was not the literal "son" of St. George Tucker. Henry was actually the child of a distant Bermuda relative. At an early age, however, Henry went to live with St. George Tucker, who raised him, but never formally adopted him. *See* Armistead M. Dobie, *Henry St. George Tucker*, *in* DICT. AM. BIO., *supra* note 90.

137. Under Tucker's leadership, the Virginia Court–in great contrast to other Southern courts of the time–often ruled in favor of slaves whose manumission had been legally challenged. *See* Cobin & Finkelman, *supra* note 136, at xxviii-xxix.

138. *See* Carrington, *supra* note 19, at 333 n.1.

Jackson's offer to serve as United States Attorney General.[139] In 1831, he wrote a three volume treatise *Commentaries on the Law of Virginia*.[140] Although he followed Blackstone's organization, the treatise was entirely Tucker's own, and it represented an important step forward in the development of distinctly American law. This treatise "was standard fare for aspiring lawyers"[141] and was "the primary reference source for the bar of Virginia" until the Virginia Code was adopted in 1850.[142] Tucker had created the "*vade mecum*[143] of the bar of Virginia. . . . It was recognized by the bar of Virginia, and in many of the Southern States, as the most valuable text-book for students and lawyers then in existence."[144] Tucker's work "established the standard for American treatise writing, helped organize American law, and provided access to it for attorneys distant from law libraries."[145]

Explaining "the principal absolute rights of individuals," Tucker wrote:

> [C]ertain protections or barriers have been erected which serve to maintain inviolate the three primary rights of personal security, personal liberty, and private property. These may in America may be said to be:
>
> 1. The Bill of Rights and written Constitutions . . . .
>
> 2. The right of bearing arms—which with us is not limited and restrained by an arbitrary system of game laws, as in England; but 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.
>
> 3. The right of applying to the courts of justice for redress of injuries.[146]

139. *See* Dobie, *supra* note 136.

140. TUCKER, *supra* note 136.

141. Warren M. Billings, *Seventeenth-Century Virginia Law and Its Historians, With an Accompanying Guide to Sources*, 87 L. LIBR. J. 556, 558 (1995).

142. Cobin & Finkelman, *supra* note 136, at v.

143. A small book or manual carried as a reference book. *See* 2 THE NEW SHORTER OXFORD ENGLISH DICTIONARY 3538 (3d ed. 1993).

144. 1 TUCKER, *supra* note 41, at 807.

145. Cobin & Finkelman, *supra* note 136.

146. 1 TUCKER, *supra* note 136, at 42-43. In other writings, the younger Tucker extolled the natural right to reform or abolish the government, and the natural right to self-defense. *See* HENRY ST. GEORGE TUCKER, A FEW LECTURES ON NATURAL LAW 10-11, 95-99 (1844); HENRY ST. GEORGE TUCKER, LECTURES ON GOVERNMENT 37 (1844).

Tucker continued, quoting Blackstone's formulation of the English right to arms. Tucker added that this right "is secured with us by Am. C. U. S. art. 4."[147] (Like some other writers of the period, Tucker numbered the amendments as they were when sent to the states for ratification by the first Congress.)

When human rights were violated, Tucker concluded, the citizen was entitled first to justice in the courts, "next to the right of petitioning for redress of grievances; and, lastly, to the right of having and using arms for self-preservation and defence."[148] While all of the rights Tucker described were "our birthright to enjoy entire," they could be subject to "necessary restraints" which were "gentle and moderate."[149]

2. *Benjamin Oliver*

Benjamin L. Oliver was "a writer of law books, a noted chess player, and son of a former Governor of Massachusetts."[150] His 1832 *The Rights of an American Citizen* contained a chapter entitled "Of the rights reserved to the people of the United States; not being granted either to the general government, or the state governments." This chapter explained the Second Amendment "right of the citizens to bear arms" as making it possible for a militia to combat invasion, insurrection, or usurpation.[151]

An 1822 Kentucky decision, *Bliss v. Commonwealth*, interpreted the state's constitution to find a law against carrying concealed weapons (the first American weapons control law of general applicability) to be unconstitutional.[152]

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147. 1 TUCKER, *supra* note 136, at 43.

148. *Id.*

149. *Id.*

150. Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 953 n.124 (1993); *see also* BENJAMIN L. OLIVER, THE LAW SUMMARY: A COLLECTION OF LEGAL TRACTS ON SUBJECTS OF GENERAL APPLICATION IN BUSINESS (2d ed., Fred B. Rothman & Co. 1995) (1831).

151. BENJAMIN L. OLIVER, THE RIGHTS OF AN AMERICAN CITIZEN; WITH A COMMENTARY ON STATE RIGHTS, AND ON THE CONSTITUTION AND POLICY OF THE UNITED STATES 174 (1832). The book was cited by the dissent in *Harmelin v. Michigan*, 501 U.S. 957, 1009-10 (1991) (White, J., dissenting) for the proposition that the Eighth Amendment forbids punishments disproportionate to the underlying offense.

152. *See* Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90 (1822).

> If, therefore, the act in question imposes any restraint on the right, immaterial what appellation may be given to the act, whether it be an act

Oliver thought that carrying concealed weapons, "if it is really unconstitutional to restrain it by law, ought to be discountenanced," since concealment allowed an antagonist to surprise a victim.[153] Still, "[t]here are without doubt circumstances, which may justify a man for going armed; as, if he has valuable property in his custody; or, if he is traveling in a dangerous part of the country; or, if his life has been threatened."[154]

3. *James Bayard*

James Bayard's *A Brief Exposition of the Constitution of the United States* was intended as "a text-book for the instruction of youth."[155] The book was adopted by some colleges and seminaries and was praised by Chief Justice John Marshall, Justice Joseph Story, Chancellor James Kent, "and other distinguished jurists," according to the author.[156] The small book took the reader through the Constitution clause by clause, offering short explanations of the meaning and background of each provision.

Bayard wrote that the Second Amendment "secures the right of the people to provide for their own defence."[157] This

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> regulating the manner of bearing arms or any other, the consequence, in reference to the constitution, is precisely the same, and its collision with that instrument equally obvious.

Id. at 92. "For, in principle, there is no difference between a law prohibiting the wearing concealed arms [sic], and a law forbidding the wearing such as are exposed; and if the former be unconstitutional, the latter must be so likewise." *Id.* "[I]f any portion of that right be impaired, immaterial how small the part may be, and immaterial the order of time at which it be done, it is equally forbidden by the constitution." *Id.* at 93.

153. OLIVER, *supra* note 151, at 176-78.

154. *Id.* at 178. Another passage described self-defense as a natural right:

> There are some other rights, which are reserved to the people, though not mentioned in the general constitution. Among these is the right of self-defence, in cases where the danger is so imminent, that the person in jeopardy, may suffer irreparable injury, if he waits for the protection of the laws. . . . as the compact between him and society is mutual, if society is unable to protect him, his natural right revives to protect himself.

Id. at 186. Also, "*Of those rights which are usually retained in organized society*, . . . [t]he first and most important of these rights, is that of self-defence." *Id.* at 40.

155. JAMES BAYARD, A BRIEF EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 4 (Fred B. Rothman & Co. 1992) (2d ed. 1845).

156. *Id.* at 3.

157. *Id.* at 147.

short statement is not, in isolation, necessarily inconsistent with the Standard Model or with the anti-individual theories. One could read the language, Standard Model-style, as "the Amendment guarantees the pre-existing right of people to protect themselves with arms." Or one could, with a little more effort, read Bayard's language Henigan style: "the Amendment protects state governments from federal interference, so that the people may be defended by state militias."

Any confusion arising from Bayard's terseness on the Second Amendment is clarified by his discussion of the Third Amendment, which prohibits quartering troops in private homes under most circumstances.[158] Bayard detailed its historical background: "The people of this country, while under the dominion of England, had felt too sensibly the evils arising from the want of arms . . . not to take every precaution against their recurrence."[159]

Formally, Bayard's reference to "the evils arising from the want of arms" makes no sense in a Third Amendment discussion. The Third Amendment keeps soldiers out of homes, but does nothing to prevent "the want of arms." Historically, however, the Second and Third Amendments were closely linked, and they are placed next to each other because both were intended as checks against the dangers of militaristic tyranny on the part of the central government. The disarmament of individual citizens, the replacement of the militia by a standing army, and the abuses of a standing army (including the forced quartering of soldiers in private homes) were closely linked to the abuses of King Charles I, which precipitated the English Civil War,[160] whose history the Americans knew well—especially since similar abuses helped precipitate the American Revolution. As the Founders also knew from reading Montesquieu and others, the quartering of

158. *See* U.S. CONST. amend. III: "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 a manner to be prescribed by law."

159. BAYARD, *supra* note 155, at 148.

160. *See* LOIS G. SCHWOERER, "NO STANDING ARMIES!" THE ANTIMILITARY IDEOLOGY IN SEVENTEENTH-CENTURY ENGLAND (1974); William S. Fields & David T. Hardy, *The Third Amendment and the Issue of the Maintenance of Standing Armies: A Legal History*, 35 AM. J. LEGAL HIST. 393, 402-13 (1991); MALCOLM, *supra* note 1, at 6-15.

soldiers was one of the major abuses perpetrated against the disarmed French Huguenots by Louis XIV in the 1690s.[161]

Thus, it was not unreasonable for Bayard to address the problems of centralized militarism in one unified discussion. Knowing "the evils arising from the want of arms," the Americans took "every precaution against their recurrence," and it is therefore impossible to read Bayard as supporting Henigan's theory that the federal government may constitutionally disarm the American people.

4. *Francis Lieber*

One of the most important of America's early political scientists was Francis Lieber, a German immigrant. He taught history, political science, and public law at South Carolina College, Columbia College, and Columbia Law School. His code of military conduct for land warfare, written for the Union Army during the Civil War, later became part of the Geneva and Hague Conventions.[162] Lieber's main contribution, however, was his analysis of how a society could create complex institutional structures to promote civil liberty; the fullest exposition of his political thought is found in his book *On Civil Liberty and Self-Government*, first published in 1853.[163]

In the penultimate paragraph of a chapter discussing control of standing armies and the Third Amendment, Lieber wrote:

> Akin to the last-mentioned guarantee, is that which secures to every citizen the right of possessing and bearing

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161. *See* Kates, *Self-Protection*, *supra* note 1, at 100 ("As Englishmen and Americans were well aware from their reading of Bodin, Beccaria and Montesquieu, the Huguenots had been rendered incapable of resisting either individually or as a group by the Continental policy of disarming all but the Catholic nobility.").

> [T]he most atrocious–and effective–were the *dragonnades*, or billeting of dragoons on Huguenot families with encouragement to behave as viciously as they wished. Notoriously rough and undisciplined, the enlisted troops of the dragoons spread carnage, beating and robbing the householders, raping the women, smashing and wrecking and leaving filth . . . .

BARBARA W. TUCHMAN, THE MARCH OF FOLLY 21 (1984).

162. *See* Steven Alan Samson, *Francis Lieber on the Sources of Civil Liberty*, 9 HUMANITAS 1-2 (1996) (visited Mar. 16, 1998) <http://www.nhumanities.org/samson.htm>.

163. *See id.*; FRANCIS LIEBER, ON CIVIL LIBERTY AND SELF-GOVERNMENT 5 (Theodore D. Woolsey ed., Da Capo Press 1972) (3d ed. 1877).

> arms. Our constitution says: "The right of the people to keep and bear arms shall not be infringed upon;" and the [English] Bill of Rights secured this right to every protestant. It extends now to every English subject. It will hardly be necessary to add, that laws prohibiting secret weapons, or those which necessarily endanger the lives of the citizens, are no infringement of liberty; on the contrary, liberty resting necessarily on law, and lawful, that is, peaceful state of the citizens, liberty itself requires the suppression of a return to force and violence among the citizens—a fact by no means sufficiently weighed in recent times in America.[164]

Lieber recognized the individual right of "every citizen" to bear arms; he did not even quote the militia clause of the Second Amendment. Unlike Tucker, Rawle, and Story, who distinguished the broad American right to arms from its feeble English ancestor, Lieber saw the English right as robust and identical to the American right. (Lieber's general theme was to contrast the strong rights in Anglo-American law with the weak or non-existent rights in France and the rest of Europe.) The endorsement of concealed weapons control laws, followed by the complaint about American attitudes, might reflect the fact that outside the Southeast and the state of Indiana, there were no concealed weapons laws or any other sort of gun control at all. And, as Lieber ruefully recognized, Americans were often too quick to resort to private revenge, rather than to the judicial system.[165]

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164. LIEBER, *supra* note 163, at 120 (quoting U.S. CONST. amend. II). Lieber's Second Amendment quotation was, of course, slightly in error. The word "upon" is not part of the Amendment. *See also* Francis Lieber, *Anglican and Gallican Liberty*, *in* 2 THE MISCELLANEOUS WRITINGS OF FRANCIS LIEBER 373-75 (David C. Gilman ed., 1880); Samson, *supra* note 162 (discussing the fact that Lieber listed the right to arms and the right to resist unlawful authority as among the essential rights of a society in which civil liberty is secure).

A southern reviewer of another Lieber book, *Manual of Political Ethics* (1839), used the review to defend slavery under the Constitution; the reviewer included the right to arms in a litany of individual rights that the Constitution guaranteed to free men:

> To the *people*, the *habeas corpus* act, the trial by jury, the exemption from excessive bail, and the quartering of soldiers, and the right to keep and bear arms, was secured; but these privileges only applied to free people, and not to persons held to service or labor in one State, who might escape into another . . . .

Lieber's Political Ethics, 24 S. Q. REV. 464, 481 (Oct. 1847).

165. For the sake of completeness, two other treatises written before the Civil

5. *Elliot's* Debates

Jonathan Elliot's 1836 compilation, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, is still the major documentary source for its subject. Elliot's "Digest of the Constitution" indexed the various Constitutional provisions. Under the index heading "*Rights of the citizen* declared to be—," there is a listing for "To keep and bear arms," and other rights from the first nine amendments. In contrast, the Tenth Amendment, unquestionably a "states' right," was not included in the heading "Rights of the Citizen."[166]

War should be mentioned. Maurice Richter's 1859 *The Municipalist* examined the relationship between local and federal power. He argued that many provisions of the Bill of Rights would make sense in Europe as restraints on central power, but that these provisions were of no use in the United States, since the national government had no affirmative power to violate those rights. Thus, for the Second Amendment, Richter wrote, "Good for Europe. We have read the dispositions of the constitution [in Article I] about the militia. Congress has no power to legislate on the keeping and bearing of arms, except in the District of Columbia." MAURICE A. RICHTER, INTERNAL RELATIONS OF THE CITIES, TOWNS, VILLAGES, COUNTIES, AND STATES OF THE UNION; OR THE MUNICIPALIST: A HIGHLY USEFUL BOOK FOR VOTERS, TAX-PAYERS, STATESMEN, POLITICIANS AND FAMILIES 133 (N.Y., Ross & Tousey, 2d ed. 1859), *available online* <http://moa.umdl.umich.edu/cgi-bin/moa/sgml/moa-idx?notisid=AEW4742)>.

William Duer's lectures on the Constitution at Columbia College in the 1830s were published as WILLIAM ALEXANDER DUER, A COURSE OF LECTURES ON THE CONSTITUTIONAL JURISPRUDENCE OF THE UNITED STATES (Burt Franklin Press 1971) (1856). Duer's lengthy analysis of federal militia powers and standing armies said nothing about the Second Amendment. *See id.* at 196-210. His discussion of constitutional amendments amounted to summary quotations of Amendments four through eight, with no mention of Amendments one through three, nine, or ten. *Id.* at 39-40. His discussion of natural rights paraphrased Blackstone's three primary rights (personal security, personal liberty, and private property) and five auxiliary rights (legislative authority; limits on the king's prerogative; the right to apply to court for redress of injury, and the associated rights of trial by jury and habeas corpus; the right to petition; and "of keeping arms for defence; which was, indeed, a public allowance, under certain restrictions, of the natural right of resistance and self-preservation"). *Id.* at 36-37. Duer's list of Blackstone's auxiliary rights contained a footnote to the Seventh Amendment for "Trial by Jury." There was no citation to Article I for habeas corpus, to the First Amendment for the right to petition, nor to the Second Amendment for the right to arms. *See id.*

A footnote concerning the auxiliary right to arms discussed a Kentucky case holding a law against wearing concealed arms void under the Kentucky Constitution and likewise voiding a law against free blacks defending themselves against white aggressors. *See id.* at 37 n.1; *see also infra* text accompanying notes 394-95. Regarding the self-defense issue, a contrary case was also cited. *See id.*

166. 1 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, at xv (2d ed., 2d prtg. 1937).

6. *Webster's* Dictionary

The legitimacy of the American version of the English language found its truest champion in Noah Webster. Webster's father served as a captain on the "alarm list" of the militia near his Hartford farm,[167] and the family strongly supported the Revolution. Noah Webster's first major work was the *American Spelling Book* (1783), of which millions of copies were eventually printed. He published his first dictionary in 1806, the *Compendious Dictionary of the English Language*.[168] But his revered classic came in 1828, the two-volume *American Dictionary of the English Language*.[169] By examining the Second Amendment word-by-word, as defined by Webster, we see the meaning of the Amendment's words in the nineteenth century.

"Regulated" meant "[a]djusted by rule, method or forms; put in good order; subjected to rules or restrictions."[170] As Randy Barnett has observed in relation to the Congressional power to "regulate" interstate commerce, to regulate something means to make it more regular—not to prohibit it.[171]

"Militia" was

> The body of soldiers in a state enrolled for discipline, but not engaged in actual service except in emergencies; as distinguished from regular troops, whose sole occupation is war or military service. The militia of a country are the able bodied men organized into companies, regiments and brigades, with officers of all grades, and required by law to attend

167. Kemp Mallone, *Noah Webster*, *in* DICT. AM. BIO., *supra* note 90.

168. *See* MARSHALL SMELSER, THE DEMOCRATIC REPUBLIC: 1801-1815, at 32 n.27 (1968).

169. NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).

170. 2 *Id.* at 54. Similarly, George Cabot—a Federalist and one of the richest men in New England—wrote that society should function like a "well regulated family" with "each one learning his proper place and keeping to it." Robert E. Shalhope, *Individualism in the Early Republic*, *in* AMERICAN CHAMELEON: INDIVIDULAISM IN TRANS-NATIONAL CONTEXT 66, 67 (Richard O. Curry & Lawrence B. Goodheart eds., 1991) (citing DAVID H. FISCHER, THE REVOLUTION OF AMERICAN CONSERVATIVISM (1965)). Thus, in "a well regulated militia," the militia-men would be able to march and deploy for combat in proper formations, with each militia-man knowing his place.

171. *See* Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745, 775 (1997). Or as Congressman Daniel Webster explained, regarding federal power to "regulate" international commerce, "To regulate . . . could never mean to destroy." ROBERT V. REMINI, DANIEL WEBSTER: THE MAN AND HIS TIME 94 (1997).

> military exercises on certain days only, but at other times left to pursue their usual occupations.[172]

"Necessary" meant "indispensibly requisite . . . ."[173]

"Security" was "[p]rotection; effectual defense or safety from danger of any kind."[174]

"Free" meant "[i]n *government*, not enslaved; not in a state of vassalage or dependence; subject only to fixed laws, made by consent, and to a regular administration of such laws; not subject to the arbitrary will of a sovereign or lord; as a *free* state, nation, or people."[175]

"State" meant

> A political body, or body politic; the whole body of people
>
> united under one government, whatever may be the form of government. . . . More usually the word signifies a political body governed by representatives . . . . In this sense, *state* has sometimes more immediate reference to government, sometimes to the people or community.[176]

Thus, "state" is not just the "government." The Second Amendment aims to protect the security of a free American people, not just to protect their government.

"Right" was a "[j]ust claim; immunity; privilege. All men have a *right* to secure enjoyment of life, liberty, personal safety, liberty, and property. . . . *Rights* are natural, civil, political, religious, personal, and public."[177]

"People" meant "[t]he body of persons who compose a community, town, city or nation. We say, the *people* of a town; the *people* of London or Paris; the English *people*."[178]

"Keep" was "[t]o hold; to retain in one's power or possession."[179]

"Bear" meant firstly, "[t]o support; to sustain; as, to *bear* a weight or burden"[180]—a meaning that does not fit with the

172. 2 WEBSTER, *supra* note 169, at 15.
173. 2 *id*. at 21.
174. 2 *id*. at 66.
175. 1 *id*. at 87.
176. 2 *id*. at 80.
177. 2 *id*. at 59.
178. 2 *id*. at 32.
179. 2 *id*. at 2.
180. 1 *id*. at 19.

context of the Second Amendment. The second and third meanings of "bear" are much more congruent, however: "To carry; to convey; to support and remove from place to place" and "[t]o wear; to bear as a mark of authority or distinction; as, to *bear* a sword, a badge, a name; to *bear* arms in a coat."[181]

It is sometimes argued that "bear" has an exclusively military connotation, so that the right to "bear" arms refers only to bearing them in militia service.[182] But none of Webster's definitions for bear contain such a narrow construction. And rather significantly, we know that "bear" was used with a broad meaning in one of the key documents that gave birth to the Second Amendment: the minority report from the Pennsylvania ratifying convention. The minority demanded constitutional protection for the right of the people "to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game."[183] Hunting—"killing game"—is obviously a personal, non-militia purpose for which one could "bear arms."

Further, the state constitutions of Missouri (1820), Indiana (1816), Ohio (1802), Kentucky (1792), and Pennsylvania (1776) all recognized a right of citizens to "bear arms" in the "defense of themselves and the state."[184] While arms-bearing for defense of "the state" would be in a militia context, citizens bearing arms merely for "defense of themselves" would merely be defending themselves against criminal attack. Hence, the phrase "bear arms" did not connote that arms-bearing could only occur while in active militia service.

In a 1998 case, the Supreme Court was called upon to construe the meaning of the phrase "carries a firearm" in a mandatory sentencing statute. While the majority opinion did not refer to the Second Amendment, Justice Ginsburg, writing for four dissenters, used the Second Amendment to help explain the phrase:

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181. *Id.*

182. *See, e.g.*, Aymette v. State, 21 Tenn. (2 Hum.) 154, 161 (1840).

183. The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents (Dec. 18, 1787), *reprinted in* ORIGIN, *supra* note 37, at 154, 160.

184. *See* discussion *infra* note 190.

> Surely a most familiar meaning is, as the Constitution's Second Amendment ("keep and *bear* Arms") (emphasis added) and Black's Law Dictionary, at 214, indicate: "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person."[185]

Justice Ginsburg's reading of the Second Amendment is thus consistent with the reading suggested by Webster's Dictionary.

"Arms" meant "[w]eapons of offense, or armor for defense and protection of the body . . . . *A stand of arms* consists of a musket, bayonet, cartridge-box and belt, with a sword. But for common soldiers a sword is not necessary."[186] Webster's definition offers two useful insights. First, the distinction sometimes drawn between "offensive" and "defensive" weapons is of little value. All weapons are made for offense, although they may be used for defensive purposes (i.e., shooting someone who is attempting to perpetrate a murder).

Second, Webster's dictionary suggests that the "arms" protected by the Second Amendment may include more than just weapons. The Amendment may encompass "armor for defense and protection of the body." The defensive aspect of arms would be relevant to legislative proposals to prohibit non-government possession of bullet-resistant vests.

Finally, "infringed" meant "[b]roken, violated, transgressed."[187]

How would the Second Amendment read if rephrased according to Webster's dictionary?

> The good order of able-bodied men required to attend military exercises on certain days being indispensibly requisite to the protection of a not-enslaved body politic, the just claim of the body of persons who compose the United States to retain and wear weapons and armor shall not be violated.

While hardly as elegant as the Second Amendment, Webster's dictionary does point us in the same direction as do the legal commentators who argue that the militia (an essential

185. Muscarello v. United States, 118 S. Ct. 1911, 1921 (1998) (Ginsburg, J., dissenting) (omissions in original).

186. 1 WEBSTER, *supra* note 169, at 13.

187. 1 *id*. at 110.

institution of a free society) will only be effective as long as the people are guaranteed the ownership of arms. In fact, Noah Webster himself, during the ratification debates, provided a concise summary of why the entire population should be armed:

> Before a standing army can rule, the people must be disarmed;
>
> as they are in almost every kingdom in Europe. The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any band of regular troops that can be, on any pretence, raised in the United States.[188]

In sum, all of the pre-1850 sources analyzed above—including the leading treatises, the lesser treatises, other books, and the Supreme Court's *Houston* case—support the Standard Model approach to the Second Amendment: the Amendment grants an individual right to bear arms.

III. STATE CONSTITUTIONS AND CASE LAW

The nineteenth century was a fertile period for the right to bear arms in state courts and in state constitutions. Many of these state sources provide a good deal of useful information about how the Second Amendment was understood. This Part discusses state constitutional texts first and then discusses state case law. The purpose is not to comprehensively survey

188. Noah Webster, *An Examination into the Leading Principles of the Federal Constitution*, *in* PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 55, 56 (Paul Leicester Ford ed., Brooklyn 1888).

Often confused with Noah Webster, but having no relation, was Massachusetts Senator Daniel Webster, perhaps the greatest orator of the nineteenth century. Among the most famous of all Webster's public speeches was "The Plymouth Oration," which he delivered at Plymouth Rock on December 22, 1820—the bicentennial of the Pilgrim landing. Webster, who was an avid hunter all his life, traced the connection between the social conditions created by the Pilgrims and the current condition of American freedom; he emphasized that the social conditions, and not just the formal Constitution, were essential ingredients of freedom: "The practical character of government depends often on a variety of considerations, besides the abstract frame of its constitutional organization. Among these are the condition and tenure of property . . . an armed or unarmed yeomanry." Further, "[e]ducation, wealth, talents, are all parts and elements of the general aggregate of power; but numbers, nevertheless, constitute ordinarily the most important consideration, unless, indeed, there be a *military force* in the hands of the few, by which they can control the many." Daniel Webster, *The Plymouth Oration*, Dec. 22, 1820, *available in part at* <http://www.dartmouth.edu/~dwebster/speeches/plymouth~oration.html>.

the nineteenth century arms rights cases,[189] but rather to survey state materials solely as they may shed light on the federal Second Amendment.

A. State Constitutions

The texts of nineteenth century state constitutions are worth reviewing for several reasons. First, the large number of state provisions suggests that the right to arms was considered an important human right. Of the thirty-six states that were admitted or readmitted to the Union in the nineteenth century, twenty-eight provided a right to arms provision in their state constitution.[190] Several states adopted right to arms

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189. Clayton Cramer's book provides a superb survey of state firearms constitutional case law in the nineteenth century. *See* CRAMER, *supra* note 1. The works of other scholars offer useful studies of particular states in the nineteenth century. *See* STEPHEN HALBROOK, A RIGHT TO BEAR ARMS: STATE AND FEDERAL BILLS OF RIGHTS AND CONSTITUTIONAL GUARANTEES (1989); Robert Dowlut, *Federal and State Constitutional Guarantees to Arms*, 15 U. DAYTON L. REV. 59 (1989); Robert Dowlut, *The Right to Arms*, *supra* note 1; Robert Dowlut & Janet A. Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 OKLA. CITY U. L. REV. 177 (1982); Stephen P. Halbrook, *Rationing Firearms Purchases and the Right to Keep Arms: Reflections on the Bills of Rights of Virginia, West Virginia, and the United States*, 96 W. VA. L. REV. 1 (1993); Stephen P. Halbrook, *The Right to Bear Arms in Texas: The Intent of the Framers of the Bills of Rights*, 41 BAYLOR L. REV. 629 (1989); Glenn Harlan Reynolds, *The Right to Keep and Bear Arms under the Tennessee Constitution: A Case Study in Civic Republican Thought*, 61 TENN. L. REV. 647 (1994).

190. Many thanks to Eugene Volokh, who compiled these provisions, and who has made them available at <http://www.law.ucla.edu/faculty/volokh/beararms/statecon.htm>, to which all following cites are made.

Alabama: "That every citizen has a right to bear arms in defense of himself and the state." Art. I, § 26 (enacted 1819, art. I, § 23, with "defence" in place of "defense," spelling changed 1901).

Arkansas: "The citizens of this State shall have the right to keep and bear arms for their common defense." Art. II, § 5 (1868). This replaced the 1836 provision: "That the free white men of this State shall have a right to keep and to bear arms for their common defense." Art. II, § 21.

California: No provision.

Colorado: "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." Art. II, § 13 (1876).

Connecticut: Although Connecticut had been one of the original thirteen states, it added a right to arms provision to its constitution in 1818: "Every citizen has a right to bear arms in defense of himself and the state." Art. I, § 15 (enacted 1818, art. I, § 17). The original 1818 text came from the Mississippi Constitution of 1817.

Florida: Upon admission to the Union in 1838, the Florida constitution provided: "That free white men of this State shall have a right to keep and to bear arms, for

their common defence." Art. I, § 21. The 1865 Constitution, a white supremacist document, made no mention of a right to arms. The 1868 Constitution, a Reconstruction document, provided, "The people shall have the right to bear arms in defence of themselves and of the lawful authority of the State." Art. I, § 22. This was modified in 1885 to allow restrictions on the carrying of arms: "The right of the people to bear arms in defence of themselves, and the lawful authority of the State, shall not be infringed, but the Legislature may prescribe the manner in which they may be borne." Art. I, § 20.

Georgia: The state's original constitution had no right to arms, which impelled an 1845 Georgia Supreme Court decision striking down gun control to rely on the Second Amendment and natural law. The 1865 and 1868 Georgia Constitutions did include an arms right. 1865: "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." Art. I, § 4. 1868: "A well-regulated militia being necessary to the security of a free people, the right of the people to keep and bear arms shall not be infringed; but the general assembly shall have power to prescribe by law the manner in which arms may be borne." Art. I, § 14. The provision took its final form in the 1877 Constitution: "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." Art. I, § I, ¶ VIII.

Idaho: The 1889 statehood Constitution stated: "The people have the right to bear arms for their security and defense; but the Legislature shall regulate the exercise of this right by law." Art. I, § 11.

Illinois: The state had no right to arms until the adoption of a new constitution in 1970.

Indiana: The right to arms in the 1816 statehood constitution ("That the people have a right to bear arms for the defense of themselves and the State, and that the military shall be kept in strict subordination to the civil power." Art. I, § 20) was revised in 1851 to state: "The people shall have a right to bear arms, for the defense of themselves and the State." Art. I, § 32.

Iowa: No provision.

Kansas: "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." Bill of Rights, art. I, § 4 (1859).

Kentucky: The Kentucky Constitution of 1792 provided: "The right of the citizens to bear arms in defense of themselves and the State shall not be questioned." Art. XII, § 23. It was changed slightly in 1799: "That the rights of the citizens to bear arms in defense of themselves and the State shall not be questioned." Art. X, § 23. An 1850 revision addressed a court case from several decades before and specifically authorized restrictions on concealed arms: "That the rights of the citizens to bear arms in defense of themselves and the State shall not be questioned; but the General Assembly may pass laws to prevent persons from carrying concealed arms." Art. XIII, § 25. The provision took its modern form in 1891:

> All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned:
>
> First: The right of enjoying and defending their lives and liberties.
>
> . . . .
>
> 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. Bill of Rights § 1.

Louisiana: The 1879 Constitution stated: "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 abridged. This shall not prevent the passage of laws to punish those who carry weapons concealed." Art. 3.

Maine: The 1819 Constitution stated "Every citizen has a right to keep and bear arms for the common defense; and this right shall never be questioned." Art. I, § 16. In 1987, after a state court decision which interpreted the Maine provision as recognizing no individual right, the Constitution was amended to provide: "Every citizen has a right to keep and bear arms and this right shall never be questioned." Art. I, § 16.

Michigan: "Every person has a right to bear arms for the defence of himself and the state." Art. I, § 6 (1835).

Minnesota: No provision.

Mississippi: The state's first Constitution, in 1817, provided: "Every citizen has a right to bear arms, in defence of himself and the State." Art. I, § 23. The comma was removed in 1832. The 1868 Reconstruction Constitution changed the wording to: "All persons shall have a right to keep and bear arms for their defence." Art. I, § 15. In 1890, the provision was rewritten to copy a formulation common in late-19th century rights to arms, making explicit the many purposes of the right to arms, and also the authority of the legislature to control concealed weapons: "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." Art. III, § 12.

Missouri: The form used in Mississippi, Colorado, and Montana first appeared in the 1875 Missouri Constitution: "That the right of no citizen 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 not be called into question; but nothing herein contained is intended to justify the practice of wearing concealed weapons." Art. II, § 17. The provision replaced language from 1820: "That the people have the right peaceably to assemble for their common good, and to apply to those vested with the powers of government for redress of grievances by petition or remonstrance; and that their right to bear arms in defence of themselves and of the State cannot be questioned." Art. XIII, § 3. The 1865 Constitution had copied the 1820 language, except to substitute "the lawful authority of the State" for "the State." Art. I, § 8.

Montana: "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." Art. III, § 13.

Nebraska: No arms right provision until 1988.

Nevada: No provision until 1982.

North Carolina: The 1868 Constitution substantially followed the arms provision in the 1776 Constitution ("That the people have a right to bear arms, for the defence of the State; and, as standing armies, in 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 governed by, the civil power." Bill of Rights, § XVII) and stated: "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." Art. I, § 24. In 1875, concealed weapons control was added: "Nothing herein contained shall justify the practice of carrying concealed weapons, or prevent the General Assembly from enacting penal statutes against that practice."

North Dakota: No right to arms until 1984.

Ohio: The original 1802 provision stated "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 shall not be kept up, and that the military shall be kept under strict subordination to the civil power." Art. VIII, § 20. The language was modernized in 1851: "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." Art. I, § 4.

Oregon: "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." Art. I, § 27 (enacted 1857, as art. I, § 28).

Rhode Island: The state had no constitution until 1842. The 1842 constitution stated: "The right of the people to keep and bear arms shall not be infringed." Art. I, § 22.

South Carolina: The original constitution had no right to arms. The 1868 Constitution added one: "The people have a right to keep and bear arms for the common defence. As, in times of peace . . . ." Art. I, § 28. This was revised in 1895 to more closely parallel the Second Amendment: "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." Art. 1, § 20.

South Dakota: "The right of the citizens to bear arms in defense of themselves and the state shall not be denied." Art. VI, § 24 (1889).

Tennessee: The 1834 state constitution's right to arms exactly matched the language of the original 1796 constitution: "That the freemen of this State have a right to keep and to bear arms for their common defence." Art. XI, § 26. The Reconstruction Constitution added legislative power to control the carrying of arms: "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." Art. I, § 26 (1870).

Texas: When the Texan nation gained independence in 1836, the Declaration of Rights provided: "Every citizen shall have the right to bear arms in defence of himself and the republic. The military shall at all times and in all cases be subordinate to the civil power." Declaration of Rights, cl. 14. When Texas joined the Union in 1845, the new Constitution stated: "Every citizen shall have the right to keep and bear arms in lawful defence of himself or the State." Art. I, § 13. The Reconstruction Constitution of 1868 declared: "Every person shall have the right to keep and bear arms in the lawful defence of himself or the State, under such regulations as the legislature may prescribe." Art. I, § 13. The final version appeared in 1876: "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. Art. I, § 23.

Utah: "The people have the right to bear arms for their security and defense, but the legislature may regulate the exercise of this right by law." Art. I, § 6 (1896).

Washington: The state's 1889 provision was typical of its time, except for its explicit statement about armed groups, including company goon squads: "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." Art. I, § 24.

West Virginia: No provision until 1986.

Wisconsin: No provision until 1998.

provisions repeatedly—first upon admission to the Union, then upon readmission shortly after the Civil War, and again upon creation of a new Constitution under Reconstruction. The Confederate States of America also put a right to arms in their national Constitution.[191]

Second, states often thought it necessary to specifically enumerate the exceptions to the right to arms. Many constitutions contain a specific exception allowing restrictions on *concealed* carry. Open carry was considered honorable, but concealed carry was seen useful only to people who wanted to surprise a victim. Louisiana's constitution, for example, closely tracked the Second Amendment, but added an exception against concealed carry: "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 abridged. This shall not prevent the passage of laws to punish those who carry weapons concealed."[192] This concealed carry exception, which was aimed at individuals, shows that the Louisiana right was an individual one. The close reliance on the language of the Second Amendment further suggests that, at least to those who drafted and ratified the Louisiana Constitution, the Second Amendment was seen as protecting an individual right.

Similarly, Georgia during Reconstruction adopted a Bill of Rights copied nearly verbatim from the federal Bill of Rights. The arms provision stated: "A well-regulated militia being necessary to the security of a free people, the right of the people to keep and bear arms shall not be infringed; but the general assembly shall have power to prescribe by law the manner in which arms may be borne."[193] The Georgia Supreme Court has had no difficulty in upholding this provision as protecting the right of individual Georgians to own and carry guns. At the same time, the court relied on the Constitution's express grant

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Wyoming: "The right of citizens to bear arms in defense of themselves and of the state shall not be denied." Art. I, § 24 (1889).

191. *See* CONSTITUTION FOR THE PROVISIONAL GOVERNMENT OF THE CONFEDERATE STATES OF AMERICA, art. I, § 7, cl. 10; CONSTITUTION OF THE CONFEDERATE STATES OF AMERICA, art. I, § 9, cl. 13, *reprinted in* CHARLES ROBERT LEE, JR., THE CONFEDERATE CONSTITUTIONS apps. B & C (1963). The Confederate Constitution adopted the United States Constitution's Bill of Rights word for word. *See id.*

192. LA. CONST. art. 3.

193. GA. CONST. art. I, § 14 (1868).

of authority to regulate the conditions of carrying as reason for upholding a state law prohibiting deadly weapons at election grounds, courts, churches, and other public gatherings.[194]

Third, state constitutional arms provisions that address the issue of the military and standing armies were not seen as inconsistent with individual rights. Opponents of the individual rights view of the Second Amendment normally point out that the Founders were gravely concerned about standing armies (true), that they saw state militias as a counterpoise to a federal standing army (also true), and that during the ratification debates over the proposed federal Constitution, many anti-federalists worried that the new federal government would destroy the state militias (also true). The anti-individual theorists then claim that because the Founders saw militias as a protection against standing armies, the Second Amendment, therefore, guaranteed only the right of state governments to have militias.[195]

But state constitutions show us that an anti-standing army arms right provision can also be an individual right provision. For example, the Ohio Constitution of 1851 stated, "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."[196] Ohio courts have always treated this provision as guaranteeing an individual right.[197]

Likewise, the 1868 North Carolina Constitution provided:

> 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 ought not to be kept up, and the

194. *See* Hill v. State, 53 Ga. 472, 473-83 (1874).

195. *See, e.g.*, Ehrman & Henigan, *supra* note 2, at 14-32.

196. OHIO CONST. art. I, § 4. This language revised the 1802 language: "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 shall not be kept up; and that the military shall be kept under strict subordination to the civil power." OHIO CONST. art. VIII, § 20 (1802).

197. *See, e.g.*, Arnold v. City of Cleveland, 616 N.E.2d 163, 169-71 (Ohio 1993); *In re* Reilly, 31 Ohio Dec. 364 (C.P. 1919).

> military should be kept under strict subordination to, and governed by, the civil power.[198]

This language quoted the Second Amendment but added additional language denouncing standing armies. Surely if the anti-individual view of the Second Amendment were correct, then the North Carolina language (even more heavily weighted with anti-army language) could not be construed as an individual right.

But the North Carolina language was indeed so construed. In 1875, the North Carolina legislature added concealed weapons control to the state constitution: "Nothing herein shall justify the practice of carrying concealed weapons, or prevent the General Assembly from enacting penal statutes against that practice."[199] The anti-concealed weapons language was obviously aimed at individual arms carriers, not at the state militia. And North Carolina courts consistently interpreted the provision as guaranteeing an individual right.[200]

B. State Case Law

Except for some statutes late in the century banning arms from public parades, gun control in the nineteenth century was almost exclusively a Southern phenomenon. In the post-Civil War period, the Southern gun laws were clearly aimed at controlling the Freedmen; although written in racially neutral terms, the laws were meant for, and applied almost exclusively to, blacks.[201]

As for the antebellum period, scholars have speculated that the Southern controls were aimed at free blacks. But Clayton Cramer has shown that the antebellum laws, which were

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198. N.C. CONST. art. I, § 24 (1868).

199. *Id.* § 30 (1875).

200. *See, e.g.*, State v. Kerner, 107 S.E. 222 (N.C. 1921); State v. Speller, 86 N.C. 697, 699-701 (1882); State v. Newsom, 27 N.C. (5 Ired.) 250, 253-54 (1844); State v. Huntly, 25 N.C. (3 Ired.) 418, 422-23 (1843).

201. For an excellent survey of the racial implications of nineteenth century arms control in the South, see Robert J. Cottrol & Raymond T. Diamond, *"Never Intended to be Applied to the White Population": Firearms Regulation and Racial Disparity—The Redeemed South's Legacy to a National Jurisprudence?*, 70 CHI.-KENT L. REV. 1307 (1995), Clayton E. Cramer, *The Racist Roots of Gun Control*, 4 KAN. J.L. & PUB. POL'Y 17 (1995), and Stefan B. Tahmassebi, *Gun Control and Racism*, 2 GEO. MASON U. CIV. RTS. L.J. 67 (1991).

written in facially neutral terms in a period when there was no Fourteenth Amendment to require racial neutrality, had a different purpose. Dueling had been widely practiced in the Southeast; legislative efforts to outlaw dueling had been undermined by the courts and by juries. In the absence of regulated dueling, Southerners whose honor had been offended simply killed the offender. The concealed weapons laws were an extension of the antidueling laws and were intended to prevent the victims of insults from killing the insulter. Legislatures accurately expected massive resistance to the laws, and therefore included many special enforcement mechanisms, such as allowing private citizens to bring criminal prosecutions and forbidding juries to consider the defendant's motives.[202]

The solid majority of courts that reviewed the gun control laws, which were often challenged under the Second Amendment and its state analogues, would uphold the particular control, while affirming an individual right to own and carry guns.

1. *Tennessee*

One of the most important state gun cases in the nineteenth century was *Aymette* v. *State*, an 1840 decision upholding restrictions on carrying concealed weapons.[203] The decision was based on the Tennessee Constitution's right to arms, but the court stated that the Tennessee provision was intended "[i]n the same view" as the Second Amendment.[204] The Aymette court read the Tennessee provision (and, by analogy, the Second Amendment) narrowly, finding that the right to arms was only so that the people as a whole could rise up against tyranny; the right was not for "private" defense.[205] Further, the right to "bear arms" meant only the right to carry weapons in a public military context, not to carry concealed weapons for personal

202. *See generally* Clayton Cramer, Concealed Weapons Laws in the Early Republic (1998) (unpublished Master's thesis in History, Sonoma State University) (on file with author).

203. *See* Aymette v. State, 21 Tenn. (2 Hum.) 154 (1840). For the history of the right to arms in Tennessee, see Glenn Harlan Reynolds, *The Right to Keep and Bear Arms Under the Tennessee Constitution: A Case Study in Civic Republican Thought*, 61 TENN. L. REV. 647 (1994).

204. *Aymette*, 21 Tenn. at 157.

205. *Id.*

protection.[206] Given the anti-tyranny purpose of the right, the only arms protected were weapons useful for resisting tyranny, but not those useful mainly for crime:

> [T]he use of those weapons which are usually employed in private broils, and which are efficient only in the hands of the robber and the assassin . . . . The right to keep and bear them, is not, therefore, secured by the constitution.[207]

As to the weapons which were protected:

> The citizens have the unqualified right to *keep* the weapon . . . . But the right to *bear arms* is not of that unqualified character. . . . [B]ut it does not follow, that they may be borne by an individual, merely to terrify the people, or for purposes of private assassination. . . . [T]he legislature may prohibit such manner of wearing as would never be resorted to by persons engaged in the common defence.[208]

Aymette laid down the line followed by the majority of state courts considering right to arms cases: the right was for protection from tyranny; the right encompassed the ownership of weapons useful for resisting tyranny; but the right did not encompass the carrying of concealed weapons not suitable for resisting tyranny.[209]

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206. *See id.* at 161.

207. *Id.* at 158.

208. *Id.* at 160. A good argument could be made that there is not as much difference between militia weapons and crime weapons as *Aymette* and the nineteenth century majority line of cases would suggest. Concealable knives may be useful for hand-to-hand combat and for guerilla warfare, and small handguns even more so. Conversely, rifles can be used to murder innocent people.

209. *Aymette* may have been too facile in equating the arms right provision in the Tennessee Constitution with the Second Amendment. The Tennessee Constitution protected "the right of the people to keep and bear arms for their common defence" and thus contained restrictive language which the U.S. Senate had voted not to include in the Second Amendment. While common defense may have been the only purpose of the Tennessee right, the Second Amendment language was broad enough to include other purposes, such as self-defense. *See* 1 BLACKSTONE, *supra* note 14, app. at 300. The *Aymette* court's theory that concealed carry was not within the scope of the arms right was predicated on reasoning that a militia-man would never carry concealed. But while concealed carry might be of no use to someone engaged in the "common defence," concealed carry could be quite useful for personal defense. Thus *Aymette*, and the cases from other states which cite to *Aymette*, may be on shaky ground to the extent that the other state cases involve constitutional provisions worded more broadly than Tennessee's.

After the Civil War, the Tennessee Supreme Court decided another case, *Andrews v. State*, which elaborated on the principles of *Aymette*, and which, like *Aymette*, was widely cited in other states.[210] The Tennessee legislature had banned the carrying of certain weapons—concealed or openly—and several defendants charged with violation of the law argued that the law violated the Second Amendment and the Tennessee Constitution. The summary of the briefs at the beginning of the case shows that, regarding the Second Amendment, the Attorney General simply replied that the Second Amendment was not enforceable against the states.[211] In oral argument, apparently, the Attorney General went further, arguing that the Second Amendment and the Tennessee state constitutional right to arms were meant to protect a "political right."[212]

Citing *Barron v. Baltimore*,[213] the *Andrews* court held that the Second Amendment was inapplicable to the states.[214] But the Court construed the Tennessee provision and the Second Amendment together, finding "that, necessarily, the same rights, and for similar reasons, were being provided for and protected in both the Federal and State Constitutions . . . ."[215] The court's construction of the state and federal right to arms is worth quoting at length, because it is a perfect example of the dominant line of nineteenth-century case law on the right to arms, expressing several principles:

> 1. The purpose of the right is to secure a militia, which is a foundation of a free society.
> 2. To make possible a militia, all persons have the right to purchase, use, practice with, and carry weapons for all non-nefarious purposes.
> 3. The right only includes the type of arms used by a militia (e.g., rifles and swords) and does not include non-militia type weapons allegedly favored by criminals (e.g., concealable knives).

As the court wrote:

210. *See* Andrews v. State, 50 Tenn. (3 Heisk.) 165 (1871).
211. *See id.* at 168.
212. *Id.* at 170.
213. Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).
214. *See Andrews*, 50 Tenn. at 173-75.
215. *Id.* at 177.

> It was the efficiency of the people as soldiers, when called into actual service for the security of the State, as one end; and in order to this [sic], they were to be allowed to *keep* arms. What, then, is involved in this right of keeping arms? It necessarily involves the right to purchase and use them in such a way as is usual, or to keep them for the ordinary purposes to which they are adapted; and as they are to be kept, evidently with a view that the citizens making up the yeomanry of the land, the body of the militia, shall become familiar with their use in times of peace, that they may the more efficiently use them in times of war; then the right to keep arms for this purpose involves the right to practice their use, in order to attain to this efficiency. The right and use are guaranteed to the citizen, to be exercised and enjoyed in time of peace, in subordination to the general ends of civil society; but, as a right, to be maintained in all its fullness.
>
> The right to keep arms, necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair. And clearly for this purpase [sic], a man would have the right to carry them to and from his home, and no one could claim that the Legislature had the right to punish him for it, without violating this clause of the Constitution.
>
> But farther than this, it must be held, that the right to keep arms, involves, necessarily, the right to use such arms for all the ordinary purposes, and in all the ordinary modes usual in the country, and to which arms are adapted, limited by the duties of a good citizen in times of peace . . . .
>
> . . . .
>
> What, then, is he protected in the right to keep and thus use? Not every thing that may be useful for offense or defense; but what may properly be included or understood under the title of arms, taken in connection with the fact that the citizen is to keep them, as a citizen. . . . [W]e would hold, that the rifle of all descriptions, the shot gun, the musket, and repeater, are such arms . . . .[216]

216. *Id*. at 178-79. A "repeater" is "any firearm capable of firing more than one shot without having to be reloaded manually." R.A. STEINDLER, STEINDLER'S NEW FIREARMS DICTIONARY 213 (1985); *see also* 2 THE NEW SHORTER OXFORD ENGLISH DICTIONARY 2548 (3d ed. 1993) (defining "repeater" as "[a] firearm which fires several shots without reloading," and explaining that this usage first appeared in the middle

The Attorney General, however, had argued "that the right to keep and bear arms is a political, not a civil right."[217] Under existing Tennessee doctrine, rights classified as "political" (such as voting) were subject to limitless legislative restriction, while rights classified as "civil" were not.[218] The Tennessee court responded that the Attorney General

> fails to distinguish between the nature of the right to keep, and its necessary incidents, and the right to bear arms for the common defense. Bearing arms for the common defense may well be held to be a political right, or for protection and maintenance of such rights, intended to be guaranteed; but the right to *keep* them, with all that is implied fairly as an incident to this right, is a private individual right, guaranteed to the citizen, not the soldier.[219]

The court then quoted at length from Justice Story's treatise on constitutional law:[220]

> We cite this passage as throwing light upon what was intended to be guaranteed to the people of the States, against the power

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nineteenth century).

217. *Andrews*, 50 Tenn. at 182.

218. State v. Staten, 46 Tenn. (6 Cold.) 233, 277, 279 (1869) (Shackleford, J., concurring). The state court explained:

> The right of suffrage being a political, and not a natural or inherent right, the sovereign power has the right to restrict or enlarge the privilege. . . .
>
> . . . The one [the right to follow a profession] is an inherent and natural right, and [the right to vote], a political right or privilege, a trust delegated. The first falls directly within the prohibitions of the Constitution of the United States; the other is a trust, subject to be revoked by the sovereign will.

Id. at 277-79. *Ridley v. Sherbrook*, 43 Tenn. (3 Cold.) 569, 576-77 (1866), is also instructive of this distinction:

> The elective franchise is not an inalienable right or privilege, but a political right, conferred, limited, or withheld, at the pleasure of the people, acting in their sovereign capacity.
>
> . . . .
>
> These [rights to follow a profession or calling] are civil rights, and inalienable, and of which he cannot be deprived by the people of the State. But a political right stands upon a very different principle; it is a political privilege or grant, that may be extended or recalled, at the will of the sovereign power.

Id.

219. *Andrews*, 50 Tenn. at 182.

220. *See id.* at 183; *see also supra* notes 112, 114 and accompanying text.

> of the Federal Legislature, and at the same time, as showing clearly what is the meaning of our own Constitution . . . . So that, the meaning of the one, will give us an understanding of the purpose of the other.
>
> The passage from Story, shows clearly that this right was intended, as we have maintained in this opinion, and was guaranteed to, and to be exercised and enjoyed by the citizen as such, and not by him as a soldier, or in defense solely of his political rights.[221]

The court quoted additional material from Justice Story and shared his worries about the neglect of the militia. The court also quoted the earlier Tennessee case, *Aymette* v. *State*,[222] and its invention of the "civilized warfare" test for determining the types of arms constitutionally protected.[223]

The Tennessee statute had forbidden the concealed carrying of, among other small weapons, any "pocket pistol."[224] The Tennessee Supreme Court ruled that whether the defendant's revolver was a weapon—the "skill in the use of which will add to the efficiency of the soldier"—was a matter for decision at trial, based on the evidence.[225] The instant statute was clearly unconstitutional, however, because it forbade all carrying, rather than just concealed carry.[226]

A concurring and dissenting opinion argued for a broader rule than the majority, not limiting the type of arms to "civilized warfare" weapons and allowing only the "regulation" of concealed carry, but not its prohibition.[227]

2. *Arkansas*

The anti-individual interpretation of the Second Amendment made its first appearance in a concurring opinion in an 1842 Arkansas decision upholding a law against carrying

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221. *Id.* at 183-84.

222. 21 Tenn. (2 Hum.) 154 (1840).

223. *See Andrews*, 50 Tenn. at 184-85 (quoting Amyette v. State, 21 Tenn. (2 Hum.) 154 (1840)).

224. *Id.* at 186.

225. *Id.* at 187. This formulation closely prefigured the U.S. Supreme Court's handling of a challenge to a federal law prohibiting unregistered possession of short shotguns; the Court sent the case back to trial court to determine if short shotguns were militia-type weapons. *See* United States v. Miller, 307 U.S. 174, 178-83 (1939).

226. *See Andrews*, 50 Tenn. at 187-88.

227. *See id.* at 193-95.

concealed weapons against a challenge under the Arkansas Constitution and the Second Amendment.[228] Existing Arkansas case law provided sufficient authority to uphold the law, but the court majority went further, offering a narrow construction of the Second Amendment and its corresponding provision in the 1836 Arkansas constitution.[229] The majority argued that:

> 1. All natural rights are surrendered to full government control upon the creation of a government;
> 2. An "absolute" right to arms would mean that disarming violent criminals upon their apprehension was unconstitutional;
> 3. Therefore, since the policy implications of the straw-man "absolute" right to arms are unacceptable, there must be no right to arms at all.[230]

According to this Arkansas court, the sole purpose of the Second Amendment was to secure a well-regulated militia: "the language used appears to indicate, distinctly, that this, and this alone, was the object for which the article under consideration was adopted."[231] The Amendment was based on the theory

> that the militia, without arms, however well disposed, might be unable to resist, successfully, the efforts of those who should conspire to overthrow the established institutions of the country, or subjugate their common liberties . . . . [F]or this purpose only, it is conceived that the right to keep and bear arms was retained, and the power which, without such reservation, would have been vested in the government, to prohibit, by law, their keeping and bearing arms for any purpose whatever, was so far limited or withdrawn . . . that the people designed and expected to accomplish this object, by the adoption of the article under consideration, which would

228. *See* State v. Buzzard, 4 Ark. 18 (1842).

229. *See* ARK. CONST. of 1836, art. II, § 21 ("That the free white men of this State shall have a right to keep and to bear arms for their common defence."). The Arkansas Constitution was one of a few of the nineteenth century state constitutions to include a "common defence" purpose and no other. During Senate debate over the Second Amendment, the United States Senate rejected a motion to add "for the common defense" to the end of the Second Amendment. *See* SENATE JOURNAL, Sept. 9, 1789, attested by Sam A. Otis, Secretary of the Senate, Executive Communications, box 13, p.1, Virginia State Library and Archives, *cited in* Dennis, *supra* note 1, at 70 n.54; SENATE SUBCOMM. ON THE CONST., *supra* note 1, at 6.

230. *See Buzzard*, 4 Ark. at 19-23.

231. *Id.* at 24.

> forever invest them with a legal right to keep and bear arms for that purpose; but it surely was not designed to operate as an immunity to those, who should so keep or bear their arms as to injure or endanger the private rights of others, or in any manner prejudice the common interests of society.[232]

Thus, since the restriction on carrying concealed arms did not impair the ability of the people to rise against tyranny, the law did not violate the state constitution's right to arms.[233] As for the Second Amendment, it was "an open question" since no court had yet construed it.[234]

Justice Dickinson's concurring opinion went much further. "The provision of the Federal Constitution . . . is but an assertion of that general right of sovereignty belonging to independent nations, to regulate their military force."[235] Since the law against carrying concealed weapons did not interfere with the performance of federal militia duty, it did not violate the Second Amendment.[236] This represents the birth of the anti-individual version of the Second Amendment.

The dissent bitterly contested the majority's arguments one-by-one, pointing out that the same rationale could be used to obliterate any natural law right guaranteed under the Arkansas or federal constitutions. Regarding the Second Amendment, the dissent lamented that under the concurring opinion's interpretation,

> it is the militia alone who possess this right, in contradistinction from the mass of the people; and even they cannot use them for private defence or personal aggression, but must use them for public liberty, according to the discretion of the Legislature. According to the rule laid down in their interpretation of this clause, I deem the right to be valueless, and not worth preserving; for the State unquestionably possesses the power, without the grant, to arm the militia, and direct how they shall be employed in cases of invasion or domestic insurrection. If this be the meaning of the

232. *Id.* at 24-25.
233. *See id.* at 27.
234. *Id.* at 28.
235. *Id.* at 32 (Dickinson, J., concurring).
236. *See id.* at 33 (Dickinson, J., concurring).

> Constitution, why give that which is no right in itself, and guaranties a privilege that is useless?[237]

Whether rightly or wrongly reasoned, the concurrence in *State v. Buzzard* marks the birth of the states' rights, anti-individual view of the Second Amendment. It is notable that the birth occurs half a century after the ratification of the Amendment, and the concurrence was not able to cite a single authority of any type in support of its position. Anti-individualists appear unaware of the *Buzzard* concurrence, although it should have pride of place as the creator of their theory.

After the Civil War, the Arkansas court moved away from *Buzzard*'s more extreme language, and began to restore some force to the right to arms. An 1872 decision cited *Buzzard* merely for the proposition that the legislature could prohibit injurious uses of firearms, "so long as their discretion is kept within reasonable bounds."[238] Under this standard, a law against concealed carry was "not unreasonable."[239]

In 1876, the court heard a Second Amendment and state constitutional challenge to a new law prohibiting the wearing—openly or concealed—of various edged weapons, pistols, and brass knuckles.[240] The court ruled that the Second Amendment was not a limit on the states.[241] Following the 1871 Tennessee decision *Andrews v. State*, the Arkansas court held that the state Constitution and the Second Amendment protected citizen ownership of arms, but limited that protection to weapons that were useful for purposes of war.[242] Thus, the ban on these particular concealable weapons was

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237. *Id.* at 35 (Lacy, J., dissenting).

238. Carroll v. State, 28 Ark. 99, 101 (1872).

239. *Id.*

240. *See* Fife v. State, 31 Ark. 455, 456 (1876).

241. *See id.* at 458.

242. *See id.* at 458-59. Regarding the Second Amendment, the court cited 3 STORY, *supra* note 106, at 750-51, §§ 1896-97, and THOMAS COOLEY, *infra* note 395, at 498, to support the statement that

> the arms which it [the Second Amendment] guarantees American citizens the right to keep and to bear, are such as are needful to, and ordinarily used by a well regulated militia, and such as are necessary and suitable to a free people, to enable them to resist oppression, prevent usurpation, repel invasion, etc., etc.

Fife, 31 Ark. at 458.

constitutional.[243] While large military-size repeating pistols were within the scope of the right to arms, small pistols were not.[244]

In 1878, the court struck down a ban on carrying weapons, as applied to the defendant's carrying of a concealed army-sized pistol: "If cowardly and dishonorable men sometimes shoot unarmed men with army pistols or guns, the evil must be prevented by the penitentiary and gallows, and not by a general deprivation of a constitutional privilege."[245] Although the Arkansas Supreme Court never formally overruled *Buzzard*, the court's postwar decisions returned Arkansas law to the mainstream. The *Buzzard* concurrence's assertion that the right to arms was not individual vanished from American case law for the rest of the nineteenth century.

3. *Georgia*

The 1846 case *Nunn v. State* was the first case in which a court used the Second Amendment to invalidate a gun control law.[246] The Georgia legislature had banned the sale and possession of knives intended for offensive or defensive purposes and pistols, except "such pistols as are known and used as horseman's pistols."[247] The law made an exception which allowed possession (but not sale) of the banned weapons if the weapon were worn "exposed plainly to view."[248]

The Georgia Constitution at the time had no right to arms provision, but the state Supreme Court combined natural rights analysis with the Second Amendment to declare the law unconstitutional:

> [When] did any legislative body in the Union have the right to deny to its citizens the privilege of keeping and bearing arms in defence of themselves and their country?
>
> . . . [T]his is one of the fundamental principles, upon which rests the great fabric of civil liberty, reared by the fathers of the Revolution and of the country. And the

243. *See Fife*, 31 Ark. at 461-62.

244. *See id.* at 461.

245. Wilson v. State, 33 Ark. 557, 560 (1878) (striking a ban on unconcealed carry).

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

247. *Id.* at 246.

248. *Id.* at 247.

> Constitution of the United States, in declaring that the right of the people to keep and bear arms, should not be infringed, only reiterated a truth announced a century before, in the act of 1689, "to extend and secure the rights and liberties of English subjects"—Whether living 3,000 or 300 miles from the royal palace.[249]

And thus, "[t]he language of the *second* amendment is broad enough to embrace both Federal and State governments—nor is there anything in its terms which restricts its meaning."[250]

The Georgia court kept the introductory clause to the Amendment firmly in view: "our Constitution assigns as a reason why this right shall not be interfered with, or in any manner abridged, that the free enjoyment of it will prepare and qualify *a well-regulated militia*, which are necessary to the security of a free State."[251] Thus:

> If a well-regulated militia is *necessary* to the *security* of the State of Georgia and of the United States, is it competent for the General Assembly to take away this security, by disarming the people? What advantage would it be to tie up the hands of the national legislature, if it were in the power of the *States* to destroy this bulwark of defence? In solemnly affirming that a well-regulated militia is necessary to the *security* of a *free State*, and that, in order to train properly that militia, the unlimited right of the *people* to *keep* and *bear* arms shall not be impaired, are not the sovereign people of the State committed by this pledge to preserve this right inviolate?[252]

And what is the scope of this "unlimited right"?

> The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear *arms* of every description, and not *such* merely as are used by the *militia*, shall not be *infringed*, curtailed, or broken in upon, in the smallest degree; and all this for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of a free State. Our opinion is, that any law, State or Federal, is repugnant to the Constitution, and void, which contravenes this *right*, originally

249. *Id.* at 249.
250. *Id.* at 250.
251. *Id.*
252. *Id.* at 251.

> belonging to our forefathers, trampled under foot by Charles I. and his two wicked sons and successors, re-established by the revolution of 1688, conveyed to this land of liberty by the colonists, and finally incorporated conspicuously in our own *Magna Charta!* And Lexington, Concord, Camden, River Raisin, Sandusky, and the laurel-crowned field of New Orleans plead eloquently for this interpretation! And the acquisition of Texas may be considered the full fruits of this great constitutional right.[253]

The opinion concluded by holding that the ban on concealed carrying was valid because it did not interfere with a citizen's Second Amendment right; but insofar as the law "contains a prohibition against bearing arms *openly*, [it] is in conflict with the Constitution, and *void*"[254] Since the indictment did not specify that Nunn's weapon was concealed, the charges were quashed.

After the Civil War, Georgia added a right to arms to its state constitution. Although courts enforced this provision, they rejected the Second Amendment as a limit on state power, and also rejected the use of natural law.[255]

4. *Louisiana*

In 1850, the Louisiana Supreme Court faced a challenge to a state law banning concealed carry, but allowing open carry. The court considered the Second Amendment to be applicable to the states—to protect an individual's right to carry a gun for

253. *Id.* For the impact of the right to arms on the Texas war for independence against Mexico—which was precipitated by the Mexican government's attempt to confiscate a cannon, and the Texans' reply of "Come and take it," see Stephen P. Halbrook, *The Right to Bear Arms in Texas: The Intent of the Framers of the Bills of Rights*, 41 BAYLOR L. REV. 629 (1989).

254. *Nunn*, 1 Ga. at 251. The *Nunn* Court's approach to natural rights was not unusual for its time. In an 1857 Massachusetts case, Chief Justice Lemuel Shaw—perhaps the most influential state court judge of the period—used principles of "natural justice" to find that the state constitution required the use of grand juries for infamous crimes, despite the absence of any grand jury language in the Massachusetts Bill of Rights. *See* Jones v. Robbins, 72 Mass. (8 Gray) 329 (1857).

255. *See* Hill v. State, 53 Ga. 472, 473-74 (1874). Justice McCay opined that if the question were one of first impression, he would hold that both the Second Amendment and the Georgia provision only protected "the arms of a militiaman, the weapons ordinarily used in battle, to-wit: guns of every kind, swords, bayonets, horseman's pistols, etc." *Id.* at 474. But, he admitted, *Nunn v. State* required a much broader definition. *See id.* at 475.

personal defense—but held that a state law which banned only carrying concealed did not violate the Second Amendment.[256] Subsequent cases in 1856[257] and 1858[258] reaffirmed this holding.

5. *North Carolina*

An 1844 decision of the North Carolina Supreme Court relied on *Barron v. Baltimore* to rule that the Second Amendment does not constrain state laws.[259] The state constitution provided

> [t]hat the people have a right to bear arms, for the defence of the State; and, as standing armies, in 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 governed by, the civil power.[260]

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256. *See* State v. Chandler, 5 La. Ann. 489, 490 (1850).

> [The law] interfered with no man's right to carry arms (to use its words) "in full open view," which places men upon an equality. This is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations.

Id.

257. *See* Smith v. State, 11 La. Ann. 633, 633 (1856).

> The statute against carrying concealed weapons does not contravene the second article of the amendments of the Constitution of the United States. The arms there spoken of are such as are borne by a people in war, or at least carried openly. The article explains itself. It is in these words: "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." This was never intended to prevent the individual States from adopting such measures of police as might be necessary, in order to protect the orderly and well disposed citizens from the treacherous use of weapons not even designed for any purpose of public defence, and used most frequently by evil-disposed men who seek an advantage over their antagonists, in the disturbances and breaches of the peace which they are prone to provoke.

Id.

258. *See* State v. Jumel, 13 La. Ann. 399, 399-400 (1858) ("The statute in question does not infringe the right of the people to keep or bear arms. It is a measure of police, prohibiting only *a particular mode* of bearing arms which is found dangerous to the peace of society.").

259. *See* State v. Newsom, 27 N.C. (5 Ired.) 250, 251 (1844) (upholding restriction against possession of arms by free people of color since they were not parties to the constitutional compact).

260. N.C. BILL OF RIGHTS § XVII (1776); *see supra* note 190.

Although this provision was replete with antistanding army language, the court held that the North Carolina provision guaranteed more than just a right to the state militia. The North Carolina Supreme Court treated the constitutional guarantee as protecting a right of all persons to possess and carry firearms, including for defensive purposes. The court held, however, that an implicit exception allowed the legislature to exclude free blacks from enjoying this right; therefore an 1840 law requiring free blacks who wished to own guns to obtain a license was constitutional.[261] (The implication, of course, was that a licensing statute applied to a citizen with full civil rights would be unconstitutional.)

The North Carolina court's decision illustrates that, *contra* the central argument of the anti-individualists, concern about standing armies is not inconsistent with protection of a broad individual right to personal defense. The other North Carolina decisions from the nineteenth century (and the twentieth) treated the arms rights provision as protective of an important individual right of personal defense.[262]

6. *Texas*

A Texas statute specified that manslaughter with a Bowie knife or dagger would be treated as murder, and a defendant in *Cockrum v. State* claimed that his conviction under this statute violated the Second Amendment.[263] The court began by explaining that the introductory clause of the Second Amendment "has referenee [sic] to the perpetuation of free government, and is based on the idea, that the people cannot be effectually oppressed and enslaved, who are not first disarmed."[264] The Texas clause "has the same broad object in relation to the government, and in addition thereto, secures a

261. *See Newsom*, 27 N.C. at 254-55.

262. *See* State v. Kerner, 107 S.E. 222, 224-26 (N.C. 1921) (citing Cooley to declare unconstitutional a law against carrying pistols, openly or concealed, on public property); State v. Speller, 86 N.C. 697, 700-01 (1882); State v. Huntly, 25 N.C. (3 Ired.) 418, 422-23 (1843); *see also* Carl W. Thurman, III, Note, State v. Fennell: *The North Carolina Tradition of Reasonable Regulation of the Right to Bear Arms*, 68 N.C. L. Rev. 1078 (1990) (discussing various twentieth century cases).

263. *See* Cockrum v. State, 24 Tex. 394, 397 (1859).

264. *Id.* at 402.

personal right to the citizen."[265] In other words, the Second Amendment guaranteed a right to possess arms to resist tyranny, but not a right to possess arms for personal protection. A second implication was that the Second Amendment was a collective right, rather than a "personal" one. But there is no indication that the Texas court meant that individual citizens could not exercise Second Amendment rights. The court, basing its decision on the Texas arms right, simply ruled that the law was constitutional because it did not ban the carrying of the Bowie knives, but merely set a higher penalty for criminal misuse of this particularly dangerous weapon.[266]

After the Civil War, while Texas was under a Reconstruction government very much concerned with Confederate sympathizers, the legislature banned the carrying of certain edged and blunt weapons, whether openly or concealed; there were exceptions for carrying under certain circumstances. Deciding a Second Amendment and Texas Constitution challenge to the law, the Texas Supreme Court decision in *English v. State* declared that the Second Amendment bound the states.[267] Following "civilized warfare" precedent from other states,[268] the court stated

> The word "arms" in the connection we find it in the constitution of the United States, refers to the arms of a militiaman or soldier, and the word is used in its military sense. The arms of the infantry soldier are the musket and bayonet; of cavalry and dragoons, the sabre, holster pistols and carbine; of the artillery, the field piece, siege gun, and mortar, with side arms.

265. *Id.*

266. *See id.* at 402-03. "The right to carry a bowie-knife for lawful defense is secured, and must be admitted. It is an exceeding destructive weapon. . . . The gun or pistol may miss its aim . . . . The bowie-knife . . . is the instrument of almost certain death." *Id.* at 403.

267. *See* English v. State, 35 Tex. 473, 474-75 (1872).

268. The *English* case highlights the flip side of the "civilized warfare" coin: if "civilized warfare" was a good rationale for excluding various small weapons from the right to arms, it could also imply the right to own all military type weapons. However, as Don Kates points out, the textual language "keep *and bear*" suggests that only personally portable weapons are within the scope of the right to "arms"; therefore, the siege gun and other forms of crew-served, non-portable artillery would not be covered by the arms right. *See* Kates, *Handgun Prohibition*, *supra* note 1, at 261.

> The terms dirks, daggers, slungshots, sword-canes, brass knuckles and bowie knives, belong to no military vocabulary.[269]

Three years later, political power in Texas had shifted, and *State* v. *Duke* repudiated *English's* narrow reading of the type of arms protected. The Texas Constitution was read to protect all "arms as are commonly kept, according to the customs of the people, and are appropriate for open and manly use in self-defense, as well as such as are proper for the defense of the State."[270] These included, besides the weapons described in *English*, "the double-barreled shot-gun, the huntsman's rifle, and such pistols at least as are not adapted to being carried concealed."[271] *Duke* rejected the defendant's effort to raise the Second Amendment, stating that the Second Amendment did not limit the states, and thus based the decision solely on the Texas Constitution.[272]

7. *Illinois*

In *Dunne v. People*, the Illinois Supreme Court affirmed the centrality of state power over the militia, citing the Tenth Amendment and the United States Supreme Court's *Houston v. Moore* precedent.[273] The *Dunne* Court also explained how a state's constitutional duty to operate a militia was complemented by the right of the state's citizens to have arms:

> "A well regulated militia being necessary to the security of a free State," the States, by an amendment to the constitution, have imposed a restriction that Congress shall not infringe the right of the "people to keep and bear arms." The chief executive officer of the State is given power by the constitution to call out the militia "to execute the laws, suppress insurrection and repel invasion."[274] This would be a mere

269. *English*, 35 Tex. at 476-77.

270. State v. Duke, 42 Tex. 455, 458 (1875).

271. *Id.*

272. *See id.*

273. *See* Dunne v. People, 94 Ill. 120, 124-28 (1879).

274. The court was quoting language from Article I, Section 8 of the Constitution, which in fact gives such authority to Congress. This grant is not inconsistent with pre-existent state authority, so long as the state authority is not used in conflict with the federal authority. *See* Houston v. Moore, 14 U.S. (1 Wheat.) 1, 16-17 (1820) (holding that state authority over the militia pre-exists the Constitution); 1 BLACKSTONE, *supra* note 14, app. at 273.

> barren grant of power unless the State had power to organize its own militia for its own purposes. Unorganized, the militia would be of no practical aid to the executive in maintaining order and in protecting life and property within the limits of the State. These are duties that devolve on the State, and unless these rights are secured to the citizen, of what worth is the State government?[275]

8. *West Virginia*

West Virginia did not have a state constitutional right to arms until the twentieth century.[276] The 1891 case of *State* v. *Workman* involved a Second Amendment challenge to a statute banning the carrying of "any revolver or other pistol, dirk, bowie-knife, razor, slung-shot, billy, metallic or other false knuckles, or any other dangerous or deadly weapon of like kind or character."[277] The statute allowed the defendant to win an acquittal by proving that he was "carrying such weapon for self-defence and for no other purpose."[278]

The applicability of the Second Amendment to the states was, said the court, "a question upon which authorities differ."[279] Following the "civilized warfare" theory of other state courts, West Virginia stated that the Second Amendment protected ownership of

> the weapons of warfare to be used by the militia, such as swords, guns, rifles, and muskets—arms to be used in defending the State and civil liberty—and not to pistols, bowie-knives, brass knuckles, billies, and such other weapons as are usually employed in brawls, street-fights, duels, and affrays, and are only habitually carried by bullies, blackguards, and desparadoes, to the terror of the community and the injury of the State.[280]

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275. *Dunne*, 94 Ill. at 132-33.

276. *See* W. VA. CONST. art. 3, § 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.") (enacted in 1986); *see also* Halbrook, *supra* note 19, at 68.

277. State v. Workman, 35 W. Va. 367, 367 (1891).

278. *Id.* (quoting W. VA. CODE ch. 148, § 7).

279. *Id.* at 372.

280. *Id.* at 373 (citing Bish. Crim. St. § 792). Further, the court explained, the Second Amendment was intended to protect "public liberty," and incorporated various restrictions from English law regarding the carrying of weapons. *Id.* at 372-73.

Thus, the anticarrying statute stood. However, the individual rights implications of the decision are clear.

9. State case law summary

The majority of state courts in the nineteenth century upheld restrictions on the carrying of concealed weapons. Courts affirmed the right of citizens to carry firearms openly for protection but held that *concealed* carry could be regulated, or even banned, by the legislature.[281] Courts differed on whether the Second Amendment applied directly to the states.[282]

Similarly, most state courts upheld restrictions on the types of weapons which were protected by the state right to arms. Rifles, shotguns, some or all handguns, and swords were protected; but weapons thought to be associated with dangerous characters—in particular, dirks and bowie knives—were generally held to be outside the scope of the right to arms.[283]

While validating particular gun controls, every nineteenth century state court judge who said anything about the Second Amendment, except for one concurring judge in an 1842 Arkansas case, agreed that it protected the right of individual Americans to own firearms.

IV. ANTEBELLUM YEARS AND THE CIVIL WAR

The right to bear arms was often analyzed with the issue of slavery in mind. Proslavery and abolitionist commentators agreed: a freedman had the right to bear arms, while disarmament was an essential characteristic of a slave.

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281. In addition to the cases discussed above, see *Walburn v. Territory*, 59 P. 972, 973 (Okla. 1899) (holding that a concealed weapon statute "violates none of the inhibitions of the constitution of the United States").

282. In addition to the cases discussed above, see *State v. Shelby*, 90 Mo. 302 (1886) (holding that the Second Amendment is inapplicable to the states; that a law against carrying concealed weapons in certain places except when necessary for personal defense is valid; that a law against carrying a weapon while intoxicated is valid; and that a "revolving pistol" is within scope of state right to arms).

283. But not everyone thought that dirks were only for scoundrels. Nathaniel Beverly Tucker, son of St. George Tucker (and, like his father, a law professor at William and Mary and a state court judge) wrote a novel in which one of the heroes (a Virginian who is participating in a guerilla war against a tyrannical federal government) carries a dirk. *See* NATHANIEL BEVERLY TUCKER, THE PARTISAN LEADER: A TALE OF THE FUTURE 12 (1971) (1856).

A. Dred Scott

Dred Scott may be the best-known case decided by the antebellum Supreme Court. Even persons who think that "Marbury vs. Madison" was an important boxing match may have some passing familiarity with "Dred Scott." The *Dred Scott* case is sometimes found among Standard Model articles on the Second Amendment,[284] but is entirely absent from the anti-individual right articles.

Chief Justice Taney's majority opinion held that a free black could not be an American citizen. To support this conclusion, Justice Taney enumerated the parade of horribles which would follow from American citizenship for blacks: they would have the right to "the full liberty of speech in public and private upon all subjects upon which its [a state's] own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went."[285]

Another part of the opinion explained that Congress had no power to infringe upon civil liberty (including, from the Taney Court's viewpoint, the right to possess property in the form of slaves) in the territories:

> [N]o one, we presume, will contend that Congress can make any law in a Territory respecting the establishment of religion, or the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people of the Territory peaceably to assemble, and to petition the Government for the redress of grievances. . . .
>
> Nor can Congress deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel any one to be a witness against himself in a criminal proceeding . . . .[286]

The above statement, which treated the right to arms as one of several enumerated constitutional rights belonging to

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284. *See, e.g.*, Kates, *Handgun Prohibition*, *supra* note 1, at 246; Kopel & Little, *supra* note 1, at 526.

285. Scott v. Sanford, 60 U.S. (19 How.) 393, 417 (1856). Of course, Chief Justice Taney did not explicitly say "and the right to keep and bear arms wherever they went, which is guaranteed by the Second Amendment," any more than he explicitly said "the right to hold public meetings upon political affairs, which is guaranteed by the First Amendment."

286. *Id.* at 450.

individuals, was widely quoted during the debates over slavery and popular sovereignty.[287]

Dred Scott, while never formally overruled, is not good law today, having been deliberately invalidated by section one of the Fourteenth Amendment. The purpose in discussing *Dred Scott* is not to cite it as binding precedent, but to acknowledge it

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287. *See, e.g.*, Stephen Douglas, *The Dividing Line Between Federal and Local Authority: Popular Sovereignty in the Territories*, HARPER'S, Sept. 1859, at 519, 530.

One other slavery case involving a Supreme Court Justice should be mentioned. In 1833, two months after *Barron v. Baltimore* was decided, Supreme Court Justice Henry Baldwin, while circuit-riding, listed the Second Amendment among the individual rights protected by the U.S. Constitution, and implied that the Second Amendment was binding on the states. *See* Johnson v. Tompkins, 13 F. Cas. 840 (C.C.E.D. Pa. 1833) (No. 7416). The case of *Johnson v. Tompkins* arose out of a slave-owner's lawsuit against a Pennsylvania constable who had arrested the slave-owner for kidnapping and breach of the peace while the slave-owner was attempting to recapture an alleged runaway slave. After the slave-owner, Johnson, was acquitted of the criminal charges, he sued Tompkins and the others who had arrested him and had interfered with his attempt to recapture his slave property. (Justice Baldwin instructed the jury that although slavery's existence "is abhorrent to all our ideas of natural right and justice," the jury must respect the legal status of slavery. *Id.* at 843.)

As part of the jury charge, Justice Baldwin listed some of the constitutional rights possessed by the plaintiff, Johnson. Justice Baldwin listed the Pennsylvania Constitution's right to acquire, possess, and protect property; the Pennsylvania Constitution's bar on deprivation of property except "by the judgement of his peers, or the law of the land"; and the Pennsylvania Constitution's "right of citizens to bear arms in defence of themselves and the state." *Id.* at 850. Justice Baldwin then began listing Johnson's rights under the U.S. Constitution—the Article IV guarantee that "the citizens of each state shall be entitled to the privileges and immunities of citizens in the several states"; the prohibition on state impairment of the obligations of contract—and then stated that "[t]he second amendment provides, 'that the right of the people to keep and bear arms shall not be infringed.'" *Id.* The rights litany concluded with the ban on deprivation of property without due process. *See id.* Additionally, Justice Baldwin explained the U.S. Constitution's fugitive slave clause. *See id.* at 850-51.

Justice Baldwin's list of rights made it clear that each of the rights, including the Second Amendment right to arms, was a personal right, since the right belonged to the plaintiff. Since Johnson's lawsuit was against an employee of a subdivision of the Pennsylvania state government, Justice Baldwin's listing of the Second Amendment implied that Justice Baldwin considered the Second Amendment to be a restriction on state actions against individuals.

In 1837, Justice Baldwin wrote *A General View of the Origin and Nature of the Constitution of the United States*. *See* HENRY BALDWIN, A GENERAL VIEW OF THE ORIGIN AND NATURE OF THE CONSTITUTION OF THE UNITED STATES (N.Y., Da Capo Press 1970) (1837). The book focused on the political status of the states and the people, examining the transitions from colony to independent states to confederated states to parties to the Constitutional compact. The book did not address the Second Amendment or the militia.

as one of several nineteenth-century Supreme Court cases involving the right to arms—all of which, as we shall see, treat the Second Amendment as an individual right.

B. The Human Rights Advocates

Antislavery activists deplored *Dred Scott*, but they agreed with Chief Justice Taney that owning and carrying guns was a badge and incident of freedom and was inconsistent with status as a slave. The abolitionists used this theory, however, to reach a conclusion opposite to Taney's. Their basic argument was that the institution of slavery, which prevented certain people from bearing arms, was repugnant to the Second Amendment, which guaranteed the right to bear arms to all persons. The argument thus illustrates the popularly held belief that the Second Amendment guaranteed a personal right.

1. Lysander Spooner

"Lysander Spooner was surely one of the most remarkable American men of letters of the Nineteenth Century."[288] He wrote important books and pamphlets on scores of subjects, from intellectual property to the right to jury trial.[289] But his greatest passion was antislavery. "[O]ne of the most prominent radical theorists"[290] of the antebellum era, Lysander Spooner was a hero to many antislavery activists, including John Brown, whose raid on Harper's Ferry was inspired by reading Spooner.[291] Spooner's prewar writing remained influential after the Civil War, making Spooner "pre-eminent in the group of abolitionists who developed the constitutional law now incorporated in the Fourteenth Amendment."[292] He remains a

288. Tom G. Palmer, *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects*, 13 HARV. J.L. & PUB. POL'Y 817, 821 (1990).

289. *See, e.g.*, LYSANDER SPOONER, AN ESSAY ON THE TRIAL BY JURY (1852); LYSANDER SPOONER, THE LAW OF INTELLECTUAL PROPERTY: OR AN ESSAY ON THE RIGHT OF AUTHORS AND INVENTORS TO A PERPETUAL PROPERTY IN THEIR IDEAS (1855).

290. Jules Lobel, *Losers, Fools & Prophets: Justice as Struggle*, 80 CORNELL L. REV. 1331, 1359 (1995).

291. *See* Tom G. Palmer, Book Review, *The Lysander Spooner Reader* (visited Jan. 16, 1998) <http://www.laissezfaire.org/pl5578.html>.

292. C. Shively, *Introduction* to 4 LYSANDER SPOONER, COLLECTED WORKS 11 (1971). *But see* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 156-58 (1975) (arguing that Spooner did not really intend to prove that

popular author among libertarians and other advocates of small government.[293]

In contrast to William Lloyd Garrison and his Antislavery Society, who denounced the Constitution as proslavery,[294] Spooner was "the most theoretically profound advocate" of the position that slavery was unconstitutional.[295] In the widely-distributed and frequently reprinted book *The Unconstitutionality of Slavery*, Spooner argued that the Constitution should be interpreted according to principles of natural justice.[296] His natural justice interpretation of the Second Amendment explained:

> This right "to keep and bear arms," implies the right to use them—as much as a provision securing to the people the right to buy and keep food, would imply their right also to eat it. But this implied right to use arms, is only a right to use them in a manner consistent with natural rights—as, for example, in defence of life, liberty, chastity, &c. . . . If the courts could go beyond the innocent and necessary meaning of the words, and imply or infer from them an authority for anything contrary to natural right, they could imply a constitutional authority in the people to use arms, not merely for the just and innocent purposes of defence, but also . . . robbery, or any other acts of wrong to which arms are capable of being applied. The mere

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slavery was unconstitutional, and that he sought instead to convince abolitionists to seek out judgeships, so that they could free slaves).

293. Spooner distributed many of his works through an alternative mail system, since many proslavery postmasters refused to carry antislavery literature. Spooner's American Mail Company was cheaper than the United States Post Office, which led the Post Office to lower its rates, and Congress to pass "Spooner Acts," forbidding competition with the government postal monopoly. *See* Dmitry N. Feofanov, *Luna Law: The Libertarian Vision in Heinlein's* The Moon is a Harsh Mistress, 63 TENN. L. REV. 71, 133 (1995). Spooner is one of the fathers of cheap postage in America. *See* Ernest A. Kehr et al., *Look Before You Lick*, READER'S DIGEST, June 1947, at 126.

294. "The compact which exists between the North and the South is a covenant with death and an agreement with hell." William Lloyd Garrison, *Resolution Adopted by the Antislavery Society, Jan. 27, 1843, available online at William Lloyd Garrison. 1804-1879*. (visited Sept. 22, 1998) <http://www.sol.com.sg/classroom/references/bartlett/346.htm>; *cf. Isaiah* 28:15 ("We have made a covenant with death, and with hell are we at agreement.").

295. David A. J. Richards, *Abolitionist Political and Constitutional Theory and the Reconstruction Amendments*, 25 LOY. L.A. L. REV. 1187, 1193 (1992).

296. *See* HALBROOK, THAT EVERY MAN BE ARMED, *supra* note 1, at 231 nn. 82-83. For a modern analysis of the essay, see generally Randy E. Barnett, *Was Slavery Unconstitutional Before the Thirteenth Amendment?: Lysander Spooner's Theory of Interpretation*, 28 PAC. L.J. 977 (1997).

> *verbal* implication would as much authorize the people to use arms for unjust, as for just, purposes. But the *legal* implication gives only an authority for their innocent use.[297]

Spooner obviously viewed the Second Amendment as a right belonging to individuals. His exposition is an answer to twentieth-century gun prohibition advocates who assert that an individual right to arms constitutes a right protecting criminals who use weapons offensively.[298]

Spooner used the Second Amendment to argue that slavery was unconstitutional. Since a slave is a person who cannot possess arms, and the Second Amendment guarantees that all persons can possess arms, no person in the United States, therefore, can be a slave. Similarly, the militia clause—Article I, Section 8—gives Congress the power to have everyone armed. He elaborated:

> These provisions obviously recognize the natural right of all men "to keep and bear arms" for their personal defence; and prohibit both Congress and the State governments from infringing the right of "the people"—that is, of *any* of the people—to do so; and more especially of any whom Congress have power to include in their militia. The right of a man "to keep and bear arms," is a right palpably inconsistent with the idea of his being a slave. Yet the right is secured as effectually to those whom the States presume to call slaves, as to any whom the States condescend to acknowledge free.
>
> Under this provision any man has a right either to give or sell arms to those persons whom the States call slaves; and there is no *constitutional* power, in either the national or State

297. LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY 66 (Burt Franklin 1965) (1860). For reprinted selections, see Lysander Spooner, *The Unconstitutionality of Slavery*, 28 PAC. L.J. 1015, 1022 (1997).

298. *See, e.g.*, ROSCOE POUND, THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY 91 (1957) ("In the urban industrial society of today a general right to bear efficient arms so as to be enabled to resist oppression by the government would mean that gangs could exercise an extra-legal rule which would defeat the whole Bill of Rights."). Although Pound is sometimes cited by opponents of the Standard Model, Pound's point is not really that the Standard Model is wrong as a matter of history, but simply that the Second Amendment is no longer a good idea as a matter of public policy. Pound's view that the Second Amendment could be ignored if modern persons thought it was no longer a good idea is consistent with his general view that legislation which once would have been clearly unconstitutional could be considered constitutional in modern times, based on changed social needs. *See generally* Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

> governments, that can punish him for so doing; or that can take those arms from the slaves; or that can make it criminal for the slaves to use them, if, from the inefficiency of the laws, it should become necessary for them to do so, in defence of their own lives or liberties; for this constitutional right to keep arms implies the constitutional right to use them, if need be, for the defence of one's liberty or life.[299]

Twentieth century readers are not required to find Spooner's argument persuasive. Article IV, Section 2 of the Constitution, requiring the return of fugitive slaves, obviously contemplated that persons in the United States could be slaves.[300] Instead, the point for purposes of this article is that Spooner saw the Second Amendment as guaranteeing an individual right to own and use guns for self-defense or defense of others, and he used this fact in arguing against slavery.

Spooner made further use of the Second Amendment's individual right to arms in other arguments. Advocating the right of fugitive slaves to use weapons to resist recapture, Spooner wrote:

> The constitution contemplates no such submission, on the part of the people, to the usurpations of the government, or to the lawless violence of its officers. On the contrary it provides that "The right of the people to keep and bear arms shall not be infringed." This constitutional security for "the right to keep and bear arms," implies the right to use them . . . . The constitution, therefore, takes it for granted that, as the people have the right, they will also have the sense, to use arms, whenever the necessity of the case justifies it.[301]

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299. SPOONER, *supra* note 297, at 98.

300. *See* U.S. CONST. art. IV, § 2, cl. 3 ("No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."). Spooner attacked this clause by claiming that since the clause did not specifically mention slaves, the clause should, consistent with natural justice, be read as applying to indentured servants.

301. LYSANDER SPOONER, A DEFENCE FOR FUGITIVE SLAVES 27 (1850). The Fugitive Slave Act promoted widespread violence in the recapture of fugitive slaves, in Northern white vigilante resistance to the slave-hunters and to federal authorities, and in the use of the U.S. military against the vigilantes. "In these frightful circumstances, blacks warned their fellows to keep firearms close at hand." NELL IRVIN PAINTER, SOJOURNER TRUTH: A LIFE, A SYMBOL 133 (1996).

Similarly, Spooner argued that unconstitutional laws need not be obeyed pending their repeal; to require obedience to unconstitutional laws would be to allow the government "to disarm the people, suppress the freedom of speech and the press, prohibit the use of suffrage, and thus put it beyond the power of the people to reform the government through the exercise of those rights."[302] Thus, the right to arms provided one of the ways in which people could reassert control over an erring government.

In Spooner's best seller, the 1852 *An Essay on the Trial by Jury*, he used language drawn from the paragraph quoted above to prove that the "right of resistance is recognized by the constitution of the United States."[303] In the 1860 *Address of the Free Constitutionalists*, Spooner again made the argument that "the right to keep and bear arms implies the right to use them, and, therefore, this is an inherent right of people to resist criminal assaults when the government fails to provide protection."[304]

2. *Joel Tiffany*

Joel Tiffany made his living as the reporter for the New York Court of Appeals, as an author of legal treatises,[305] and as publisher of *Tiffany's Monthly* magazine. But like Lysander Spooner, he was consumed with the antislavery cause. Lysander Spooner and Joel Tiffany were "the 'principal spokesmen' and theorists of the abolitionist movement."[306] "Spooner's and Tiffany's importance is recognized by nearly all."[307] The Spooner and Tiffany theory that the Constitution

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302. SPOONER, *supra* note 297, at 104.

303. LYSANDER SPOONER, AN ESSAY ON THE TRIAL BY JURY 17 (1852).

304. LYSANDER SPOONER, ADDRESS OF THE FREE CONSTITUTIONALISTS TO THE PEOPLE OF THE UNITED STATES 25 (2d ed. 1860).

305. *See* JOEL TIFFANY, THE NEW YORK PRACTICE: A TREATISE UPON PRACTICE AND PLEADINGS IN ACTIONS AND SPECIAL PROCEEDINGS (1864-1865); JOEL TIFFANY, THE LAW OF TRUSTS AND TRUSTEES, AS ADMINISTERED IN ENGLAND IN AMERICA (1862).

306. RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 22 (1977); Raoul Berger, *Bruce Ackerman on Interpretation: A Critique*, 1992 BYU L. REV. 1035, 1043 n.43 (1992) (reviewing BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991)).

307. Trisha Olson, *The Natural Law Foundation of the Privileges or Immunities Clause of the Fourteenth Amendment*, 48 ARK. L. REV. 347, 373 n.109 (1995) (citing various scholars); *see also* WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY

guaranteed certain rights to all citizens "marked out a path for using the doctrines of substantive due process and of the natural law privileges and immunities of citizenship to further minority freedom."[308]

Like Spooner, Tiffany argued that the Second Amendment's guarantee of a right to arms applied to all persons, and since an armed man could not be a slave, slavery was unconstitutional.

> Here is another of the immunities of a citizen of the United States, which is guaranteed by the supreme, organic law of the land. This is one of the subordinate rights, mentioned by Blackstone, as belonging to every Englishman. It is called "*subordinate*" in reference to the great, absolute rights of man; and is accorded to every subject for the purpose of *protecting and defending himself*, if need be, in the enjoyment of his absolute rights to life, liberty and property. And this guaranty is to all without any exception; for there is none, either expressed or implied. And our courts have already decided, that in such cases we have no right to make any exceptions. It is hardly necessary to remark that this guaranty is absolutely inconsistent with permitting a portion of our citizens to be enslaved. The colored citizen, under our constitution, has now as full and perfect a right to keep and bear arms as any other; and no State law, or State regulation has authority to deprive him of that right.
>
> But there is another thing implied in this guaranty; and that is *the right of self defence*. For the right to keep and bear arms, also implies the right to use them if necessary in self defence; without this right to use the guaranty would have hardly been worth the paper it consumed.[309]

CONSTITUTIONALISM IN AMERICA, 1760-1848, at 269 (1977); Michael Kent Curtis, *The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger*, 16 WAKE FOREST L. REV. 45, 55 (1980); John Choon Yoo, *Our Declaratory Ninth Amendment*, 42 EMORY L.J. 967, 1000 (1993) ("Influential abolitionist writers such as Lysander Spooner and Joel Tiffany . . . .").

308. David S. Bogen, *The Transformation of the Fourteenth Amendment: Reflections from the Admission of Maryland's First Black Lawyers*, 44 MD. L. REV. 939, 964 (1985).

309. JOEL TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY 117-18 (1849).

C. Bloody Kansas

Just as the civil war in Spain served as a prelude to World War II, civil war broke out in the Territory of Kansas several years before the American Civil War. Following the 1854 Kansas-Nebraska Act, proslavery and antislavery settlers rushed in to take control of the territory and win the vote on whether Kansas would join the Union as slave or free. The pro-slave forces, with heavy support from "Border Ruffians" in Missouri, stuffed ballot boxes, violently drove free soilers away from the polls in 1855, and expelled all slavery opponents from the territorial legislature.

The free-soil settlers asked for guns for themselves, and the Massachusetts Emigrant Aid Company promptly began smuggling Sharps Rifles to Kansas. (The Company falsely claimed that while some of its members might be sending rifles, the armament program was not officially run by the Company.) The Sharps were high-tech rifles, incorporating the new breech loading design (as opposed to loading from the muzzle).[310] The rifles did their job and rapidly evened the balance of power in Kansas. The proslavery government, however, attempted, with some success, to disarm various armed groups of free-soil men.[311]

On May 19, 1856, Massachusetts Senator Charles Sumner—an antislavery radical—rose to deliver what would become one of the most famous orations ever delivered on the floor of the United States Senate. Sumner's speech, "The Crime against Kansas," continued until the twentieth of May. South Carolina Senator A.P. Butler had allegedly remarked that the people of Kansas should be disarmed of their Sharps rifles. Sumner thundered:

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310. Invented in 1848, the Sharps could fire five rounds a minute; it rapidly displaced muzzle-loading guns and was especially popular in the West. John Brown's raiders carried the Sharps carbine (a type of short rifle). *See* HAROLD F. WILLIAMSON, WINCHESTER: THE GUN THAT WON THE WEST 5 (1952).

311. *See* JAY MONAGHAN, CIVIL WAR ON THE WESTERN BORDER 1854-1865 (1955). Although the abolition movement had a strong strain of non-resistance and pacifism, the "Beecher Bibles" were widely approved. For example, Wendell Phillips said, "I believe the age of bullets is over. I believe the age of ideas is come . . . . Yet, let me say, in passing, that I think you can make a better use of iron than forging it into chains. If you must have metal, put it into Sharpe's [sic] rifles." LAWRENCE J. FRIEDMAN, GREGARIOUS SAINTS: SELF AND COMMUNITY IN AMERICAN ABOLITIONISM, 1830-1870, at 210 (1982) (omission in original).

> Really, sir, has it come to this? The rifle has ever been the companion of the pioneer and, under God, his tutelary protector against the red man and the beast of the forest. Never was this efficient weapon more needed in just self-defence, than now in Kansas, and at least one article in our National Constitution must be blotted out, before the complete right to it can in any way be impeached. And yet such is the madness of the hour, that, in defiance of the solemn guaranty, embodied in the Amendments to the Constitution, that "the right of the people to keep and bear arms shall not be infringed," the people of Kansas have been arraigned for keeping and bearing them, and the Senator from South Carolina has had the face to say openly, on this floor, that they should be disarmed—of course, that the fanatics of Slavery, his allies and constituents, may meet no impediment. Sir, the Senator is venerable . . . but neither his years, nor his position, past or present, can give respectability to the demand he has made, or save him from indignant condemnation, when, to compass the wretched purposes of a wretched cause, he thus proposes to trample on one of the plainest provisions of constitutional liberty.[312]

Senator Butler indignantly replied that he had never proposed disarming the people of Kansas. He had simply proposed bringing before appropriate judicial authority "an organized body" who possessed Sharps rifles.[313]

But even if Senator Butler could claim that his remarks were misunderstood, antislavery Congressmen had no doubt

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312. CHARLES SUMNER, THE KANSAS QUESTION. SENATOR SUMNER'S SPEECH, REVIEWING THE ACTION OF THE FEDERAL ADMINISTRATION UPON THE SUBJECT OF SLAVERY IN KANSAS 22-23 (Cincinnati, G. S. Blanchard, 1856) (reprinting speech delivered on the floor of the Senate, May 19-20, 1856), *also available online at* <http://moa.umdl.umich.edu/cgi-bin/moa/sgml/moa-idx?notisid=ABT6369>.

313. The speech (including Butler's lengthy quotation of Sumner) was reprinted for general circulation. *See* ANDREW PICKINS BUTLER, SPEECH OF HON. A. P. BUTLER, OF SOUTH CAROLINA, ON THE BILL TO ENABLE THE PEOPLE OF KANSAS TERRITORY TO FORM A CONSTITUTION AND STATE GOVERNMENT, PREPARATORY TO THEIR ADMISSION INTO THE UNION, ETC. 24 (Washington, D.C., Union Office 1856), *also available online* <http://moa.umdl.umich.edu/cgi-bin/moa/sgml/ moa-idx?notisid=AJA3511>.

South Carolina Representative Preston Brooks, Butler's nephew, was so infuriated by Sumner's attacks on Brooks (such as the claim that while Brooks "believes himself a chivalrous knight, with sentiments of honor and courage," he "has chosen a mistress" who is "the harlot slavery") that he beat Sumner on the head with a heavy cane until the cane broke, incapacitating Sumner for four years.

about the atrocities being perpetrated in Kansas. Representative G.A. Grow of Pennsylvania, for example, gave a litany of constitutional abuses perpetrated by the proslavery government in Kansas, including: "With the shout of law and order you disarm the citizen, while the Constitution of his country declares that the right 'to keep and bear arms shall not be infringed.'"[314]

The 1856 national Republican Convention resolved that "the dearest constitutional rights of the people of Kansas have been fraudulently and violently taken from them . . . the rights of the people to keep and bear arms have been infringed."[315]

The federal government, obviously, had done nothing to interfere with the official militia of the proslavery government in Kansas. Yet the Republicans still saw a violation of the Second Amendment: some of the state's citizens were being disarmed because they considered the current state government illegitimate. Indeed, the event that had precipitated Republican Sumner's speech was the "Sack of Lawrence," in which the Kansas territorial militia, bearing arms supplied by the United States government and under the command of a deputy federal marshal, confiscated the guns of a group of free-soilers.[316] The Republicans, seeing their constituents disarmed, invoked the Second Amendment. However, soon the Democrats would invoke the Second Amendment to protest the disarmament of citizens who did not belong to active state militias.

D. The Civil War

During the Civil War, President Lincoln ordered many suppressions of civil liberties. His suspension of *habeas corpus* in states which were not in rebellion against the Union, through which he imprisoned newspaper editors and other

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314. G.A. Grow, Admission of Kansas, June 30, 1856, *reprinted in* POLITICAL SPEECHES, PARTLY IN THE HOUSE AND SENATE, DEALING MAINLY WITH KANSAS AND SLAVERY 7 (Washington 1855), *also available online* <http://moa.umdl.umich.edu/cgi-bin/moa/sgml/moa-idx?notisid=ABT6364>.

315. *Reprinted in* EVERETT CHAMBERLIN, THE STRUGGLE OF '72. THE ISSUES AND CANDIDATES OF THE PRESENT POLITICAL CAMPAIGN 23 (San Francisco, Union Publ. 1872), *also available online* <http://moa.umdl.umich.edu/cgi-bin/moa/sgml/moa-idx?notisid=AEW6886>.

316. *See* GUNJA SENGUPTA, FOR GOD AND MAMMON: EVANGELICALS AND ENTREPRENEURS, MASTERS AND SLAVES IN TERRITORIAL KANSAS, 1854-1860, at 105-11 (1996).

persons who criticized the war, is the most famous.[317] Less well known are the Union government's confiscations of firearms. Although Maryland and Missouri never seceded, both states had significant pockets of Confederate sympathizers. In Missouri, Union General John C. Frémont issued an order declaring that all persons in a certain area found in possession of arms would be shot.[318] Later, General Marsh ordered a general confiscation of all arms and ammunition, "not in the hands of the loyal militia" and the transfer of all such arms and ammunition to the militia.[319] Confederates made sure that Lincoln's actions were publicized in the South; as one book put it: "The right of the people to keep and bear arms shall not be infringed, says the constitution; but upon this privilege he has trampled in Maryland, Missouri and Kentucky."[320]

The 1864 Democratic Convention denounced Lincoln's suppression of civil liberties, condemning "the subversion of the civil by military law in States not in insurrection; the arbitrary military arrests . . .; the suppression of freedom of speech and of

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317. *See, e.g.*, *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866). *See generally* MARK E. NEELY, JR., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES (1991) (dealing exclusively with *habeas corpus* issues and defending Lincoln's actions).

318. *See* 3 WAR OF THE REBELLION, ser. 1, 467 (Frémont's Declaration of Martial Law, Aug. 30, 1861), *quoted in* HALBROOK, THAT EVERY MAN BE ARMED, *supra* note 1, at 233 n.96. Frémont, of course, had been the 1856 Republican Presidential candidate and had run on a platform denouncing the proslavery government of Kansas for the same thing he was now doing.

319. 13 *id.* at 506, *quoted in* HALBROOK, THAT EVERY MAN BE ARMED, *supra* note 1, at 233. In defense of Lincoln's actions against people living in Confederate states, William Whiting listed various individual rights protected by the Constitution and then showed that they could not be applicable in time of war; otherwise, the army would not be able to kill enemy soldiers without due process. Similarly, "[i]f all men have the right to 'keep and bear arms' what right has the army of the Union to take them away from rebels?" He concluded that the Bill of Rights "[was] intended as [a] declaration[] of the rights of peaceful and loyal citizens," and therefore inapplicable to the Southern rebels. WILLIAM WHITING, THE WAR POWERS OF THE PRESIDENT AND THE LEGISLATIVE POWERS OF CONGRESS IN RELATION TO REBELLION, TREASON, AND SLAVERY 49-51 (Boston, J.L Shorey 1862) *available at* <http://moa.umdl.umich.edu/cgi-bin/moa/sgml/moa-idx?notisid=AEW5618>. Whiting served as a leading attorney for the War Department; under a modified title, this pamphlet was reprinted 43 times over the next eight years. *See* Richard J. Purcell, *William Whiting*, *in* DICT. AM. BIO., *supra* note 90.

320. T.W. MCMAHON, CAUSE AND CONTRAST: THE AMERICAN CRISIS, *excerpted in* 32 DEBOW'S REVIEW, AGRICULTURAL, COMMERCIAL, INDUSTRIAL PROGRESS AND RESOURCES 317 (1862), *available online at* <http://moa.umdl.umich.edu/cgi-bin/moa/sgml/moa-idx?notisid= ACG1336-1315DEBO-31>.

the press; . . . and the interference with and denial of the right of the people to bear arms in their defence."[321]

Also in 1864, one of Lincoln's strongest northern Democrat critics, C. Chauncey Burr, authored *Notes on the Constitution of the United States*.[322] The book analyzed the Constitution clause by clause, adding commentary intended to show that President Lincoln was violating the Constitution. Regarding federal militia powers, Burr noted that the Constitution provided that the militia could be called into federal service for three purposes only: "to execute the Laws of the Union, suppress Insurrections, and repel Invasions."[323] Burr contended that the militia was being used improperly in the Civil War because the war was not being fought to execute the laws of the Union, but to abolish slavery and to subjugate the South. There was no insurrection since state governments (as opposed to individuals within a state) could not commit insurrection: state governments "are not *subjects*. They are sovereign bodies."[324] And obviously, there was no foreign power invading the United States.

In discussing the next clause of the Constitution (granting Congress authority over militia training standards and discipline, while reserving to states the appointment of militia officers and supervision of militia training),[325] Burr commented, "The militia is strictly a State institution. . . . The object of this provision is to preserve the State character of the militia—to keep it as representative of State sovereignty, even while it is but for a specified service under the direction of the United States."[326] This would have been the perfect time to criticize Lincoln for violating the Second Amendment had Burr thought that the Amendment protected state militia from federal

321. E. POLLARD, THE LOST CAUSE 574 (1867), *quoted in* HALBROOK, THAT EVERY MAN BE ARMED, *supra* note 1, at 233 n.96.

322. C. CHAUNCEY BURR, NOTES ON THE CONSTITUTION OF THE UNITED STATES (N.Y., J. F. Feeks 1864). Burr also founded a monthly journal, *The Old Guard*, and sometimes wrote for a New York newspaper, *The Day Book or Caucasian*. Few Northerners surpassed Burr's strong opposition to Lincoln's policies. *See* NEELY, *supra* note 317, at 57.

323. U.S. CONST. art. I, § 8, cl. 15.

324. BURR, *supra* note 322, at 30-31.

325. *See* U.S. CONST. art. I, § 8, cl. 16.

326. BURR, *supra* note 322, at 34.

interference. But the Second Amendment was absent from Burr's criticism.

Instead, the Second Amendment discussion came much later. Burr quoted Justice Story at length on how tyrants "accomplish their purposes . . . by disarming the people."[327] "The present administration," charged Burr, "has violated this article of the Constitution in every particular. It has, in a great many instances, disarmed the people by forcibly entering their houses and seizing their arms of every description."[328] Burr also complained that the Lincoln administration had "substituted United States soldiery for militia" and had imposed *de facto* martial law by stationing regular troops in New York City. And, as Akhil Amar would argue many years later,[329] Burr wrote that federal conscription for a standing army violated the Second Amendment, since conscription "tends to annihilate" the ranks of the state militias.[330]

To Burr, Lincoln's firearm confiscations apparently violated the main clause of the Second Amendment ("the right of the People"), while Lincoln's reliance on a conscripted standing army at the expense of the militia violated the introductory clause ("A well-regulated militia, being necessary to the security of a free State"), which is why Lincoln's policies could be said to violate the Second Amendment "in every particular."[331]

Whether Lincoln's policies were right or wrong is not the subject of this article. The objections of the Democratic Convention and Burr to Lincoln's actions reflected the belief

327. *Id*. at 80.

328. *Id*. Here, Burr accused the Lincoln government of the same act perpetrated more than a century later by the Chicago Housing Authority, with the encouragement of the Clinton administration. *See* Pratt v. Chicago Hous. Auth., 848 F. Supp. 792 (N.D. Ill. 1994) (holding that police sweeps of public housing in order to confiscate firearms was unconstitutional).

329. *See* Amar, *The Bill of Rights as a Constitution*, *supra* note 1, at 1171-73.

330. BURR, *supra* note 322, at 81. Rep. Samuel Sullivan Cox made the same argument on Feb. 26, 1863, in opposition to the Lincoln administration's Conscription Bill. Cox relied mainly upon the militia clauses and Justice Story, but also cited the Second Amendment. *See* SAMUEL SULLIVAN COX, EIGHT YEARS IN CONGRESS, FROM 1857 TO 1865, at 313 (New York, D. Appleton & Co. 1865), *also available online* <http://moa.umdl.umich.edu/cgi-bin/moa/sgml/moa-idx?notisid=ACP4141>.

331. BURR, *supra* note 322, at 80.

that the Second Amendment guaranteed the right of individuals to bear arms.

V. RECONSTRUCTION AND LABOR UNREST

A. *Congress, Civil Rights, and the Fourteenth Amendment*

After the Union victory in the Civil War, Congress debated and passed various measures, such as the Civil Rights Act and the Fourteenth Amendment, designed to protect the civil rights of freedmen. During this period, the Second Amendment was mentioned many times in Congressional testimony, in reports to Congress, in Committee reports, and in floor debates.[332] These statements treated the Second Amendment as an individual right. Records of Congress from this era are replete with references to the "right" to arms, but since this article is about the Second Amendment, and not about the state constitutional or natural right to arms, this article quotes only those statements that specifically refer to the Second Amendment.

1. *The Freedmen's Bureau*

The Freedmen's Bureau reported to Congress on the numerous abuses of civil rights taking place in the defeated Southern states. For example, in Kentucky, "[t]he civil law prohibits the colored man from bearing arms . . . . Their arms are taken from them by the civil authorities . . . . Thus, the right of the people to keep and bear arms as provided in the Constitution is *infringed* . . . ."[333] Similarly, General Rufus Saxton, the former assistant commissioner of the Freedmen's Bureau in South Carolina, provided Congress with evidence

> that in some parts of this State armed parties are, without proper authority, engaged in seizing all fire-arms found in the hands of the freedmen. Such conduct is in plain and direct violation of their personal rights as guaranteed by the Constitution of the United States, which declares that "the right of the people to keep and bear arms shall not be infringed." The freedmen of South Carolina have shown by their peaceful and orderly conduct that they can safely be

332. For the discussion of the Fourteenth Amendment and the statutes which led up to it, the author is deeply indebted to Stephen Halbrook.

333. H.R. EXEC. DOC. NO. 70, at 233, 236 (1866).

> trusted with fire-arms, and they need them to kill game for subsistence, and to protect their crops from destruction by birds and animals.[334]

Throughout Reconstruction, many witnesses and special committees complained that unreconstructed governments and terrorist organizations, such as the Ku Klux Klan, were violating the Second Amendment rights of freedmen by disarming them.[335]

To address the civil rights violations, Congress took up Senate Bill 60, a bill to expand the powers of the Freedmen's Bureau. During debate over the bill, Kentucky Democratic Senator Garret Davis emphasized that a shared commitment to civil liberty united Americans more than party factionalism divided them:

> But there were some principles upon which those great, grand,
>
> noble old parties agreed; and what were they? . . . They were for every man bearing his arms about him and keeping them in his house, his castle, for his own defense. They were for every right and liberty secured to the citizen by the Constitution.[336]

In the House, Massachusetts Congressman Nathaniel Banks announced his plans to offer an amendment to the bill "inserting after the word 'including' the words 'the constitutional right to bear arms;' so that it will read, 'including the constitutional right to bear arms, the right to make and enforce contracts, to sue.'"[337] As passed by Congress, the final bill reflected Banks's desire for a specific recognition of the individual right to arms:

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334. REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, H.R. REP. NO. 39-30, pt. 2, at 229 (1866).

335. *See* Halbrook, *Personal Security*, *supra* note 1, at 353-54, 363, 384-88, 396-97, 401-02, 405-08, 414-15, 418, 424.

Related to the complaints about disarmament were complaints about Southern governments' tolerant attitude about white violence against blacks. Virginia attorney George Tucker (yes, one of the descendants of Henry St. George Tucker) testified about the need for Congressional action to protect blacks against such abuses of the unreconstructed governments: "They have not any idea of prosecuting white men for offenses against colored people; they do not appreciate the idea." McCleskey v. Kemp, 481 U.S. 279, 347 n.2 (1987) (quoting H.R.J. COMM. REP. NO. 39-30, pt. 2, at 25 (1866)).

336. CONG. GLOBE, 39th Cong., 1st Sess. 371 (1866).

337. *Id.* at 585.

> 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 . . . the right to make and enforce contracts . . . and to have full and equal benefit 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.[338]

President Johnson vetoed the bill. Congress, however, came back with the Second Freedmen's Bureau Bill, which it passed over President Johnson's veto. Section 14 of that Second Bill contained the same language as that quoted above, protecting "the constitutional right to bear arms."[339]

2. *Southern representation in Congress*

In early 1866, Congress took up the question of whether the defeated states should be allowed representation in Congress. During the debate, Nevada Senator James W. Nye stated that "[a]s citizens of the United States [freedmen] have equal right to protection, and to keep and bear arms for self-defense. They have long cherished the idea of liberty . . . ."[340]

In support of Southern representation, Illinois Representative Anthony Thornton suggested that once the war had ended, all constitutional rights were immediately restored. In support of this theory, he argued:

> In all of the northern States, during the war, the privilege of the writ of *habeas corpus* was suspended; freedom of speech was denied; the freedom of the press was abridged; the right to bear arms was infringed . . . . Our rights were not thereby destroyed. They are inherent. Upon a revocation of the proclamation, and a cessation of the state of things which prompted these arbitrary measures, the Constitution and laws woke from their lethargy, and again became our shield and safeguard.[341]

338. Act of July 16, 1866, 14 Stat. 173, 176-77 (1866).
339. 14 Stat. 173, 176 (1866).
340. CONG. GLOBE, 39th Cong., 1st Sess. 1073 (1866).
341. *Id.* at 1168.

Thus, Senator Nye and Representative Thornton viewed the Second Amendment right to arms as a personal right, similar to the other rights in the first eight amendments.

3. *Civil Rights Bill*

Rep. Henry Raymond (R-N.Y.) served on the Joint Committee on Reconstruction and as an editor of the *New York Times*. He stated in support of the Civil Rights Bill: "Make the colored man a citizen of the United States and he has every right which you or I have as citizens of the United States under the laws and Constitution of the United States . . . a right to defend himself and his wife and children; a right to bear arms . . . ."[342] Another New York Republican, Roswell Hart, argued that the Constitution required states to maintain a republican form of government, which meant, *inter alia*, a government "where 'the right of the people to keep and bear arms shall not be infringed;' . . . . Have these rebellious States such a form of government? If they have not, it is the duty of the United States to guaranty that they have it speedily."[343] If the Second Amendment only protected state governments against the federal government, then Rep. Hart's statement that the Second Amendment must be obeyed by state governments would make no sense.

Rep. Sidney Clarke of Kansas agreed with the New Yorkers:

> [I] find in the Constitution of the United States an article which declares that "the right of the people to keep and bear arms shall not be infringed." For myself, I shall insist that the reconstructed rebels of Mississippi respect the Constitution in their local laws . . . .[344]

4. *Anti-KKK Act*

The frequently-invoked federal civil rights statutes, which allow criminal and civil prosecution of state officials who violate federal civil rights, were created by the "Anti-KKK Act." The Committee Report on the Act explained, "in many counties they

342. *Id.* at 1266.
343. THE RECONSTRUCTION AMENDMENTS' DEBATES 193 (Alfred Avins ed., 1967).
344. CONG. GLOBE, 39th Cong., 1st Sess. 1838 (1866).

have preceded their outrages upon him [the freedman] by disarming him, in violation of his right as a citizen to 'keep and bear arms,' which the Constitution expressly says shall never be infringed."[345]

Rep. Benjamin Butler (R-Mass.) elaborated:

> Section eight is intended to enforce the well-known constitutional provision guaranteeing the right of the citizen to "keep and bear arms," and provides that whoever shall take away, by force or violence, or by threats and intimidation, the arms and weapons which any person may have for his defense, shall be deemed guilty of larceny of the same.[346]

Tennessee Democrat Washington C. Whitthorne objected that the lawsuit provision of the anti-KKK act (allowing lawsuits for deprivation of constitutional rights) would allow a New York police officer who disarmed a drunk to be sued, "because the right to bear arms is secured by the Constitution."[347]

5. *Fourteenth Amendment*

When debate on the Fourteenth Amendment began, some members of Congress argued that the Thirteenth Amendment already gave Congress sufficient power to address Southern laws which prevented the ex-slaves from enjoying the status of free men. Supporting this position, Kansas Senator Samuel Pomeroy asked:

> And what are the safeguards of liberty under our form of Government? There are at least, under our Constitution, three which are indispensable—
>
> 1. Every man should have a homestead, that is, the right to acquire and hold one, and the right to be safe and protected in that citadel of his love. . . .
>
> 2. He should have the right to bear arms for the defense of himself and family and his homestead. And if the cabin door of the freedman is broken open and the intruder enters for purposes as vile as were known to slavery, then should a well-loaded musket be in the hand of the occupant to send the

345. H.R. REP. NO. 41-37, at 3 (1871).
346. *Id.* at 7.
347. CONG. GLOBE, 42d Cong., 1st Sess. 337 (1871).

> polluted wretch to another world, where his wretchedness will forever remain complete; and
>
> 3. He should have the ballot . . . .[348]

Congressmen expressed their intention to remedy the deprivation of Second Amendment rights through corrective statutes, and eventually through the Fourteenth Amendment. For example:

> Senator Howard . . . explicitly invoked "the right to keep and bear arms" in his important speech cataloguing the "personal rights" to be protected by the Fourteenth Amendment. Howard and others may have been influenced by the antebellum constitutional commentator William Rawle, who had argued in his 1825 treatise that the Second Amendment as written limited both state and federal government . . . .[349]

As Eric Foner observes,

> [I]t is abundantly clear that the Republicans wished to give constitutional sanction to states' obligation to respect such key provisions as freedom of speech, the right to bear arms, trial by impartial jury . . . . The Freedman's Bureau had already taken steps to protect these rights, and the Amendment was deemed necessary, in part, precisely because every one of them was being systematically violated in the South in 1866.[350]

After the Amendment had been ratified, its Congressional sponsors explained its meaning in relation to other legislation. For example, Jonathan Bingham (R-Ohio), discussing section 1 of the Fourteenth Amendment, stated "that the privileges and immunities of citizens of the United States, . . . are chiefly defined in the first eight amendments to the Constitution of the United States."[351] After listing the amendments, Bingham explained: "These eight articles I have shown never were limitations upon the power of the States, until made so by the fourteenth amendment."[352]

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348. CONG. GLOBE, 39th Cong., 1st Sess. 1182 (1866).

349. Amar, *The Bill of Rights as a Constitution*, *supra* note 1, at 1167 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866)). Senator Howard had "a wide reading knowledge not only of law and history, but also of literature." James O. Knauss, *Jacob Merritt Howard*, *in* DICT. AM. BIO., *supra* note 90.

350. ERIC FONER, RECONSTRUCTION 258-59 (1988).

351. CONG. GLOBE, 42d Cong., 1st Sess. app. at 84 (1871).

352. *Id.*

Rep. Henry Dawes (R-Mass.) agreed with Bingham that the Fourteenth Amendment "privileges" incorporated the first eight amendments against states, so a citizen "had secured to him the right to keep and bear arms in his defense."[353] Later, Senator Allen G. Thurman (D-Ohio) agreed that the "rights, privileges, and immunities of a citizen of the United States" included all the rights secured by the first eight amendments, which he described in order, including the right to bear arms: "Here is another right of a citizen of the United States, expressly declared to be his right—the right to bear arms; and this right, says the Constitution, shall not be infringed."[354]

6. *The Civil Rights Act of 1875*

Georgia Democrat Thomas M. Norwood stated that U.S. citizens living in territories enjoyed "the privileges and immunities of a citizen of the *United States*" including "[t]he right . . . of peacable [sic] assembly and of petition," and "to keep and bear arms."[355] In debate on the same bill, Mississippi Republican James Alcorn made it clear that the militia consisted of all citizens, not just a select group: "The citizens of the United States, the *posse comitatus*, or the militia if you please, and the colored man composes part of these."[356]

7. *Summary of Congressional policy*

The Congressmen of this period were hardly interested in strengthening the state militias (which had just been defeated in the War of Rebellion, as they called it), or in reinforcing states' rights.[357] The Congressional concern about the constitu-

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353. *Id.* at 475.

354. CONG. GLOBE, 42d Cong., 2d Sess. app. at 26 (1872).

355. CONG. REC., 43d Cong., 1st Sess. app. at 241-42 (1874).

356. *Id.* at 302; *see also Letters from the Federal Farmer* XVIII, *in* 2 THE COMPLETE ANTI-FEDERALIST 341 (1981) ("A militia, when properly formed, are in fact the people themselves . . . and include . . . all men capable of bearing arms . . . ."); George Mason, Virginia Ratifying Convention of June 16, 1788, *reprinted in* ORIGIN, *supra* note 37, at 430 ("Who are the Militia? They consist now of the whole people . . . .").

357. The only known nineteenth century invocation of the Second Amendment as a meaningful state's right occurred during a floor speech by Delaware Democrat Willard Saulsbury, as he indicated that violation of the Second Amendment would mean the disarmament of the entire population. Objecting to the proposed S.R. 32, to disband most Southern states' militias, Saulsbury said:

tional right to keep and bear arms was plainly a concern about the self-defense rights of individual citizens, especially freedmen.[358] It would be ludicrous to attempt to explain the record of the Reconstruction Congresses as anything but strong support for a personal right to arms for self-defense. Thus, the anti-individual authors simply avoid any mention of the subject. Jonathan Bingham and Jacob Howard, like St. George Tucker, are carefully ignored.

B. Cruikshank

Under the authority of the new civil rights laws, federal prosecutors brought many cases against white defendants who, alone or in groups, had violated the civil rights of freedmen. These defendants were frequently charged with violating the Second Amendment rights of freedmen by taking their firearms.[359]

> The proposition here . . . is an application to Congress to do that which Congress has no right to do under the second amendment of the Constitution. . . .
>
> We hear a great deal about the oppressions of the negroes down South, and a complaint here comes from somebody connected with the Freedmen's Bureau. . . . Yet, sir, no petitions are here to protect the white people against the outrages committed by the negro population; but if a few letters are written to members here that oppression has been practiced against negroes, then the whole white population of a State [is] to be disarmed.

CONG. GLOBE, 39th Cong., 1st Sess. 914-15 (1866).

358. Akhil Reed Amar suggests that the Fourteenth Amendment accomplished a re-orientation of the Second Amendment. Whereas the Second Amendment had originally dealt mainly with the right of people to own guns to resist an oppressive federal government through participation in the militia, the Second Amendment extolled by the framers of the Fourteenth Amendment dealt with personal security, and the means to resist criminal attack effectively. *See generally* Amar, *The Bill of Rights and Fourteenth Amendment*, *supra* note 1. Amar's point is useful when taken as an observation about two eras' different views of the intended primary purpose of the Second Amendment. We should keep in mind, however, that the Fourteenth Amendment merely emphasized an existing thread of the Second Amendment; it did not weave in anything new. The Framers of the Constitution and the Second Amendment saw community defense against a criminal government as simply one end of a continuum that began with personal defense against a lone criminal; the theme was self-defense, and the question of how many criminals were involved (one, or a standing army) was merely a detail. *See* Kates, *Self-Protection*, *supra* note 1, at 92-93. Thus, the beginning of St. George Tucker's exposition of the Second Amendment reminded the reader that "[t]he right of self defence is the first law of nature." *See* 1 BLACKSTONE, *supra* note 14, app. at 300; *see supra* text accompanying note 61.

359. *See* Kermit L. Hall, *Political Power and Constitutional Legitimacy: The South Carolina Ku Klux Klan Trials, 1871-1872*, 33 EMORY L.J. 921 (1984).

Eventually, the federal prosecutions made their way to the Supreme Court in *United States v. Cruikshank*.[360] *Cruikshank* involved the aftermath of the 1872 elections in Louisiana. Following the elections, two separate governments—one Unionist and one racist—declared themselves the winner and the official government of the state. In the town of Colfax, armed blacks occupied the courthouse and the surrounding district to assert the legitimacy of their side's control of the local government. Atrocities had been committed on both sides; a rioting band of white farmers attacked the courthouse, burned it to the ground, and murdered blacks who tried to escape the flames. Klansman William Cruikshank and other leaders of the riot were tried in federal district court for violating federal civil rights laws. By the terms of the Enforcement Acts,[361] the trial court found Cruikshank guilty of conspiring to deprive the blacks of their Constitutional rights, including the right to assemble peaceably and the right to bear arms.[362]

The *Cruikshank* case forced the United States Supreme Court to squarely address the issue of whether the enumerated provisions of the Bill of Rights were made enforceable against the states by the Fourteenth Amendment and the Congressional laws enacted pursuant to the Amendment. The issue had arisen a few years before, in a federal prosecution of South Carolina Klansmen for conspiring to deprive blacks of their arms and to destroy the black militias. There, the lower federal courts had held that the Fourteenth Amendment did not incorporate the Bill of Rights. The Supreme Court evaded review on procedural grounds.[363]

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360. 92 U.S. 542 (1876).

361. *See* 16 Stat. 140 § 6 (1870); *see also* 18 U.S.C. §§ 241-242 (1994).

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

Id.

362. *See* GEORGE C. RABLE, BUT THERE WAS NO PEACE: THE ROLE OF VIOLENCE IN THE POLITICS OF RECONSTRUCTION 125-29 (1984).

363. *See* United States v. Avery, 80 U.S. (13 Wall.) 251 (1871); United States v. Crosby, 25 F. Cas. 701, 701-05 (D.S.C. 1871) (No. 14,893). The cases are discussed in Hall, *supra* note 359, at 921.

In *Cruikshank*, the Supreme Court held the Enforcement Acts unconstitutional. The Fourteenth Amendment, the Court acknowledged, did give Congress the power to prevent interference with rights granted by the Constitution. However, the Court held that the right to assemble and the right to arms were not rights granted or created by the Constitution. The first part of the opinion explained:

> The right of the people peaceably to assemble for lawful purposes *existed long before* the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government. It "derives its source," to use the language of Chief Justice Marshall, in *Gibbons v. Ogden*, 9 Wheat. 211, "from those laws whose authority is acknowledged by civilized man throughout the world." It is found wherever civilization exists. It was not, therefore, a right granted to the people by the Constitution. The government of the United States when established found it in existence, with the obligation on the part of the States to afford it protection.[364]

The Court further explained that the right to arms is a fundamental human right:

> The right . . . of "bearing arms for a lawful purpose" . . . is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this . . . means no more than that it shall not be infringed by Congress . . . 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 "powers which relate to merely municipal legislation . . . ."[365]

364. *Cruikshank*, 92 U.S. at 551 (emphasis added). A subtext of the opinion was that the Reconstruction government of Louisiana had encouraged blacks to assemble armed, knowing that disturbances would result; hence, it was the state government's responsibility (not the Supreme Court's) to protect blacks from disarmament and interference with their right to assemble.

365. *Id.* at 553 (quoting New York v. Miln, 36 U.S. (11 Pet.) 125, 139 (1837)); *cf.* Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90, 92 (1822) ("The right [to arms in the Kentucky Constitution] existed at the adoption of the constitution; it had then no limits short of the moral power of the citizens to exercise it, and it in fact consisted in nothing else but in the liberty of the citizens to bear arms.").

Cruikshank thus asserted that the Second Amendment protected, but did not create, the individual's right to bear arms; the right instead derives from natural law. The Court's position that people must look to local governments "for their protection against any violation by their fellow-citizens of the rights" that the Second Amendment recognizes is comprehensible only under the individual rights view. If individuals have a right to own a gun, then individuals can ask local governments to protect them against "fellow-citizens" who attempt to disarm them. In contrast, if the Second Amendment right belongs to the state governments as protection against federal interference, then mere "fellow-citizens" could never infringe that right by disarming mere individuals.

The *Cruikshank* decision completed the work begun by *The Slaughter-House Cases*, ruining the Fourteenth Amendment as a check on most state abuses of the Bill of Rights until the 1920s.[366] Although no longer good law, the case clearly ap-

366. Robert Palmer writes that "*United States v. Cruikshank* accomplished the nullification of the fourteenth amendment that scholars traditionally attribute to *Slaughter-House*." Robert C. Palmer, *The Parameters of Constitutional Reconstruction:* Slaughter-House, Cruikshank, *and the Fourteenth Amendment*, 1984 U. ILL. L. REV. 739, 762. Palmer argues that Justice Waite's opinion in *Cruikshank* misread *Slaughter-House*, and wrongly assumed that state and federal privileges and immunities were absolutely distinct. *See id.*

Cruikshank was overruled by implication by *DeJonge* v. *Oregon*, 299 U.S. 353 (1937), which held, directly contrary to *Cruikshank*, that the right to assemble peaceably was guaranteed by the Fourteenth Amendment. Because *Cruikshank* had applied identical reasoning to find that the First Amendment (assembly) and Second Amendment (arms) were not protected by the Fourteenth Amendment, *Cruikshank* may not be good law today with regard to the Fourteenth Amendment's protection of the right to bear arms.

One other Reconstruction Supreme Court case touched on the right to arms. *Cummings* v. *Missouri* was an 1866 case growing out of the 1865 Missouri Constitution, which imposed numerous civil disabilities—prohibitions on engaging in various professions, holding certain types of property, and holding government office—on persons who had supported the Confederate cause. Cummings v. Missouri, 71 U.S. 277 (1866). The State of Missouri defended the disabilities on the grounds that deprivations of civil rights were not punishment. The Supreme Court disagreed. Justice Stephen Field's majority opinion observed that:

> In France, deprivation or suspension of civil rights, or of some of them, and among these is the right of voting, of eligibility to office, of taking part in family councils, of being guardian or trustee, of bearing arms, and of teaching or being employed in a school or seminary of learning, are punishments prescribed by her code.

Id. at 321. The Court then explained that a deprivation of civil rights in the United

States must also be considered a form of punishment:

> The theory upon which our institutions rest is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in protection of these rights all are equal before the law. And deprivation or suspension of these rights for past conduct is punishment, and can in no otherwise be defined.

Id. at 321-22.

The Court struck down the relevant provisions of the Missouri Constitution as a bill of attainder, an ex post facto law, and a violation of due process. (The Missouri deprivations did not prohibit the ownership or carrying of arms in any way; instead the 1865 Missouri Constitution affirmed the right of the people of Missouri "to bear arms in defence of themselves and of the lawful authority of the State cannot be questioned." MO. CONST. art. I, § 8 (1865). Thus, there was no place for the Supreme Court to consider the Second Amendment as an objection to the Missouri civil rights deprivations.) The Court emphasized that the ex-confederates could be punished for participation in the rebellion according to laws which existed at the time of the rebellion, but that additional punishments could be not added after the fact. *Id.* at 327-29.

The *Cummings* principles remain valid law. For example, in 1965, the Supreme Court relied on *Cummings* to overturn a law which barred ex-Communists from becoming officers of labor unions. United States v. Brown, 381 U.S. 437, 447-48 (1965) (holding that a deprivation of civil rights is punishment; the Bill of Attainder clause is to be broadly construed).

Cummings raises interesting issues about modern gun control laws. The Supreme Court in *Cummings* labeled "bearing arms" a civil right, and insisted that a citizen may be deprived of civil rights only as the result of a conviction for a crime when the penalty for the crime was established before, rather than after, the commission of the crime. In the modern United States, in contrast, it is common for federal and state laws to impose additional punishments for a crime, long after the defendant has pled guilty and served his punishment. For example, a person might have pled guilty to federal tax evasion in 1954 and served a prison term or paid a fine. The punishment for the tax crime, as of 1954, did not include loss of the right to keep and bear arms. But in the Gun Control Act of 1968, the Congress banned the possession of firearms by anyone with a felony conviction—even felony convictions incurred long before 1968. 18 U.S.C. § 922(g)(1). The ban likewise extends retroactively to persons in various categories unrelated to crime, such as being dishonorably discharged from the military. *Id.* § 922(g)(6). Similarly, in 1994, Congress banned firearms possession by anyone with a misdemeanor conviction for domestic violence, no matter how long before 1994 the conviction occurred. *Id.* § 922(g)(9). The courts have upheld these retroactive prohibitions on the grounds that they do not impose any retroactive punishment; no one will be sent to prison unless they possess a firearm *after* the effective date of the law. *See, e.g.*, United States v. Brady, 26 F.3d 282, 290-91 (2d Cir. 1994). Thus, the modern courts adopt the position of the Missouri Attorney General (that deprivation of civil rights is not punishment; only prison, executions, and fines are punishment), and reject the position of the United States Supreme Court. A person dishonorably discharged from the standing army because of his objections to the Vietnam War is deprived of the constitutional protections which were accorded even to persons who had borne arms in rebellion against the federal army in the nineteenth century. It is not always true that modern courts protect civil rights and enforce the Constitution with more zeal than did their nineteenth century predecessors.

proaches the Second Amendment from an "individual right" perspective.

C. Presser

Labor and anti-labor violence, both in urban centers and in rural coal mines, became quite frequent in the latter part of the nineteenth century.[367] The major nineteenth century Supreme Court interpretation of the Second Amendment involved a group of German immigrants—*Lehr und Wehr Verein*[368]—marching in military exercise in public. The case grew out of an Illinois arms control measure enacted in response to the labor uprisings of the late 1870s. State militias and the federal army had brutally suppressed peaceful strikes. When workers began forming self-defense organizations such as *Lehr und Wehr Verein*, the state government outlawed private militias.[369]

A member of *Lehr und Wehr Verein* took the case to the United States Supreme Court, and lost. First, the unanimous Court stated that the Illinois laws "do not infringe the right of the people to keep and bear arms."[370] Thus, the right to own and carry guns does not include the right to carry guns in public as part of a large group on military parade.[371] Further, as

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367. *See, e.g.*, JEREMY BRECHER, STRIKE! (1997); ROBERT W. BRUCE, 1877: YEAR OF VIOLENCE (1989); PRISCILLA LONG, WHERE THE SUN NEVER SHINES: A HISTORY OF AMERICA'S BLOODY COAL INDUSTRY (1989); Philip Taft & Philip Ross, *American Labor Violence: Its Causes, Character, and Outcome*, *in* VIOLENCE IN AMERICA: HISTORICAL AND COMPARATIVE PERSPECTIVES 281-395 (Hugh Davis Graham & Ted Robert Gurr eds., 1969). Another historian writes:

> One of the major themes in American urban history since the 1850s has been the struggle of municipal authorities and their business-class allies to gain a monopoly on the use of violence. The problem was not that the elected officials lacked a monopoly on the use of legally authorized violence; rather, they struggled to convince turbulent portions of the populace that all other violence was illegitimate.

Michael Feldberg, *The Crowd in Philadelphia History: A Comparative Perspective*, *in* RIOT, ROUT, AND TUMULT: READINGS IN AMERICAN SOCIAL AND POLITICAL VIOLENCE 142 (Roger Lane & John J. Turner, Jr., eds., 1978).

368. This title translates to "teaching and defense union." CRAMER, *supra* note 1, at 130.

369. *See* PAUL AVRICH, THE HAYMARKET TRAGEDY 45-46 (1984).

370. Presser v. Illinois, 116 U.S. 252, 265 (1886).

371. The Court's opinion was consistent with established common law limits on the right to arms which prohibited large, terrifying assemblies of armed men. *See* 1 HAWKINS, *supra* note 96, at ch. 60.

Cruikshank had noted, the Second Amendment, under the *Slaughter-House* rationale, "is a limitation only upon the power of Congress and the National government, and not upon that of the States."[372]

In dictum, the Court stated that even though the Second Amendment did not limit state gun control, there was still a constitutional limit on state controls. The states could not disarm the public so as to deprive the federal government of its militia:

> It is undoubtedly true that all citizens capable of bearing arms
>
> constitute the reserved military force or reserve militia of the United States . . . and, in view of this prerogative of the general government . . . the States cannot, even laying the constitutional provision in question [the Second Amendment] out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government. But, as already stated, we think it clear that the sections under consideration do not have this effect.[373]

The militia thus includes "all citizens capable of bearing arms."[374]

Anti-individualist authors who discuss *Cruikshank* and *Presser* tend to emphasize the nonapplicability of the Second Amendment to the states, while gliding over the cases' clear understanding of an individual right to arms. Most Standard Model authors acknowledge *Cruikshank* and *Presser* as green lights for *state* gun control. The Standard Modelers argue, however, that *Cruikshank* and *Presser* should be repudiated in light of modern Fourteenth Amendment doctrine,[375] or that the two cases already have been repudiated by dicta in three modern cases listing "the right to keep and bear arms" as among the "full scope of the liberty" protected against state infringement by the Fourteenth Amendment.[376] Stephen

372. *Presser*, 116 U.S. at 265.
373. *Id.* at 265-66.
374. *Id.* at 265.
375. *See, e.g.*, Levinson, *supra* note 1, at 652-53.
376. *See* Planned Parenthood v. Casey, 505 U.S. 833, 848 (1992); Moore v. East Cleveland, 431 U.S. 494, 502 (1977) (plurality opinion); Poe v. Ullman, 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting).

Halbrook, one of the most important Standard Model authors, argues that the state gun control passages in *Cruikshank* and *Presser* are mere *dicta*; the holding of *Cruikshank* was that the Second Amendment could not be infringed by nongovernment actors, and the holding of *Presser* was that the Second Amendment was not infringed by a ban on armed parades.[377]

VI. COMMENTARY FROM THE LATE 19TH CENTURY: COOLEY AND OTHERS

Turning to the scholarly commentators of the late nineteenth century, Part VI of this Article examines, among other things, how *Cruikshank* and *Presser* were read by the legal community of the period in which they were decided.

A. Thomas Cooley

By far the leading constitutional expositor of the post-Civil War America, "the nation's elder statesman on matters of constitutional law,"[378] was Michigan Supreme Court Justice Thomas Cooley. He was considered "the greatest authority on constitutional law in the world."[379] Cooley served on the Michigan Supreme Court from 1864 to 1885, was listed by Roscoe Pound as one of the ten greatest judges in American history,[380] and would have been appointed to the United States Supreme Court, but for Republican bosses who feared his independence.[381]

Cooley also served as the first Dean of the Law Department at the University of Michigan, which eventually became the Michigan Law School. He taught Constitutional Law, among other subjects, and wrote important treatises on taxation[382] and

377. *See* Halbrook, *Personal Security*, *supra* note 1, at 343-44.

378. ALAN R. JONES, THE CONSTITUTIONAL CONSERVATISM OF THOMAS MCINTYRE COOLEY 1 (1987).

379. B. TWISS, LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT 34 (1942), *quoted in* Stephen A. Siegal, *Historism in Late Nineteenth-Century Constitutional Thought*, 1990 WIS. L. REV. 1431, 1485 n.302.

380. *See* ROSCOE POUND, THE FORMATIVE ERA OF AMERICAN LAW 30 n.2 (1938).

381. *See* Paul D. Carrington, *Law as "The Common Thoughts of Men": The Law-Teaching and Judging of Thomas McIntyre Cooley*, 49 STAN. L. REV. 495, 496 (1997).

382. *See* THOMAS COOLEY, A TREATISE ON THE LAW OF TAXATION, INCLUDING THE LAW OF LOCAL ASSESSMENTS (1876).

torts.[383] Professor Cooley was a superb lecturer, and (in great contrast to Harvard's Langdell) courteous to his students. In his classes, he always paid heed to the social and cultural context of the law.[384]

President Cleveland appointed Cooley the first head of the new Interstate Commerce Commission (ICC). Although Cooley was a Republican, Democrat Cleveland selected him because his reputation for impartiality would give the ICC the trust and respect of persons of all points of view.[385] He is the only person mentioned in this article to have a law school named after him. In short, Thomas Cooley was "the most influential legal author of the late nineteenth and early twentieth centuries."[386]

1. A Treatise on Constitutional Limitations

"[T]he foundation of [Cooley's] fame and his central contribution was his first major publication,"[387] the 1868 volume *A Treatise on Constitutional Limitations*, which went through several editions over the following decades. It became "a canonical text for jurists."[388] Two decades later, it "was still the most scholarly and certainly the most admired American law book."[389] As a reviewer of a later edition explained, the book was "cited in every argument and opinion on the subjects which it treats, and not only is the book authoritative as a digest of law, but its author's opinions are regarded as almost conclusive."[390] A century later, *Constitutional Limitations* could accurately be described as "the most influential lawbook ever published."[391]

The first edition of *Constitutional Limitations* stated:

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383. *See* THOMAS COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT (1880). The torts treatise "was long considered the authoritative American treatment." 4 DICTIONARY OF AMERICAN BIOGRAPHY 393 (A. Johnson & D. Malone eds., 1930), *quoted in* Siegal, *supra* note 379, at 1486 n.309.

384. *See* Carrington, *supra* note 381, at 515-16.

385. *See id.* at 498.

386. P. PALUDAN, A COVENANT WITH DEATH: THE CONSTITUTION, LAW AND EQUALITY IN THE CIVIL WAR ERA 252 (1975), *quoted in* Siegal, *supra* note 379, at 1485 n.302.

387. Siegal, *supra* note 379, at 1487.

388. ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 87 (1960).

389. Carrington, *supra* note 381, at 496-97.

390. Book Note, 27 ALB. L.J. 300 (1883).

391. BERNARD SCHWARTZ, THE LAW IN AMERICA 134 (1974).

Right to bear Arms

> Among the other defences to personal liberty should be mentioned the right of the people to keep and bear arms. A standing army is particularly obnoxious in any free government, and the jealousy of one has at times been demonstrated so strongly in England as almost to lead to the belief that a standing army recruited from among themselves was more dreaded as an instrument of oppression than a tyrannical king, or any foreign power. So impatient did the English people become of the very army which liberated them from the tyranny of James II., that they demanded its reduction, even before the liberation could be felt to be complete; and to this day, the British Parliament render a standing army practically impossible by only passing a mutiny bill from session to session. The alternative to a standing army is "a well-regulated militia," but this cannot exist unless the people are trained to bearing arms. How far it is in the power of the legislature to regulate this right, we shall not undertake to say, as happily there has been little occasion to discuss that subject by the courts.[1]
>
> [1] In Bliss *v.* Commonwealth, 2 Lit. 90, the statute "to prevent persons wearing concealed arms" was held unconstitutional, as infringing on the right of the people to bear arms in defence of themselves and of the State.[392] But see Nunn v. State, 1 Kelly 243.[393] As bearing upon the right of self-defence, see Ely v. Thompson, 3 A.K. Marsh. 73,[394] where it was held that the statute subjecting free persons of color to corporal punishment for "lifting their hands in opposition" to a white person was held unconstitutional.[395]

After denouncing standing armies, Cooley informed the reader that "'a well-regulated militia' [requires that] the people are trained in the use of arms."[396] In the footnote, Cooley first

392. *See supra* note 152 and accompanying text.

393. *See supra* text accompanying notes 246-54 (reviewing the Georgia case, *Nunn v. State*, holding that the Second Amendment guarantees individual right to open carry, but not to concealed carry).

394. 10 Ky. (3 A.K. Marsh.) 70 (1820) (holding also that free blacks have some constitutional rights, as "parties to the political compact").

395. THOMAS M. COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 350 (Little, Brown 1972) (1868).

396. *Id.*

mentioned a Kentucky case using the state constitution to strike down a ban on concealed carry. Cooley next cited a Georgia case using the Second Amendment to void a restriction on carrying guns openly, while upholding a restriction on carrying concealed guns. The third case shows plainly that to Cooley, the "Right to bear Arms" (as he entitled this section) was about individual self-defense.[397]

Elsewhere in the text, Cooley offered advice about the "Formation of State Constitutions."[398] Among the elements which Cooley thought appropriate to include in every state constitution was

> a declaration of rights for the protection of individuals and minorities. This declaration usually contains the following classes or provisions:
>
> 1. Those declaratory of the general principles of republican government [including a ban on peacetime standing armies] . . . .
>
> 2. Those declaratory of the fundamental rights of the citizen; . . . [including free speech, freedom of religion, freedom from unreasonable searches and seizures, and] that every man may bear arms for the defence of himself and of the State.[399]

If Cooley could reflect "happily" on how little gun control had been enacted in the United States, it is unsurprising that he urged new states to adopt Bills of Rights which specifically guarantee arms possession for personal defense.

2. The General Principles of Constitutional Law

In 1880, Cooley authored *The General Principles of Constitutional Law*, an abridged version of the *Constitutional Limitations* treatise. The book was "a popular college text and

397. *See id*. Only one pre-Cooley treatise cited *Ely*. *See* DUER, *supra* note 165, at 37 n.1. Cooley's selection of a case upholding justifiable self-defense by a black man may have been a reflection of Cooley's own anti-racism. His Michigan Law School was always open to people of all colors. *See* Carrington, *supra* note 381, at 516. On the Michigan Supreme Court, Justice Cooley authored an opinion voiding racial segregation in the Detroit public schools. *See* People v. Board of Educ., 18 Mich. 399 (1869).

398. *See* COOLEY, *supra* note 395, at 35.

399. *Id*. at 35-36.

student's guide."[400] *General Principles* had a much longer exposition of the right to arms:

> Section IV. — THE RIGHT TO KEEP AND BEAR ARMS.
>
> *The Constitution*. — By the second amendment to the Constitution it is declared that "a well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed."
>
> The amendment, like most other provisions in the Constitution, has a history. It was adopted with some modification and enlargement from the English Bill of Rights of 1688, where it stood as a protest against arbitrary action of the overturned dynasty in disarming the people, and as a pledge of the new rulers that this tyrannical action should cease.[401] The right declared was meant to be a strong moral check against the usurpation and arbitrary power of rulers, and as a necessary and efficient means of regaining rights when temporarily overturned by usurpation. [Cooley then placed a footnote to St. George Tucker's extravagant tribute to the individual right to arms.[402]]
>
> *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. The militia, as has been elsewhere explained, consists of those persons who, under the law, are liable to the performance of military duty, and are officered and enrolled for service when called upon. 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

400. Siegal, *supra* note 379, at 1486 n.307.

401. These last two sentences were quoted (with proper citation) as an explanation of the Second Amendment in C. ELLIS STEVENS, SOURCES OF THE CONSTITUTION OF THE UNITED STATES, CONSIDERED IN RELATION TO COLONIAL AND ENGLISH HISTORY 224 (New York, MacMillan 2d ed. 1894). The right to arms is a "right involving the latent power of resistance to tyrannical government," Stevens explained. *Id*. at 223. "From prehistoric days the right to bear arms seems to have been the badge of a Teutonic freeman, and closely associated with his political privileges. Such armed freemen made up the military host of the tribe." *Id*. Stevens traced the right to arms and the corresponding militia duty from Saxon times to the middle ages, and finally to the 1689 English Bill of Rights. *See id*.

402. *See* THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 281-82 (Boston, Little, Brown 2d ed. 1891).

> 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. But this enables the government to have a well-regulated militia; for to bear arms implies something more than the mere keeping; it implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use; in other words, it implies the right to meet for voluntary discipline in arms, observing in doing so the laws of public order.
>
> *Standing Army.* — A further purpose of this amendment is, to preclude any necessity or reasonable excuse for keeping up a standing army. A standing army is condemned by the traditions and sentiments of the people, as being as dangerous to the liberties of the people as the general preparation of the people for the defence of their institutions with arms is preservative of them.
>
> *What Arms may be kept.* — The arms intended by the Constitution are such as are suitable for the general defence of the community against invasion or oppression, and the secret carrying of those suited merely to deadly individual encounters may be prohibited.[403]

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403. *Id.* at 282-83. At the end of the section, Cooley cited *Andrews v. State*, 50 Tenn (3 Heisk.) 165 (1872), for the proposition that the improper carrying of small weapons not suitable for defense against tyranny could be prohibited. COOLEY, *supra* note 402, at 283 n.1; *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 143 (Thomas M. Cooley ed., Chicago, Callaghan 1884) (containing Cooley's notes on Blackstone's exposition of the right to arms: "In the United States this right is preserved by express constitutional provisions. But it extends no further than to keep and bear those arms which are suited and proper for the general defense of the community against invasion and oppression."). Lawrence Cress quotes this passage from Cooley to support Cress's position that the Second Amendment guarantees only a right of state governments. *See* Cress, *supra* note 2, at 42. In light of Cooley's statements in *Constitutional Limitations* (which Cress must have known about since he cites *Constitutional Limitations*, even though he does not quote it), Cress's attempt to use Cooley to support an anti-individual Second Amendment is totally implausible.

Also implausible is the claim of Robert J. Spitzer, author of *The Politics of Gun Control*, that the "classic analyses of the nineteenth century, like those of Joseph Story and Thomas Cooley" support Spitzer's theory that no individual has a right to own a gun. SPITZER, *supra* note 2, at 42-43. In the endnote for the assertion, Spitzer cites Story and Cooley, but does not quote any of their words. Instead, Spitzer writes that "Cooley did not include discussion of the important *Presser* case until the subsequent (fourth) edition of his book, published in 1931, when he buttressed the standard interpretation found in the writings of other constitutional scholars." *Id.* at 56 n.60 (parenthetical in original). Actually, Judge Cooley had been dead for 33 years when the fourth edition was published. *See* Andrew C. Mclauchlin, *Thomas McIntyre*

Cooley repeated the above language verbatim in the 1898 edition of *General Principles*.[404]

Cooley's discussion in "The Right is General" is perhaps the most concise explication of how the individual right to arms supports the Second Amendment's goal of "a well-regulated militia." There is no ambiguity to Cooley's view of the Second Amendment as an individual right, and there is no questioning Cooley's position as, by far, the leading constitutional commentator of post-Civil War America.

Cooley also provided the succinct Standard Model reply to the argument of David Williams that the right to bear arms is contingent on the government maintaining the militia: "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."[405] If govern-ment neglect could destroy the Second Amendment, then the Amendment would hardly be a check on government abuse.

Henigan addresses Cooley, but sidesteps the Second Amendment issue. He first notes that Levinson quotes from Cooley's third edition. Henigan then points out that the fourth edition (published years after Cooley's death) contains a citation to *Presser*, not contained in the third edition, which stands for the principle that the Second Amendment limits only the federal government, and not the states.[406] This is true enough, but Henigan does not show any flaws in Cooley's interpretation of the Second Amendment, nor does he show that Cooley's view was rejected by any contemporary. Henigan fails to acknowledge another statement by Cooley, which directly

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Cooley, *in* DICT. AM. BIO., *supra* note 90.

404. *See* THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 297-99 (Boston, Little, Brown 3d ed. 1898).

405. COOLEY, *supra* note 395, at 270; *see generally* Williams, *Civic Republicanism*, *supra* note 8.

406. *See* Henigan, *Arms, Anarchy*, *supra* note 2, at 122. Henigan credits himself with scoring a point on Levinson, since the fourth edition undercuts Levinson's point that the Second Amendment may invalidate state antigun laws. *See id.* But Levinson was not relying on Cooley's third edition in regard to state gun laws; Levinson elsewhere cited and acknowledged the authority of *Cruikshank* and *Presser*. Levinson's point about state gun laws turned on his argument that twentieth-century analysis about the Fourteenth Amendment has rendered *Cruikshank* and *Presser* obsolete. *See* Levinson, *supra* note 1, at 652-53.

addresses Henigan's concern that a constitution cannot contemplate the overthrow of the government created by the constitution, should the government become tyrannical:

> The right of the people to bear arms in their own defence, and to form and drill military organizations in defence of the State, may not be very important in this country, but it is significant as having been reserved by the people as a possible and necessary resort for the protection of self-government against usurpation, and against any attempt on the part of those who may for the time be in possession of State authority or resources to set aside the constitution and substitute their own rule for that of the people. Should the contingency ever arise when it would be necessary for the people to make use of the arms in their hands for the protection of constitutional liberty, the proceeding, so far from being revolutionary, would be in strict accord with popular right and duty.[407]

In analyzing Cooley, Henigan was attempting to refute Sanford Levinson's *The Embarrassing Second Amendment* point by point (while accusing Levinson of selective quotation).[408] It seems likely, then, that Henigan was aware of Cooley's statement—since Levinson had quoted the statement in full in his own article.[409]

Thomas Cooley was unquestionably an adherent to the Standard Model, and believer in what Henigan derides as the insurrectionary view of the Second Amendment. Of course, Cooley, like every other commentator of the nineteenth century, saw the use of arms to restore the Constitution and to remove a government that was destroying the Constitution as a method of upholding the law, not as "insurrection." If, as Henigan's

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407. Thomas M. Cooley, *The Abnegation of Self-Government*, PRINCETON REV., July-Dec. 1883, at 209, 213-14; *see also* Levinson, *supra* note 1, at 649 n.64 (quoting Cooley's use of this text in the third edition of GENERAL PRINCIPLES OF CONSTITUTIONAL LAW). In the next paragraph, Cooley wrote that a person who refuses to heed an unconstitutional law "need for the purpose no judicial decision, no official assistance; he simply obeys the constitution, which is the law made by the sovereign, and is therefore paramount, instead of the law attempted to be made by the subordinate, which must necessarily be inferior, and if conflicting, inoperative." Cooley, *supra* note 404, at 214. The concluding paragraph urged Americans to exceed the minimal duties of good citizenship, which were "that they should cast their ballots for suitable persons in election, or that they should perform jury duty, or bear arms when summoned to the defence of the State." *Id.* at 226.

408. *See* Henigan, *Arms, Anarchy*, *supra* note 2, at 119-20.

409. *See* Levinson, *supra* note 1, at 649 n.64.

group claims, the Standard Model of the Second Amendment is "a fraud," then was Justice Cooley a participant in that "fraud"? Or a victim? Or is it perhaps inappropriate to describe as a "fraud" the view held by the leading commentator of the late nineteenth century—a view which, we shall see below, was held by every other scholar in the period who discussed the issue?

B. The Lesser Commentators

Many other scholars wrote constitutional treatises in the postwar years, although none was as influential as Cooley's. All of these scholars, like all of the commentators before them, treated the Second Amendment as an individual right.

1. Joel Tiffany

Antislavery attorney Joel Tiffany remained active after the Civil War. His 1867 book *A Treatise on Government and Constitutional Law*[410] stated:

> The second amendment of the constitution provides that the
>
> right of the people to keep and bear arms shall not be infringed, because a well-regulated militia is necessary to the security of a free state. The militia are the citizen soldiers, as distinguished from those who are trained to arms as a profession, and who constitute the elements of a standing army. To be an efficient militiaman the right to keep and bear arms is essential. This provision had its source in that jealousy of power in the hands of the central government, so manifest in the people, at the time the constitution was framed and adopted. This right in the people to keep and bear arms, although secured by this provision of the constitution, is held in subjection to the public safety and welfare. Whenever for any cause, the public safety shall require the substitution of *martial* for *civil* administration, then the maxim, *salus respublica suprema lex*,[411] applies; and this constitutional right may be temporarily suspended. But while civil authority bears sway, this provision of the constitution is the supreme law on that subject. Of the same character is the third amendment. No soldier shall, in time of peace, be quartered in any house,

410. JOEL TIFFANY, A TREATISE ON GOVERNMENT AND CONSTITUTIONAL LAW—BEING AN INQUIRY INTO THE SOURCE AND LIMITATIONS OF GOVERNMENTAL AUTHORITY ACCORDING TO THE AMERICAN THEORY (1867).

411. The good of the republic is the supreme law.

> without the consent of the owner, nor in time of war, but in the manner prescribed by law.[412]

Tiffany's prewar antislavery writings had used the individual right in the Second Amendment as an argument against slavery.[413] After the war, he construed the Second Amendment *in pari materia* with the Third Amendment, which no one[414] disputes is an individual right.[415]

2. *Timothy Farrar*

Antislavery attorney Timothy Farrar had been the law partner of Daniel Webster,[416] and also part of a group of trustees of Dartmouth college who modernized the curriculum.[417] By the time he wrote his 1867 *Manual of the Constitution of the United States*,[418] he had risen to the bench.

> Farrar was a respected figure, and his views were widely known. An Ohio congressman, Judge William Lawrence, cited Farrar's 1867 treatise as authority to defend the constitutionality of the 1866 Civil Rights Act. Historians have praised Farrar's abilities and noted his influence on national leaders during the Civil War and Reconstruction as well as his role "help[ing] to define clearly public attitudes on the nature and purpose of the Constitution."[419]

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412. TIFFANY, *supra* note 410, at 394-95.

413. *See supra* note 309 and accompanying text.

414. Well, almost no one. Garry Wills contends that the Third Amendment has no legally meaningful content. *See* Wills, *supra* note 5, at 72. *But see* Powe, *supra* note 1, at 1361 (responding to Wills on the Third Amendment).

415. Tiffany's broad theory of martial law (allowing suspension of the Second or Third Amendment during war), which was no doubt influenced by Lincoln's aggressive and arguably unconstitutional use of martial law powers during the Civil War, might reasonably be questioned. The Third Amendment specifically provides for circumstances of war, and the *habeas corpus* clause states that it may be suspended during martial law. The provision for suspension of *habeas corpus* during martial law implies that other constitutional rights, for which there are no suspension provisions, may not be suspended during martial law.

416. *See* Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 83-84 n.158 (1993).

417. *See* Paul D. Carrington, *The Revolutionary Idea of University Legal Education*, 31 WM. & MARY L. REV. 527, 562 (1990).

418. TIMOTHY FARRAR, MANUAL OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA (Boston, Little, Brown 1867).

419. Aynes, *supra* note 416, at 85 (alteration in original) (citations omitted).

Taking an expansive view of constitutional rights, similar to the one shared by Fourteenth Amendment sponsor Jonathan Bingham,[420] Farrar wrote:

> The States are recognized as governments, and, when their own constitutions permit, may do as they please; provided they do not interfere with the Constitution and laws of the United States, or with the civil or natural rights of the people recognized thereby, and held in conformity to them. The right of every person to "life, liberty, and property," "to keep and bear arms," to the "writ of *habeas corpus*," to "trial by jury," and divers others, are recognized by, and held under, the Constitution of the United States, and cannot be infringed by individuals or States, or even by the government itself.[421]

In the chapter on "State Disabilities," Farrar first listed the provisions on the main text of the Constitution forbidding acts which infringe civil liberty (such as the prohibition on Bills of Attainder).[422] He then observed:

> Many subjects are similarly restricted in the constitutional amendments of which the following are examples: The free exercise of religion; . . . the right of the people to assemble and petition the government; the right of the people to keep and bear arms; the right of the people to be secure in their persons, houses, papers and effects . . . . [These] acknowledged constitutional rights of the people must be protected by the government, not only against their own wrongdoing, but against any other agency in the land.[423]

He argued that the federal government has no right "to put a citizen to the rack" nor "to permit a village magistrate to do the same thing, under the pretended authority of a State law. And so of every other prohibition in the catalogue."[424]

Thus, Farrar (like Lysander Spooner but unlike Jonathan Bingham) believed that the Bill of Rights, including the enumerated right of a person to keep and bear arms, was enforceable against the states even without the Fourteenth

420. *See id.* at 83.
421. FARRAR, *supra* note 418, at 145.
422. *See id.* at 512-13.
423. *Id.* at 513-14.
424. *Id.* at 514.

Amendment.[425] What is relevant for our purposes is not whether this theory of the direct application of the Bill of Rights to the states was correct, but that the right to arms was treated as one of the important individual rights guaranteed by the Constitution.

In another chapter, Farrar argued that many constitutional provisions forbid the government to perform acts which it has no positive power to perform anyway.[426] Pointing to the constitutional prohibition against the granting of titles of nobility, Farrar noted that even without the prohibition, Congress had no power to confer honorable titles.[427] Likewise, the First Amendment prohibits Congressional establishment of religion and Congressional interference with free exercise of religion, peaceable assembly, or the right to petition. But what

> specific power mentioned in any part of the Constitution,
>
> authorizes Congress to touch any one of these subjects, for any purpose whatever? Why, then, restrict the power? So of "the right to keep and bear arms," and divers other valuable common-law rights. Obviously they are all carefully guarded; because under the general powers of the government to provide for the common defence, the general welfare, and the blessings of liberty, and to do any thing necessary and proper for those purposes, nothing could be said to be beyond the legitimate claims of an agent charged with these duties.[428]

Farrar was wrong in guessing which particular clauses of the Constitution would be used to twist the limited powers given to Congress into unlimited power. It was perhaps beyond the contemplation of any mid-nineteenth century legal scholar that the federal powers to tax and to regulate interstate commerce would be twisted into power to regulate on any subject whatsoever. Regardless of the textual source of the abuse of Congressional power, however, the First and Second

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425. *See* Aynes, *supra* note 416, at 84. Farrar recognized *Barron v. Baltimore*, but argued that Justice Johnson's opinion in *Houston v. Moore* had suggested that the Fifth Amendment is applicable to the states. *See id.;* Houston v. Moore, 18 U.S. (5 Wheat.) 1, 33-34 (1820) (separate opinion of Johnson, J.).

426. William Rawle and St. George Tucker made a similar point: even without the limitation created by the Second Amendment, the federal government had no power to enact antigun laws. *See also supra* notes 62-66, 96 and accompanying text.

427. *See* FARRAR, *supra* note 418, at 285.

428. *Id.* at 286.

Amendments were construed by Farrar as nearly identical clauses, protecting important personal rights from an overweening central government.

3. *George W. Paschal*

A "leading Texas lawyer"[429] and staunch Unionist, George W. Paschal was arrested by the Confederate government of Texas during the Civil War. Although he had served on the Arkansas Supreme Court,[430] he spent many of his postwar years in Washington, D.C., where he helped found the Georgetown University Law School, wrote books on various legal topics,[431] and was one of the "leading practitioners" before the Supreme Court.[432] He authored *The Constitution of the United States Defined and Carefully Annotated* in 1868.[433] The treatise was "an important addition to nationalist constitutionalism."[434] Representative Jonathan Bingham "endorsed Paschal's treatise" on several occasions, even urging the House of Representatives to purchase ten thousand copies.[435] Representative (and future President) James A. Garfield cited Paschal on the floor of Congress, as did Representative William Lawrence, Senator George Vickers, and Senator Lyman Trumbell.[436] Supreme Court Justice Samuel Freeman Miller called Paschal's treatise a "very valuable work."[437]

After quoting the Second Amendment, Paschal wrote:

> This clause has reference to a free government, and is based on the idea, that the people cannot be oppressed or enslaved, who are not first disarmed.

429. Charles Fairman, *Reconstruction and Reunion, 1864-1888*, *in* 6 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 632 (Paul A. Freund ed., 1971).

430. *See* Aynes, *supra* note 416, at 86 n.174.

431. *See, e.g.*, GEORGE W. PASCHAL, PASCHAL'S ANNOTATED DIGEST (1868).

432. Charles Fairman, *Reconstruction and Reunion, 1864-1888*, at 3-4, *in* 7 HISTORY OF THE SUPREME COURT OF THE UNITED STATES (Paul A. Freund & Stanely Katz eds., 1987).

433. GEORGE W. PASCHAL, THE CONSTITUTION OF THE UNITED STATES DEFINED AND CAREFULLY ANNOTATED (Washington, D.C., W.H. & O.H. Morrison 1868).

434. HAROLD M. HYMAN, A MORE PERFECT UNION 517 (1973).

435. Aynes, *supra* note 416, at 87.

436. *See id*.

437. SAMUEL FREEMAN MILLER, THE CONSTITUTION OF THE UNITED STATES 34 (1880).

> The President, by order, disbanded the volunteer companies of the District of Columbia, in November, 1867. His right to do so has been denied.[438]

Paschal cited Tucker's *Blackstone*, Rawle's *Treatise*, and the Texas case allowing an enhanced penalty for use of a bowie knife in a manslaughter.[439]

Paschal's discussion of the militia clauses in Article I was more extensive, as he thoroughly covered what had grown to be an extensive body of case law, governing topics such as when the militia could be called out and the parameters of federal control over the militia.[440] The Militia, he said, consists "of the able-bodied male inhabitants of a prescribed age . . . the body of arms-bearing citizens, as contradistiguinshed from the regular army."[441]

4. *Joel Bishop*

Joel Prentiss Bishop authored important treatises on criminal law, and in those treatises addressed criminal law-related constitutional issues in passing. The 1865 third edition of *Commentaries on the Criminal Law* and the 1873 first edition of *Commentaries on the law of Statutory Crimes* contained identical discussions of the Second Amendment: "This provision is found among the amendments; and, though most of the amendments are restrictions on the General Government alone, not on the States, this one seems to be of a nature to bind both the State and National legislatures; and doubtless it does."[442]

Bishop obviously adhered to the Standard Model individual rights view; he viewed the Second Amendment as a restriction

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438. PASCHAL, *supra* note 433, at 256 (citations omitted).

439. *See* Cockrum v. State, 24 Tex. 394 (1859). The first paragraph of Paschal's exposition is taken from *Cockrum*.

440. *See* PASCHAL, *supra* note 433, at 133-36.

441. *Id.* at 133, 135.

442. JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF STATUTORY CRIMES § 792, at 497 (1873) [hereinafter BISHOP, STATUTORY CRIMES]; *see also* 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 124, at 73 (3d ed. 1865)[hereinafter BISHOP, CRIMINAL LAW]. Bishop was a leading founder of the late nineteenth century "classical" approach to law, although his contribution has been unjustly overshadowed by Langdell and other Harvard professors. *See* Stephen A. Siegel, *Joel Bishop's Orthodoxy*, 13 LAW & HIST. REV. 215-16 (1995).

on state governments, not a protection of state governments against the federal government. Bishop continued:

> As to its interpretation, if we look to this question in the light of juridical reason, without the aid of specific authority, we shall be led to the conclusion, that the provision protects only the right to "keep" such "arms" as are used for purposes of war, in distinction from those which are employed in quarrels, brawls, and fights between maddened individuals; since such, only, are properly known by the name of "arms;" and such, only, are adapted to promote "the security of a free State."[443]

Bishop thus followed the dominant line of state constitutional case law, excluding certain weapons from the scope of the right. Next, Bishop articulated the nineteenth century's most restrictive reading of the Second Amendment right to bear arms in a scholarly treatise, although Bishop acknowledged that there was contrary case law:

> In like manner, the right to "bear" arms refers merely to the military way of using them, not to their use in bravado and affray. Still, the Georgia tribunal seems to have held, that a statute prohibiting the open wearing of arms upon the person violates this provision of the Constitution, though a statute against wearing of the arms concealed does not.[444] And, in accord with the latter branch of this Georgia doctrine, the Louisiana court has laid it down, that the statute against carrying concealed weapons does not infringe the constitutional right of the people to keep and bear arms; for this statute is a measure of police, prohibiting only a particular mode of bearing arms, found dangerous to the community.[445]

Bishop's contrast between bearing arms in "the military way" versus using them for "bravado and affray" (such as

443. BISHOP, STATUTORY CRIMES, *supra* note 442, § 792, at 497; *see also* 1 BISHOP, CRIMINAL LAW, *supra* note 442, § 124, at 73-74.

444. Here Bishop cited *Nunn v. State*, 1 Ga. 243 (1847) (discussing an individual Second Amendment right to carry unconcealed guns for personal defense), and *Stockdale v. State*, 32 Ga. 225 (1861) (decision of Confederate state court) (reasoning that a person does not violate law against concealed carry if part of the gun is visible).

445. BISHOP, STATUTORY CRIMES, *supra* note 442, § 792, at 497-98 (citing *State v. Jumel*, 13 La. Ann. 399 (1858), which explained that the Second Amendment guarantees an individual right to carry for personal defense, but not to concealed carry).

shooting them off at New Year's, or using them in duels), does not explicitly state Bishop's views on carrying guns for personal defense. But Bishop's acknowledgment of *Nunn v. State* (a case guaranteeing a right to carry unconcealed firearms for personal protection) as a case contrary to Bishop's own position suggests that Bishop opposed gun carrying for personal defense.[446]

Read in the most restrictive light possible, Bishop's treatise suggests: (1) the Second Amendment guarantees a right of individuals to own guns; (2) the right's sole purpose was insurrection against tyranny; (3) the arms which could be kept included only arms suitable for warfare; and (4) the right to "bear" arms included only the right to carry arms in public during militia activity.

There is no nineteenth century commentator who appears more dubious about the Second Amendment than Bishop. All of the restrictions articulated by Bishop were, at the least, well-grounded in at least one branch of nineteenth century case law. It is important to recognize that, as restrictive as Bishop's approach is, it is clearly an individual rights one, comfortably within the Standard Model.

The 1901 edition of *Statutory Crimes* condensed the Second Amendment discussion, emphasizing that the Second Amendment is "declaratory of personal rights" but (like most of the rest of the Bill of Rights) does not bind the states:

> It is among the older amendments, most of which are held to be restrictions on the national power, and not to bind the states. This one is declaratory of personal rights, so also are some of the others which are adjudged not to extend to the states; and, contrary perhaps to some former views, it is now settled in authority that this provision has no relevancy to state legislation.[447]

5. *John Norton Pomeroy*

New York University law professor John Norton Pomeroy was "one of the ten top law teachers in nineteenth century

446. To put the mere possession of guns for home defense within the scope of "bravado and affray" would require a very elastic reading of Bishop's words.

447. JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF STATUTORY CRIMES § 792, at 536 (3d ed. 1901).

America."[448] Pomeroy moved to California, where he led the founding of the Hastings College of Law[449] (the first three-year law school in the American West),[450] and served as the reporter for the California Supreme Court. His treatise on equity endured for decades as the leading authority on the subject,[451] and his treatises on municipal law, contracts, water law, and other subjects were also important, continuing for many editions.[452]

But of all Pomeroy's books, the one that was apparently most in demand was *An Introduction to the Constitutional Law of the United States*.[453] First published in 1870, the book went through eight editions until Pomeroy's death in 1885,[454] plus a posthumous edition in 1888.[455] Pomeroy's constitutional treatise was known nationally and used as a textbook at West Point and other colleges.[456]

Prefatory to his discussion of the clauses of the Bill of Rights following the First Amendment, Pomeroy stated, "[W]hatever construction is given to these clauses, will also

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448. THOMAS GARDEN BARNES, HASTINGS COLLEGE OF LAW: THE FIRST CENTURY 89 (1978).

449. *See* Barbara Allen Babcock, *Clara Shortridge Foltz: "First Woman"*, 28 VAL. U. L. REV. 1231, 1266 (1988).

450. *See* Siegel, *supra* note 379, at 1453 n.89.

451. *See* JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE (5th ed. 1941); JOHN NORTON POMEROY, POMEROY'S EQUITABLE REMEDIES (1919); Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 27 n.63 (1989) ("Many considered his treatise on equity jurisprudence . . . the leading work on the subject during the late nineteenth and early twentieth centuries.").

452. *See* JOHN NORTON POMEROY, AN INTRODUCTION TO MUNICIPAL LAW (2d ed. 1886); JOHN NORTON POMEROY, A TREATISE ON THE LAW OF WATER RIGHTS (1893); JOHN NORTON POMEROY, A TREATISE ON THE SPECIFIC PERFORMANCE OF CONTRACTS (2d ed. 1874); JOHN NORTON POMEROY, CODE REMEDIES (4th ed. 1904); JOHN NORTON POMEROY, LECTURES ON INTERNATIONAL LAW IN TIME OF PEACE (1886); JOHN NORTON POMEROY, REMEDIES AND REMEDIAL RIGHTS BY THE CIVIL ACTION ACCORDING TO THE REFORMED AMERICAN PROCEDURE (3d ed. 1894). The *Code Remedies* book "was the seminal late nineteenth century work on that subject." Bone, *supra* note 451, at 27 n.63.

453. JOHN POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES (1870).

454. *See* JOHN POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES (8th ed. 1885); Bone, *supra* note 451, at 27 n.63 (year of Pomeroy's death).

455. *See* Siegal, *supra* note 379, at 1469 n.201.

456. *See* Aynes, *supra* note 416, at 90.

apply to the same or similar provisions in the state constitutions."[457] He wrote:

> 1. The right of the people to keep and bear arms. The object of this clause is to secure a well-regulated militia. It has always been the policy of free governments to dispense, as far as possible, with standing armies, and to rely for their defence, both against foreign invasion and domestic turbulence, upon the militia. Regular armies have always been associated with despotism. But a militia would be useless unless citizens were allowed to exercise themselves in the use of warlike weapons. To preserve this privilege, and to secure to the people the ability to oppose themselves in military force against usurpations of the government, as well as against enemies from without, that government is forbidden by any law or proceeding to invade or destroy the right to keep and bear arms. But all such provisions, all such guarantees, must be construed with reference to their intent and design. This constitutional inhibition is certainly not violated by laws forbidding persons to carry dangerous or concealed weapons, or laws forbidding the accumulation of quantities of arms with the design to use them in a riotous or seditious manner. The clause is analogous to the one securing freedom of speech and of the press. Freedom, not license, is secured; the fair use, not the libelous abuse, is protected.[458]

Pomeroy's analysis succinctly distills the nineteenth century Standard Model. Standing armies were still considered dangerous. The militia was to be secured by guaranteeing a right of individual citizens "to exercise themselves in the use of warlike weapons."[459] Like Joseph Story, Pomeroy saw nothing inconsistent with the role of the people's militia in suppressing "domestic turbulence" and the Second Amendment's purpose "to secure to the people the ability to oppose themselves in military force against usurpations of the government."[460] Republican order could be disturbed by domestic riots or domestic tyrants; the Second Amendment was to ensure the defeat of both.

457. POMEROY, *supra* note 454, at 152.
458. *Id.* at 152-53.
459. *Id.* at 152.
460. *Id.*; *cf.* 3 STORY, *supra* note 106, at 746-47.

To Pomeroy, the essence of the nation was the people of the United States, not the government they had erected.[461] Therefore, the people's sovereignty "still potentially exist[s] in the nation, ready to be called forth whenever the people shall see fit . . . to put their inherent, paramount force in motion."[462] Consistent with *Cruikshank*, Pomeroy saw the limitations expressed in the Bill of Rights not as grants by the government of certain rights to the people, but instead as safeguards created by the people

> to protect the private rights which exist anterior to all governments . . . these limitations, I say, are the very portions of the constitution which, more than all others, should receive a broad, extensive, liberal interpretation in favor of the citizen against the government[]. All experience shows that these fundamental rights are the most exposed to injurious legislation; and it often needs the whole moral force of the judiciary to shield them from invasion.[463]

Pomeroy, consistent with explicit state constitutional provisions and state case law from the post-war years, thought there were exceptions to the right to arms: carrying concealed weapons and seditious accumulation of weapons. These exceptions, which only make sense as exceptions to an individual right, not to a state government right, are the exceptions which prove the rule: the Second Amendment, like the First Amendment, is an individual right, but abuse of the right is not constitutionally protected.

6. *Oliver Wendell Holmes, Jr., and James Kent*

Oliver Wendell Holmes, Jr., was a distinguished legal scholar and professor of law at Harvard. Serving on the Massachusetts Supreme Judicial Court, he became one of the most important judges of the nineteenth century. His three decades of service on the United States Supreme Court have

461. "The people themselves, the entire mass of persons who compose the political society, are the true nation, the final, permanent depository of all power. The organized government, whatever be its form and character, is but the creature and servant of the political unit . . . ." JOHN POMEROY, AN INTRODUCTION TO CONSTITUTIONAL LAW OF THE UNITED STATES 28 (9th ed. 1888).

462. *Id.* at 220.

463. *Id.* at 718.

made him the most widely remembered legal scholar from the nineteenth century. But in 1873, Holmes was only at the beginning of his legal career when his first book was published, an annotated edition of Chancellor James Kent's *Commentaries on American Law*.[464]

Chancellor Kent's multi-volume commentaries, first published in 1826, had displaced Tucker's *American Blackstone* as the leading American law book. Kent's *Commentaries* had systematically discussed the main body of the Constitution, including the Congressional militia powers.[465] The *Commentaries* did not include a systematic analysis of amendments to the Constitution, and Kent said nothing about the Second Amendment, although he did extol self-defense as one of the absolute rights of American citizens. Americans have "the natural right of self-defence, in all those cases in which the law is either too slow or too feeble to stay the hand of violence."[466] Kent explained that homicide in self-defense is justifiable, not merely excusable, and that the right to self-defense "cannot be superseded by the law of society."[467]

Holmes added his own annotations to Kent's *Commentaries*, and Holmes did address the right to arms. In a discussion of the police power, Holmes observed:

> As the Constitution of the United States, and the constitutions of several of the states, in terms more or less comprehensive, declare the right of the people to keep and bear arms, it has been a subject of grave discussion, in some of the state courts,

464. JAMES KENT, COMMENTARIES ON AMERICAN LAW (O.W. Holmes, Jr. ed., Boston, Little, Brown 12th ed. 1873).

465. *See* 1 *id*. at *262-67. All citations to Kent use the star pagination system, which is keyed to the first edition.

466. 2 *id*. at *15.

467. *Id*. Lawrence Cress uses the fact that "James Kent does not mention the right to bear arms among the individual rights guaranteed in English tradition and American law" to bolster the argument that the Second Amendment protects the authority of state governments, not the right of individuals. Cress, *supra* note 2, at 42 n.48. Cress cites Kent's discussion of personal rights in the second volume of the *Commentaries* on pages 1-13. *See id.* But in fact, there are many individual constitutional rights which Kent did not mention in these pages, such as the right to assemble, the right to petition, and protection from unreasonable searches and seizures. Cress's citation to Kent terminates in the middle of Kent's discussion of personal rights, rather than at the end of a section. Cress thereby avoids directing the reader's attention to the last full page of the section, in which Kent discussed and praised the individual right to self-defense.

> whether a statute prohibiting persons, when not on a journey, or as travellers, from *wearing or carrying concealed weapons*, be constitutional. There has been a great difference of opinion on the question.[468]

Holmes then noted the states and cases where such restrictions had been found unconstitutional (Kentucky, Tennessee, and Mississippi) and the states where such restrictions had been upheld (Indiana, Alabama, and Arkansas). Holmes concluded with his own opinion that "[a]s the practice of carrying concealed weapons has been often so atrociously abused, it would be very desirable, on principles of public policy, that the respective legislatures should have the competent power to secure the public peace, and guard against personal violence by such a precautionary provision."[469]

Holmes, like James Kent, Thomas Cooley, and Joseph Story, earned a place on Roscoe Pound's list of the ten greatest American judges.[470] As a jurist, Holmes made two more contributions to self-defense jurisprudence. In *Patsone v. Pennsylvania*, he upheld a state statute which barred aliens from possessing rifles and shotguns.[471] Holmes observed that the purpose of the statute was to preserve the game for consumption by Americans.[472] And he explained that the statute "does not extend to weapons such as pistols that may be supposed to be needed occasionally for self-defence."[473]

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468. 2 KENT, *supra* note 464, at *340 n.2.

469. *Id.*

470. *See* POUND, *supra* note 380, at 30 n.2.

471. *See* Patsone v. Pennsylvania, 232 U.S. 138 (1914).

472. *See id.* at 143. Holmes cited several cases affirming state authority to control the taking of game: *Lawton v. Steele*, 152 U.S. 133 (1894) (holding that a ban on the use of nets for fishing on rivers is within police power; the preservation of game is a core component of the police power); *Silz v. Hesterberg*, 211 U.S. 31 (1908) (holding that the fourteenth amendment was not violated by a state law banning hunting of certain birds during certain seasons); *Purity Extract Co. v. Lynch*, 226 U.S. 192 (1912) (quoting *Silz* favorably).

In treating *Patsone* as a pure hunting case, Holmes willfully ignored the facts. Despite the legislative declaration, the *Patsone* statute had been passed very shortly after a violent incident involving immigrant mine workers. *See* G. Edward White, *Oliver Wendell Holmes, Jr.*, *in* THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY 225, 228 (Melvin I. Urofsky ed., 1994). The statute was, like earlier English statutes, condemned by Blackstone, Tucker, and Rawle, ostensibly for the preservation of game, but actually for the protection of the existing government. *See supra* notes 36-39, 61, 96, 120 and accompanying text.

473. *Patsone*, 232 U.S. at 143.

But Holmes' most important work in a self-defense case was the 1921 decision *Brown v. United States*.[474] The *Brown* case began at a federal naval yard in Texas. A man named Hermis had twice assaulted Brown with a knife, and warned that the next time, either Hermis or Brown "would go off in a black box."[475] One day, Hermis again attacked Brown with a knife; Brown ran to get his coat, which contained a pistol. Hermis pursued, and Brown shot him four times, killing him. At trial, the judge instructed the jury that Brown had a duty to retreat, if he could do so safely.

Justice Holmes, a legal historian, traced the duty to retreat rule to an earlier period in English history, when the law did not even recognize a legal right of self-defense. "The law has grown," Holmes wrote, "in the direction of rules consistent with human nature."[476] Thus, declared Holmes, there is no legal duty to retreat before using deadly force. Nor should a victim's response to a criminal attack be second-guessed at leisure by a judge: "Detached reflection cannot be demanded in the presence of an uplifted knife."[477]

7. *Editions of* Blackstone

By the late nineteenth century, American law had come a long way from the days when Tucker's *American Blackstone* was the only law book available. But *Blackstone* was still the first treatise read by most would-be lawyers, and the only law book read by some.[478] Thomas Cooley's edition of *Blackstone*,[479] while benefitting from its author's great prestige, was not the only updated edition available. English law professor Herbert Broom[480] and Edward A. Hadley had their own edition, pub

474. 256 U.S. 335 (1921).

475. *Id.* at 342.

476. *Id.* at 343. This echoes Holmes' observation in his classic 1881 book, *The Common Law*, that "[t]he life of the law has not been logic: it has been experience." O.W. HOLMES, JR., THE COMMON LAW (1881).

477. *Brown*, 256 U.S. at 343; *cf.* O.W. Holmes, Jr., *George Otis Shattuck*, *in* THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES 92, 95 (Mark DeWolfe Howe ed., 1962) ("It is one thing to utter a happy phrase from a protected cloister; another to think under fire—to think for action upon which great interests depend.").

478. *See* Carrington, *supra* note 381, at 516.

479. BLACKSTONE, *supra* note 403.

480. Herbert E. Broom authored a number of treatises. *See, e.g.*, HERBERT BROOM, COMMENTARIES ON THE COMMON LAW: DESIGNED AS INTRODUCTORY TO ITS

lished in 1875.[481] The Broom and Hadley annotation about Blackstone's description of the English right to arms quoted the Second Amendment, and pointed out: "The constitutions of several of the states contain a similar clause. The right of carrying arms for self-protection was discussed in *Bliss v. Commonwealth*, 2 Lit. 90; *Nunn v. State*, 1 Kelly, 243; and *Ely v. Thompson*, 3 A.K. Marsh. 73."[482] The citations suggest a rather strong prodefense inclination on the part of Broom and Hadley, since they are the three strongest cases from the nineteenth century involving an individual right to arms. *Bliss* declared a law against concealed carry unconstitutional;[483] *Nunn* declared a law against open carrying unconstitutional, while extolling the right to arms;[484] and *Ely* held that free people of color had a right to use force to defend themselves against criminal attacks by whites.[485]

William Draper Lewis was a leading Progressive, the Dean of the University of Pennsylvania Law School, the first Director of the American Law Institute, and one of the attorneys who wrote the American Civil Liberties Union's *amicus* brief in the *Korematsu* case.[486] Lewis's 1897 edition of *Blackstone*, like Broom and Hadley's *Blackstone*, explicated an individual Second Amendment right, but cited *Andrews v. State* to show that concealed carry restrictions were lawful.[487]

STUDY (reprint ed. 1997); HERBERT BROOM, LEGAL MAXIMS (W. J. Byrne ed., 9th ed. 1924); HERBERT BROOM, SELECTION OF LEGAL MAXIMS CLASSIFIED AND ILLUSTRATED (reprint ed. 1971); HERBERT BROOM, THE PHILOSOPHY OF LAW: BEING NOTES OF LECTURES DELIVERED DURING TWENTY-THREE YEARS (1852 TO 1875 IN THE INNER TEMPLE HALL) ADAPTED FOR STUDENTS (reprint ed. 1980); E. HILTON JACKSON & HERBERT BROOM, LATIN FOR LAWYERS (1992) (1915). Broom taught at the Inns of Court, in London. The *Maxims* was "enormously successful" and enjoyed ten editions, from 1845 to 1939. *See* Simpson, *supra* note 96, at 647.

481. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (Herbert Broom & Edward A. Hadley eds., 1875).

482. 1 *id.* at 121 n.64.

483. *See supra* text accompanying note 152.

484. *See supra* text accompanying notes 246-54.

485. *See supra* notes 394-95 and accompanying text.

486. *See* Stephen Botein, *William Draper Lewis*, *in* DICT. AM. BIO., *supra* note 90; Korematsu v. United States, 323 U.S. 214 (1944); *see also* WILLIAM D. LEWIS & A. Q. KEASBEY, MISCELLANEOUS WRITINGS OF THE LATE HON. JOSEPH P. BRADLEY AND A REVIEW OF HIS JUDICIAL RECORD (1886).

487.

> A defence of the right to carry concealed deadly weapons—delivered, however, in a dissenting opinion in Andrews v. State, 3 Heisk. (Tenn.) 199

8. *Theophilus Parsons*

Theophilius Parsons was the son of the renowned Theophilus Parsons, Chief Justice of the Massachusetts Supreme Judicial Court from 1806 to 1813. The younger Parsons was "a successful insurance and admiralty lawyer"[488] who later taught contracts at Harvard Law School.[489] Although Parsons was a poor lecturer,[490] he wrote several treatises,[491] including a very popular one on contract law, which Samuel Williston later took over as revisor and editor.

In 1876, Parsons wrote, for a nonlegal audience, *The Personal and Property Rights of a Citizen of the United States*.[492] Parsons' treatment of the Second Amendment came as part of his three paragraph chapter "Military Rights and Duties." After describing federal militia powers, he wrote:

> "Militia" undoubtedly means the body of arms-bearing citizens, as distinguished from the regular army. In 1863 Congress passed an act declaring that all citizens of the United States, &c., "are hereby declared to constitute the national forces, and shall be liable to perform military duty in the service of the United States, when called out by the President for that purpose." In New York it has been held that this act was unconstitutional, and in Pennsylvania that it was constitutional; both the decisions being by single judges.
>
> The second article of the amendments to the constitution provides that a well-regulated militia being necessary to the

(1871). That the right of carrying arms as secured by the U.S. constitution, and generally by State constitutions, does not include the habitual carrying of concealed deadly weapons by private individuals.

1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 144 n.91 (William Draper Lewis ed., 1897).

488. Paul Finkelman, *Legal Ethics and Fugitive Slaves: The Anthony Burns Case, Judge Loring, and Abolitionist Attorneys*, 17 CARDOZO L. REV. 1793, 1836 (1996).

489. *See* Allen D. Boyer, Book Review, *Logic and Experience: The Origin of Modern American Legal Education*, 80 CORNELL L. REV. 362 (1995).

490. *See* Robert W. Gordon, *The Case For (and Against) Harvard*, 93 MICH. L. REV. 1231, 1233 (1995) (recounting how one student stopped taking notes in Parsons' class in October, writing in his notebook "at this point *Parsons* became *Pathetic*!").

491. *See* E. Allan Farnsworth, *Contracts Scholarship in the Age of the Anthology*, 85 MICH. L. REV. 1406, 1408-09 (1987).

492. THEOPHILUS PARSONS, THE PERSONAL AND PROPERTY RIGHTS OF A CITIZEN OF THE UNITED STATES: HOW TO EXERCISE AND HOW TO PRESERVE THEM (Hartford, S.S. Scranton 1876).

> security of a free State, the right of the people to keep and bear arms shall not be infringed.[493]

Since Parsons has nothing to say about the Second Amendment, other than to quote it, it is difficult to discern his views, if any, on the subject. Thus, he is the only nineteenth century commentator whose statement about the Second Amendment may be said not to take a Standard Model position.

9. A foreigner's vantage: von Holst

In 1886, Dr. Hermann Eduard von Holst, a member of the German Privy Council and professor at the University of Freiburg, authored a treatise on American law for a European audience.[494] After quoting the Second Amendment, he noted that

> It has therefore been argued that the constitutional provision
>
> refers only to arms necessary or suitable for the equipment of militia; although it must not be inferred from this that the right is restricted to those citizens who belong to the militia. As to whether or not the bearing of other arms can be forbidden, judicial decisions are far apart. It is, however, generally admitted that the secret carrying of arms can be prohibited.[495]

Holst also authored an eight-volume treatise entitled, *Constitutional and Political History of the United States*.[496] He devoted several chapters to the pre-Civil War troubles in Kansas and noted, "The governor and the federal dragoons were very active in the discovery and confiscation of arms, although the possession of bearing of arms is a right of every American, guaranteed by the constitution."[497]

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493. *Id.* at 189.

494. *See* H. VON HOLST, THE CONSTITUTIONAL LAW OF THE UNITED STATES OF AMERICA (Alfred Bishop Mason trans., Chicago, Callaghan 1887).

495. *Id.* at 230.

496. H. VON HOLST, THE CONSTITUTIONAL AND POLITICAL HISTORY OF THE UNITED STATES (John J. Lalor trans., Chicago, Callaghan 1885) (first published in 1873, as *Verfassung und Demokratie der Vereinigten Staaten*).

497. 5 *id.* at 306-07. Contrary to the title chosen by the American publisher, the book is really a constitutional history from 1750, with an eye on events leading to the slavery crisis. *See Hermann Edward von Holst*, *in* DICT. AM. BIO., *supra* note 90. Holst had lived in America for many years, after being exiled for writing a pamphlet opposing Prussian dictatorship. His eight volume *opus* was published after he was

10. John Hare

Thus far, none of the late nineteenth century commentators had dealt with *Cruikshank* and *Presser* in much detail. In contrast, Pennsylvania state district judge John Hare's treatise *American Constitutional Law* addressed the Second Amendment exclusively through the lens of two recent Supreme Court cases.[498] Hare wrote:

> [T]he Second Amendment, which declares, "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," neither confers the right so guaranteed nor lays any restraint on the States. They may make any regulation which does not impair the prerogative of the General Government to call forth all citizens capable of bearing arms for the public defence, or disable the people from performing their duty in response to such a behest.
>
> So the right voluntarily to associate as a military company or organization, or to drill and parade with arms, is not an attribute of national citizenship, but may be regulated by each State and forbidden to any company or body of men who are not duly organized for that end, according to her laws or those passed by Congress under the power to provide for organizing, arming, and disciplining the militia. Such a conclusion is the more necessary because the authority of the General Government in this behalf is so limited as to be practically a dead letter; and if it were held to be exclusive of the States, an important arm of national defence and for the suppression of riot and insurrection would be impotent.[499]

The above quotation contains two pinpoint cites to *Presser*.[500]

Hare's next paragraph observed that, similarly, the right to practice law in a state court was not an attribute of national

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allowed to return to Germany; the books' moral fervor and devotion to freedom made them highly readable, in spite of their length. Holst's reputation was of such magnitude that he was chosen to head the History Department at the new University of Chicago in 1892. *See id.*

498. *See* 1 J. I. CLARK HARE, AMERICAN CONSTITUTIONAL LAW (Boston, Little, Brown 1889); *see also* Francis Samuel Philbrick, *John Innes Clark Hare*, *in* Dict. AM. BIO., *supra* note 90.

499. 1 HARE, *supra* note 498, at 521-22 (citations omitted).

500. *See id.*

citizenship, but depended exclusively on the laws of the relevant state.[501] He continued:

> The prohibitory articles of the Constitution were critically considered by Chief-Justice Waite in The United States *v.* Cruikshank in an opinion which gives a clear and consistent view of their operation on the United States, the States, and the people, and defines the limits within which they may be enforced by Congress. The case arose out of an indictment containing numerous counts, drawn under a statute which was held to be invalid because the clauses relied on for its support simply disable the States or the General Government, without imposing any duty or restraint on individuals, and consequently do not afford a ground for penal legislation.[502]

Hare's exposition of *Presser* and *Cruikshank* was fully consistent with the Standard Model. *Presser* removed the Second Amendment as a barrier to state gun control, except to the extent that a state law might interfere with federal militia powers. *Cruikshank* stood for the principle that the Fourteenth Amendment does not grant Congress power to legislate against nongovernmental conduct. The language in the first paragraph that the Second Amendment does not "confer[] the right so guaranteed" tracked *Cruikshank's* language that the Second Amendment (like the First Amendment right of assembly) guaranteed a pre-existing human right, rather than conferring a new right.

11. George Ticknor Curtis

George Ticknor Curtis achieved national fame as the losing lawyer in the *Dred Scott* case.[503] Thereafter, he enjoyed a long career as a Washington lawyer, and frequently practiced before the Supreme Court.[504] George Curtis was also a prodigious author of important treatises on jurisprudence, equity, admiralty, and intellectual property.[505] His modern importance,

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501. *See id.* at 522.

502. *Id.*

503. Scott v. Sanford, 60 U.S. (19 How.) 39 (1856); *see* Carl Russell Fish, *George Ticknor Curtis*, *in* DICT. AM. BIO., *supra* note 90.

504. His brother Benjamin Curtis served on the U.S. Supreme Court.

505. *See* GEORGE TICKNOR CURTIS, A TREATISE ON THE LAW OF COPYRIGHT (1847); GEORGE TICKNOR CURTIS, A TREATISE ON THE LAW OF PATENTS (1849); GEORGE TICKNOR CURTIS, COMMENTARIES ON THE JURISDICTION, PRACTICE, AND PECULIAR

however, is based mainly on his two volume *Constitutional History of the United States: From the Declaration of Independence to the Close of Their Civil War*. "This work is the classic treatment of the Constitution from the Federalist, Websterian point of view."[506]

The creation of the Constitution, and the causes and aftermath of the Civil War were Curtis's primary focus, and his attention to the Bill of Rights was cursory. In his chapter on the Bill of Rights, Curtis focused on the Ninth and Tenth Amendments as limitations of federal power, and offered no elaboration about any of the first eight amendments.[507] But Curtis did plainly treat the Second Amendment as an individual right—one of the "rights of persons"—like the rest of the first eight. Explaining the controversy that led to the creation of the Bill of Rights, Curtis noted that the human rights provisions in the text of the Constitution (such as the prohibition on ex post facto laws) "did not secure the rights of persons as they were provided for in eight of the amendments, and, above all, they did not reach the very important declarations contained in the ninth and tenth."[508] Curtis added that amendments in the Bill of Rights were restrictions only on the federal government, not the states.[509] Volume II contained an annotated appendix, in which Supreme Court case citations were placed next to the provision to which they pertained. The only citation that Curtis gave for the Second Amendment was to *Presser v. Illinois*.[510]

JURISPRUDENCE OF THE COURTS OF THE UNITED STATES (2 vols. 1854 & 1858); GEORGE TICKNOR CURTIS, DIGEST OF CASES ADJUDICATED IN THE COURTS OF ADMIRALTY OF THE UNITED STATES, AND IN THE HIGH COURT OF ADMIRALTY IN ENGLAND (1839); GEORGE TICKNOR CURTIS, EQUITY PRECEDENTS (1850); GEORGE TICKNOR CURTIS, TREATISE ON THE RIGHTS AND DUTIES OF MERCHANT SEAMEN (1841).

506. Fish, *supra* note 503, at ¶ 3.

507. Regarding the Tenth Amendment, Curtis argued that the reservation of power "to the states or to the people" meant the "people" as citizens of particular states, "not the people of the United States, regarded as a mass." 2 GEORGE TICKNOR CURTIS, CONSTITUTIONAL HISTORY OF THE UNITED STATES: FROM THEIR DECLARATION OF INDEPENDENCE TO THE CLOSE OF THEIR CIVIL WAR 160 n.1 (Joseph Culbertson Clayton ed., 1896). Espousing the theory that the Constitution was created by the people through the states—and not by the people of the nation directly—Curtis wrote: "The 'people of the United States,' regarded as a nation, have no powers of government—they have the power to make a *revolution*." *Id.*

508. *Id.* at 155.

509. *See id.* at 159.

510. *See id.* at 491.

12. John C. Ordronaux

The 1890s saw a significant acceleration in the publication of legal treatises. Columbia law professor John Ordronaux, who also held a medical degree, wrote extensively on issues of criminal law and mental health.[511] He also wrote *Constitutional Legislation in the United States* in 1891.[512] Ordronaux stated:

> The right to bear arms has always been the distinctive privilege of freemen. Aside from any necessity of self-protection to the person, it represents among all nations power coupled with the exercise of a certain jurisdiction. From time immemorial the sword has been the sceptre of military sovereignty. From this arose the profession of arms, as a distinctive calling in every age. Exposed as our early colonists were to the attacks of savages, the possession of arms became an indispensable adjunct to the agricultural implements employed in the cultivation of the soil. Men went armed into the fields, and went armed to church. There was always public danger. This was recognized by the laws of the Plymouth Colony, which required that "each person for himself have piece, powder, and shot—viz., a sufficient musket or other serviceable piece for war, with bandeleroes,[513] swords, and other appurtenances for himself, and each man-servant he kept able to bear arms." And another ordinance required that men should go armed to church. Whence it followed that the "embattled farmers"[514] of the Revolution naturally enough

511. *See, e.g.*, JOHN C. ORDRONAUX, COMMENTARIES ON THE LUNACY LAW OF NEW YORK AND ON THE JUDICIAL ASPECTS OF INSANITY AT COMMON LAW AND IN EQUITY (1878); JOHN C. ORDRONAUX, JUDICIAL PROBLEMS RELATING TO THE DISPOSAL OF INSANE CRIMINALS (1881); JOHN C. ORDRONAUX, THE PLEA OF INSANITY AS AN ANSWER TO INDICTMENT (1880); *see also* G. Alder Blumer, *John Ordronaux*, *in* DICT. AM. BIO., *supra* note 90.

512. JOHN ORDRONAUX, CONSTITUTIONAL LEGISLATION IN THE UNITED STATES: ITS ORIGIN, AND APPLICATION TO THE RELATIVE POWERS OF CONGRESS, AND OF STATE LEGISLATURES (1891).

513. Ordronaux was using a Spanish spelling; the English spelling is "bandoliers," meaning "A shoulder-belt for holding ammunition, (*Hist.*) with small cases each containing a charge for a musket, (now) with small loops or pockets for carrying cartridges." 1 THE NEW SHORTER OXFORD ENGLISH DICTIONARY 177 (1993).

514. By the rude bridge that arched the flood,
Their flag to April's breeze unfurled,
Here once the embattled farmers stood,
And fired the shot heard round the world.
Ralph Waldo Emerson, "Concord Hymn" (recited at the completion of the Concord Monument, July 4, 1837).

> became the minute men of Concord and Lexington, and the founders of our national system of militia.[515]

Next, Ordronaux cited *Cruikshank* for the "arms as a natural right" view:

> Therefore, it was not necessary that the right to bear arms should be granted in the Constitution, for it had always existed. It is not in consequence dependent upon that instrument, and is only mentioned therein as a restriction upon the power of the national government against any attempt to infringe it. In other words, it is a right secured and not created.[516]

Without citing *Presser*, Ordronaux stated that "this prohibition is not upon the States, whose citizens are left free in respect to the extent of their enjoyment or limitation of the right."[517]

Because "arms" were meant "in its military sense alone," states could regulate the carrying of arms. "Thus, the carrying of *concealed* weapons may be absolutely prohibited without the infringement of any constitutional right, while a statute forbidding the bearing of arms openly would be such an infringement."[518] Further, states could require permits for armed assemblies in public, or for the carrying of concealed

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515. ORDRONAUX, *supra* note 512, at 241-42 (footnotes omitted). For the last sentence, Ordononaux cited a letter by John Adams. John Adams, *Letter to Abbé Mably*, *in* 5 WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES: WITH A LIFE OF THE AUTHOR 495 (Charles Francis Adams ed., 1850-56), *also cited in* ORDRONAUX, *supra* note 512, at 242 n.2.

516. ORDRONAUX, *supra* note 512, at 242. Besides *Cruikshank*, Ordronaux cited *State v. Hewson* [sic "Newsom"], 27 N.C. 350, 5 Ired. 35 (1844) (upholding a law against possession of weapons by free people of color, since they are not parties to the constitutional compact); and *Fife v. State*, 31 Ark. 455 (1876) for the natural right proposition. *See id.* at 242 n.3.

517. *Id.* at 242.

518. *Id.* at 242-43 (emphasis in original).

weapons by even a single person.[519] Ordronaux concluded with a paragraph summarizing state and federal militia powers.[520]

Modern scholars might quibble with some of Ordronaux's historical details. We now know, for example, that the Minutemen were not the same as the militia; the Minutemen were a smaller group, who received extra training.[521] The issue for this article, though, is not whether Ordronaux and his fellow scholars were right in every detail, but what the legal scholars thought about the Second Amendment. Ordronaux, with a high degree of enthusiasm, joins the unanimous opinion of other nineteenth century scholars in viewing the Second Amendment as an individual right. Like the Reconstruction Congresses, but unlike Bishop, Ordronaux exulted the Second Amendment not just for resistance to tyranny, but for self-defense.

13. Samuel Freeman Miller and J.C. Bancroft Davis

After practicing medicine in Kentucky for twelve years, Samuel Freeman Miller became an attorney, moved to Iowa, helped found the nascent Republican party in that state, and became friends with another attorney interested in Republican politics—Abraham Lincoln.[522] Appointed to the Supreme Court by President Lincoln in 1862, Justice Miller served until his death in 1890. Throughout his tenure, he was a strong opponent of allowing use of the Fourteenth Amendment to protect human rights. He lectured on the Constitution at the

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519. *See id.* at 243 (citing Presser v. Illinois, 116 U.S. 252 (1886) (holding that the Second Amendment is not a limit on state government); Nunn v. State, 1 Ga. 243 (1847) (holding that the Second Amendment guarantees an individual right to carry arms for personal defense, but not to carry concealed); State v. Jumel, 13 La. Ann. 399 (1858) (same holding as *Nunn*); State v. Smith, 11 La. Ann. 633, 66 Am. Dec. 208 (1856) (same holding as *Nunn*); State v. Chandler, 5 La. Ann. 489 (1850) (same holding as *Nunn*); Andrews v. State, 50 Tenn. (3 Heisk.) 165 (1872) (establishing an individual Second Amendment right to carry unconcealed arms for personal defense; the Amendment encompasses all arms usable in "civilized warfare")).

520. *See* ORDRONAUX, *supra* note 512, at 243.

521. *See* JOHN R. GALVIN, THE MINUTE MEN: THE FIRST FIGHT: MYTHS AND REALITIES OF THE AMERICAN REVOLUTION (1989) (published in conjunction with the Institute of Land Warfare Association of the U.S. Army); ROBERT A. GROSS, THE MINUTEMEN AND THEIR WORLD 59 (1976).

522. *See Physicians in Public Service to America*, POLITICAL STETHOSCOPE, Summer 1996 (visited Feb. 6, 1998) <http://www.ama-assn.org/ad-com/roots/pol_edu/stetho.htm>.

University of Michigan Alumni Day, at a Philadelphia celebration commemorating the Constitution, and ten times at National University Law School in Washington, in the years 1887-1890.[523] After his death, the lectures were collected and published as a book in 1893.[524]

Regarding *Cruikshank*, he cited the case for the proposition that the Seventh Amendment is "a restriction upon the power of Congress, but did not limit the power of the State governments in respect to their own citizens."[525] He did not mention *Presser* in his lectures.

Miller's editor, J.C. Bancroft Davis, wrote an appendix to *Lectures on the Constitution of the United States*, to discuss constitutional provisions which had not been addressed in the Miller lectures.[526] The editor cited *Cruikshank* for the proposition that the Fourteenth Amendment

> simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society. . . . The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more.[527]

On the same page, he cited *Presser* for the statement that the Fourteenth Amendment Privileges and Immunities Clause "does not prevent a State from passing such laws to regulate the privileges and immunities of its own citizens as do not abridge their privileges and immunities as citizens of the United States."[528]

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523. *See* SAMUEL FREEMAN MILLER, LECTURES ON THE CONSTITUTION OF THE UNITED STATES, at v (Fred B. Rothman & Co. 1980) (1893).

524. *See id.*

525. *Id.* at 521.

526. The editor, John Chandler Bancroft Davis, had served as U.S. Minister to Germany from 1874-77, as acting Secretary of State in the Grant administration, as a Judge on the Court of Claims, and as the reporter for the U.S. Supreme Court. *See* Claude Moore Fuess, *John Chandler Bancroft Davis*, *in* DICT. AM. BIO., *supra* note 90; *The Political Graveyard* (visited Feb. 6, 1998) <http://www.potifos.com/tpg/bio/davis.html>; *see generally* JOHN CHANDLER BANCROFT DAVIS, MR. FISH AND THE ALABAMA CLAIMS (1893).

527. MILLER, *supra* note 523, at 661-62.

528. *Id.* at 662.

In a discussion of the militia clauses in Article I of the Constitution, the editor cited *Presser* for the premise that the power retained by states over the militia

> is so complete that a State may, unless restrained by its own constitution, enact laws to prevent any body of men whatever, other than the regularly organized volunteer militia of the State, and the troops of the United States, from associating themselves together as a military company or organization, or to drill or parade with arms in any place within the State, without the consent of the governor of the State.[529]

The description of the first three amendments to the Bill of Rights was terse, consisting of only a paragraph for each amendment. The Second Amendment was explained:

> This provision is a limitation only on the power of Congress, and not upon the power of the States; and, unless restrained by their own constitutions, State legislatures may enact statutes to control and regulate all organizations, drilling and parading of military bodies and associations, except those which are authorized by the militia laws of the United States.[530]

The book concluded with another appendix written by Gherardi Davis, which consisted of the text of the Constitution, with string citation footnotes provided for each constitutional provision. For the Second Amendment,[531] the editor cited *Presser*,[532] *Spies v. Illinois*,[533] and *Eilenbecker v. Plymouth County*.[534]

Spies was the prosecution growing out of the Haymarket Riot, and is discussed below.[535] The only thing the court said about the Second Amendment was: "[t]hat the first ten Articles of Amendment were not intended to limit the powers of the state governments in respect to their own people, but to operate on the National Government alone, was decided more than a half century ago, and that decision has been steadily adhered to

529. *Id.* at 625.
530. *Id.* at 645 (citing Presser v. Illinois, 116 U.S. 252 (1886)).
531. *See id.* at 708 & n.1.
532. Presser v. Illinois, 116 U.S. 252 (1886).
533. 123 U.S. 131 (1887).
534. 134 U.S. 31 (1890).
535. *See infra* text accompanying note 587.

since."[536] The Court also cited *Presser*, *Cruikshank*, and other cases for the proposition.[537] Similarly, *Eilenbecker* held that the Fourteenth Amendment does not apply the Fifth, Sixth, and Eighth Amendments against the states. The case's only reference to the Second Amendment is the following statement: "the first eight articles of the amendments to the Constitution have reference to powers exercised by the government of the United States and not to those of the States."[538] Again, the Court cited *Cruikshank*, *Presser*, and other cases.

14. Henry Campbell Black

Henry Campbell Black is known today by almost every American law student and lawyer as the author of *Black's Law Dictionary*. However, he also authored treatises on a variety of other subjects,[539] including the *Handbook of American Constitutional Law*.[540] In this "celebrated summary of constitutional law,"[541] he wrote:

> RIGHT TO BEAR ARMS
>
> 203. The second amendment to the federal constitution, as well as the constitutions of many of the states, guaranty to the people the right to bear arms.
>
> This is a natural right, not created or granted by the constitutions. The second amendment means no more than that it shall not be denied or infringed by congress or the other

536. *Spies*, 123 U.S. at 166.

537. *See id.*

538. *Eilenbecker*, 134 U.S. at 34.

539. For example, he took over Pomeroy's water law treatise after Pomeroy's death. *See* JOHN NORTON POMEROY, A TREATISE ON THE LAW OF WATER RIGHTS: BEING A REVISED AND ENLARGED EDITION OF "POMEROY ON RIPARIAN RIGHTS," WITH SEVERAL ADDITIONAL CHAPTERS BY HENRY CAMPBELL BLACK (1893); *see also* HENRY CAMPBELL BLACK, A TREATISE ON THE LAW OF INCOME TAXATION UNDER FEDERAL AND STATE LAWS (1913); HENRY CAMPBELL BLACK, A TREATISE ON THE LAW OF JUDGEMENTS (2d ed. 1902); HENRY CAMPBELL BLACK, A TREATISE ON THE RESCISSION OF CONTRACTS AND CANCELLATION OF WRITTEN INSTRUMENTS (2d ed. 1929); HENRY CAMPBELL BLACK, HANDBOOK ON THE LAW OF JUDICIAL PRECEDENTS OR THE SCIENCE OF CASE LAW (1912); HENRY CAMPBELL BLACK, THE RELATION OF THE EXECUTIVE POWER TO LEGISLATION (1919). Starting in 1917, Campbell also edited *The Constitutional Review*, a law review dealing with constitutional issues.

540. HENRY CAMPBELL BLACK, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW (1895). There was a second edition in 1897, and a third printing in 1910.

541. William D. Bader, *Some Thoughts on Blackstone, Precedent, and Originalism*, 19 VT. L. REV. 5, 13 (1994).

> departments of the national government. The amendment is no restriction upon the power of the several states.[542]

As authority, Black cited *Cruikshank*.[543] He continued: "Hence, unless restrained by their own constitutions, the state legislatures may enact laws to control and regulate all military organizations, and the drilling and parading of military bodies and associations, except those which are authorized by the militia laws or the laws of the United States."[544] Black cited *Presser* and a Massachusetts case.[545]

As to the type of arms protected, the arms

> are those of a soldier. They do not include dirks, bowie knives, and such other weapons as are used in brawls, fights, and riots. The citizen has at all times the right to keep arms of modern warfare, if without danger to others, . . . but not such weapons as are only intended to be the instruments of private feuds or vengeance.[546]

He cited some of the standard state cases for this proposition.[547] Lastly, he asserted that prohibitions on carrying concealed weapons are not unconstitutional.[548] Black thus provides another individual rights view, along with the standard exceptions from the late nineteenth century.

15. George S. Boutwell

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542. BLACK, *supra* note 540, at 462-63.

543. *See id.* at 463 n.35.

544. *Id.* at 463.

545. *See* Commonwealth v. Murphy, 44 N.E. 138 (Mass. 1896).

546. BLACK, *supra* note 540, at 463.

547. *See id.* at 463 n.37 (citing English v. State, 35 Tex. 473 (1872); Fife v. State, 31 Ark. 455 (1876); State v. Workman, 14 S.E. 9 (W. Va. 1891)).

548. *See id.* at 463 (citing Haile v. State, 38 Ark. 564 (1882) (upholding a law allowing the carrying of weapons in public only when carried openly in the hand); State v. Wilforth, 74 Mo. 528 (1882) (holding that a concealed weapons law was not unconstitutional because it still allowed open carrying for personal defense); State v. Speller, 86 N.C. 697 (1882) (upholding a concealed weapons law based on express authority to restrict concealed carry in state constitution; noting that the law does not prevent a person from carrying weapons openly for personal protection); Wright v. Commonwealth, 77 Pa. 470 (1875) (holding that the state constitutional right to arms was not infringed by imposition of court costs on a defendant who carried a concealed weapon with malicious intent)).

"[A] sturdy Puritan and politician of sterling virtue,"[549] attorney George S. Boutwell was the "arch-radical" of radical Republicans during the Civil War and Reconstruction.[550] He was elected to the Massachusetts state legislature as a Democrat, and then elected Governor of Massachusetts in 1851 by a coalition of Democrats and Free Soilers. But his vehement opposition to slavery impelled him to become one of the founders of the Massachusetts Republican party.

During the Civil War, Boutwell served as America's first Commissioner of Internal Revenue, and then in the United States House of Representatives from 1863 to 1869. He was one of the Radical Republican leaders in the House, serving on the Joint Committee on Reconstruction, and playing a major role in the shaping and passage of the Fourteenth and Fifteenth Amendments. Boutwell was exceeded by no one in Congress in his determination to use federal power to end slavery and promote civil rights for the freedmen.[551] He was far ahead of his time, proposing an amendment to the Civil Rights Act of 1866 that would have required public schools to be integrated.[552]

President Grant appointed Boutwell Secretary of the Treasury, a post he left in 1873 when he was elected to the Senate. He left the Senate in 1877 when President Hayes appointed him to recodify the statutes of the United States. He produced the Revised Statutes of the United States in 1878. Thereafter, until his death in 1905, he practiced international law in Massachusetts. Boutwell remained active in public affairs, closing his career as President of the Anti-Imperialist League and playing a leading role in the fight against the new American foreign policy created by President McKinley.[553]

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549. James Ford Rhodes, *Ulysses S. Grant, Eighteenth President*, 9 AMERICA 69, 75 (1868), *in* AMERICAN FREEDOM LIBRARY: TODAY'S ISSUES, TRADITIONAL VALUES (CD ROM ed. 1997).

550. John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1440 (1992).

551. *See* THOMAS H. BROWN, GEORGE SEWALL BOUTWELL: HUMAN RIGHTS ADVOCATE 66 (1989); Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 183 (1997).

552. *See* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1071-72 (1995).

553. *See, e.g.*, GEORGE S. BOUTWELL, THE WAR OF DESPOTISM IN THE PHILIPPINE ISLANDS (1899); Henry G. Pearson, *George Sewall Boutwell*, *in* DICT. AM. BIO., *supra* note 90; George S. Boutwell, Imperialism and Anti-Imperialism, Address at Conference of Anti-Imperialists, Boston (May 16, 1899), *available online* <http://home.ican.net/

George Boutwell's *The Constitution of the United States at the End of the First Century* appeared in 1895.[554] Boutwell's chapter on "The Right of the People to Keep and Bear Arms" informed the reader that "the only case of importance" which has arisen under the Second Amendment was *Presser*.[555] After summarizing the case background and pointing out that the Illinois militia statute enrolled able-bodied males between the ages of eighteen and forty-five in the state militia, Boutwell noted that the claim was made that the Illinois statute against armed parades without a permit (excepting parades by the state militia) was challenged under the Second Amendment. But the Supreme Court explained "that the Second Amendment was a guarantee that nothing should be done by the United States in restraint of the right of the people to keep and bear arms, but that the amendment could not be appealed to as limiting the power of the States."[556] Boutwell concluded with *Presser*'s caveat that state gun controls could not disable citizens from performing their federal militia duties.[557]

16. James Schouler

Professor James Schouler essentially founded the legal subject of domestic relations with his 1870 treatise on the topic, a treatise which went through six printings over the next half-century.[558] He also wrote treatises on wills, bailments, and property,[559] and authored a major history of the United

~fjzwick/ailtexts/gsbimper.html>.

554. GEORGE BOUTWELL, THE CONSTITUTION OF THE UNITED STATES AT THE END OF THE FIRST CENTURY (1987) (1895).

555. *Id.* at 358

556. *Id.* at 359.

557. *See id.* at 359-60.

558. *See* JAMES SCHOULER, A TREATISE ON DOMESTIC RELATIONS (1870); JAMES SCHOULER, A TREATISE ON THE LAW OF HUSBAND AND WIFE (1882); JAMES SCHOULER, A TREATISE ON THE LAW OF MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS (6th ed. 1921); *see also* Michael Grossberg, *Balancing Acts: Crisis, Change, and Continuity in American Family Law, 1890-1990*, 28 IND. L. REV. 273, 275 (1995) (noting that "family law had been scattered about the legal landscape" until the "first major compilation" by Schouler).

559. *See* JAMES SCHOULER, A TREATISE ON THE LAW OF BAILMENTS (3d ed. 1897); JAMES SCHOULER, A TREATISE ON THE LAW OF PERSONAL PROPERTY (2d. ed. 1887); JAMES SCHOULER, LAW OF WILLS, EXECUTORS AND ADMINISTRATORS (6th ed. 1921).

States—the first to cover the period between the Revolution and the Civil War in a scholarly manner.[560]

In 1897, Professor James Schouler's series of lectures to graduate students at Johns Hopkins University was published as *Constitutional Studies: State and Federal*.[561] Describing the first eight amendments of the Bill of Rights, Schouler wrote that they "touch the individual and civil rights" and "apply exclusively to Federal jurisdiction and procedure."[562] For the Second Amendment and the Fourth Amendment, Schouler's text did nothing more than quote the amendment in full, offering a sparse commentary in a footnote.[563]

The Second Amendment footnote stated: "In the English Bill of Rights of 1688 was a similar provision as to Protestants, whom the King had disbanded while treating Roman Catholics with favor."[564] The footnote also referred the reader to "State maxims corresponding," in an earlier part of the treatise, dealing with the Virginia Declaration of Rights of 1776.[565]

Explaining the Congressional militia powers, Schouler wrote that States "feared that the Union would weaken each local militia for strengthening the regular army; and hence the reservation here asserted [Article I's reservation of militia training, and the appointment of militia officers to the states], as well as the jealous amendments of 1789."[566] The "jealous amendments" are cited in the footnotes as "Amendments II. and III."[567]

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560. *See* JAMES SCHOULER, HISTORY OF PEOPLE OF THE UNITED STATES OF AMERICA: UNDER THE CONSTITUTION (Dodd, Mead & Co. rev. ed. 1970) (1st pub. 1880-1913, 7 vols.); John H. Latane, *James Schouler*, *in* DICT. AM. BIO., *supra* note 90.

561. JAMES SCHOULER, CONSTITUTIONAL STUDIES: STATE AND FEDERAL (Da Capo Press ed. 1971) (1897).

562. *Id.* at 192.

563. *See id.* at 192-93.

564. *Id.* at 192-93, n.6.

565. The Virginia section of the treatise quoted the Virginia Declaration: "A well-regulated militia is the natural and safe defence of a free state; standing armies in time of peace are dangerous to liberty; and in all cases the military should be strictly subordinate to the civil power." *Id.* at 33. Schouler's footnote added: "See standing army grievances under the King recited in the Declaration of Independence, also English Bill of Rights (Rights 6 and 7). Dependence upon a militia is more strongly asserted than hitherto." *Id.* at 33 n.5.

566. *Id.* at 145-46.

567. *Id.* at 146 n.1.

Like many other late nineteenth century commentators, Schouler took care to emphasize that laws restricting concealed weapons could pass constitutional muster. Describing changes in state constitutions in the middle of the nineteenth century, he wrote: "To the time-honored right of free people to bear arms[568] was now annexed, . . . the qualification that carrying concealed weapons was not to be included."[569] State laws restricting the carrying of concealed weapons apply, obviously, only to individuals, and not to state governments or state militias. If concealed weapons laws are an exception to the right to keep and bear arms, then the right is necessarily an individual right.

17. Home schooling

The "Home Law School Series" of books reminds us of an era when graduation from a law school accredited by the American Bar Association was not necessary for admission to the bar. The *Constitutional Law* book in the series combined the Second and Third Amendments into a single paragraph.[570]

> The provisions of Articles 2 and 3 were intended to protect the people from arbitrary action on the part of government similar to that of the English government in the past. The right of the people to bear arms was a practical recognition of their right to demand with force that the government as constituted observe Constitutional restraints. The right is general, and extends to all citizens, whether enrolled in the militia or not. But it is held that it does not authorize the carrying of weapons that are concealed, and which are chiefly useful in individual encounters.—Cooley, Principles, 3d ed., 299.[571]

568. A footnote here referred the reader to the Second Amendment discussion. *See id.* at 226 n.3.

569. *Id.* at 226. His footnote cited the 1850 Kentucky Constitution. *See id.* at 226 n.4. That Constitution included a right to bear arms provision that specifically excepted concealed carry. *See supra* note 190. This provision was a response to an 1821 Kentucky court decision holding a law against concealed carry to be in violation of the state constitutional right to keep and bear arms. *See supra* note 152 and accompanying text.

570. *See* CHARLES E. CHADMAN, CONSTITUTIONAL LAW, FEDERAL AND STATE: BEING A CLEAR AND COMPLETE ANALYSIS OF THE CONSTITUTION, TOGETHER WITH A SUMMARY OF THE LEADING DECISIONS AND BASIC PRINCIPLES WHICH GO TO MAKE UP THE FUNDAMENTAL LAW OF THE STATE AND NATION (1899).

571. *Id.* at 159.

The paragraph is a rather concise summary of the view of the nineteenth century commentators: the right belongs to all Americans, not just militia members. The purpose of the right is to resist unconstitutional government. The right to bear arms does not extend to the *concealed* carrying of guns, or to weapons unsuitable for resisting tyranny.

18. Civics manuals for youth

While legal texts from the nineteenth century are found in most academic law libraries, books which discuss legal matters for a popular audience are often not. Nor are such books often listed in legal indexes. Thus, the four popular books discussed in this section are likely not the only books from the nineteenth century which were written by and for non-lawyers about legal aspects of American government, including the Second Amendment. But the books do offer at least some insight of how materials for secondary schools and colleges treated the Second Amendment.

Caspar Thomas Hopkins' 1872 book *A Manual of American Ideas* was written to instruct youth in principles of American government.[572] Hopkins listed "*The right to keep and bear arms*" as among "*the rights which are secured to every individual by the Constitutions and laws of the United States*."[573] In a chapter devoted to a denunciation of standing armies, Hopkins explained that one method by which standing armies are kept in check is that "[e]very individual throughout the nation has the Constitutional right to keep and bear arms. This accustoms the people to their use. (This right is not allowed by governments that are afraid of the people.)"[574] The state-based militia system was described separately, as a distinct check on standing armies.[575]

The Reverend Joseph Alden's *Alden's Citizen's Manual: A Text-Book on Government for Common Schools* was simpler than the Hopkins book in its approach to many issues. Alden

572. *See* CASPAR THOMAS HOPKINS, A MANUAL OF AMERICAN IDEAS (1872), *available online* <http://moa.umdl.umich.edu/cgi-bin/moa/sgml/moa-idx?notisid=AEW4514>.

573. *Id.* at 49.

574. *Id.* at 177-78.

575. *See id.* at 178-79.

quoted the full text of the Second Amendment in answer to the question "Can the government disarm the people?"[576]

Israel Ward Andrews' 1874 textbook *Manual of the Constitution of the United States* had the same title as Timothy Farrar's 1867 legal treatise, although it is impossible to know if Andrews knew of the Farrar book.[577] Andrews was a highly-regarded professor at Marietta College in Ohio, and his *Manual* was used for many years as a college textbook.[578] Andrews gave a militia-based exposition of the Second Amendment: "The militia are the citizen soldiery of the country, as distinguished from the standing, or regular, army. The militia system has been allowed to fall into partial decay, showing that the people have little fear of need to defend themselves by force of arms against their government."[579] Andrews' *Manual* is not inconsistent with Henigan's theory,[580] since Andrews does not specify who the militia are, or how they are armed. Nor are Andrews' two sentences inconsistent with the mainstream of nineteenth century thought.

Calvin Townsend's 1868 *Analysis of Civil Government* (written as a textbook usable for primary, secondary, and higher education) also offered a militia-centric explanation of the Second Amendment:

> The right of the people to keep and bear arms, with which the General Government is herein prohibited from interfering, refers to an organization of the militia of the States. There have been fears expressed, that the liberty the people might be destroyed by the perverted power of a formidable standing army. But here is the check to any such danger. The militia, that might be called out anytime on a month's notice, would outnumber, twenty to one, any standing army in time of peace

576. JOSEPH ALDEN, ALDEN'S CITIZEN'S MANUAL: A TEXT-BOOK ON GOVERNMENT, FOR COMMON SCHOOLS (New York, Sheldon & Co. 1869), *available online* <http://moa.umdl.umich.edu/cgi-bin/moa/sgml/moa-idx?notisid=AHM4111>. Alden was a professional educator, and the author of over seventy books, most of them didactic and intended for Sunday school or classroom use. *See* Harris Elwood Starr, *Joseph Alden*, *in* DICT. AM. BIO., *supra* note 90.

577. ISRAEL WARD ANDREWS, MANUAL OF THE CONSTITUTION OF THE UNITED STATES (Homer Morris revised ed., N.Y., American Book 1900) (1887).

578. *See* Arthur Grandville Beach, *Israel Ward Andrews*, *in* DICT. AM. BIO., *supra* note 90.

579. ANDREWS, *supra* note 577, at 267.

580. *See supra* notes 3-4 and accompanying text.

> that will ever be tolerated in United States. Large standing armies might indeed be dangerous in a republican government, but for a much stronger force distributed throughout the ranks of the people.[581]

But while Henigan sees the lauding of the militia as inconsistent with an individual right, the nineteenth century did not. Townsend's book included detailed outlines showing the order in which individual topics should be presented. Under the general heading of "Freedom" was the subheading "Civil." The individual topics listed under civil freedom were freedom of speech, freedom of the press, "[t]he right of the people peaceably to assemble and petition the government for redress of grievances" and "[t]he right of the people to keep and bear arms."[582] Townsend listed the right to arms as among the rights of an individual to civil freedom, rather than among the powers of state governments.

19. John Randolph Tucker

The story of nineteenth century legal treatises and the Second Amendment ends where it began, with the Tucker family. John Randolph Tucker was the son of the Henry St. George Tucker (the treatise writer and Virginia judge).[583] John Randolph Tucker served as Attorney General of Virginia, United States Representative, and President of the American Bar Association.[584] He was a Democratic leader in Congress and an ardent defender of the Constitution and its limits on central power.[585] He also taught law at Washington & Lee, bearing as profound an influence on the growth and success of that school as Thomas Cooley did at the University of Michigan.[586]

As a private attorney, his most famous trial was the Haymarket case, which grew out of an 1886 confrontation

581. CALVIN TOWNSEND, ANALYSIS OF CIVIL GOVERNMENT 224 (1868).

582. *Id.* at 91.

583. *See* 1 JOHN RANDOLPH TUCKER, THE CONSTITUTION OF THE UNITED STATES, at v (Fred B. Rothman & Co. 1981) (1899). For a discussion of Henry St. George Tucker, see *supra* notes 136-49 and accompanying text.

584. *See* Halbrook, *supra* note 19, at 33.

585. "It is unfashionable, I know to stickle for the Constitution," he once said. 49 CONG. REC., 1st Sess., app. at 59 (1886); *see* William G. Bean, *John Randolph Tucker*, *in* DICT. AM. BIO., *supra* note 90.

586. *See* Carrington, *supra* note 19, at 333.

between strikers and a violent police force.[587] Tucker argued to the Supreme Court that the Privileges and Immunities Clause of the Fourteenth Amendment made all of the Bill of Rights (including, of course, the Second Amendment) enforceable against the states, and therefore, the Haymarket defendants were entitled to a reversal of their convictions, based on the violation of the rights against self-incrimination and on their right to an impartial jury. Tucker pointed to Congressional debates on the Fourteenth Amendment, argued that *Cruikshank* supported his position, and suggested that *Presser* merely stood for the proposition that armed parades could be prohibited. The Supreme Court, however, managed to sidestep the whole issue, by pointing out that the objections raised by Tucker in the Supreme Court had not been raised by the Haymarket defendants' attorney at trial. Tucker's arguments concerning the Fourteenth Amendment were adopted in 1892 by Justices Field, Harlan, and Bradley.[588]

John Randolph Tucker continued teaching at Washington & Lee throughout his 1876-88 tenure in Congress. Upon retirement from Congress he resumed full-time law teaching and began writing a treatise on constitutional law. Elected President of the American Bar Association in 1892, Tucker was not able to see his treatise through to publication before his death in 1897. His son, Henry St. George Tucker II (also a law professor at Washington & Lee, and a future Congressman) brought the manuscript to completion, without making editorial changes, in 1899.[589] John Randolph Tucker explained the Second Amendment:

> This prohibition indicates that the security of liberty against the tyrannical tendency of government is only to be found in the right of the people to keep and bear arms in resisting the wrongs of government.[590] The case of *Presser v.*

587. *See* Spies v. Illinois, 123 U.S. 131 (1887). At a meeting called to protest the killing of strikers by police, someone threw a bomb into a group of policemen.

588. *See* O'Neil v. Vermont, 144 U.S. 323, 361 (1892) (Field, J., dissenting, joined by Harlan, J., and Bradley, J.) ("[A]fter much reflection I think the definition given at one time before this court by a distinguished advocate—Mr. John Randolph Tucker, of Virginia—is correct."); *see also* Twining v. New Jersey, 211 U.S. 78, 114-27 (1908) (Harlan, J., dissenting); Maxwell v. Dow, 176 U.S. 581, 605-17 (1900) (Harlan, J., dissenting).

589. *See* 1 JOHN RANDOLPH TUCKER, *supra* note 583, at vi.

590. The Tuckers' footnote cited *Federalist Nos. 28* and *46*. In *Federalist 46*,

> *Illinois* arose out of an act passed by the State of Illinois prohibiting all bodies of men other than the regularly organized volunteer militia of the state from associating and drilling as such. The Supreme Court held that it did not conflict with this amendment, because the amendment is only a limitation of power on Congress, not on the States.[591]

Thus, Tucker followed standard nineteenth century thought in seeing the Second Amendment as designed to facilitate popular resistance to tyranny. He likewise followed the standard post-*Presser* view that the Second Amendment was not directly applicable to the states.

C. Law Review Articles

So far as the indexes reveal, few nineteenth century law reviews discussed the Second Amendment. For example, the *Albany Law Journal* carried a two-part article about the New York militia law, which did not mention the Second Amendment.[592]

Madison rejoiced in "the advantage of being armed, which the Americans possess over the people of almost every other nation." A national standing army could not, as a practical matter, amount to more than 30,000 men, Madison said. "To these would be opposed a militia amounting to near half a million of citizens with arms in their hands . . . . It may well be doubted whether a militia thus circumscribed could ever be conquered by such a proportion of regular troops." He predicted that the European governments, who were "afraid to trust the people with arms," would be "speedily overturned" if ever opposed by a popular militia directed by locally-controlled governments and officers.

In *Federalist No. 28*, Hamilton outlined one scenario of resistance to

> [t]he enterprises of ambitious rulers in the national councils. If the federal army should be able to quell the resistance of one State, the distant States would have it in their power to make head with fresh forces. The advantages obtained in one place must be abandoned to subdue the opposition in others; and the moment the part which had been reduced to submission was left to itself, its efforts would be renewed, and its resistance revive.

591. 2 JOHN RANDOLPH TUCKER, THE CONSTITUTION OF THE UNITED STATES 671-72, (Henry St. George Tucker ed., 1899); *see also id.* at 853 (citing *Presser* for the proposition that under section 5 of the Fourteenth Amendment, Congress "can take no action . . . to protect a citizen in his rights as a citizen of a State"; citing *Cruikshank* for the proposition that federal constitutional rights belong to a person in his capacity as a citizen of the United States, and that section 5 of the Fourteenth Amendment "does not limit the police powers of the States, nor affect the State organism or its functions").

592. *See* William M. Ivins, *The Status of the Militia in Time of Riot—Part I*, 18 ALB. L.J. 85 (1878); William M. Ivins, Note, *The Status of the Militia in Time of*

One notable exception, however, appeared in the *Kansas Law Journal*. Published in 1885, this article remains to this day one of the most incendiary discussions of militias ever to appear in a law journal.[593] The article opened with sentiments that are commonplace in the militia movement of the 1990s, but rarely seen in law journals. "Devoted to the constitution," began the epigraph quoting Wisconsin Supreme Court Chief Justice Ryan, "we invoke the vengeance of God upon all who raise their sacrilegious hands against it." The author continued by quoting Tocqueville's statement that unless democracy is guarded, "it merges into despotism."[594] The author maintained that Kansas was in fact drifting into despotism, as demonstrated by the new state militia law.[595]

This new Kansas militia law gave local officials the authority to call out the militia, and the author feared that the law would be invoked to suppress peaceful assemblies of political dissidents.[596] Even worse, militia commanders themselves were given unilateral authority to take action.[597] The author theorized that this was particularly dangerous because railroad companies could make their employees militia captains, and then have the militia available as a private army.[598] This new law was said to violate the Kansas Constitution, which gave only the Governor the authority to call out the militia in circumstances far more limited than the militia law authorized.[599]

A strike in the town of Atchison illustrated the danger of the new state militia law. Although the strike ended peacefully, it was learned that both the Mayor and Sheriff of Atchison wrote to the Kansas Governor during the conflict, falsely claiming that the town was in the possession of a violent mob. In their letters, they asked that the Governor call out the militia to break the strike and suppress the mob.[600] If the

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Riot—Part II, 18 ALB. L.J. 107 (1878).

593. *See* G.C. Clemens, *The Militia Law*, 1 KAN. L.J. 261 (1885).

594. *Id.*

595. *See id.* at 261-62.

596. *See id.* at 263.

597. *See id.*

598. *See id.* at 264.

599. *See id.* at 265.

600. *See id.* at 262.

Mayor or Sheriff had possessed unilateral authority to call out the militia, they "would have crimsoned the streets of Atchison with the blood of curious men, women and children, and provoked an insurrection that would have made that city a bloody field of battle."[601]

Moreover, continued the article, the militia created by the new law was a select militia in which only a small class of citizens enlisted; in other words, "a military class to terrorize the community."[602] In contrast:

> The constitutional militia is a thing into which a man grows by reaching his majority—he does not become a member by voluntary enlistment. The intention was that every able-bodied citizen should have a gun in his hands and know how to use it; then none need fear his neighbor nor a despot; while this law puts arms into the hands of *a class*, and leaves the average citizen at their mercy. This law creates a standing army in violation of the Bill of Rights. What element does it lack? And while "the people have the right to bear arms for their defense and security," "standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated." ([Kansas] Bill of Rights, sec. 4.)[603]

The article concluded by urging "some courageous county attorney" to "wrap the stars and stripes about his hand and get hold of this reptile before it hurts somebody."[604] Although the subject of the article was the Kansas State Constitution, not the Second Amendment, the article's sentiments are notable because it is one of only three nineteenth century American law review articles that addressed the militia.

The only nineteenth century law journal article to address the Second Amendment directly is a casenote on *Presser*, in the *Central Law Journal*.[605] The note is a straightforward summary of *Presser*, treating the case as affirming state authority over conduct within its boundaries. The author concluded that "[i]t will no doubt be news to most people, not members of the legal profession, and to many who are," that the Second Amendment

601. *Id.*
602. *Id.*
603. *Id.* at 265-66.
604. *Id.* at 266.
605. *See* Note, *Constitutional Law—Militia—Right to Bear Arms*, 22 CENT. L.J. 411 (1886).

limits only Congress, and provides no protection against state gun laws.[606]

D. Summary of the Late Nineteenth Century Commentators

Some important lessons may be gleaned from the post-Civil War treatises, commentaries, and law review articles. All of them treat the Second Amendment as an individual right. Except for Cooley, none are mentioned anywhere in the anti-individual literature. Some of them limit the individual right to the possession of guns for resisting tyranny, while others explicitly affirm an individual right to own and carry guns for personal protection.

The treatises also list various exceptions to the right to arms, which were also expressed in Supreme Court cases: the right limits only the federal government, not the states (*Presser*[607] and perhaps *Cruikshank*[608]); the right is not infringed by a ban on armed parades on public property (*Presser*);[609] and the right is not infringed by a prohibition on carrying concealed weapons (*Robertson v. Baldwin*).[610]

VII. *FIN-DE-SIÈCLE* AND BEYOND

A. The Supreme Court

The Supreme Court decided two cases involving the Second Amendment in the 1890s.

1. Miller v. Texas

Franklin P. Miller was the white owner of a small store in Dallas who fell in love with a black woman.[611] Because the period just before and after the turn of the century was the

606. *Id.* at 412-13.

607. Presser v. Illinois, 116 U.S. 252 (1886).

608. United States v. Cruikshank, 92 U.S. 542 (1876).

609. *Presser*, 116 U.S. 252.

610. 165 U.S. 275 (1897). For a discussion of the case, see *infra* text accompanying notes 623-25.

611. The discussion of the facts about *Miller* is based on the on-going research of Stephen Halbrook, including the material in STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876, 184-85 (1998).

apex of the horrible Jim Crow era,[612] a white man associating with a black woman often sparked violence in the South. The city police in Dallas heard that Miller was carrying a handgun without a license. The law of the time did not require that a warrant be obtained in order to arrest a person for unlicensed gun carrying. A group of police officers assembled in a local tavern, enjoyed a good session of whiskey drinking, headed over to Miller's store, snuck in a side alley, and then burst into Miller's store with guns drawn.[613]

The evidence is conflicting as to whether Miller thought that the men breaking in with drawn revolvers were criminals or government officials. The evidence is also conflicting about who fired first. In any case, Mr. Miller got off the first good shot, killing one of the intruders. But Miller was outnumbered and captured.

The episode infuriated the people of Dallas. Newspapers raged that a man who loved a "greasy negress" had shot a police officer. A lynch mob attempted to extricate Mr. Miller from jail and hang him on the spot, but they did not succeed. Mr. Miller was able to get a trial before being hanged. At the trial, where defendant Miller was charged with murder, the prosecutor told the jury that Miller had been illegally carrying a gun. Miller was convicted of murdering a police officer. Seeking to stave off execution, Miller filed various appeals (all of which were rejected), finally appealing to the United States Supreme Court. Miller's appeal to the Supreme Court claimed that his Second, Fourth, Fifth, and Fourteenth Amendment rights had been violated.[614] In particular, Miller argued that (1) the Texas statute against concealed carry was invalid; (2) the statute allowing arrest without a warrant was also invalid; and (3) his alleged violation of the carry law should not have been used as an argument by the prosecutor.

The Court disagreed and wrote that "the law of the State [which forbade the carrying of dangerous weapons on the person did not] abridge the privileges or immunities of *citizens*

612. "Jim Crow" was the name of a plantation song; the term was applied to the Southern system of legally-mandated racial segregation.

613. The modern term for this is "dynamic entry."

614. *See* Miller v. Texas, 153 U.S. 535 (1894).

of the United States."[615] Further, "the restrictions of these amendments [Second and Fourth] operate only upon the Federal power."[616]

At first glance, *Miller* would seem to reiterate what was well established by *Cruikshank* and *Presser*. However, the Court muddied the waters by stating that "[i]f the Fourteenth Amendment limited the power of the States as to such rights, as pertaining to the citizens of the United States, we think it was fatal to this claim that it was not set up in the trial court."[617] The neglect to raise the Fourteenth Amendment at trial was also fatal to Miller, and he was executed by the State of Texas.

If the problem with Mr. Miller's Fourteenth Amendment argument was that the argument was not raised at the trial court, then the Fourteenth Amendment issue must logically be one which has not been finally settled. The *Miller* court had said that the Second, Fourth, and Fifth Amendments had no place in state courts, but this language could be read as stating only that the Amendments are not *directly* applicable to the states.

And, in fact, the Court was preparing to move away from earlier holdings that the Fourteenth Amendment did not apply the Bill of Rights to the states. Three years after *Miller*, the Court held the Fifth Amendment (one of the amendments at issue in *Miller*) enforceable against the states.[618] Was *Miller* one of the first hints that the Court was going to start taking the Fourteenth Amendment more seriously after decades of malign neglect?

Halbrook, almost alone among twentieth century commentators, characterizes the nonincorporation language of *Cruikshank* and *Presser* as dicta.[619] Yet the nineteenth century commentators who mentioned *Presser* and *Cruikshank*, as well as the Court in several cases, habitually cited those cases for non-incorporation.[620] On the other hand, not only did *Miller* leave the door open a crack, but the 1891 West Virginia

615. *Id*. at 539.
616. *Id*. at 538.
617. *Id*.
618. *See* Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226 (1897).
619. *See* Halbrook, *Personal Security*, *supra* note 1, at 343-44.
620. *See supra* notes 498-510, 522-48, 583-91 and accompanying text.

Supreme Court case *Workman* applied the Second Amendment directly against the state.[621] John Randolph Tucker, a very highly regarded lawyer, apparently felt that *Preseser* and *Cruikshank* left enough room for him to argue to the Supreme Court—the year after *Presser* was decided—that the whole Bill of Rights was enforceable against the states.[622] Further, in the years between *Cruikshank* and *Presser*, a number of commentators, including Thomas Cooley, viewed the Second Amendment as enforceable against the states.

If *Miller* leaves us unclear about the Fourteenth Amendment, its Second Amendment implications are straightforward. Mr. Miller was a private store owner and never claimed to be part of the Texas militia. Unlike the defendant in *Presser*, Miller was not even acting as part of an unofficial private militia. Under the anti-individualist theory of the Second Amendment, it should have been easy for the Court to deny his Second Amendment claim on the grounds that, as a private citizen, he had nothing to do with the Second Amendment. But instead, the Court simply said that Miller had raised the claim against the wrong government by invoking the Second Amendment directly against a state and at the wrong time (attempting post-trial to use the Second Amendment as applied through the Fourteenth).

Miller's practical result, allowing the execution of a man who defended himself against racist thugs, is hardly a shining example in civil liberty. But the case, like the preceding Supreme Court cases involving the right to arms, does treat the Second Amendment as a right of individuals.

2. Robertson v. Baldwin

Three years after *Miller v. Texas*, the Court heard *Robertson v. Baldwin*, a case involving merchant seamen who, after jumping ship, were captured and impressed back into maritime service without due process. The seamen argued that the terms of their service contract amounted to "involuntary servitude" in violation of the Thirteenth Amendment.[623]

621. *See supra* notes 277-80 and accompanying text.
622. *See supra* notes 587-88 and accompanying text.
623. Robertson v. Baldwin, 165 U.S. 275 (1897).

The Court disagreed, explaining that all Constitutional rights (including the right to be free from involuntary servitude) include certain exceptions. These exceptions did not need to be specifically noted in the Constitution, since they were obvious and traditional:

> The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case.[624]

The Court went on to add that these exceptions constituted such things as legislation prohibiting libel, which does not abridge the First Amendment freedom of speech, and the prohibition of carrying concealed weapons, which does not infringe the right to keep and bear arms.[625]

The Court's statement about the Second Amendment indicates that the Court believed the Second Amendment protects an individual right. After all, there were no statutes prohibiting state militias or the National Guard from carrying concealed weapons. Concealed carry proscriptions are aimed only at private citizens, not at state militias.

Standard Model authors cite *Robertson* and *Miller* frequently. Anti-individualists tend to emphasize the holding in *Miller*, while ignoring the implications of the point about a procedural default. *Robertson* is rarely cited, since it is fatal to the theory that the Second Amendment does not protect the right of individuals to carry guns.

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624. *Id*. at 281. The *Robertson* Court's theory that the American Bill of Rights includes all the limits from British common law was plainly wrong. "[T]o assume that English common law in this field became ours is to deny the generally accepted historical belief that 'one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press.'" A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Mass., 383 U.S. 413, 429 (1966) (Douglas, J., concurring) (quoting Schofield, *Freedom of the Press in the United States*, 9 PUBLICATIONS OF THE AMERICAN SOCIAL SOCIETY 67, 76). Indeed, St. George Tucker's exposition of the new American Constitution had shown in great detail how American rights were broader than their British counterparts. *See* BLACKSTONE, *supra* note 14.

625. *See Robertson*, 165 U.S. at 282.

B. *The Collective Right Establishes a Footing:* Salina v. Blaksley

After its creation by a concurring judge on the Arkansas Supreme Court in 1842, the anti-individual theory of the Second Amendment disappeared from cases and treatises for the rest of the nineteenth century. Beginning in 1905, the anti-individual theory gained a more secure footing in the Kansas Supreme Court decision *Salina v. Blaksley*. The *Salina* court ruled that "right to arms" meant only that the state militia, in its official capacity, and while in actual service, could not be disarmed.[626] Although the Kansas Supreme Court later moved away from *Salina* by declaring a local gun control ordinance unconstitutional,[627] by then, *Salina*'s "collective right" theory (meaning, in this context, no right at all),[628] had spread far beyond the Kansas state line.[629]

The significance of *Salina* for this article is that the *Salina* court was forced to reject or misdescribe every nineteenth century source of authority which it used. (No eighteenth century or prior sources were cited.) The Kansas court rejected *Bliss v. Commonwealth*[630] and the long line of cases holding that in order to secure a well-regulated militia, individual citizens needed to be able to own and practice with guns.[631] The court quoted a sentence from Bishop's *Statutory Crimes* that "the keeping and bearing of arms has reference only to war, and possibly also to insurrections."[632] The quote was accurate, but

626. *See* Salina v. Blaksley, 83 P. 619 (Kan. 1905).

627. *See* Junction City v. Mevis, 601 P.2d 1145 (Kan. 1979).

628. The nineteenth century understanding of a "collective right" read the Second Amendment as guaranteeing a personal right to keep arms, so that the people as a group could resist tyranny. But as used by the Kansas court, "collective right" meant an affirmation of government power, in derogation to any right of a citizen.

629. The "collective right" (meaning no right at all), next appeared in a judicial opinion in *United States v. Adams*, 11 F. Supp. 216 (S.D. Fla. 1935) (reasoning that the Second Amendment "refers to the militia, a protective force of government; to the collective body and not individual rights"). Since *Adams*, the collective right has appeared frequently in *dicta* in lower federal courts, but has not made headway in the Supreme Court. *See* Denning, *Simple Cite*, *supra* note 1 (discussing lower court cases); Kopel & Little, *supra* note 1, at 525-41 (discussing Supreme Court case history).

630. 12 Ky. (2 Litt.) 90 (1822).

631. *See Salina*, 83 P. at 620-21.

632. *Id.* at 621 (quoting BISHOP, STATUTORY CRIMES, *supra* note 442, § 793, at

the Kansas court neglected the language surrounding the quote and other writings by Bishop, which made it clear that Bishop thought the right to arms belonged to individuals, not the state.[633] Lastly, the court quoted *Commonwealth v. Murphy*, an 1896 decision which had upheld, against a state constitutional claim, a Massachusetts law (similar to the Illinois law upheld by the U.S. Supreme Court in *Presser*) which banned mass parades with weapons.[634] The Massachusetts court had written: "The right to keep and bear arms for the common defense does not include the right to associate together as a military organization, or to drill and parade with arms in cities or towns, unless authorized so to do by law."[635] But of course, the Massachusetts holding that the right to arms does not authorize individuals to behave in a certain manner is not the same as the Kansas holding that there is no individual right at all.

Ultimately, the *Salina* holding stands on the Kansas court's textual analysis of the implications of the Kansas arms right provision and of the Second Amendment. The Second Amendment was not at issue in the case, and was simply analyzed as a guide to textual analysis of the Kansas provision. No amount of textual analysis, however, can explain why the framers of the Kansas Constitution, in the middle of an Article titled "Bill of Rights," suddenly inserted a provision that had nothing to do with rights, but which instead tautologically affirmed a power of the state government: in essence, *the militia is under the complete power of the state government*.[636]

Salina's paragraph of dicta about the meaning of the Second Amendment laid the foundation for a late twentieth century anti-individual theory of the Second Amendment, a theory

536).

633. *See supra* notes at 442-47 and accompanying text.

634. *See* Commonwealth v. Murphy, 44 N.E. 138 (Mass. 1896).

635. *Id., quoted in Salina*, 83 P. at 621.

636. The *Salina* court was clearly on a mission. Neither party had urged an anti-individual interpretation in the briefs; the government attorney had simply argued that the local law was a reasonable gun control. *See* Brief for Appellee, Salina v. Blaksley, *discussed in* Dowlut, *Guarantees to Arms*, *supra* note 1, at 77. Unsurprisingly, the *Salina* court also ignored the pre-Civil War history of Kansas, in which the proslavery government's disarmament of individual citizens was denounced nationally as a violation of the Second Amendment. *See supra* notes 310-16 and accompanying text.

whose proponents often insist is the only possible interpretation. The record of the nineteenth century demonstrates just the opposite.

C. Late Twentieth Century Commentators

1. Some thoughts about David Williams

David Williams is the twentieth century exponent of the most sophisticated version of the collective rights theory of the Second Amendment. According to Williams, the Second Amendment was, as the nineteenth century cases and commentators agreed, intended to ensure that "the people" of the United States would be able to overthrow federal tyranny. According to Williams, the sole purpose of the Second Amendment was a well-regulated militia; self-defense had nothing to do with it. The right to arms continues to exist, wrote Williams, only as long as do the conditions on which the Second Amendment's republican theory is premised: only as long as the people are universally trained to virtue through state militia service; and only as long as the people are unified, homogenous, and share a common vision of the good, so that they could rise as a single body to overthrow a tyrant. Since the diverse Americans of the late twentieth century do not fit the criteria of the republican "people," there is currently no Second Amendment right to arms, although the right could reappear if the people changed so that they once again fit the republican model.[637]

Williams' theory has been criticized on three major grounds. First, his theory allows a constitutional right to vanish as a result of government inaction (failure to conduct militia training).[638] Second, his theory is ahistorical. The Framers of the Second Amendment were well aware that "the people" of the early American Republic were never as unified as in the republican ideal that Williams posits. If the Framers and the

637. *See* Williams, *Militia Movement*, *supra* note 8. *But cf.* SIR EDWARD COKE, 2 THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND § 279b (Garland Publ. 1979) (1628) ("*'A right cannot die.' Dormit aliquando jus, moritur nunquam.* For of such an high estimation is right in the eye of the law, as the law preserveth it from death and destruction: trodden downe it may bee, but never trodden out.").

638. *See* Powe, *supra* note 1, at 1379-81; Volokh, *The Amazing Vanishing Second Amendment*, *supra* note 1.

American people would create a Second Amendment without need for a utopian type of "people," why should we now impose utopian conditions precedent on the Second Amendment?[639] Indeed, Williams admits that the virtuous people of his theory never existed, but incongruously asserts that the Second Amendment cannot be given force unless his Platonic ideal becomes incarnate.[640] Third, any change for the worse in the character of any actor named in the Constitution (e.g., "the people," or "the House of Representatives") is not a valid reason for negating a portion of the Constitution.[641] The Bill of Rights was written not only for an age of virtue, but for potential future ages of depravity, when controls on government—and reminders of virtuous ideals—would be all the more necessary.[642]

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639. *See* Kopel & Little, *supra* note 1, at 483-84; *see also* GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 60-63, 218-222, 491, 579, 607 (1969) (stating that, in contrast to the British Whigs of the seventeenth century, the Founders were well aware of divisions among the people, particularly class conflicts).

As Chancellor Kent explained, the thirteen colonies were

> jealous of each other's prosperity, and divided by policy, institutions, prejudice, and manners. So strong was the force of these considerations, and so exasperated were the people of the colonies in their disputes with each other concerning boundaries and charter claims, that Doctor Franklin (who was one of the commissioners to the congress that formed the plan of union in 1754) observed, in the year 1760, that a union of the colonies against the mother country was absolutely impossible, or at least without being forced by the most grievous tyranny and oppression.

1 KENT, *supra* note 464, at *205. In other words, Williams has things exactly backwards: national unity is the result of resistance to tyranny, not an essential condition precedent. The absence of national unity in a nontyrannical period (such as the late twentieth century) does not preclude the emergence of unity in a time of emergency.

640. *See* Lund, *Past and Future*, *supra* note 1, at 59 n.138.

641. *See* Kopel & Little, *supra* note 1, at 483-84 n.237.

642. It is not enough to confine the measure of human rights to the virtuous:

> We should endeavour to mete out the blessing to ages of depravity (and these will sooner or later take place) as a restorative to virtue. . . . The surest way to avoid the evil [of enslavement by government], and preserve the dignity and happiness of man, is to *begin right*—by clearly defining the powers intended to be delegated by the people to their rulers for the sake of protection—and expressly enumerating the rights to be reserved. Here would appear the *quid pro quo*–and *by appearing*, these rights would be universally understood and *remembered*. The transition from freedom to slavery would be less easy–for the rights of the people being constantly impressed upon the mind, and the principles of government fully understood–nothing would be left to the sport of implication, or the construction of arbitrary controul.

But it is nineteenth century legal history that provides the most powerful critique of Williams' theory. During that century, according to Williams, the Second Amendment right to arms should have vanished. Instead, the Amendment grew stronger than ever. Williams points to the various forms of American disunity today—such as divisions regarding race, religion, ethnicity, and sexual orientation—as proof that Americans of the late twentieth century are no longer the homogenous and unified Americans of the late eighteenth century. While we should not underestimate the centrifugal pull of multi-culturalism, and its harmful effect on American national unity,[643] American disunity today is trivial compared to the disunity associated with the Civil War. A civil war is, after all, about the most profound sign of disunity possible.

Even after the North defeated the South, the country experienced great difficulty restoring its unity. The end of the Civil War was the beginning of a lower-grade, often violent struggle between white supremacists and freedmen in the South. And not long after the struggle ended, with the triumph of white supremacy, America found itself in the midst of another violent struggle—this one taking place all over the nation—as workers literally fought for their rights and capital holders suppressed the workers violently. America in the last half of the nineteenth century was divided on sectional, racial,

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> . . . [Quoting Jefferson:] "Our rulers will become corrupt, our people careless. . . . *It can never be too often repeated*, THAT THE TIME FOR FIXING EVERY ESSENTIAL RIGHT ON A LEGAL BASIS, IS WHILE OUR RULERS ARE HONEST, AND OURSELVES UNITED."

Tullius (Philadelphia), FREEMAN'S J., Mar. 26, 1788, *in* ORIGIN, *supra* note 37, at 309-10 (quoting Jefferson from *Notes on the State of Virginia*).

At the Virginia ratifying convention, Patrick Henry warned that the federal government might neglect the militia, and the people would be disarmed. Expecting that virtue alone would guarantee the continuation of the militia was foolish, Henry predicted: "In this great, this essential part of the Constitution [federal powers of the militia], if you are safe, it is not from the Constitution, but from the virtues of men in government. If gentlemen are willing to trust themselves and posterity to so slender and improbable a chance, they have greater strength of nerves than I have." Richard Henry Lee, Va. Convention Debates, June 14, 1788, *in* ORIGIN, *supra* note 37, at 407.

In what age is it more important to enforce strictly all constitutional rules designed to protect the people from less than virtuous rulers: The Age of Thomas Jefferson, or The Age of William Jefferson Clinton?

643. *See, e.g.*, ARTHUR M. SCHLESINGER, JR., THE DISUNITING OF AMERICA (1997).

and class lines to a much more profound degree than America is divided today.

And what happened to the Second Amendment during this period of very unrepublican disunity? The elected representatives of "the people" made the Second Amendment stronger than ever.[644] For over a decade, Congress worked energetically to protect the Second Amendment from private and state government interference. Further, the state legislatures ratified a Fourteenth Amendment intended to guarantee a right to own weapons for personal defense.[645] Commentator after commentator and court after court affirmed that the Second Amendment was a current, enforceable guarantee of the right of every American citizen to own weapons.[646] Almost all of these cases and commentaries were contemporaneous with the turmoil associated with the Civil War, the Reconstruction, or the labor wars. If the Second Amendment survived and thrived through all the disunity of the second half of the nineteenth century, and also survived the abandonment of the pretense of regular militia training by most states after the Civil War, then it is hard to believe that the Second Amendment is such a feeble creature that it can be felled by the relatively minor modern disunities of the 1990s.

2. *Some thoughts about Carl Bogus*

In his 1998 article, *The Hidden History of the Second Amendment*, Carl Bogus follows in the path of David Williams[647] and attempts to seriously engage original sources.[648] Although Bogus writes in opposition to the Standard Model, his article makes an important contribution by highlighting the importance of the militia in the South in crushing and deterring slave insurrections.[649] With the exception of Robert Cottrol and Ray Diamond,[650] Standard Model authors have neglected this unattractive aspect of the militia.

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644. *See supra* notes 333-58 and accompanying text.
645. *See supra* notes 348-54 and accompanying text.
646. *See supra* notes 360-487, 494-591, 611-25 and accompanying text
647. Bogus, *Hidden History*, *supra* note 2.
648. *See generally id.*
649. *See id.* at 333-35.
650. *See* Cottrol & Diamond, *supra* note 1.

Unfortunately, Bogus attempts to turn a useful contribution to scholarship about the militia into a tool that single-handedly overturns the individual rights Standard Model. Bogus' history is plainly defective in its reading (and invention) of the eighteenth century record, and the defects become all the clearer in light of the nineteenth century. Because Bogus' article addresses eighteenth century sources not previously discussed in this article, it is now necessary to examine these sources.

Bogus makes the following argument: (1) the militia in the South was frequently used to suppress slave insurrections, and for slave patrolling to deter insurrection or flight;[651] and (2) at the Virginia ratifying convention, opponents of the proposed Constitution, such as Patrick Henry, worried that the federal powers over the militia would prevent the states from calling out their militias to suppress slave insurrections.[652] From these uncontested facts, Bogus then makes a leap of reasoning to conclude that Madison wrote the Second Amendment solely to affirm the power of states to use their militias to crush slave revolts.[653]

One problem with Bogus' thesis is that it ignores the evidence that even the hard-core Virginia slave owners, such as Patrick Henry, who wanted a strong militia to protect them from the slaves, *also* wanted a strong militia for protection from the federal government.[654] Bogus tells the reader three times that George Mason had three hundred slaves;[655] but Bogus never tells the reader that Mason wanted an armed white populace not just to control slaves, but because without arms, the white population could more easily be enslaved.[656]

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651. *See* Bogus, *Hidden History*, *supra* note 2, at 333-37.

652. *See id.* at 322-37.

653. *See id.* at 359-74.

654. "Have we means of resisting disciplined armies, when our only defence, the militia, is put into the hands of Congress?" Patrick Henry, Virginia Ratifying Convention, June 5, 1788, *in* ORIGIN, *supra* note 37, at 370.

655. *See* Bogus, *Hidden History*, *supra* note 2, at 331 n.102, 349, 374 n.313.

656.

> Forty years ago, when the resolution of enslaving America was formed in Great Britain, the British Parliament was advised by an artful man [Sir William Keith], who was governor of Pennsylvania, to disarm the people; that it was the best and most effectual way to enslave them; but that they should not do it openly, but weaken them, and let them sink gradually, by totally disusing and neglecting the militia.

Further, Bogus underplays the demand for an arms right that came from the Northern states, where protection of slavery was not an important issue. Half a year before the Virginia convention had met, the minority of the Pennsylvania ratifying convention had demanded a Bill of Rights, including:

> 7. 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; 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 shall be kept under strict subordination to and be governed by the civil power.
>
> 8. The inhabitants of the several states shall have liberty to fowl and hunt in seasonable times, on the lands they hold, and on all other lands in the United States not enclosed, and in like manner to fish in all navigable waters, and others not private property, without being restrained therein by any laws to be passed by the legislature of the United States.[657]

Four months before Virginia met, Massachusetts ratified the Constitution, after hard-line federalists turned back an amendment authored by Samuel Adams,

> that the said Constitution be never construed to authorize Congress to infringe the just liberty of the press, or the rights of conscience; or to prevent the people of the United States, who are peaceable citizens, from keeping their own arms; or to raise standing armies, unless when necessary for the defence of the United States . . . .[658]

Likewise, while Virginia was still debating the Constitution, New Hampshire ratified the document and recommended amendments, including that "Congress shall never disarm any

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George Mason, Virgina Ratifying Convention, June 14, 1788, *in* ORIGIN, *supra* note 37, at 401.

657. *The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents*, PENNSLYVANIA PACKET, Dec. 18, 1797, *in* ORIGIN, *supra* note 37, at 160.

658. Massachusetts Convention Debates, Feb. 6, 1788, *in* ORIGIN, *supra* note 37, at 260. See also *id.* at 263 n.4, for the political machinations surrounding the Adams amendment.

citizen, unless such as are or have been in actual rebellion."[659] New York's convention concluded about a month after Virginia's, and New York ratified while requesting amendments, *inter alia*, "[t]hat the people have a right to keep and bear arms; that a well-regulated militia, including the body of the people *capable of bearing arms*, is the proper, natural, and safe defence of a free state."[660] Rhode Island, which refused to ratify until 1790, copied New York's right to arms demand.[661]

Long before the United States Constitution had even been proposed, a right to arms had already been constitutionally recognized—north of the Mason-Dixon line—in the Pennsylvania Constitution,[662] the Vermont Constitution,[663] and (more restrictively) in the Massachusetts Constitution.[664] Bogus entirely neglects to mention the Pennsylvania dissent and the Samuel Adams proposal in Massachusetts. He provides no explanation for why the right to arms amendment, supposedly motivated only by Southern slave concerns, was demanded by three Northern state conventions where slavery was insignificant.[665]

Thus, Bogus errs by giving the entire credit for the Second Amendment to Virginia and the rest of the South, even though demands for a right to bear arms came first from the North,

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659. N.H. Ratifying Convention, June 21, 1788, *in* ORIGIN, *supra* note 37, at 446.

660. N.Y. Ratifying Convention, July 26, 1788, *in* ORIGIN, *supra* note 37, at 481.

661. *See* R.I. Ratifying Convention, May 29, 1790, *in* ORIGIN, *supra* note 37, at 735.

662.

> That the people have a right to bear arms for the defence of themselves and the state; 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 governed by, the civil power.

PENN. CONST., DECLARATION OF RIGHTS art. XIII (1776), *excerpted in* ORIGIN, *supra* note 37, at 754.

663. *See* VT. CONST. ch. 1, art. XV (1777), *excerpted in* ORIGIN, *supra* note 37, 767 (same language as Pennsylvania).

664.

> The people have a right to keep and to bear arms for the common defence. And as, in the 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 in an exact subordination to the civil authority, and be governed by it.

MASS. CONST., PART THE FIRST art. XVII (1780), *excerpted in* ORIGIN, *supra* note 37, at 773.

665. *See* Bogus, *Hidden History*, *supra* note 2, at 364-65.

and such a right was already constitutionally established in three northern states.[666] Bogus further errs by emphasizing only one important Southern interest in the militia (suppression of servile insurrection), while underestimating other important Southern and Northern interests in the militia (such as deterring centralized tyranny enforced by a standing army, or promoting civic virtue).[667] Moreover, Bogus ignores the human rights tradition—of which Madison's closest political ally and life-long friend Thomas Jefferson was an important part—which promoted the right to arms for reasons totally unconnected to the militia.[668]

The Standard Model scholarship has provided abundant eighteenth century historical evidence that one purpose of the state militias was to resist federal tyranny, should the other checks and balances in the government fail. Another purpose was to ensure that the people would be armed so that the militia might be effective.[669] But Bogus avoids discussing or quoting any of these many statements by dismissing them as "soapbox rhetoric."[670] He makes the astonishing claim that, despite having recently fought a revolution to overthrow a tyrannical government, the Framers of the Constitution did not believe in the legitimacy of armed resistance to a tyrannical government (and hence, the Second Amendment could not protect the arming of the populace as a last-resort check on despotism).[671] Bogus supports this claim by stringing together a litany of quotes showing that the Framers (Jefferson excepted) were horrified by Shays' Rebellion.[672] Bogus asserts that

666. Bogus briefly acknowledges the Northern views, but argues that they were insignificant, compared to the importance of Virginia. *See id.*

667. *See* Williams, *Civic Republicanism*, *supra* note 8.

668. *See* Hardy, *Second Amendment*, *supra* note 1. Jefferson's model constitution for Virginia declared, "No freeman shall be debarred the use of arms within his own lands or tenements." Thomas Jefferson, *The Virginia Constitution, Third Draft*, *in* 1 THE PAPERS OF THOMAS JEFFERSON, 1760-1776, at 363 (1950).

669. *See* sources cited *supra* note 1.

670. Bogus, *Hidden History*, *supra* note 2, at 344.

671. *See id.* at 390-407.

672. *See id.* at 393-95. Throughout the article, Bogus offers a one-sided catalogue of militia failures, never acknowledging any militia success after 1775. *See id.* at 337-44. For example, Bogus twice reminds the reader that the Virginia militia disgraced itself by fleeing at the Battle of Camden, South Carolina in 1780. *See id.* at 341, 345. But Bogus ignores the militia's excellent performance a few months later in South Carolina, at the Battle of Cowpens—the turning point of the war in the South—which

because the Framers were against Daniel Shays, they must have been against the general principle of revolution against tyranny.[673] To the contrary, Shays' Rebellion lacked two of the

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set the stage for Yorktown. *See* LAWRENCE E. BABITS, A DEVIL OF A WHIPPING: THE BATTLE OF COWPENS (1998). There, the militia was supported by the Continental Army, and superbly led by Brigadier General Daniel Morgan. *See id.*

Nor does Bogus mention the militia's success against General Burgoyne's 1777 Saratoga campaign, or that in 1778-79, the Kentucky militia, led by George Rogers Clark, captured key British posts on the Wabash River in the future states of Indiana and Illinois. The victories helped legitimize the United States' claim to all British territory east of the Mississippi, which Britain later recognized in the 1783 peace treaty. *See* ROBERT W. COAKLEY & STETSON CONN, THE WAR OF THE AMERICAN REVOLUTION 60-62 (1975); EDWARD COUNTRYMAN, A PEOPLE IN REVOLUTION: THE AMERICAN REVOLUTION AND POLITICAL SOCIETY IN NEW YORK, 1760-1790, at 76 (1989); WALTER LAFEBER, THE AMERICAN AGE: UNITED STATES FOREIGN POLICY AT HOME AND ABROAD SINCE 1750, at 20 (1989).

A recent study of George Washington's use of the militia in Connecticut, New York, and New Jersey explains that, while the militia could not, by itself, defeat the Redcoats in a pitched battle, the militia was essential to American success:

> Washington learned to recognize both the strengths and the weaknesses of the militia. As regular soldiers, militiamen were deficient . . . . He therefore increasingly detached Continentals to support them when operating against the British army . . . . Militiamen were available everywhere and could respond to sudden attacks and invasions often faster than the army could. Washington therefore used the militia units in the states to provide local defense, to suppress Loyalists, and to rally to the army in case of an invasion. . . .
>
> Washington made full use of the partisan qualities of the militia forces around him. He used them in small parties to harass and raid the army, and to guard all the places he could not send Continentals . . . . Rather than try to turn the militia into a regular fighting force, he used and exploited its irregular qualities in a partisan war against the British and Tories.
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> . . . His view of militiamen attached to the army did not change from the view presented early in the war: "all the General Officers agree that no Dependence can be put on the militia for a Continuance in Camp, or Regularity or Discipline during the short time they may stay." This was Washington's major complaint about the militiamen. He did not question their bravery, loyalty, or willingness to fight when necessary, but he could never accept their habit of coming and going when they pleased. . . .
>
> On the other hand, militiamen had much to offer, especially when fighting on their own and as partisans, and Washington tried to take advantage of their availability everywhere. As the war came to an end, Washington expressed this attitude clearly: "The Militia of this Country must be considered as the Palladium of our security, and the first effectual resort in case of hostility . . . ."

MARK W. KWASNY, WASHINGTON'S PARTISAN WAR: 1775-1783, at 337-38 (1996) (alteration in original for Washington quote) (citing Letter from George Washington to John Hancock (July 10, 1775); George Washington, *Circular to the States* (June 8, 1783)).

673. *See* Bogus, *Hidden History*, *supra* note 2, at 390-96.

essential elements which, according to the Declaration of Independence, were necessary justifications for a legitimate revolution. First, the policies of the Massachusetts government, which so aggrieved Shays and his fellow farmers in the western part of the state, may have been mistaken and burdensome, but they were not an attempt to enslave the people of Massachusetts. In contrast to the policies of King George III, nobody could seriously describe the polices of the Massachusetts government as "all having in direct object the establishment of an absolute Tyranny."[674]

Second, the Massachusetts government, in contrast to King George's government, was a republican one in which Shays and his fellows were represented. When the American colonists had "Petitioned for Redress in the most humble terms . . . [and] been answered by repeated injury,"[675] the colonists' peaceful remedies were at an end; they had no representation in Parliament. To accept Bogus' theory that the Founders were no longer "insurrectionists" (Bogus' term for justifiable revolution against tyranny), Bogus requires us to believe that the condemnation of Shays' Rebellion proves that the Founders had turned against the very political theory to which they had pledged their "Lives," their "Fortunes," and their "sacred Honor."[676] An explanation which does not require the reader to believe that the Founders were so ideologically inconsistent is simply that the Framers thought revolution justified in 1776 against King George, but not in 1787 against Massachusetts. After all, if a speaker condemns an unjustified use of force in purported self-defense, the condemnation does not necessarily mean that the speaker is opposed to forceful self-defense in all circumstances.

The theory that the Framers disapproved of revolt against tyranny is particularly erroneous in the case of James Madison, because in *Federalist No. 46* Madison sketched out a scenario in which the necessarily small federal standing army would be

674. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). Some of the more fervid Shaysites did claim that the Massachusetts government wanted to take all their land and enslave them, *see* DAVID P. SZATMARY, SHAY'S REBELLION: THE MAKING OF AN AGRARIAN INSURRECTION 96-97 (1980), but the claim obviously had no credibility among the Framers of the Constitution.

675. THE DECLARATION OF INDEPENDENCE para. 19 (U.S. 1776).

676. *Id.* at para. 20.

opposed by "a militia amounting to near half a million of citizens with arms in their hands" which would be able to defeat a tyrannical standing army.[677] How could tyranny overcome "the advantage of being armed, which the Americans possess over the people of almost every other nation"?[678] Bogus labors mightily to undo the obvious implications of these words, and in the process offers some useful insights. For example, Bogus observes that Madison was writing *arguendo*, since Madison had made it clear that he expected that the federal government would never attempt to rule tyrannically by military force.[679] But neither this point, nor Bogus' other points (such as the fact that the Federalist essays were written in a hurry),[680] undermine the basic fact that Madison obviously thought armed militia resistance to American federal tyranny to be legitimate–even though Madison never expected the dire event to take place.

That Madison apparently saw the militia as potentially useful in resisting tyranny cannot be squared with Bogus' assertion that the Second Amendment was *only* about protecting the militia for slave patrolling and slave controlling; nor can Madison's words be squared with Bogus's assertion that except for Jefferson none of the Framers were "insurrectionists." Bogus erroneously states that "one cannot read *The Federalist Number 46* as an explanation of the Second Amendment because, of course, it would be several more years before Madison would write that provision."[681] Actually, the interval from the publication of *Federalist No. 46* (January 29, 1788) to Madison's introduction of the Bill of Rights in Congress (June 8, 1789) was less than a year and a half.[682] What evidence is there in this interval that Madison abandoned his last "insurrectionist" thoughts? In support of his statement that the *Federalist No. 46* is not an explanation of the Second Amendment, Bogus argues that Madison's "support for a strong

677. THE FEDERALIST NO. 46 (James Madison).

678. *Id*. As the rest of the essay makes clear, Madison saw the likely success of a militia revolt against tyranny as depending on the existence of strong state governments to lead the militias. *See id.*

679. *See* Bogus, *Hidden History*, *supra* note 2, at 400-04.

680. *See id*. at 401.

681. *Id*. at 404.

682. *See* ORIGIN, *supra* note 37, at 234, 647.

federal government and his fear of anarchy probably both increased."[683] Bogus further notes that one of Madison's biographers concluded that Madison liked the Constitution even better after he had finished writing the *Federalist*.[684] True enough, but liking the Constitution even more does not mean that Madison loved civil liberty any less.

In addition, writes Bogus, "The full impact of Shays' Rebellion and lesser insurrections had probably not been fully absorbed."[685] Bogus provides no support for this claim, and it is preposterous. As Robert Rutland, one of Madison's biographers on whom Bogus does not rely, notes, Shays' Rebellion was precisely the event that Madison used to convince George Washington to attend the Philadelphia Convention that Madison was trying to organize.[686] Rutland also observes that the Philadelphia Convention opened in an atmosphere of panic engendered by Shays' Rebellion, and Madison himself found the Rebellion "distressing beyond measure to the zealous friends of the Revolution."[687] But if we are to believe Bogus, the very Founder who organized this convention which was so stricken by panic over Shays that it created an entirely new form of government, was himself not feeling "the full impact" of the Rebellion. Madison was apparently a rather odd person: he used Shays' Rebellion to convince America's elite that a new government was desperately needed, and led a campaign that spanned the continent in order to get the new government approved; but perhaps suffering from some form of psychic numbing, Madison never felt the full impact of Shays' Rebellion until the next year.

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683. Bogus, *Hidden History*, *supra* note 2, at 404.

684. *See id.*

685. *Id.*

686. *See* ROBERT A. RUTLAND, JAMES MADISON: THE FOUNDING FATHER 5 (1987).

687. Letter from James Madison to George Mater (Jan. 7, 1787), *in* 9 THE PAPERS OF JAMES MADISON 230, 231 (Robert Rutland ed., 1975); *see also* RUTLAND, *supra* note 686, at 14. The suppression of any future Shays-like insurrection was of great importance to the Philadelphia Convention, and was one of the reasons that the new Constitution gave the national government power over the militia, to rescue the militia from the neglect of the states. *See* SZATMARY, *supra* note 674, at 129 (citing Madison's *Notes of the Debates in the Federal Convention of 1787*). The Framers' interest in using the militia to suppress insurrections by Northern white farmers of course contradicts Bogus's picture of the militia as irrelevant except for the purposes of crushing Southern slave revolts.

Finally, writes Bogus, Madison's insurrectionary inclinations from *Federalist No. 46* cannot be carried forward seventeen months into the Second Amendment because, in the interval, the "rhetoric that had been so useful in stimulating revolution, such as romanticizing the militia and railing against the evils of a standing army, must have begun to have a different effect on Madison as it became the tool of anti-Federalist opposition."[688] Again, there is no evidence for Bogus' attempted mind reading.

The historical record makes it abundantly clear that to James Madison, "the rhetoric" about the virtues of militias and the terrors of standing armies was not a mere talking point that he abandoned once his cherished Constitution became operative. In 1801, the political party created by Jefferson and Madison took power after winning the election of 1800—despite the problems caused by the election being thrown into the House of Representatives by Vice-President Aaron Burr's chicanery. "What had saved America from the spectacle of bloodshed?" asks Robert Rutland, the compiler of the Madison Papers.

> In Madison's mind the answer was crystal-clear: the lack of a standing army. He never expected the anti-Jefferson forces to win, he confessed to the newly elected president, for it would have been impossible to oppose the people's will "without any military force to abet usurpation." Ever the optimist, Madison said the whole experience had been beneficial. "And what a lesson to America & the world, is given by the efficacy of the public will when there is no army to be turned agst. it!"[689]

In his First Inaugural Address, in March 1809, President Madison urged Americans during a period leading up to war with Great Britain, "to keep within the requisite limits a standing military force, always remembering that an armed and trained militia is the firmest bulwark of republics—that without standing armies their liberty can never be in danger, nor with large ones safe."[690] Not only did Madison still prefer militias to standing armies, he obviously saw the militia as

688. Bogus, *Hidden History*, *supra* note 2, at 404.

689. RUTLAND, *supra* note 686, at 168 (citing Letter from James Madison to Thomas Jefferson (Feb. 28, 1801)).

690. James Madison, First Inaugural Address, March 4, 1809.

useful for something other than catching slaves—namely protection against foreign invasion.

The English Declaration of Rights of 1689 proclaimed "[t]hat the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law."[691] Bogus argues that this provision "did not give Protestants an individual right to have arms; it decreed that Parliament, and not the Crown, would determine the right of Protestants to have arms."[692] Madison, Bogus informs us, "was almost certainly influenced by the right to arms provision of the Declaration," and "Madison followed Parliament's solution" by not inserting an individual right into the Second Amendment.[693]

"We do not know why Madison chose to draft his provisions precisely this way. He did not explain his thinking in any speech or letter that has come to light," writes Bogus.[694]

691. 1 W. & M., Sess. 2, ch. 2 (1689).

692. Bogus, *Hidden History*, *supra* note 2, at 384. Bogus is correct in saying that the British provision gave Parliament wide latitude in controlling who could own what types of guns, but wrong to conclude that the provision's plain language did not recognize a right of Englishmen. Bogus reasons that since the "as allowed by law" clause recognized Parliamentary authority to limit arms ownership, the entire clause is merely an assertion of Parliamentary supremacy against the King with regard to arms control. *Id.* at 383-85. The assertion that a subordinate clause overwhelms and obliterates the plain meaning of the main clause is an interpretive mode which Bogus applies to both the English Declaration of Rights and the American Second Amendment.

Bogus leads himself into error by reasoning that since the Convention Parliament (which gave the crown to William and Mary, after the Glorious Revolution) was angry that the previous King, James II, had attempted to disarm most of the population, Parliament was merely asserting its own supremacy regarding arms control. But *everything* that James II did to take arms away from English subjects was pursuant to duly-elected Parliamentary statutes, including the Game Act of 1671. James II had never asserted that he, rather than Parliament, could make the gun laws; he had simply rigorously enforced the guns laws made by the Restoration Parliaments. *See* MALCOM, *supra* note 1, at 94-112. Bogus does not provide one example of any seizure of private arms by King James II that went beyond the bounds of what Parliament's laws authorized.

Of course, the mere recognition of an individual right by Parliament did not do much to protect the right, beyond making a moral statement. In a system of Parliamentary supremacy and without meaningful judicial review, future Parliaments could easily undo what the 1689 Parliament had done. And given the breadth of the "suitable to their conditions, and as allowed by law" language, one could argue that, even today, Parliament has not infringed the right, since modern English subjects are allowed to have manual action rifles and shotguns, after passing through a rigorous licensing process.

693. Bogus, *Hidden History*, *supra* note 2, at 386.

694. *Id.* at 366.

Actually, Madison did explain his drafting choices, and that explanation makes it clear that Madison (unlike Bogus) viewed the English Declaration as protecting an individual right, and that Madison wanted the American arms right to be broader and more protective of individual rights than was the English version.

Madison's notes for his speech in Congress introducing the Bill of Rights explained that the proposals were to deal with the "omission of guards in favr. of rights & libertys."[695] His amendments "relate 1st. to private rights." A Bill of Rights was "useful—not essential." There was a "fallacy on both sides—especy as to English Decln. of Rts." First, the Declaration was a "mere act of parlt." Second, the English Declaration was too narrow; it omitted certain rights and protected others too narrowly. In particular, there was "no freedom of press—Conscience." There was no prohibition on "Gl. Warrants" and no protection for "Habs. corpus." Nor was there a guarantee of "jury in Civil Causes" or a ban on "criml. attainders." Lastly, the Declaration protected only "arms to Protestts."—apparently too narrow a slice of population.[696]

And there is more evidence, apparently hidden from Bogus, about what Madison's Bill of Rights meant. A few days after Madison introduced the Bill of Rights, Madison's political ally Tench Coxe (who would serve President Madison's administration as the Purveyor of Public Supplies, in charge of procuring arms for the militia) wrote the most comprehensive section-by-section exposition on the Bill of Rights to be published during its ratification period. Regarding the Second Amendment, Coxe explained:

> As civil rulers, not having their duty to the people, duly before them, may attempt to tyrannize, and as the military forces which shall be occasionally raised to defend our country, might pervert their power to the injury of their fellow-citizens, the people are confirmed by the next article in their right to keep and bear their private arms.[697]

695. James Madison, *Notes for Speech in Congress Supporting Amendments*, June 8, 1789, *in* ORIGIN, *supra* note 37, at 645.

696. *Id.*

697. FEDERAL GAZETTE (Philadelphia), June 18, 1789, at 2, *in* ORIGIN, *supra* note 37, at 671.

Coxe sent a copy of his essay to Madison, along with a letter of the same date.[698] Madison wrote back acknowledging "your favor of the 18th. instant. The printed remarks inclosed in it are already I find in the Gazettes here [New York]."[699] Madison approvingly added that ratification of the amendments "will however be greatly favored by explanatory strictures of a healing tendency, and is therefore already indebted to the co-operation of your pen."[700] Madison respected Coxe's ceaseless work on behalf of the proposed Constitution in 1787-88, and liked some of Coxe's federalist essays so much that Madison successfully urged Virginia newspapers to reprint them.[701] Of course, Madison's appreciative endorsement of Coxe's essay on the Bill of Rights did not specifically say "I endorse every single statement made in your essay." On the other hand, if Madison disagreed with the prolific author's analysis, Madison might have been expected to correct him, so as to prevent the propagation of further errors. Historians may debate how much weight to give Coxe's explication (which was uncontradicted during the ratifying period) and Madison's approving letter to Coxe. But it is astounding that Bogus, in a hundred-page article filled with speculation about Madison's supposed hidden thoughts, fails even to mention some rather notable written evidence about what Madison and his contemporaries really thought.

Bogus' theory is also self-contradictory. He asserts that Madison wrote the Second Amendment the way he did because, "Specifically, Madison sought to assure that Congress's power to arm the militia would not be used to disarm the militia."[702] But then Bogus informs us that Congress can, using its power to "organize" the militia, declare that the militia consists only of a small group (such as the modern National Guard) and disarm everyone else.[703] Bogus thus joins Garry Wills in the assertion that the Second Amendment effectively means nothing at all. But while Wills considers Madison a devious trickster—with a

698. *See* Coxe to Madison, June 18, 1789, *in* ORIGIN, *supra* note 37, at 672.
699. Madison to Coxe, June 24, 1789, *in* ORIGIN, *supra* note 37, at 673.
700. *Id.* at 674.
701. *See* JACOB E. COOKE, TENCH COXE AND THE EARLY REPUBLIC 113 (1978).
702. Bogus, *Hidden History*, *supra* note 2, at 369.
703. *See id.* at 408.

clever ploy of draftsmanship that meant nothing and fooled the entire nation[704]—the implication drawn from the Bogus article is that Madison was a fool; Madison supposedly drafted an amendment that was intended to prevent Congress from disarming the state militias; but despite Madison's amendment, Congress can do exactly what the amendment was designed to prevent.

Here, Bogus is directly contradicted by the historical record. Madison's original Second Amendment concluded with the provision "but no person religiously scrupulous shall be compelled to bear arms."[705] Although Bogus notes that Massachusetts Congressman Elbridge Gerry wanted Madison's clause narrowed,[706] Bogus does not inform the reader of Gerry's specific objection: "Now, I am apprehensive, sir, that this clause would give an opportunity to the people in power to destroy the constitution itself. They can declare who are those religiously scrupulous, and prevent them from bearing arms."[707] In other words, Representative Gerry was afraid that Congress could use the religious exemption as a pretext to exclude large numbers of people from the militia. Representative Gerry was attempting to ensure that Congress would not have the power to do what Bogus asserts Congress can do: to replace the universal militia with a select militia, and to disarm everyone not in the select militia.

Bogus' unsupported claims to know what Madison thought are buttressed by claims to know what everyone else thought. We are informed by Bogus that "Madison's colleagues in the House and Senate almost certainly considered the Second Amendment to be part of the slavery compromise."[708] But Bogus provides no evidence, other than to list the slavery compromises that were included in the original Constitution.[709]

Putting aside evidence from the Founding Era, a powerful refutation of Bogus' thesis can be found in the Appendix to George Ticknor Curtis' *Constitutional History of the United*

704. *See* Wills, *supra* note 5.
705. House of Representatives, July 28, 1789, *in* ORIGIN, *supra* note 37, at 680.
706. *See* Bogus, *Hidden History*, *supra* note 2, at 370.
707. House of Representatives, Aug. 17, 1789, *in* ORIGIN, *supra* note 37, at 695.
708. Bogus, *Hidden History*, *supra* note 2, at 371.
709. *See id*.

States.[710] Among Curtis' appendices is the full text of *Anti-Slavery Tracts* published around 1833.[711] The tract is an abolitionist argument that the United States Constitution "is a pro-slavery instrument."[712] The tract analyzes in detail the text of the Constitution, the intent of the Framers, the implementation of the Constitution by Congress, and the constitutional law decisions of the Supreme Court, all of which support slavery, according to the tract.[713] In each of the four parts of analysis, the tract points to Article I, section 8, which gives Congress the authority to call forth the militia to suppress insurrection. The tract even quotes from the Virginia ratifying convention, in which George Nicholas and James Madison both argued that Article I, section 8 does not diminish a state's authority to use its own militia to crush an insurrection; rather, the clause allows Congress to call forth the militias from other states, in order to assist the suppression of the insurrection.[714]

Yet while Article I, Section 8 is, quite plausibly, shown to be a proslavery part of the Constitution, the Second Amendment is never mentioned in that tract.[715] If, as Bogus argues, the only important reason for the Amendment was to suppress slave revolts, it is rather strange that the antislavery, anticonstitution tract never mentioned the Second Amendment. That one purpose of the militia was to suppress "servile insurrection," and that the Richmond Convention debates discussed this militia purpose, was not "hidden," but was perfectly obvious to antebellum America. But as for the Second Amendment, it was, so far as the known record indicates, never used to bolster the argument (from either the abolitionist or the slave-owning side) that the Constitution was meant to protect slavery. To the contrary, the Second Amendment appeared in the antebellum writings of Lysander Spooner and Joel Tiffany for just the opposite proposition: that the Second Amendment was incompatible with slavery.[716] If the Second Amendment were a slavery-protecting device, then the Reconstruction

710. *See* discussion of Curtis *supra* notes 503-10 and accompanying text.
711. *See* 2 CURTIS, *supra* note 507, at 580.
712. *Id*.
713. *See id*. at 580-88.
714. *See id*. at 584-85.
715. *See id*. at 580-88.
716. *See supra* notes 288-309 and accompanying text.

Congresses would likely have treated it with the disdain reserved for other constitutional theories—like the doctrine of nullification and interposition—that had been invoked to shield slavery from federal interference. Congress, of course, did just the opposite; Congress venerated the Second Amendment as a right of individual freedmen to protect themselves against the Ku Klux Klan and other descendants of the slave patrols.[717]

Like Garry Wills' theory that the Second Amendment was a fraud known only to James Madison,[718] Carl Bogus' *Hidden History* is contrary to the writings of the Founders and to the interpretive record of the century following the creation of the Second Amendment. One testament to the overwhelming evidence for the individual rights Standard Model is that opponents of the model must rely on theories which claim to read the secret thoughts of James Madison; secret thoughts which are claimed to be more important than what James Madison and his allies actually said and wrote.

D. Firearms Policy for the Twenty-first Century

Following a period of scholarly neglect in mid-century, the Second Amendment is currently enjoying a renaissance of scholarly interest as the twentieth century concludes. As scholars attempt to provide constitutional guidance for the twenty-first century, it is worth remembering the intellectual heritage of the nineteenth century discussed in this article.

1. Who is protected by the Second Amendment?

This is the easiest question; the answer is "the people of the United States." The right belongs to all people, not just to militia members or to state governments. According to *Robertson*, there are implicit exceptions, such as prisoners. Women were not subject to militia duty in the nineteenth century, but no one appears to have argued that women could legally be barred from owning and carrying guns.

717. *See supra* notes 333-58 and accompanying text.
718. *See* Wills, *supra* note 5.

2. Does the Second Amendment limit the states?

This is the hardest question. *Presser* and the dicta in *Cruikshank* suggest not, but these two cases are part of a period of constricted Fourteenth Amendment interpretation which the Supreme Court rejected in the twentieth century. The new research, conducted by scholars such as Richard Aynes and Stephen Halbrook, into the Congressional creation of the Fourteenth Amendment provide additional justification for the rejection of the *Slaughter-House*/*Cruikshank*/*Presser* line of cases as inconsistent with the original intent of the Fourteenth Amendment—or at least the original intent of the Radical Republicans who created and promoted the Amendment. Perhaps the twenty-first century will put an end to over 125 years of result-oriented Fourteenth Amendment jurisprudence and simply make the whole Bill of Rights enforceable against the states through the Privileges and Immunities Clause. Such a result would be more logically defensible than the current practice, under which incorporated "due process" includes everything in the first nine articles of the Bill of Rights except the Second and Third Amendments and the right to grand jury indictment.

3. What kind of "arms"?

The dominant line of nineteenth century interpretation protected ownership only of weapons suitable for "civilized warfare." This standard was adopted by the U.S. Supreme Court in the 1939 *United States v. Miller* case.[719] There, the Court allowed defendants who never claimed to be part of any militia (they were bootleggers) to raise a Second Amendment claim. But the Supreme Court rejected the federal district court's determination that a federal law requiring the registration and taxation of sawed-off shotguns was facially invalid as a violation of the Second Amendment. Rather, said the *Miller* Court, a weapon is only covered by the Second Amendment if it might contribute to the efficiency of a well-regulated militia. And the Court would not take judicial notice of militia uses for sawed-off shotguns.[720] The case was remanded for trial (at which the defendants could have offered

719. 307 U.S. 174 (1939).
720. *See id.* at 178.

evidence that sawed-off shotguns have utility in a militia context). However, the trial was never held because the defendants disappeared while the government's appeal of the indictment dismissal was pending.

A minority line of nineteenth century arms rights analysis—adopted in this century, for example, by the Oregon Supreme Court—goes further. This analysis protects not just militia-type weapons, but also weapons which are useful for personal defense, even if not useful in a military context. Thus, the Oregon state constitution's right to arms was held to protect the possession of billy clubs and switchblades—weapons which were pointedly excluded from protection by the civilized warfare cases.[721]

With the civilized warfare test as the constitutional minimum, efforts to ban machine guns or ordinary guns that look like machine guns (so-called "assault weapons") appear constitutionally dubious. These rifles are selected for prohibition because gun control lobbies claim that the rifles are "weapons of war."[722] This claim, if true, amounts to an admission that the rifles lie at the core of the Second Amendment.

In the 1990s, once people understand that "assault weapons" are firearms that are cosmetically threatening, but functionally indistinguishable from other long guns, they may be more willing to accord these arms a place within the right to keep and bear arms. Machine guns, in contrast, really are functionally different. Machine guns are rarely used in crime; and lawfully possessed machine guns, which must be registered with the federal government, are essentially absent from the world of gun crime.[723] Nevertheless, even many people who

721. *See* State v. Delgado, 692 P.2d 610 (Or. 1984) (switchblades); State v. Blocker, 630 P.2d 824 (Or. 1981) (billy clubs).

722. *See, e.g.*, Center to Prevent Handgun Violence, *Center Files Suits Against Assault Weapon Maker For Victims of California Shooting*, LEGAL ACTION RPTR. (Sept. 1994) (quoting from the litigation arm of Handgun Control: "In filing these lawsuits, the Center hopes finally to make the manufacturers of these weapons of war and their accessories pay for at least some of the cost their products impose on the victims of gun violence").

723. *See* David T. Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 CUMB. L. REV. 585, 674 (1987) (citing statement by Director of the Bureau of Alcohol, Tobacco and Firearms that "[r]egistered machine guns which are involved in crimes are so minimal so as not to be considered a law enforcement

consider themselves strong Second Amendment supporters cannot bear the thought of a constitutional right to own machine guns.

The civilized warfare test, however, offers no way out of this problem. Accordingly, some of the twentieth century Standard Modelers propose alternative tests. For example, Don Kates, relying on commentary stemming from a 1687 English case which allowed the carrying of arms in public places for protection so long as the circumstances of the carrying were not apt to terrify the populace, proposes a test with a prong that excludes weapons which "terrify" the public.[724]

Stephen Halbrook suggests that "artillery pieces, tanks, nuclear devices and other heavy ordinances are not constitutionally protected" arms, nor are "grenades, bombs, bazookas and other devices . . . which have never been commonly possessed for self-defense."[725] But the Halbrook test sidesteps the fact that militia uses, not just personal defense uses, are part of the core of the Second Amendment. Moreover, the Halbrook test could allow governments to ban new types of guns or weapons, since those weapons, being new, "have never been commonly possessed for self-defense."[726] Further, the test could allow Second Amendment technology to be frozen. Such a ban would be like the government claiming that new

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problem").

724. *See* Kates, *The Second Amendment: A Dialogue*, *supra* note 1, at 146-48; Kates, *Handgun Prohibition*, *supra* note 1, at 261-64. The case which supplies Kates' rule, *Sir John Knight's Case*, 87 Eng. Rep. 75, 90 Eng. Rep. 330 (King's Bench 1687), created the rule in the context of carrying unconcealed arms in public. A rule designed to protect people's sensibilities in public spaces should not be applied to the mere possession of a weapon on private property. In a private space, no one from "the public" is at risk of being terrified. Certain members of the public may be personally offended by the knowledge that someone else may be in private possession of a machine gun, just as other members of the public may be offended that someone may be engaged in a particular type of sex act. The legitimate legal objective of protecting public areas from undue disturbance is entirely distinct from the illegitimate (but all too common) objective of satisfying the desire of certain people to eradicate the unseen private behavior of other adults. By extending *Sir John Knight's Case* from public spaces into private homes, Kates wrongly conflates two distinct legal interests—an interest in public tranquility (an interest which deserves respect) and an interest in private repression (an interest which a tolerant society may give no legal force).

725. Stephen Halbrook, *What the Framers Intended: A Linguistic Analysis of the Second Amendment Right to "Bear Arms"*, 49 LAW & CONTEMP. PROBS. 151 (1986).

726. *Id.* at 160.

communications devices were unprotected by the First Amendment simply because they have never before been commonly used for speech.

Just as the civilized warfare test protects firearms that many persons want excluded from the Second Amendment, the test excludes firearms that many persons want to be included. The civilized warfare cases protected large handguns, but in some applications excluded small, highly concealable handguns. This would suggest that modern bans on small, inexpensive handguns might not violate the Second Amendment. On the other hand, small handguns, such as the Colt .25 pistol, were used by the United States military during the Second World War.[727] Of course, anyone using this test to make such an argument must also accept the flip side of the civilized warfare coin: "assault weapon" prohibition is plainly unconstitutional.

The nineteenth century minority theory, however, would recognize small, relatively inexpensive handguns as highly suitable for personal defense and accord them Second Amendment protection regardless of their militia utility. Twentieth century constitutional law reflects a special concern for problems of minorities and the poor that was not present in nineteenth century law. Since a small handgun may be the only effective means of protection which is affordable to a poor person, and since the poor and minorities tend to receive inferior police protection, modern Equal Protection analysis might find some problems with banning inexpensive guns, even if one sets aside the Second Amendment.[728] But under the main nineteenth century line of cases, opponents of banning small handguns must overcome the presumption in those cases that small handguns are not suitable militia weapons; perhaps the frequent and successful use of small handguns in twentieth century partisan warfare against the Nazis and other oppressive regimes offers one potential line of argument.

Twenty-first century jurisprudence might update the civilized warfare test by changing the focus from the military to the police. The modern American police, especially at the

727. *See* Charles W. Pate, *Researching the Martial .25 Colt Pistol*, MAN AT ARMS, Jan.-Feb. 1995, at 20-29.

728. *See* T. Markus Funk, Note, *The Melting Point Case-in-Point*, 85 J. CRIM. L. & CRIMINOLOGY 764 (1995).

federal level, resemble in many regards the standing army which so concerned the founders. While the American army is geared towards overseas warfare, the police are oriented towards the type of internal order functions (e.g., suppression of riots) which were among traditional militia duties. Accordingly, the twenty-first century question "what are suitable militia-type arms?" might be answered, "arms that are typical of, or suitable for, police duty."

By the modernized test, high-quality handguns (both revolvers and semiautomatics) would lie at the core. Smaller, less expensive handguns (frequently carried by police officers as back-up weapons, often in ankle holsters) would also pass the test easily. Ordinary shotguns and rifles (often carried in patrol cars) would also be protected. Machine guns and other weapons of war are not currently ordinary police equipment, although they are becoming common in special attack units.[729]

Finally, Noah Webster's dictionary reminds us that "arms" are not just weapons. "Arms" also includes defensive armor.[730] This suggests very serious constitutional problems with proposals to outlaw possession of bullet-resistant body armor by persons outside the government.

4. *Can the carrying of weapons be controlled?*

Thirty-one states now have laws allowing ordinary citizens to carry firearms for protection.[731] Thirty of those states require a licensing process, and some of them require training. Vermont allows concealed carry without a license. While the concealed carry licensing laws are supported by the National Rifle Association (NRA), other gun rights groups, such as Gun Owners of America (GOA), argue that requiring a license for

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729. *See* DAVID B. KOPEL & PAUL H. BLACKMAN, NO MORE WACOS: WHAT'S WRONG WITH FEDERAL LAW ENFORCEMENT AND HOW TO FIX IT (1997).

730. *See supra* note 186 and accompanying text.

731. The states are: Alabama, Alaska, Arizona, Arkansas, Connecticut, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Maine, Mississippi, Montana, Nevada, New Hampshire, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia and Wyoming. *See* John R. Lott, Jr., *Guns & Violence: Does Allowing Law-abiding Citizens to Carry Concealed Handguns Save Lives?*, 31 VAL. U. L. REV. 355, 357 n.9 (1997).

concealed carry is no more legitimate than requiring a license to go to church or to buy a book.[732]

The GOA position is consistent with the first gun rights case decided in the United States, *Bliss v. Commonwealth*.[733] But the jurisprudence of the nineteenth century from then onward is on the other side. The weight of nineteenth century precedent would allow severe restrictions or perhaps even a complete prohibition on concealed carry. Consequently, a fairly administered licensing system would pose no constitutional problem under the main line of nineteenth century cases.

But that same line of precedent also affirms the right to *open* carry, and some of that precedent suggests that even a licensing procedure for open carry would be unconstitutional. In the 1990s, this has unacceptable policy implications for some people; the thought of seeing a person on the street (other than a policeman) wearing a handgun in a holster may be disturbing. Thus, concealed carry laws (like laws allowing the sale of adult magazines and videos in adults-only stores, but barring the depiction of adult content in storefronts or other public venues) reflect 1990s sensibilities. As a legacy of nineteenth century constitutional interpretation, many states, especially in the West, have no prohibition on open carry, even though the right to open carry is rarely exercised in urban areas. Arizona, however, not only has no law against open carry, but also allows people to exercise that right. If one looks carefully, one can find ordinary people walking down the streets of Phoenix or Tucson with unconcealed guns in belt holsters.

Although the issues of the legitimacy of licensing and of concealed vs. open carry will continue to be debated, the nineteenth century jurisprudence reminds us that the right to carry in some form is guaranteed by the right to keep and bear arms.

5. *Repealing or ignoring the Second Amendment*

In the twentieth century, some courts have followed the lead of *Buzzard* and *Salina* in reinterpreting the Second Amendment or a state analogue as guaranteeing no right at

732. *See* Gun Owners of America, *Why Adopt a Vermont-style CCW Law?* (Apr. 1997), *available online* <http://cgibin1.erols.com/crfields/vtcarry.htm>.

733. 12 Ky. (2 Litt.) 90 (1822).

all.[734] Other courts have gone almost as far, recognizing an individual right to arms, but upholding any gun law short of a total prohibition on all guns—so long as the law passes the rational basis test, leniently applied.[735] Brooklyn Congressman Major Owens has introduced legislation to repeal the Second Amendment. The nineteenth century helps us remember why so many otherwise law-abiding gun owners will not obey the prohibitory or near-prohibitory laws made possible by the repeal or judicial nullification of the right to keep and bear arms.

Cruikshank teaches us that the right to bear arms, while guaranteed by the Constitution, was not created by the Constitution. Rather, it "is found wherever civilization exists."[736] Thus, regardless of what becomes of the Second Amendment, the right to arms will not be negated. In a 1993 article in *The Public Interest*, attorney Jeffrey Snyder wrote:

> Those who call for the repeal of the Second Amendment so that we can really begin controlling firearms betray a serious misunderstanding of the Bill of Rights. The Bill of Rights does not grant rights to the people, such that its repeal would legitimately confer upon government the powers otherwise proscribed. . . .
>
> . . . The repeal of the Second Amendment would no more render the outlawing of firearms legitimate than the repeal of the due process clause of the Fifth Amendment would authorize the government to imprison and kill people at will. A government that abrogates any of the Bill of Rights, with or without majoritarian approval, forever acts illegitimately, becomes tyrannical, and loses the moral right to govern.
>
> This is the uncompromising understanding reflected in the warning that America's gun owners will not go gently into that good, utopian night: "You can have my gun when you pry it from my cold, dead hands." While liberals take this statement as evidence of the retrograde, violent nature of gun owners, we gun owners hope that liberals hold equally strong sentiments about their printing presses, word processors, and television

734. *See, e.g.*, United States v. Warin, 530 F.2d 103 (6th Cir. 1976); Commonwealth v. Davis, 343 N.E.2d 847 (Mass. 1976).

735. *See* David B. Kopel et al., *A Tale of Three Cities: The Right to Bear Arms in State Courts*, 68 TEMPLE L. REV. 1177 (1995) (discussing cases in Colorado and Ohio).

736. United States v. Cruikshank, 92 U.S. 542, 551 (1875).

> cameras. The republic depends upon fervent devotion to all our fundamental rights.[737]

This was a radical and provocative statement in 1993, but conventional wisdom to virtually every nineteenth century legal commentator and judge who wrote about the right to arms.[738] Persons who loathe the idea of firearms possession by anyone except government employees must understand the depth and intensity of the moral position they are setting out to destroy.

6. *The First Amendment*

During the nineteenth century, speech in America was generally free.[739] But the assassination of President McKinley in 1901 sparked increasingly severe controls on core political speech—especially speech by socialists and anarchists criticizing the government.[740] Repression grew even more severe as a result of World War I, with almost any critic of the war at

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737. Jeffrey Snyder, *A Nation of Cowards*, PUB. INTEREST, Fall 1993, at 40, 54-55 (1993); *cf.* Nicholas J. Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment*, 24 RUTGERS L.J. 1 (1992) (asserting that traditional sources of Ninth Amendment law—including Anglo-American history and natural rights theory—suggest that the right to own a handgun should be considered an unenumerated constitutional right if the right is not located elsewhere in the Constitution).

738. For example, Judge Lacy, the only nineteenth century judge who ever had to argue for an individual rights view from a dissenting opinion, wrote:

> Can it be doubted, that if the Legislature, in moments of high political excitement or of revolution, were to pass an act disarming the whole population of the State, that such an act would be utterly void, not only because it violated the spirit and tenor the Constitution, but because it invaded the original rights of natural justice?
>
> . . . .
>
> . . . [S]uppose the Legislature pass an act, that a man should not keep private arms in his own house secretly, or about his person concealed, although they should be in every way necessary, in defence of his life, liberty, or property. Can it be doubted that such an act would be a palpable infraction of the Constitution, as well as an invasion of the natural rights of society?

State v. Buzzard, 4 Ark. 18, 36-38 (1842) (Lacy, J., dissenting).

739. The greatest exceptions were the Alien & Sedition Acts (which expired during the Jefferson administration), the ante-bellum suppression of abolitionism in the South (one of the abuses that eventually prompted the Fourteenth Amendment), and the Comstock Act (allowing criminal prosecution for sending sexually-oriented material through the mail).

740. *See* David M. Rabban, *The Free Speech League, the ACLU, and Changing Conceptions of Free Speech in American History*, 47 STAN. L. REV. 47, 53 (1992); *see also* DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS (1997).

risk for federal prosecution.[741] Not until many decades later, in *Brandenburg v. Ohio*, did the Supreme Court fully defend the core of the First Amendment, allowing speakers to denounce the legitimacy of the central government, even to suggest that it should be overthrown, so long as the speech did not incite violence.[742]

Perhaps one reason that it took so long for the Court and the American public to come to this view of the First Amendment was that the First Amendment was examined in isolation. Had the First Amendment examination looked next door—at the Second Amendment and its nineteenth century interpretive tradition—the examination would almost immediately have discovered that the core of the Second Amendment was retaining the ability of the American people to overthrow a tyrannical central government. If the Framers could recognize that democratic elections, checks and balances, and the rest of the Constitution's safeguards might one day fail, if the Framers could contemplate the risk that the federal government might one day break the bounds of the Constitution and become a tyranny, and if the Framers could guarantee the right to resist tyranny by guaranteeing the possession of arms through the Second Amendment, then *a fortiori*, speech which merely questioned the legitimacy of the government would not be criminal.

The leading free speech advocates of the early twentieth century understood this point. Before there was an American Civil Liberties Union, there was a Free Speech League, led by Theodore Schroeder. Schroeder's group was the first in American history to defend the rights of all speakers on all subjects, based on the principles of the First Amendment. Journalist H.L. Mencken wrote that Schroeder had "done more for free expression in America than any other."[743]

Schroeder's 1916 book *Free Speech for Radicals* used the Second Amendment to bolster his argument for a strong First Amendment:

> [U]nabridged free speech means the right to advocate treason (or lesser crimes) so long as no overt criminal act is induced as

741. *See* Rabban, *supra* note 740, at 53.
742. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969).
743. Rabban, *supra* note 740, at 77.

a direct consequence of its advocacy. We must inquire how far this conclusion is confirmed by the constitutional guarantee to carry arms.

Again the obvious import is to promote a state of preparedness for self-defense even against the invasions of government, because only governments have ever disarmed any considerable class of people as a means toward their enslavement. It remains to ask how this view is supported by the historic conflicts preceding our American Revolution.

Our revolution only extended the principles of freedom of the English revolution of 1688. At that time, to preclude the government from going into rebellion against the people and to check its power, the revolutionists planted themselves firmly upon these propositions: (1) The illegality of raising money for the use of the Crown without grant of Parliament; (2) The illegality of the power claimed by the king to suspend laws or the execution of laws; (3) The illegality of a standing army without consent of Parliament.

Here, as in the case of Magna Charta or our American revolutions, parchment liberties are not long respected unless backed up by an adequate public opinion and physical force. So these restrictions like the others were ignored when in the contest for power this seemed desirable. Let us not forget that it has always been merely a contest for power rather than for principles, though the latter sometimes furnished the pretext behind which the lust for power was bulwarked. Thus it happened that often the precedents and principles of liberty were promoted even by tories.

In the English Bill of Rights dated Feb. 13, 1688, among the grievances charged and to be eliminated was the "keeping a standing army within the kingdom in time of peace without consent of parliament," which supposedly represents the people. Another complaint was that of "causing several good subjects, being protestants, to be disarmed and employed contrary to law." If we are to erect this complaint against disarming part of the people into a general principle, it must be that in order to maintain freedom we must keep alive both the spirit and the means of resistance to government whenever "government is in rebellion against the people," that being a phrase of the time. This of course included the right to advocate the timeliness and right of resistance.

The reformers of that period were more or less consciously aiming toward the destruction of government from over the people in favor of government from out of the people, or as Lincoln put it, "government of, for and by the people." Those who saw this clearest were working towards the

> democratization of the army by abolishing standing armies and replacing them by an armed populace defending themselves, not being defended and repressed by those in whose name the defence is made.
>
> Upon these precedents, others like them, and upon general principles reformers like DeLolme and John Cartwright made it plain that the right to resist government was one protected by the English Constitution.[744]

Thus, Schroeder explicated that the Second Amendment right to arms and the First Amendment freedom of speech are firmly rooted in the history of America and England. The governments which now rule in America and England were put in place by people who advocated, and then carried out, the overthrow of a tyrannical government. In order to provide long-term security against the recurrence of tyranny, the British and American Bills of Rights both provide for the freedom of speech to call for the removal of a tyranny, and the right to arms to carry out that removal.[745] Removing tyranny is not, observed Schroeder, any kind of illegitimate rebellion. Rather, tyrannical "government is in rebellion against the people."[746]

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744. THEODORE SCHROEDER, FREE SPEECH FOR RADICALS 103-06 (1916). British aristocrat John Cartwright was an early supporter of the American Revolution, and an advocate of radical reform in Great Britain, including a Parliament elected by universal suffrage. He also served for seventeen years as a Major of the Nottinghamshire Militia. *See John Cartwright*, *in* ENCYCLOPEDIA BRITTANICA (CD-ROM ed. 1997). Thomas Jefferson wrote to Cartwright to praise "your valuable volume on the English Constitution" which "deduced the Constitution of the English nation from its rightful root, the Anglo Saxon." Thomas Jefferson, Letter to Major John Cartwright (June 5, 1824), *available online* <http://www.founding.com/library/cl01/cl014/cl0144/jeff1824.htm>.

The Swiss Jean Louis de Lolme, while living in England, authored *The Constitution of England* in 1775. Disraeli later described de Lolme as "England's Montesquieu." MALCOLM, *supra* note 1, at 166. De Lolme praised the right of Englishmen to be "provided with arms for their own defence." J. L. DE LOLME, THE CONSTITUTION OF ENGLAND 307 (London 1821) (1775). He noted that violent resistance to tyranny "gave birth to the Great Charter," and placed the current English dynasty on the throne. *Id.* at 308. While "resistance is . . . the ultimate and lawful resource against the violences of power," *id.* at 306, an armed citizenry would rarely need to resist, according to DeLolme, for "[t]he power of the people is not when they strike, but when they keep in awe: it is when they can overthrow every thing, that they never need to move." *Id.* at 314. De Lolme is cited in, *inter alia*, *Near v. Minnesota*, 283 U.S. 697, 713 n.4 (1931) and 2 STORY, *supra* note 106, § 547 n.1.

745. *See* SCHROEDER, *supra* note 744, at 105.

746. *Id.*

By the 1930s, when the majority of the Supreme Court was ready to begin defending the First Amendment, Schroeder had retired from the fray, and the Free Speech League had been eclipsed by the more cautious American Civil Liberties Union.[747] Would some of the Court's worst pro-repression decisions perhaps have been decided differently, or on narrower grounds, if the Court had considered the lessons that the Second Amendment teaches about the First Amendment? At the least, some scholars and some portions of the general public might have better and more quickly understood the broad protection that the First Amendment offers to subversive speech—if free speech advocates had continued Theodore Schroeder's use of the Second Amendment to teach about the First.

7. The illegality of most federal gun laws

The Bill of Rights, including the Second Amendment, was never intended by its Framers to be the primary safeguard of liberty. In the view of the Framers, the main protection of liberty was the structure of the Constitution itself. The separation of powers would prevent the rule by fiat which burdened most of Europe. And the legislative branch was granted only the power to legislate on specific, enumerated subjects (e.g., patents, bankruptcies, interstate commerce). Thus, Congress would have no power to censor speech, to suppress assemblies, to outlaw guns, or otherwise infringe rights.[748]

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747. *See* Rabban, *supra* note 740, at 54.

748. *See, e.g.*, THE FEDERALIST NO. 45 (James Madison); THE FEDERALIST NO. 85 (Alexander Hamilton). As Alexander White wrote in reply to the widely-circulated demand for a Bill or Rights, as proposed by the minority from the Pennsylvania ratifying convention:

> There are other things so clearly out of the power of Congress, that the bare recital of them is sufficient, I mean the "rights of conscience, or religious liberty—the rights of bearing arms for defence, or for killing game—the liberty of fowling, hunting and fishing—the right of altering the laws of descents and distribution of the effects of deceased persons and titles of lands and goods, and the regulation of contracts in the individual States." These things seems to have been inserted among their [the dissent at the Pennsylvania ratifying convention] objections, merely to induce the ignorant to believe that Congress would have a power over such objects and to infer from their being refused a place in the Constitution, their [the federalists'] intention to exercise that power to the oppression of the people.

In the nineteenth century, St. George Tucker, William Rawle, and Timothy Farrar made precisely this point: the Second Amendment (like the First Amendment) was in a sense superfluous, because Congress had no power to ban guns in the first place.[749] But in the late twentieth century, the structural safeguards of the body of the Constitution have been eliminated by judicial acquiescence to legislative and executive abuse of power. The federal power to regulate interstate commerce (buying and selling things across state lines) and the power to tax have been twisted into a general police power to legislate on almost any subject—including the power to ban the simple possession of firearms by various classes of persons.[750]

Thus, the exercise of power which can be found nowhere in the text of the Constitution has become commonplace: the President announces that gun store owners must post or distribute antigun statements in their stores.[751] Executive

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> But if they had been admitted as reservations out of the powers granted to Congress, it would have opened a large field indeed for legal construction: I know not an object of legislation which by a parity of reason, might not be fairly determined within the jurisdiction of Congress.

Alexander White, *To the Citizens of Virginia*, VA. GAZETTE, Feb. 22, 1788, *reprinted in* ORIGIN, *supra* note 37, at 281. As a member of the Virginia legislature, White "usually voted with Madison and was one of his ablest lieutenants," taking a particular interest in issues of religious liberty. Freeman H. Hart, *Alexander White*, *in* DICT. AM. BIO., *supra* note 90. As Virginia prepared to debate the proposed Constitution, White became the "dominant leader" of federalists in Northwestern Virginia, and was elected as a delegate to the state convention. *Id.* Afterwards, he was elected to the United States House of Representatives as a member of the first two Congresses. "He was regarded by his contemporaries as the outstanding leader of western Virginia and one of the ablest lawyers in the United States." *Id.*

749. *See supra* text accompanying notes 62-63, 96, 426-28.

750. *See generally* David B. Kopel & Glenn H. Reynolds, *Taking Federalism Seriously:* Lopez *and the Partial-Birth Abortion Ban*, 30 CONN. L. REV. 59 (1997). Of course, many of the federal laws might properly be enacted as a matter of state law, and most are.

Liberals and conservatives in Washington who insist on using the interstate commerce power to enact legislation about local matters (e.g., gun possession, use of controversial medicines) should realize what a dangerous game they are playing. The thirteen colonies consented to the power of Parliament to regulate external commerce, but went to war against Parliament's attempt to control internal commerce. *See* KENT, *supra* note 464, at *208 n.(a).

751. *See* Posting of Signs and Written Notification to Purchasers of Handguns, 62 Fed. Reg. 45364-65 (proposed 1997) (to be codified at 27 C.F.R. pt. 178) (requiring gun stores to post a sign, or give customers a brochure stating, *inter alia*, that "Handguns are a leading contributor to juvenile violence and fatalities" and that "Safely storing and locking handguns away from children can help ensure compliance with Federal law"—even though there is no federal law requiring gun owners to lock

branch officials in the Bureau of Alcohol, Tobacco and Firearms (BATF) from time to time announce that an additional type of weapon has been subjected to near-prohibitory federal controls, thanks to BATF's reinterpretation of a statute or regulation.[752] The Federal Trade Commission, meanwhile, is seriously contemplating a request that it issue an order prohibiting gun manufacturers from mentioning self-defense in their advertising.[753]

All this is normal constitutional law in the late twentieth century, but the nineteenth century commentators bring us back to first principles and remind us that all this federal "law-making" about guns is not really law-making at all. It may have the appearance of law (written down in statute books or other official records), and there may be the force of compulsion behind the "laws," but the Framers and the nineteenth century had a word for the exercise of power which was never granted. That word was not "law." The word was "usurpation."

Toward the end of the twentieth century, the Supreme Court has begun to take some tentative steps towards restoring the structural safeguards of the main body of the Constitution.[754] The steps are hesitant, and there is great fear of upsetting precedent. But precedent which authorizes the violation of the text of the Constitution deserves no respect. Beginning in the 1930s, and with increasing confidence in subsequent decades, the Supreme Court began to abandon precedent from the 1900s, 1910s, and 1920s which had constricted the First Amendment. The Court moved forward by

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handguns, or to take affirmative steps to prevent children from obtaining handguns).

752. *See, e.g.*, Robert W. Hausman, *BATF Says Wallet Holster Sale Alone May be an NFA Violation*, GUN WEEK, Mar. 1, 1998, at 3; Letter from Edward M. Owen, Jr., Chief, *Firearms Technology Branch, BATF*, to Bob Gortz, *Bob Gortz Gun Sales* (Sept. 30, 1996) (on file with author) (following BATF's determination that wallet holsters are covered by the "any other weapon" language of the NFA, BATF decided that wallets designed to carry a concealed handgun are now strictly controlled by the National Firearms Act); *see also Letters to the Editor*, MACHINE GUN NEWS, July 1996, at 60 (stating that a licensed firearms dealer reported that BATF confiscated a handgun contained in a wallet holster).

753. *See* Center to Prevent Hangun Violence et al., Petition to the Federal Trade Commission (Feb. 14, 1996) (visited Mar. 16, 1998) <http://www.handguncontrol.org/c-main.htm> (arguing that advertising that promotes a gun's utility for home defense is inherently "deceptive").

754. *See, e.g.*, Printz v. United States, 521 U.S. 98 (1997); United States v. Lopez, 514 U.S. 549 (1995).

returning to the original First Amendment analysis, as articulated by, among others, St. George Tucker. Perhaps in the twenty-first century, the Court will continue to restore the structure of the Constitution, so that the invocation of the First, Second, or other Amendments will become less necessary, as the federal sphere of action shrinks to constitutional boundaries.

VIII. CONCLUSION

The historical record shows that, while the boundaries of the Second Amendment were the subject of vigorous discussion during the nineteenth century, the core meaning of the Amendment was well-settled: the Standard Model of the late twentieth century scholars was the Standard Model of the nineteenth century. For all practical purposes, it was the only model. Every known scholarly commentator who said anything about the Second Amendment, all six Supreme Court cases, and every judge except for one in Arkansas treated the Second Amendment as an individual right. These Standard Model sources—like their twentieth century successors—disagreed about important features of the Second Amendment, including its application to the states and the types of arms whose possession is protected. Some analysts treated the Amendment in desultory fashion, while others celebrated it. Some cases and commentators saw the right as intended solely to allow resistance to oppressive government, while others saw the right as also encompassing defense against individual criminals, and not just criminal governments. But there is agreement on one fundamental: the Second Amendment recognizes a right of individual Americans to own guns and edged weapons suitable for resisting tyranny, and protects that right from infringement by the federal government. However confusing the Second Amendment may have become to Americans in the twentieth century, the core of the Amendment's meaning was readily apparent in the nineteenth century.

In the late twentieth century, scholars are perfectly free to argue against the Standard Model of the Second Amendment on the basis of changed circumstances. For example, Donald Beschle reasons that the Second Amendment should be reconstrued into a right of personal security, and that right can

be protected by banning all guns.[755] Several schools of constitutional interpretation suggest that the established interpretive history of constitutional provisions may be ignored if the history impedes the achievement of desirable governmental policies. Perhaps one could argue that the nineteenth century was the victim of a massive fraud (apparently perpetrated by St. George Tucker and William Rawle) which fooled everyone from Justice Story onward about the meaning of the Second Amendment.[756] Even within the limits of a nineteenth century interpretive paradigm, there is much useful precedent for advocates of restrictions on various types of concealable weapons, and for prohibitions on the carrying of concealed weapons.

But it can no longer be argued—at least not by anyone constrained by respect for the truth—that the Second Amendment has never been considered an individual right. The anti-individual view of the Second Amendment was, at most, a very lonely voice against an overwhelming nineteenth century individual rights consensus. In light of the nineteenth century record, no twentieth or twenty-first century scholars should claim that the Standard Model individual rights view is a fraud or a myth.

755. *See* Donald Beschle, *Reconsidering the Second Amendment Constitutional Protection for a Right of Security*, 9 HAMLINE L. REV. 69 (1986).

756. Madison, Jefferson, Adams, and many other Founders would appear to have been complicit in the fraud, since they were alive and active in public affairs when Tucker and Rawle published their well-known books. This fraud theory is no less preposterous than Garry Wills' theory that the Second Amendment is a hoax perpetrated by James Madison. *See generally* Wills, *supra* note 5.