Guns, Extremists, and the Constitution

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A great deal has been written about the Second Amendment in the last two decades.¹ The result is a body of work that illuminates the historical

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Given the passion that the subject of guns induces and the propensity of people to look for hidden bias in this area of scholarship, I wish to make the following disclosures. I do not belong to any gun advocacy group, whether for or against individual gun possession. I have attended a seminar sponsored by Academics for the Second Amendment, which I found to be relatively even-handed, though there were no participants who are proponents of abolition of private possession of firearms. I have never owned nor possessed a firearm and have no intention of ever doing so. I think the world would be a better place without firearms but that utopian state of affairs will never exist. I am not motivated to write this Article by the desire to advance any particular ideological perspective on firearms possession.


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There has been so much written on the subject that this is merely a selective bibliography. Apart from the legal and historical issues compressed into the Second Amendment is the voluminous literature on gun policy and gun violence. The merest tip of that bibliographic iceberg is presented here: GARY KLECK, TARGETING GUNS: FIREARMS AND THEIR CONTROL (1997); GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA (1991); DAVID B. KOPEL, GUNS: WHO SHOULD HAVE THEM? (1995); JOHN R. LOTT, JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS (1998).

2. See, e.g., Shalhope, The Ideological Origins of the Second Amendment, supra note 1, at 611-12 (collecting sources which discuss early republican views of leaders such as Washington and Madison on importance of armed citizens and their collective force as militia).
universal gun ownership, even among healthy, adult free men, and that firearms were prohibited to many people in this American society. The theoretical divide derives from and mimics the historical cleavage. One camp of theorists argues that the Second Amendment protects an individual right to gun ownership, relying for that conclusion on a variety of historical sources, structural arguments, and doctrinal nuggets extracted from a very sparse lode. The other group, sometimes described as "militia-centric," contends that the Second Amendment protects only a collective right to defend the community and definitely does not include any individual right to gun ownership or to gun possession. A relatively lonely middle ground is occupied by those, most notably Robert Shalhope, who argue that the Second Amendment was created to secure both an "individual right to possess arms and the right of the states to form their own militia."

The passions engendered by firearms possession are volcanic and occasionally color clear and objective judgment. Intemperate partisans of gun abolition have attacked individual rights theorists as dishonest tools of the gun lobby. Over-zealous champions of the individual rights point of view have uttered such outrageous nonsense as claiming that the Second Amendment "isn't about hunting ducks; it's about hunting politicians." There is, however, a genuine debate within these polar extremes. Individual rights theorists have marshaled an impressive array of early sources ranging across the Federalist and Anti-Federalist divide, including localists such as St. George Tucker and nationalists such as Joseph Story, all for the purpose of supporting their contention that the founding generation was in agreement that there existed an individual right to possess arms. This reading of history has come under sharp attack from historians, who contend that it ignores the heterogeneity of...
early American political culture, commits the sin of anachronism by assuming that the framers shared our world views and that the framers' language meant to them what it means to us, and overlooks critical aspects of how the founding generation actually behaved with respect to private firearms possession.\textsuperscript{11}

Each camp has it partly right. There is a great deal of evidence suggesting that the founding generation regarded firearms possession as an individual right.\textsuperscript{12} But that right was hardly unqualified. The historians critical of the individual rights thesis amply demonstrate the ways in which early Americans freely circumscribed the individual right to possess firearms in the interest of securing what was thought to be the public good. The historical objections to the individual rights thesis do not, however, destroy the validity of the individual rights point of view. Firearms possession in early America generally was limited to loyal members of the civil polity, essentially the electorate exclusive of criminals and the disloyal—those whose possession of firearms would pose a danger to public safety and political stability.\textsuperscript{13} The fact that early America barred large portions of the population from firearms possession—women, Indians, slaves, the propertyless—serves only to prove that the scope of the individual right to arms was limited to those who composed the civil polity. These historical practices may weaken the claim made by some individual rights theorists that the Second Amendment was designed to create an armed citizenry as a potent threat to governmental tyranny, but they fail to establish that the founding generation did not recognize any individual right at all. Today, when the civil polity includes virtually all the people disenfranchised by our ancestors, the historical evidence concerning early firearms regulation bolsters the individual rights argument more than it undercuts it.

\textsuperscript{11} See, e.g., Bellesiles, Suicide Pact, supra note 1, at 247-50 (noting that lawyers have turned to republicanism as "all inclusive" explanation of American history while historians are abandoning it); Cornell, supra note 1, at 223-26 (arguing that Standard Model scholars have ignored trend in legal community toward pluralist model of political and constitutional thought to explain "heterogeneity of [early] American political culture"); Higginbotham, The Second Amendment in Historical Context, supra note 1, at 263-65 (lamenting narrow historical focus of Standard Model of legal research); Shallhope, To Keep and Bear Arms in the Early Republic, supra note 1, at 270 (stating that ignorance of early American political culture and intellectual climate has brought about "anachronistic presentation of the Second Amendment"); Bellesiles, Gun Laws, supra note 1, at 567; Garry Wills, To Keep and Bear Arms, N.Y. Rev. Books, Sept. 21, 1995, at 62 (claiming that Standard Model proponents ignore military context of historical statements).

\textsuperscript{12} See infra notes 20-59 and accompanying text (detailing historical evidence marshaled by individual rights theorists).

\textsuperscript{13} See infra notes 57-80 and accompanying text (discussing historical limitations on firearms possession).
To prove that early Americans exhibited through regulation a belief that there was no individual right to firearms possession, it would be necessary to show that states regulated firearms possession by those who composed the civil polity: free, adult, propertied men. To put it another way, the fact that Sally Hemings could not legally possess a firearm in eighteenth century Virginia, but Thomas Jefferson could, speaks only to the exclusionary nature of the eighteenth century polity, not to blanket negation of an individual right to bear arms. If eighteenth century Virginia had barred Thomas Jefferson from firearms possession, the historians' argument for proving the absence of an individual right to bear arms would be far stronger. But that was not the case, in Virginia or anywhere else. Today, when Sally Hemings and Thomas Jefferson are equal participants in the polity, the historical limits on Sally's right to bear arms, like the historical limits on Sally's freedom or Sally's right to vote, are mute testimony to the smug assumptions of class privilege of an earlier time, but say nothing about the state's power to restrict law-abiding members of the polity from possessing firearms.

Thus, we are left with the strong probability that the Second Amendment protects individual firearms possession in some manner and to some degree, but that right is subject to a great deal of regulation and limitation. Though in the first part of this Article I will briefly survey some of the historical evidence that is amply sifted elsewhere, my focus is primarily to examine the questions that are raised by treating an individual rights theory of the Second Amendment seriously. Should the Second Amendment be incorporated into the Due Process Clause of the Fourteenth Amendment and thus fetter the states? What level of judicial scrutiny should apply to firearms regulations? Should there be specific triggers for heightened judicial scrutiny and, if so, what should they be? If there should be any heightened scrutiny, how strict should it be? Should heightened scrutiny follow the "pigeonhole" approach of traditional equal protection, or should it embrace the flexible, "sliding-scale" approach urged by Justices Thurgood Marshall and Stevens, among others? Whichever approach is adopted, what variables are appropriate to assess in reaching a decision?

14. See infra notes 68-147 and accompanying text (examining bounds of firearms possession in America and England).
15. See infra notes 172-76 and accompanying text (proposing use of "constitutional cy pres" to effect as much of Second Amendment's essential purpose as is possible in modern times).
17. See, e.g., City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 451 (1985) (Stevens, J., concurring) (noting that Supreme Court has applied "continuum of judgmental responses" to equal protection cases); id. at 460 (Marshall, J., concurring in part and dissenting...
Perhaps these questions are so large and difficult that it is best to leave the Second Amendment in its present desuetude. But that objection could have been registered with respect to equal protection, or free speech, or establishment of religion. It will not do to emasculate constitutional guarantees simply because they are difficult to implement. If the weight of evidence is that the founding generation expected the Second Amendment to secure the right of law-abiding citizens to possess firearms for their own individual and collective defense, we ought to take seriously that intention. Of course, the question of whether we are bound today by that intention is, as Jefferson Powell has reminded us, a question of present-day political theory. But if we decide today that we should adhere to the view that the Second Amendment guarantees to law-abiding citizens the right to possess firearms for the defense of themselves and others, we cannot avoid the tough questions that follow. That is the objective of the second part of this Article.

I. The Historical Record and Its Present Significance

There has been an enormous amount of research and writing exploring the historical roots of the Second Amendment. My purpose here is not to re-examine each of these sources in minute detail; rather, I intend to summarize the essential positions and evidence of the contending camps in order to express a conclusion about the meaning and utility of the historical record. The reader who wishes to engage in the minutiae of the historical debate may consult the cited sources.

The individual rights theorists contend that "the general attitude of the Founders toward the role of arms in society ... involved a set of related propositions that were deemed axiomatic truths." Two influential individual rights theorists have summarized these propositions as including an inalienable, natural right to personal self-defense, a corollary right to "possess
personal arms for defense of self, home, and family," and a derivative right to join together for collective defense. These rights, say these theorists, were regarded by the founding generation as assertable against depredations "perpetrated by apolitical criminals or for political purposes by a tyrant or his thugs" and extended, "in the ultimate extreme, to the right to overthrow tyrants and return government to its proper course." Moreover, an armed citizenry was thought to deter tyranny and oppression by government and was indispensable to maintenance of a free and republican society.

To support these propositions, the individual rights theorists rely upon statements made by various members of the founding generation in the context of revolt from Great Britain and subsequent formation of the American national government. The statements are used fairly by individual rights theorists, but the larger context of their utterance is sometimes given short shrift. For example, The Federalist No. 46, authored by James Madison, contains Madison's argument that the proposed Constitution would preserve the advantage of an armed populace as "a barrier against the enterprises of governmental ambition." The reason the original, unamended Constitution could preserve this perceived advantage was that the federal government was given no authority to regulate private firearms possession. But Madison's argument also suggests that state governments, "to which the people are attached and by which the militia officers are appointed," will aid in the preservation of an armed polity as a check on governmental tyranny, and thus says little about the power of state governments to regulate private firearms possession. Indeed,
two possible constructions could be placed on the argument. The one commonly embraced by individual rights theorists is that Madison regarded private firearms possession as a natural right that preexisted the formation of government, and thus the Second Amendment "added nothing new to the original Constitution." As with other provisions of the Bill of Rights that protected natural rights, it was inserted "for greater caution," to negate any possibility that the central government might be deemed to possess any implied authority to regulate private firearms possession. The other construction emphasizes the federalism aspect of Madison's argument. Perhaps all that Madison meant was that the Second Amendment was designed to prevent the federal government from eliminating the states' power to regulate the militia. This construction de-emphasizes or ignores the natural rights aspect of firearms possession and sees the Second Amendment as a guarantee to states of the power to constitute an armed militia out of their citizenry. How the states exercised this power was up to them.

Individual rights theorists counter by arguing that there was an overwhelming sentiment among the founding generation that firearms possession was an inalienable natural right and that this right was similarly recognized in state constitutional bills of rights. Eugene Volokh has demonstrated that many of the state constitutions drafted during the post-revolutionary era contained some guarantee of the right to possess firearms. The fact that these state constitutional provisions secured the right to firearms possession against the state government prompted Volokh to conclude that these provisions necessarily "recognize a right belonging to someone other than the state." It need hardly be added that the "someone" was the mass of individuals composing the people.

Historians such as Saul Cornell have chided Volokh and other individual rights theorists for their failure "adequately [to] contextualize constitutional texts." To make sense of constitutional text, claims Cornell, it is necessary

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31. James Madison so stated in his speech to the House presenting the proposed Bill of Rights to the First Congress. 1 ANNALS OF CONGRESS 435 (J. Gales ed., 1834).
32. This is not to say that the Second Amendment barred the exercise of federal power to regulate private firearm possession ancillary to some express grant of authority such as the Commerce Clause.
33. Volokh, The Commonplace Second Amendment, supra note 1, at 793 (listing Indiana, Kentucky, Massachusetts, Missouri, North Carolina, Ohio, Pennsylvania, and Vermont as states whose constitutions written between 1776 and 1820 specifically protected individual right to possess firearms).
34. Id. at 810.
35. Cornell, supra note 1, at 225.
"to analyze published and unpublished sources, private comments as well as published statements . . . [and] political and social texts.\textsuperscript{35} In short, "[t]he behavior of the historical actors who wrote [constitutional] texts must be read alongside their published statements."\textsuperscript{37} That behavior hardly demonstrates an unqualified commitment to an individual right to bear arms. Cornell examines Pennsylvania under its revolutionary constitution of 1776 as a test case\textsuperscript{38} and concludes "that there was considerable conflict over how to understand" the right to bear arms guaranteed by Pennsylvania’s 1776 Constitution.\textsuperscript{39}

At roughly the same time the 1776 Constitution was adopted, Pennsylvania enacted the Test Acts, which established a "stringent loyalty oath" as a precondition to "voting, holding public office, serving on juries," and bearing arms.\textsuperscript{40} The express rationale for denying the right to firearms possession to those who refused to take the loyalty oath was that their refusal established them as "persons disaffected to the liberty and independence" of Pennsylvania.\textsuperscript{41} Cornell estimates that the Test Acts "stripped many essential rights from . . . as much as forty percent of the citizenry," though he provides no basis for his estimate.\textsuperscript{42} However many Pennsylvanians were affected, there can be little doubt that Cornell is correct to observe that "[g]un ownership in Pennsylvania was based on the idea that one agreed to support the state . . . . Only citizens who were willing to swear an oath to the state could claim the right to bear arms."\textsuperscript{43} The Pennsylvania experience is thus a large obstacle to the claim

\textsuperscript{36.} \textit{Id.}
\textsuperscript{37.} \textit{Id.}
\textsuperscript{38.} Cornell defends his choice of Pennsylvania because (1) individual rights theorists rely on Pennsylvania as a state where the founding generation conceived of firearms possession as an individual right, and (2) during ratification, the state produced a particularly rich debate over the Constitution’s meaning. \textit{Id.} at 227.
\textsuperscript{39.} Article XIII of the Declaration of Rights of the Pennsylvania Constitution of 1776 proclaimed:

That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power.

\textsuperscript{5} \textsc{The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America} 3083 (Francis Thorpe ed., 1909) [hereinafter Thorpe].

\textsuperscript{40.} Cornell, \textit{supra} note 1, at 228.
\textsuperscript{41.} \textit{Id.} (quoting Test Act as enacted in 1777).
\textsuperscript{42.} \textit{Id.}
\textsuperscript{43.} \textit{Id.} at 229. Cornell has less basis to make the claim elided in the quote – that gun ownership was based on the idea that one agreed "to defend [the state] against those who might use arms against it." \textit{Id.} This claim conflates the right to gun possession on the part of a loyal
of many individual rights theorists that an individual right to bear arms was conceived as securing a popular right of armed resistance to governmental tyranny. Moreover, this claim of individual rights theorists is inherently suspicious, for it assumes that a constitutive document for a participatory democracy would guarantee to the participants a right to destroy by force of arms that democracy. Of course, the pervasively Lockean thought of American revolutionaries posited a natural right of the people to revolt against any government that had transformed itself into a tyranny, and it might be plausible to assume that the Second Amendment was, as Randy Barnett and Don Kates claim, a simple recognition of such a preexisting natural right. The experience of the Whisky Rebellion, however, casts considerable doubt on this assumption.

When the Federalist administration of George Washington levied excise taxes on whisky, farmers in western Pennsylvania and Kentucky reacted with violent anger. Not only did the Federalist Washington administration act...
with arms to quell what it regarded as an armed revolt against democratic
government, Anti-Federalist opponents of the administration divided on the
question of whether the armed rebellion was proper. 47 According to historian
Saul Cornell,

leading Anti-Federalists did not believe that individuals could spontane-
ously constitute themselves as militia units outside the control of the state
or assert an individual right to bear arms to check government tyranny.
[Even] the radical Anti-Federalists who did assert such a right did not
ground it any constitutional text, but instead framed their actions in terms
of a natural, not a constitutional, right of revolution. 48

It is possible, of course, that the radical Anti-Federalists thought the natural
right of revolution was simply restated by the Second Amendment. But a
right of revolution needs no constitutional foundation for it to be effective,
and a constitutionally guaranteed right of revolution is meaningless if the
revolution fails to succeed. The American Revolution proved the first propo-
sition; the Civil War (from a Southern perspective) proved the second. What-
ever the radical Anti-Federalists may have thought, the result of the Whisky
Rebellion was a clear repudiation of the idea that individuals possessed a
constitutional right of armed resistance to governmental authority.

Individual rights theorists also make a related, albeit slightly different,
claim: The presence of an armed citizenry was thought desirable for its
deterrent effect on governmental actors inclined to become tyrants. 49 But this
argument is also refuted by Pennsylvania’s insistence that only loyal citizens
could possess arms. True, a citizen may be loyal to democracy and a revolu-
tionary firebrand when democracy turns to tyranny, but the point is that
Pennsylvania did not concede to individuals a right to decide for themselves
when that degradation of democracy into tyranny had occurred. If it had
conceded such a right, presumably Pennsylvanians would have had no cause
to upbraid their fellow Pennsylvanians who were resisting the federal whisky
tax with force of arms. But upbraid them they did, and much of the condem-
nation came from Anti-Federalists. 50 Moreover, the argument that an individ-

47. Cornell, supra note 1, at 242-45 (discussing dissent among Anti-Federalists to violent
uprisings against government).

48. Id. at 242. For Cornell’s supporting evidence, see id. at 242-45 (identifying Anti-
Federalist opposition to use of force by instigators of Whisky Rebellion).

49. See, e.g., Levinson, supra note 1, at 647-51 (explaining “checking value” of armed
populace on governmental tyranny); Reynolds, supra note 1, at 467-71 (reasoning that armed
citizenry serve as check to standing army).

50. See Cornell, supra note 1, at 242-45 (reviewing debate of two prominent Anti-Feder-
alists, William Findley and William Petrikan, over use of force against unjust laws).
ual right to firearms was intended as a deterrent to tyranny is inherently unstable, for it assumes that each individual may act, or threaten to act, against the tyranny he sees. How else is tyranny to be defined? Timothy McVeigh presumably acted against a tyranny that he perceived, but that does not justify his actions. Would Lee Harvey Oswald have had a Second Amendment right to assert in his defense if he sincerely believed that John Kennedy was a tyrant? When Dan White shot and killed San Francisco mayor George Moscone in retaliation for Moscone’s refusal to reappoint him to the city legislature, from which White had improvidently resigned, was White asserting an individual right to combat tyranny?

The evidence from historical practice may adequately puncture the inflated claim that the Second Amendment preserves an individual right to bear arms either to deter or to revolt against tyranny, but it does not necessarily deflate the claim that the Second Amendment preserves an individual right to bear arms for self defense. State constitutions repeatedly proclaim that every citizen has the right to bear arms “in defense of himself and the state.” And every American constitutional expression of a right to bear arms – the Second Amendment and every analogous state constitutional provision – is expressly calculated to aid the common defense of the community against armed attack. If there is one thing the Second Amendment is surely about, it is defense. Collective rights theorists accentuate the importance of the provision to secure the common defense through an armed militia. Individual rights theorists accentuate the importance of the provision to secure individual defense. But the two positions are not antagonistic; indeed they reinforce one another by emphasizing the common theme of defense: of self, of other individuals, and of the community as a whole. Indeed, to the founding generation the right and obligation to defend oneself was indistinguishable from the right and obligation to defend the community. Blackstone treated the right to bear arms as one of the "absolute" natural rights of individuals, rooted in


53. See supra notes 20-51 and accompanying text (examining arguments of collective rights theorists).

54. See supra notes 20-51 and accompanying text (discussing arguments of collective rights theorists).

55. Kates, The Second Amendment and the Ideology of Self-Protection, supra note 1, at 87 (elaborating on idea that act of self-defense, by thwarting crime against oneself, serves community as well).
ancient Saxon law that guaranteed to every freeman the right to possess and to use arms. Not only did Blackstone treat the right as an individual right, he clearly explained its rationale as "for self-preservation and defence." As Don Kates has shown, early Americans believed that the moral virtue of armed self-defense was coupled with a moral obligation to bear arms for collective defense.

In the Greek and Roman republics from whose example (the founders) took so many lessons, every free man had been armed so as to be prepared both to defend his family against outlaws and to man the city walls in immediate response to the tocsin warning of approaching enemies. Thus did each citizen commit himself to the fulfillment of both his private and public responsibilities.

Collective rights theorists take issue with these conclusions by demonstrating that a wide variety of gun regulations were adopted and enforced both before and after the Second Amendment. To undermine the contention that an individual right to bear arms was imported to America from England, as historian Joyce Lee Malcolm claims, collective rights theorists charge that English law was studded with gun restrictions both before and after the Declaration of Rights of 1689 affirmed the right of Protestants to bear arms "for their defence suitable to their condition and as allowed by law." Carl Bogus, for example, contends that Malcolm is "patently wrong" in asserting that the right to bear arms protected by the English Declaration of Rights was designed to insure that individuals had the right to possess and to use arms for self-defense.

The common theme of the collective rights theorists is that these laws — both in England and America — denied a great many people access to firearms for any purpose, and thus one cannot claim that there was any meaningful general individual right to bear arms. The essential claim is that because the
right to bear arms in England, its American colonies, and the newly independent United States frequently was limited by ordinary legislation, it is manifest error to suppose that the founding generation meant the Second Amendment to secure a broad individual right to bear arms. There are, however, a number of problems with this argument.

First, many of the limitations on gun possession corresponded to limits on access to the polity itself. The Massachusetts theocratic legislature in 1637 barred Antinomians from owning guns. More frequently, gun possession was limited to white adult Protestant property owners. Women, slaves, indentured servants, the propertyless, Catholics, Indians, and youths were all excluded from gun ownership. But these same categories also were excluded from participation in civic government. Historians who claim that the individual rights theorists are guilty of anachronism fall victim to their own brand of anachronism. The existence of firearms regulations in the seventeenth, eighteenth, and nineteenth centuries limiting the right to possess firearms to the citizenry that also was entrusted with the franchise is entirely consistent with the claim that there existed then an individual right to bear arms, a right possessed only by those individuals who composed the civic polity. To disprove the claim that such an individual right to bear arms existed, it is necessary to establish that statutes of the founders' time limited the right of free adult, white, male citizens—the polity of the day—to possess firearms. By and large, the historical evidence marshaled by the collective rights theorists is not adequate to this task.

The reason so much energy and passion is expended today on what the founders did or did not do about firearms regulation is that such evidence is thought relevant to our contemporary debate about the proper extent of firearms regulation. The contemporary claim of individual rights theorists is that the Second Amendment guarantees a presumptive right to firearms possession by law-abiding, mentally stable adults. The historical practices that would cast doubt on this claim are not laws that barred the disenfranchised from firearms possession, but laws that limited access by franchise holders to firearms. In short, the fact that Virginia barred Sally Hemings from owning a gun does not wreck the present-day claims of individual rights.

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64. Bellesiles, Gun Laws, supra note 1, at 574.
65. Id.
66. See Cornell, supra note 1, at 221.
theorists. But if it could be shown that Virginia limited Thomas Jefferson's right to possess firearms, *that* historical practice would go a long way toward refuting the claims of the individual rights theorists. In fact, however, the historical evidence points to the opposite conclusion. Far from restricting gun ownership by enfranchised Virginians, Virginia (and other states) "encouraged the private ownership of firearms by white male property owners."68

To be sure, there are cogent arguments from historical practice to support the collective rights theorists. English firearms regulations of the seventeenth century and earlier impinged significantly upon the right of enfranchised members of the polity to use firearms. England's 1541 militia statute, for example, flatly prohibited ownership of handguns to all but the very wealthy.69 Other English firearms regulations were designed to disarm the general populace in order to preserve game for the wealthy, propertied gentry.70 But even these statutes, which prohibited the use of guns for hunting by all but the very wealthy, did not absolutely forbid gun ownership by the ordinary citizen. English law did, however, mandate an inventory of private firearms71 and required registration of firearms.72 Other English firearms laws were designed to prohibit arms possession by those known or suspected to be disaffected with the government.73 Such persons were, of course, considered traitors and not part of the polity.

Joyce Lee Malcolm, a leading individual rights theorist, claims in her influential book, *To Keep and Bear Arms: The Origins of an Anglo-American Right*, that such legislation was rendered illegitimate by the English Declaration of Rights of 1689.74 The validity of this claim depends partly upon whether the Declaration of Rights was, indeed, merely declaratory of ancient pre-existing rights75 or a radical document of reform,76 and partly upon a


69. *See Malcolm, supra* note 60, at 9-10, 80 (describing 1541 statute prohibiting anyone with annual income of less than 100 pounds from owning handgun). Bellesiles attributes this prohibition to the fact that handguns are "easily concealed and therefore more likely to be used in the commission of a crime," but offers no support for the claim. Bellesiles, *Gun Laws, supra* note 1, at 572.

70. Bellesiles, *Gun Laws, supra* note 1, at 567, 572 ("As Blackstone noted, under the game act [of 1671], the right to hunt - and thus to own a gun without fear of its expropriation - required fifty times as much property as the right to vote.").

71. *See Malcolm, supra* note 60, at 28 (discussing 1659 law requiring inventory of private firearms).

72. *See id.* at 43 (describing 1660 law that required firearms registration).

73. *See id.* at 35-36 (describing Charles II's order to seize weapons from all those of known or suspected disaffection to crown).

74. Id. at 74, 121-22.

75. This is the conventional wisdom of eminent English historians of the past, such as
parsing of the text of its right to arms provision and the evidence of its drafters’ intentions. Article Seven of the Declaration of Rights states "[t]hat the subjects which are Protestants may have arms for their defence suitable to their condition and as allowed by law." Because prior firearms legislation repeatedly distinguished between the gentry and yeomanry and imposed regulations that pinched even the gentry at times, it is a reasonable conclusion that this provision was intended to be declaratory of pre-existing rights. This is surely consistent with the general tenor of the Glorious Revolution, which was an assertion of a prior tradition of parliamentary power against an over-reaching and over-bearing monarch, suffused with the restoration of Protestant hegemony in Britain. Lois Schwoerer, the leading modern scholar of the Glorious Revolution, asserts that Article Seven was not intended to create an individual right to possess firearms held by all Protestants. Her reading of the provision is that the qualifying phrases, inserted by the House of Lords, were intended to insure that the gentry kept their preferred status with respect to arms (and, more to the point, that the yeomanry were denied ready access to firearms) and certainly were not intended to deny the legitimacy of the preceding century and a half of firearms regulation by Parliament.

While such analysis may undermine the claim that American colonists possessed an individual right to firearms possession via the 1689 Declaration of Rights, it hardly disposes of the possibility that American colonists turned revolutionaries perceived in the Declaration of Rights a different legacy than that intended by the Englishmen who preceded them by a century. There was nothing novel about American colonists applying English law for their own purposes. In 1610, Lord Coke had ruled in Bonham’s Case that "when an Act of Parliament is against common right or reason... the common law will controul it, and adjudge such Act to be void." Whatever Coke may have


76. This is the position of Lois Schwoerer, perhaps the foremost recent analyst of the Glorious Revolution. See SCHWOERER, supra note 61, at 283 (explaining that Declaration of Rights is properly regarded as radical reforming document). However, Schwoerer asserts that the Declaration’s right to arms provision was merely a reaffirmation of "ancient law." Id. at 78.

77. Id. at 297 (reprinting text of Declaration of Rights).

78. Even Schwoerer, the most notable champion of the reformist view of the Declaration of Rights, agrees that Article Seven was declaratory of ancient law. Id. at 78.

79. Id. at 74-78.

80. Id. at 74, 77.


meant by this cryptic observation, his successor to the mantle of commentator upon the sweep of English law, Blackstone, had no doubt. Writing in the middle of the eighteenth century, Blackstone declared that "if the Parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it." But at roughly the same time Blackstone was writing, American colonists were placing their own, and distinctly different, interpretation upon Bonham's Case. In 1761 James Otis, Jr. relied on Bonham's Case to urge a colonial court to strike down the use of general search warrants authorized by acts of Parliament. Americans were aware that they were changing English law to adapt to their American circumstances. John Adams later said of Otis’s use of Bonham’s Case that "[t]hen and there the child Independence was born."

The same phenomenon occurred with the right to possess firearms. Historians increasingly are of the opinion that there was an "incredible . . . diversity of American political culture in the Revolutionary era." The American recognition of the right to possess firearms reflects that pluralist conception of early American political thought. The most plausible reading of the firearms provision of the English Declaration of Rights is that it merely restated an existing tradition of denying lawful access to firearms to ecclesiastical and political outcasts (Catholics and traitors) and the yeomanry, with the result that national defense was reposed in a professional army. But Americans, although divided on their American understanding of the proper meaning of their hereditary right to bear arms, united in rejecting this English understanding.

Americans of the founding generation perceived the right to possess and to use firearms as a multi-faceted issue. One commonly held view was that the right to possess firearms was a natural right of all adult, free, law-abiding male citizens. This view was expressed in such well-known texts as the 1776 Pennsylvania Constitution, which declared "that the people have a right to

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83. Historians have debated the issue. Compare Theodore Flucknett, Bonham's Case and Judicial Review, 40 Harv. L. Rev. 30, 31-32 (1926) (contending that Bonham's Case relies on theory of unwritten fundamental law) with Samuel Thorne, Dr. Bonham's Case, 54 Law Q. Rev. 543, 548-52 (1938) (asserting that Bonham's Case was merely one of especially strict statutory construction).


87. Cornell, supra note 1, at 222. Among the many examples of historical work drawing on this "pluralist model of early American political and constitutional thought," id. at 223, are Forrest McDonald, Novus Ordo Seclorum (1985) and Jack Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution (1996).
bear arms for the defence of themselves and the state,\textsuperscript{88} and the 1777 Vermont Declaration of Rights, which stated "[t]hat the people have a right to bear arms for the defence of themselves and the State."\textsuperscript{89} Kentucky's constitution contained similar language,\textsuperscript{90} while Massachusetts and North Carolina guaranteed the people's right to bear arms for the "common defence"\textsuperscript{91} or for "the defence of the State."\textsuperscript{92} Commentators as politically diverse as Tench Coxe and John Adams, for example, maintained that the right to bear arms included an individual right. In urging ratification of the Constitution, Coxe responded to the call of Pennsylvania Anti-Federalists for an amendment to preserve "the peoples[s]' right to bear arms for the defense of themselves and their own state, or the United States" and to prevent Congress from "disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals."\textsuperscript{93} Writing in the Pennsylvania Gazette under the pseudonym "A Pennsylvanian," Coxe declared that "Congress have no power to disarm the militia" because the "terrible implement[s] of the soldier are the birthright of an American . . . [and the] unlimited power of the sword is not in the hands of either the Federal or state governments, but . . . in the hands of the people."\textsuperscript{94} And "[w]ho are the militia?" asked Coxe; "are they not ourselves, . . . the yeomanry of America from sixteen to sixty."\textsuperscript{95} In more restrained language, Adams concluded that the state constitutions of America secured to law-abiding individuals the right to use arms in self-defense.\textsuperscript{96} There was nothing particularly controversial about the right of

\textsuperscript{88} PA. CONST. art. XIII (1776), available in 5 Thorpe, supra note 39, at 3083.
\textsuperscript{89} VT. DECLARATION OF RIGHTS art. XV (1777), available in 6 Thorpe, supra note 39, at 3741.
\textsuperscript{90} See KY. CONST. art. XII, § 23 (1792), available in 3 Thorpe, supra note 39, at 1275 ("That the right of the citizens to bear arms in defence of themselves and the State shall not be questioned.").
\textsuperscript{91} MASS. CONST. pt. 1, art. XVII (1780), available in 3 Thorpe, supra note 39, at 1892.
\textsuperscript{92} N.C. DECLARATION OF RIGHTS art. XVII (1776), available in 5 Thorpe, supra note 39, at 2788.
\textsuperscript{93} 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 623-24 (Merill Jensen ed., 1976) [hereinafter DOCUMENTARY HISTORY]. The quoted statements are taken from a manifesto published by the Anti-Federalist opponents of ratification in Pennsylvania, in which they set forth the rights of the people they contended were insufficiently protected by the proposed Constitution. Id.
\textsuperscript{94} Stephen Halbrook & David Kopel, Tench Coxe and the Right to Keep and Bear Arms, 1787-1823, 7 WM. & MARY BILL RTS. J. 347, 363 (1999) (quoting Coxe's February 20, 1788 letter to Pennsylvania Gazette under pseudonym "A Pennsylvanian").
\textsuperscript{95} Id.
\textsuperscript{96} See, e.g., 3 J. ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 475 (1787) (stating that one of constitutional liberties of America...
self-defense. Blackstone declared self-defense such a "primary law of nature" that it was incapable of being "taken away by the law of society." Perhaps such natural rights sentiments impelled the New Hampshire ratifying convention to propose that "Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion." No doubt Americans of the founding era agreed with Blackstone, but that does not necessarily mean that they all thought the Second Amendment was the vehicle for restating this fundamental natural right.

A different rationale for securing the right to bear arms was rooted in the fear of a standing army and the fear that, without a right-to-arms provision in the Constitution, the federal government might disarm the states' militias. Carl Bogus recently has provided a thorough explication of this view, although he casts the fear of a federal disarmament of the states' militias as entirely a fear of Southern slaveholders, an explanation that Bogus concedes is based purely on circumstantial evidence. Southerners may have had their unique, peculiar reasons for writing into the Constitution an express guarantee of state authority to maintain an armed militia, but concern that the federal government might disarm the militia was far broader than Bogus implies. A great deal of the impetus for the Second Amendment was rooted in fear that a standing army could become an instrument of oppression, as the Royal Army had been perceived to be during and prior to the Revolution. An armed militia would go a long way toward checking this danger. Tench Coxe's peroration in the pages of the *Pennsylvania Gazette* during the ratification debate is a representative sample of this viewpoint.

The framers generally accepted the idea that the militia potentially included every able-bodied, free adult male, roughly the white male population from ages eighteen through forty-five (according to the federal Militia Act of 1792) or from ages sixteen through sixty (according to Tench Coxe's...
fiery statement in the Pennsylvania Gazette). Virginia’s ratifying convention proposed a declaration of rights, the seventeenth of which declared "[t]hat the people have a right to keep and bear arms" and "that a well-regulated militia, composed of the body of the people trained to arms, is the proper, natural, and safe defence of a free state."\textsuperscript{103} New York’s proposal was similar, declaring "[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."\textsuperscript{104} The United States Supreme Court agreed. In United States v. Miller,\textsuperscript{105} the only twentieth century Supreme Court decision to construe the Second Amendment, the Court concluded that the relevant eighteenth century evidence showed "plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense."\textsuperscript{106}

Arrayed against this is the textual fact that Article I, Section 8 plainly vests in Congress the power to "organiz[e], arm[ ], and disciplin[e] the Militia."\textsuperscript{107} That fact, of course, was part of what spurred Anti-Federalist opponents of the Constitution to demand a right-to-arms provision in the Bill of Rights. But when James Madison introduced what would become the Second Amendment in the First Congress his draft referred to a "well armed and well regulated" militia but it made no mention of the composition of that militia.\textsuperscript{108} Carl Bogus theorizes that this was a deliberate omission, motivated by Madison’s desire to leave intact Congress’s power to define the composition of the militia by exercising its Article I, Section 8 authority to "organiz[e]" the militia.\textsuperscript{109} Whether or not that was so, the House of Representatives added to the proposed Second Amendment language that would define the militia as "composed of the body of the people,"\textsuperscript{110} and the Senate promptly removed that language.\textsuperscript{111}

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\bibitem{103} 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 659 (Jonathan Elliot ed., 2d ed. 1888) [hereinafter ELLIOT’S DEBATES]. North Carolina’s proposal was identical. 4 ELLIOT’S DEBATES 244.
\bibitem{104} CREATING THE BILL OF RIGHTS, supra note 98, at 22.
\bibitem{105} 307 U.S. 174 (1939).
\bibitem{106} United States v. Miller, 307 U.S. 174, 179 (1939).
\bibitem{107} U.S. CONST. art. I, § 8, cl. 16.
\bibitem{108} CREATING THE BILL OF RIGHTS, supra note 98, at 12 (providing test of Madison’s resolution).
\bibitem{109} Bogus, supra note 1, at 367-68.
\bibitem{110} CREATING THE BILL OF RIGHTS, supra note 98, at 30, 38.
\bibitem{111} See id. at 46 (describing Senate Amendments to Bill of Rights).
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The contemporaneous history of militia regulation and firearms regulation bears as well on the identity of the militia that forms the heart of the justification clause of 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."  Historian Michael Bellesiles concludes that "[t]wo competing attitudes toward the public nature of firearms ownership in early America are evident: the encouragement [through militia legislation] of male citizens to bear arms, and the state’s right to regulate who could bear arms and when."[113]

[While] the right to own guns was collectively granted to law-abiding white adult Protestant males . . . [states] and communities had the authority and responsibility to deny gun possession to those perceived as a threat to social stability, a standard that shifted over time to include nonwhites, workers, the foreign born, and criminals.[114]

And they did. "Every state had gun control legislation on its books at the time the Second Amendment was approved. Every state continued to pass such legislation after the Second Amendment became the law of the land, and they were joined in such regulatory efforts by the federal government."[115]

But this history does not dispose of the individual rights claim, although collective rights theorists and historians argue that it does.[116] If there had been a consensus that the Second Amendment neither created nor recognized an individual right, it is reasonable to expect that consensus to be present in the early judicial decisions interpreting state constitutional provisions securing the right to bear arms, provisions that for the most part were nearly identical to the Second Amendment. Michael Bellesiles claims that "court after court" in this era "agreed with . . . Tennessee’s high court in Aymette v. State (1840) that 'The single individual . . . is not spoken of or thought of as "bearing arms."'[117] This statement significantly distorts what these courts really said.

In reviewing the antebellum case law, which was generated mostly by Southern statutes designed to curb revenge killings by forbidding the carrying of concealed weapons, David Kopel concludes that the "solid majority of courts that reviewed the gun control laws . . . under the Second Amendment and its state analogues [upheld] the particular control, while affirming an

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112. U.S. CONST. amend. II.
113. Bellesiles, Gun Laws, supra note 1, at 589.
114. Id.
115. Id. at 587.
116. See id. (claiming that such gun control legislation is evidence that Second Amendment was not intended to secure individual right to bear arms).
117. Id. at 587.
individual right to own and carry guns."\textsuperscript{118} Aymette v. State\textsuperscript{119} provides a good example, especially because Bellesiles relies on it for the opposite point.\textsuperscript{120} The Tennessee court relied on the arms provision of the Tennessee constitution, which protected "the right of the people to keep and bear arms for their common defence,"\textsuperscript{121} to uphold Tennessee's ban on concealed weapons. The right to bear arms did not extend to "private" defense; the constitutional right did not secure "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."\textsuperscript{122} But the Aymette court also declared that "citizens have the unqualified right to keep [weapons, though] the right to bear arms is not ... unqualified."\textsuperscript{123} Tennessee abandoned this fine and subtle distinction thirty-one years later in Andrews v. State.\textsuperscript{124} Again interpreting the Tennessee constitution's arms provision, but equating its substance with the Second Amendment, the Tennessee Supreme Court concluded that the "purpose of the right is to secure a militia\textsuperscript{125} but this "necessarily involves the right to purchase and use [firearms] in such a way as is usual, or to keep them for the ordinary purposes to which they are adapted . . . . [This] right and use are guaranteed to the citizen . . . in subordination to the general ends of civil society."\textsuperscript{126} Despite its declared purpose for the firearms right, the Andrews court did not suggest that the citizen's right either to keep or to use arms was limited to his involvement in the militia, but was limited by the "general ends of civil society."\textsuperscript{127} In short, individuals have the right to keep and to use arms so long as that practice does not pose a threat to civil society.\textsuperscript{128}

\textsuperscript{118} Kopel, supra note 1, at 1416.
\textsuperscript{119} 21 Tenn. (2 Hum.) 154 (1840).
\textsuperscript{120} See Bellesiles, Gun Laws, supra note 1, at 587-89.
\textsuperscript{121} Aymette v. State, 21 Tenn. (2 Hum.) 154, 158 (1840) (emphasis added).
\textsuperscript{122} Id.
\textsuperscript{123} Id. at 150.
\textsuperscript{124} Andrews v. State, 50 Tenn. (3 Heisk.) 165 (1871).
\textsuperscript{125} Id. at 178.
\textsuperscript{126} Id.
\textsuperscript{127} Id.
\textsuperscript{128} See id. (stating that right to keep and bear arms is subordinate to "general ends of civil society."). Of course, it is at this point that the modern policy debate begins. Gun abolitionists contend that the very existence of guns is a mortal threat to civil society. See, e.g., Jerome P. Kassirer, Guns in the Household, 329 NEW ENG. J. MED. 1117, 1117 (1993) (discussing gun related accidents in homes). Gun defenders argue that armed virtuous citizens help maintain civil society by deterring and reducing crime. See generally JOHN LOTT, JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS (William M. Landes & J. Mark Ramseyer eds., Univ. of Chicago Press 1998) (concluding that armed citizens reduce and deter crime).
An 1846 Georgia Supreme Court decision, *Nunn v. State*, used the Second Amendment to invalidate partially a Georgia law that prohibited either the sale or possession of small pistols. In sweeping language, the Georgia court opined that "any law, State or Federal, is repugnant to the Constitution" if it "contravenes [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." The Georgia court asserted, perhaps with some hyperbole, that this right was a natural right "originally 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*." Of course, the *Nunn* court was wrong to assume that the Second Amendment applied to Georgia, since thirteen years earlier the Marshall Court had ruled, in *Barron v. Baltimore*, that the Bill of Rights applied only to the federal government; however, the *Nunn* court's gaffe does not undermine its view of the substance of the Second Amendment guarantee.

These cases are but a small sampling of the nineteenth century state cases that are canvassed by David Kopel. A common theme of these cases is that the right to bear arms, whether expressed in the Second Amendment or a state constitutional analogue, was rooted in a fear of standing armies. These state courts consistently derived from that concern the principle that the firearms right was intended to create an armed populace that could form a militia to defend the country and simultaneously deter tyranny. Courts split on the question of whether the arms right included an individual right to carry arms for self-defense. Although the most widely shared view of these courts was

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129. 1 Ga. 243 (1846).
130. See *Nunn v. State*, 1 Ga. 243, 252 (1846) (finding statute invalid insofar as it prohibited open possession of firearms).
131. *Id.* at 251.
132. *Id.*
133. 32 U.S. (7 Pet.) 243 (1833).
134. See *Barron v. Mayor & City Council of Baltimore*, 32 U.S. (7 Pet.) 243 (1833); *Nunn*, 1 Ga. at 251 (describing substance of Second Amendment guarantee).
136. See *supra* notes 118-34 and accompanying text (describing early cases expounding on right to bear arms).
137. See *supra* notes 118-34 and accompanying text (describing cases expounding on right to bear arms).
that the arms right was designed to secure the common defense, "every nine-
teenth century state court judge who said anything about the Second Amend-
ment, except for one concurring judge in an 1842 Arkansas case, agreed that
it protected the right of individual Americans to own firearms." These
positions are not in tension; courts evidently thought that individuals with
guns were the backbone of national defense and were a vital security against
tyranny. Moreover, some courts were willing to read the Second Amendment
as a virtually absolute guarantee of the citizen’s right to own and to use arms
for personal self-defense, while other courts read state arms provisions as
guaranteeing a personal right to own and to carry "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 [common]
defense," and some courts construed these provisions to exclude any right
to carry concealed weapons for self-defense.

The antebellum split in the state courts over the extent, if at all, to which
the Second Amendment guaranteed a right to own and to use arms in self-
defense can be read several different ways. It corroborates the view com-
monly expressed by collective rights theorists that there was no consensus that
the right to bear arms always was thought of as an individual right. But it also
corroborates the claims of individual rights theorists that a considerable
portion of the polity thought the firearms right did extend to individuals. It is
not possible to be dogmatic (and correct) on this point. At most, the ante-
bellum state court cases confirm the message supplied by the eighteenth
century historical sources: The right to bear arms is an intellectual helix. One
strand is the collective right of the people to defend themselves against
organized, collective armed aggression; the other strand is the individual right
of the people to defend themselves against individual acts of armed aggres-
sion.

If further confirmation of this reading were needed, it is amply supplied
by the behavior of the "Reconstruction Founders": the practices, legislative
debates, and resulting legislation that poured forth from the victorious Union
government, dominated by Republicans. One of the post-war evils that the
federal government sought to address was the systematic seizure by gangs of

154, 158 (1840) (holding that right to bear arms in Tennessee Constitution did not extend to
private defense).
139. Kopel, supra note 1, at 1433.
142. See, e.g., State v. Buzzard, 4 Ark. 18, 24-25 (1842) (upholding statute prohibiting
concealed firearms); State v. Chandler, 5 La. Ann. 489, 490 (1850) (finding Second Amendment
protects right to carry arms "in full view").
whites of private arms held by newly freed blacks. Often these seizures were authorized by state laws that specifically denied to blacks the right to bear arms. But Republican officials of the federal government repeatedly characterized these state laws as infringing upon the Second Amendment right to bear arms.\textsuperscript{143} In order to secure effectively this right (as well as others), Congress enacted the 1866 Civil Rights Act, which guaranteed to newly freed slaves "the full and equal benefit of all laws and proceedings concerning personal liberty [and] personal security, . . . including the constitutional right to bear arms."\textsuperscript{144} It is hardly likely that the Reconstruction Congress thought that by this legislation they were \textit{merely} directing southern states to include blacks in the militia. After all, it was that militia, under the label of the Confederate States Army, that had proven so stubborn and vexatious that it required four years and a million human casualties to subdue. As citizens, surely blacks were entitled to participate in the militia,\textsuperscript{145} but the immediate concern of Congress was not assuring that blacks served in state militias; rather, Congress wanted to aid black Americans in resisting the continuing criminal depredations by the Ku Klux Klan and similar white gangsters. Again and again the theme of an individual right to own and to use arms in self-defense comes through in the debates and legislation produced by the Reconstruction Congresses.\textsuperscript{146} It is not clear how many newly freed blacks had either the means or ability to procure arms, but it is abundantly clear that Congress, in acting to make certain that black people possessed the right to bear arms, was evidencing "plainly a concern about the self-defense rights of individual citizens, especially freedmen."\textsuperscript{147}

This history has prompted Akhil Amar to conclude that the Second Amendment acquired an additional meaning in the immediate aftermath of the Civil War.\textsuperscript{148} Before the Civil War the function of the Second Amendment

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\bibitem{143} Kopel, \textit{supra} note 1, at 1448 (quoting 1866 legislative report of Joint Committee on Reconstruction stating that laws were "a plain and direct violation of their personal rights as guaranteed in the Constitution").
\bibitem{144} Act of July 6, 1866, 14 Stat. 173, 176 (1866).
\bibitem{145} See Kopel, \textit{supra} note 1, at 1453 (quoting Report of Joint Committee on Reconstruction, H.R. Rep. No. 39-30, at 229 (1866)) (focusing on statement of Mississippi Republican in debate upon 1875 Civil Rights bill that all citizens of United States compose militia "and the colored man composes part of these").
\bibitem{146} \textit{Id.} at 1450-53.
\bibitem{147} \textit{Id.} at 1454.
\end{thebibliography}
was to assure the states the power to maintain quasi-independent militias composed of the polity for the purpose of resisting armed aggression, whether the threat be domestic or foreign. After the Civil War, the Second Amendment acquired an additional goal: insuring the personal security of all citizens by guaranteeing to them a personal right to resist criminal attacks. The personal security purpose of the Second Amendment did not originate in the Reconstruction, however. It was always there, embodied by the recitations in such revolutionary constitutions as Pennsylvania and Vermont that the right to bear arms was in part to enable the virtuous citizen to defend himself. In terms of the right to arms, the aftermath of the Civil War was a case study in extension of the arms right as the polity was radically extended. As freed black slaves joined the polity over the bitter and violent objections of their former owners, the self-defense aspect of the Second Amendment was of paramount importance. Sally Hemings needed the means to defend herself from unwanted intrusions upon her integrity. That is what the Reconstruction Congresses recognized. It was not so much a reconception of the right to arms as it was a reinvigoration of a preexisting purpose. Until then, nobody had systematically attempted to disarm an entire discrete portion of the polity in order to deprive them of the means of self-defense. When the attempt occurred, the self-defense strand of the arms right was championed vigorously. 

Yet in United States v. Cruikshank, the Supreme Court vitiated much of the power of the federal legislation rooted in the conception of the right to bear arms as securing a right to personal defense. In the aftermath of an 1872 Louisiana race riot, Cruikshank, a Klan member, was convicted of conspiring to deprive black citizens of their federal constitutional rights of peaceable assembly and bearing arms. The Court overturned Cruikshank's conviction and held the federal statute unconstitutional as beyond the scope of congressional power. The Court reasoned that congressional power to enforce the substantive guarantees of the Fourteenth Amendment authorized Congress to protect the assembly or arms rights only if those rights were

149. See AMAR, supra note 148, at 257-66.
150. See id.
151. See supra notes 88-96 and accompanying text (exploring constitutions of Pennsylvania and Vermont).
152. 92 U.S. 542 (1875).
153. See United States v. Cruikshank, 92 U.S. 542, 548 (1875) (holding certain gun control legislation to be beyond federal power).
155. See Cruikshank, 92 U.S. at 559.
"privileges and immunities" of federal citizenship. Applying the logic of *The Slaughter-House Cases* that the privileges and immunities of national citizenship did not include the rights secured by the Bill of Rights, the Court concluded that the assembly and arms rights were not "granted or created" by the Constitution. They were natural rights that existed prior to constitutional government; all the Constitution did was recognize these rights as incapable of infringement by the federal government, but it neither created nor granted them. Moreover, even if the right to bear arms was created by the Constitution and enforceable against the states, Congress lacked any authority to prohibit invasions of that right by private citizens. Thus, the Court in *Cruikshank* did not repudiate the idea that the arms right protected individual self-defense, but it did virtually eliminate the utility of that right as against invasion by states or private citizens. Indeed, by tying the source of the arms right to natural entitlements and by suggesting that an aggrieved citizen seek recourse from his state, the *Cruikshank* Court implicitly endorsed the idea that the arms right encompasses an individual right. Whatever a natural right may be, it is surely something possessed by individuals and not the product of government. The right of a government to maintain a militia is hardly natural. Moreover, if the arms right was purely a collective right of the state, it would make no sense for the Court to observe that the "people[']s" remedy for its "violation by their fellow-citizens" is to call upon their state governments.

156. Id. at 551-54.
157. 83 U.S. (16 Wall.) 36 (1873).
158. See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81 (1873) (holding that Privileges and Immunities Clause of Fourteenth Amendment is not shorthand for first eight amendments to Constitution).
160. See id. The Court stated:
The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution .... It is found wherever civilization exists. It was not, therefore, a right granted to the people by the Constitution .... The right ... of "bearing arms for a lawful purpose" ... is not a right granted by the Constitution [or] dependent on that instrument for its existence. The second amendment declares that it shall not be infringed; but this [means] that it shall not be infringed by Congress[,] ... leaving the people to look to [their state governments] for their protection against any violation by their fellow-citizens of the rights it recognizes.

Id. at 551-53.
161. Id. at 553.
162. Id.
The other Supreme Court decision of the nineteenth century dealing with the Second Amendment is Presser v. Illinois,\(^{163}\) in which the Court upheld the validity of an Illinois statute prohibiting private militias, as applied to an organized group of armed laborers who publicly marched in a paramilitary assembly.\(^{164}\) The Court had no difficulty agreeing that the arms right does not include the right to parade about in concert with others brandishing arms.\(^{165}\) In any case, said the Court, the Second Amendment right does not apply to the states.\(^{166}\) *Presser* does not add much to our understanding of whether the arms right includes an *individual* right to self-defense because that issue was simply not considered. The case does, however, strongly suggest that the collective right of self-defense is one that can and should be regulated by the states. *Presser* leaves no doubt that the Second Amendment would not be offended were a state to outlaw the various insurrectionist militias that are lesions on the contemporary body politic.

*United States v. Miller,*\(^{167}\) the only twentieth century United States Supreme Court decision on the Second Amendment, provides grist to both ideological mills and settles nothing.\(^{168}\) The Court sustained the validity of a provision in the National Firearms Act that made it a crime to transport a sawed-off shotgun across state lines, opining that the Second Amendment was intended to insure that the nation was capable of defense by citizen-soldiers and reflected the founding generation’s distrust of a standing army.\(^{169}\) By itself, this suggests that the Court in *Miller* saw the arms right as entirely collective, and that is the spin collective rights theorists give *Miller.* But the Court also stated that in the absence of proof that a sawed-off shotgun "has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument."\(^{170}\) The clear implication of the Court was that there might be a private right to possess and to use weapons that are "part of the ordinary military equipment or [which] could contribute to the common defense."\(^{171}\) This is, of course, highly unsettling to the ideologues of

\(^{163}\) 116 U.S. 252 (1886).

\(^{164}\) See *Presser v. Illinois*, 116 U.S. 252, 269 (1886) (finding that Illinois statute prohibiting private militias was constitutional).

\(^{165}\) *Id.* at 267.

\(^{166}\) *Id.* at 266-68.

\(^{167}\) 307 U.S. 174 (1939).


\(^{169}\) *Id.* at 179.

\(^{170}\) *Id.* at 178.

\(^{171}\) *Id.* (emphasis added).
gun control because it plainly suggests a heightened constitutional interest in private possession of modern infantry weapons: fully automatic small caliber rifles and carbines with high capacity magazines. As almost everyone knows, these weapons are the particular bete noire of the gun control enthusiasts. The Miller Court may have endorsed the collective defense purpose of the Second Amendment but it surely did not repudiate the idea of an individual right to further that common defense. The Court's language surely indicates that the individual right is broader than a mere "right" to be conscripted into military service. Perhaps the Miller Court meant to drive out of the Second Amendment any individual right to possess arms for self-defense, but the Court hardly said so.

None of the text, original intent, historical practice, constitutional structure, or doctrine provides a definitive answer to the question of whether the arms right includes an individual right to keep and to use arms in self-defense. We are forced to decide for ourselves. Fortunately, we are not left completely bereft by the traditional sources of constitutional understanding.

Let us begin with a principle that all sides can agree upon: The Second Amendment was intended, at least in part, to insure that a large, relatively unselect body of the polity possess arms and hold them in readiness for the defense of the nation. We may debate whether this was due to distrust of a standing army, a device to insure that states had power to put down local insurrections, or provision of a means to resist tyranny from within or without, but there can be little argument that the aspiration was for a broad cadre of citizen-soldiers ("civilians primarily, soldiers on occasion," in the words of the Miller Court172) available to defend the community. Of course, the Second Amendment has failed to vindicate this purpose. The standing army is a fixture and has been for a very long time. The militia as a uniquely anti-insurrectionist arm of state governments is an anachronism. Almost nobody believes that the citizenry is constitutionally entitled to resist governmental tyranny by force of arms. The insurrectionist view of the arms right receives little support and we may safely discount it. There may be a "right" to revolution, but it is not constitutionally recognized. Yet, when constitutional provisions fail in their essential purpose, it is proper to apply a doctrine I have previously described as "constitutional cy pres."173 We should attempt to construe the failed provision in ways, even unintended and unorthodox ways, that will deliver as much of its essential purpose as can be provided within the context of the present constitutional structure.174 Of course, this often requires

172. Id. at 179.
174. See id. at 99. The "incorporation" doctrine reflects a form of constitutional cy pres
recasting the original intentions that have failed into a more general formulation, but this is neither new nor unprincipled. So long as the more general formulation is faithful to the specific intent that can no longer be accomplished, no violence is done to original intentions, even assuming the highly debatable premise that original intent is the lodestar of constitutional interpretation.

The undeniable theme of the arms right is defense – collective and individual. Collective defense is the melody of the theme, but the repeated sound of individual defense is the harmony. The arms right is not just about the right to die in uniform; it is about defending ourselves, our loved ones, our community, our nation, from those who would harm what we value. Not only is there evidence, albeit contested, that a personal self-defense right was part of the original specific intent of the Second Amendment’s framers, and additional evidence that a considerable portion of the polity gave it that construction over the ensuing century or so, the personal self-defense interpretation comports with the slightly more general intent of defense. Our nation is no longer defended by citizen-soldiers. We are not Switzerland, where an armed cadre of citizen-soldiers continues to form the core of national defense. Ambient circumstances have changed; the "common defense" purpose of the Second Amendment has shriveled into a useless raisin. But the need to defend against ordinary criminality is, unfortunately, still with us, and the right to defend against criminal assault is surely not useless.

Advocates of gun control ought not bridle at this conclusion. One of the reasons why the gun debate is so polarized is because many gun owners simply do not believe the disclaimers of gun controllers that they do not intend to confiscate all private firearms. Indeed, the currently fashionable trend to describe firearms as a public health problem, as if guns were a pathogenic organism like smallpox virus, exacerbates this fear because the logical response to equating guns to smallpox is to eradicate the noxious pathogen. Because gun owners do not believe that gun controllers will be content with any control scheme short of abolition of private possession of firearms, they tend to overinflate their claim of constitutional entitlement. The result is a

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175. This is what the Court did in Brown v. Board of Education, 347 U.S. 483 (1954), when it applied a more general principle of equal protection than the framers of the Equal Protection Clause specifically intended. See MASSEY, supra note 173, at 102-04.

"debate" that is an angry shouting match from very long distance. Admitting that the arms right includes a private right to possess firearms for individual self-defense provides some measure of comfort to gun owners and simultaneously denies the grossly inflated claim that firearms ownership is an absolute right or that it includes the right to pack a Ryder truck full of ammonia fertilizer and diesel oil and detonate the package in front of a federal office building. Of course, this will not satisfy either the hard-core abolitionists or the fanatic insurrectionists, but I am not interested in an interpretation of constitutional law that panders to extremists and lunatics. The real issues that the gun debate ought to revolve around are the extent of permissible regulation of firearms acquisition, ownership, possession, and use in light of a recognized, legitimate entitlement to possess and to use firearms in self-defense.

II. The Scope of an Individual Right to Armed Self-Defense

Once a right to keep arms for purposes of self-defense is recognized, the focus shifts to the standard of review that courts should employ in testing claims of governmental infringement of that right. In this Part, I will first examine that question and then turn to the logically subsequent question of whether such a Second Amendment right, complete with the standard of review I propose, should be applied to the states via the Due Process Clause of the Fourteenth Amendment.

It is axiomatic that government action is presumptively valid unless some indicator of invalidity is present, thus shifting the burden to the government to justify the validity of its action by proving that its challenged action conforms to the level of scrutiny that the Court has identified as appropriate. What should indicate when a governmental firearms regulation becomes a presumptive violation of the right to keep arms for self-defense? The right is not an absolute; almost no constitutional right is absolutely inviolate. The history of firearms regulation before and after adoption of the Second Amendment is a thorough demonstration that the Second Amendment has never been thought to bestow absolute entitlements.177 The doctrinal history of the arms right, whether in its Second Amendment or state constitutional form, reveals a tradition of sustaining restrictions upon the keeping and bearing of arms, so long as those restrictions do not materially encumber or frustrate absolutely the core purposes of the right.178 Moreover, given the contested history of a

177. See supra notes 49-101 and accompanying text (discussing historical restrictions on right to bear arms).

178. See supra notes 49-101 and accompanying text (discussing historical restrictions on right to bear arms).
Second Amendment individual right to arms for self-defense, it would be manifest error to treat such a right as absolute. The indicator of presumptive invalidity, then, should be a conclusion that the challenged regulation materially infringes upon the individual right to arms for self-defense.

What constitutes a material infringement? One way of answering the question is to describe some categories of regulations that surely are not material infringements. Regulations that deprive people who lack lawful capacity of the right to wield arms in self-defense are surely immaterial restrictions, if they even constitute restrictions at all. Such people include minors and the insane. A similar category consists of those people who are a proven threat to public safety – convicted criminals or people with a proven violent disposition. In addition to categories of people, restrictions upon categories of weapons might also be immaterial, depending on the specific category prohibited or restricted. For example, a ban on handguns equipped with silencers is surely not a material infringement. Muffled weaponry is not essential or even very useful to effective self-defense. A ban on private possession of military grenade launchers is also surely permissible. The occasions in which such a weapon would be a useful tool of self-defense are surely so few, and the risk of collateral property damage and personal injury resulting from its use is so large, that is hard to imagine that such a restriction could be seen as a material impairment upon the individual right of armed self-defense. It need hardly be added, I suppose, that bans or severe restrictions on private possession of weapons of mass destruction, bombs, tanks, artillery, rockets, and the like are easy cases that need not be discussed.

Prohibition of private possession of fully automatic weapons is also surely a non-material restriction. A fully automatic weapon causes rapid, continuous fire so long as the trigger remains depressed and rounds remain in the magazine. The rate of fire for a modern military-issue fully automatic infantry rifle is in the neighborhood of 700 rounds per minute, or slightly more than eleven bullets per second.\textsuperscript{179} Such weapons cannot sustain that rate of fire for any appreciable amount of time; they are constrained by magazine capacity (30 to 100 rounds), so these weapons provide a burst of about three to eight seconds of potential death before they must be reloaded by insertion of a new magazine. But even eight seconds of automatic fire will spew 100 slugs into the air at very high velocity, with attendant risk of considerable

\textsuperscript{179} The rate of fire for the M-14, the predecessor to the standard American military assault rifle, the M16, is 750 rounds per minute. See http://www.geocities.com/Pentagon/Camp/2781/M14.htm. The rate of fire for the AK-47, the standard Soviet bloc assault weapon since 1949, is 600 rounds per minute. See Kalashnikov Arms Catalog, \textit{AK-47 Assault Rifle}, at http://kalashnikov.guns.ru/models/ka50.html.
collateral damage. An individual right to armed self-defense does not mean the right to overwhelming firepower in self-defense, regardless of collateral consequences. Indeed, one measure of the boundary of the right might be the criminal law's limits on a deadly response in self-defense. Under the criminal law it might be justifiable to kill your attacker, but the justification would not excuse you from responsibility for the deaths of two or three bystanders shredded by errant rounds from your fully automatic rifle. It seems perverse to read the individual right to armed self-defense as securing the right to act beyond the limits of justifiable self-defense.

Absolute prohibitions upon private possession of handguns, shotguns, and rifles might well be material infringements. The answer depends upon the utility of the weapon in question. Handguns are particularly effective for self-defense; that is one reason police officers walk around with them instead of sawed-off shotguns. Moreover, the risk of collateral damage is minimized if the weapon is not fully automatic. Shotguns and rifles are less utile in self-defense, but to a person confronted with two or three armed thugs in his front hall a shotgun with an eighteen-inch barrel length is a very effective weapon with which to quell the imminent peril.

The hardest category to deal with is the semi-automatic rifle or handgun. A semi-automatic weapon fires repeatedly as quickly as the trigger is pulled after release from the prior shot. Essentially, a semi-automatic weapon can be fired as rapidly as the shooter can move his or her finger, producing an effective rate of fire of about two or three rounds per second. This is substantially less than the rate of fire produced by fully automatic weapons but is still rapid. The risk of collateral damage is lower than with an automatic weapon but is still high, especially since fear and panic often accompany shootings in self-defense. This case ought to be resolved by application of a general principle applicable to the question of when gun regulations materially impair the individual right of armed self-defense: If the regulation permits reasonable access to and use of firearms that are both suited to self-defense and that

180. See, e.g., Jane Fritsch, Officer Recounts Diallo's Shooting in Day on Stand, N.Y. TIMES, Feb. 15, 2000, at A1, B3 (providing testimony of New York police officers accused of murder in death of Amadou Diallo). Thinking Diallo was engaged in criminal activity, two plain clothed officers approached Diallo in the vestibule of an apartment building, displayed badges, asked to speak to him, then asked him to display his hands openly. Id. As Diallo pulled an object from his pocket, one of the officers shouted that it was a gun. His partner leaped backward and fell, causing the first officer to think that Diallo had shot his partner. Id. Shooting ensued. Id. One of two other officers who rushed to the scene and shot at Diallo testified that he saw the first officer that fired "in a panicked state, scrambling down the stairs and shooting." Id. Another officer testified that after the shooting he thought "I was going into shock . . . I didn't know where I was." Jane Fritsch, Two Officers Back Story of Partners, N.Y. TIMES, Feb 16, 2000, at B1, B6.
do not have an inherent high risk of collateral damage, the regulation does not materially impair the individual right of armed self-defense.

By this standard, most regulations that are short of absolute prohibitions will likely be found not to be material infringements. Limitations on the number of guns that may be purchased are unlikely to be material infringements. Requirements that guns be equipped with trigger locks or, if technology permits, an individual user identification system that will disable the firing mechanism except in the hands of the authenticated user, are unlikely to constitute material infringements.

Problems arise when considering licensing systems. These may take several forms but, for illustration, consider two types of licensing: (1) restricting access to guns only to licensed gun owners and operators and (2) restricting the carrying of a gun concealed on one's person to those licensed for the practice. The materiality of the infringement produced by licensing depends upon the standards employed to limit the discretion of the licensing authority. The proper analogy is to the branch of the law of prior restraints that governs speech licensing schemes.\footnote{181. For a general exploration of the meaning of the Second Amendment by reference to the First Amendment's speech jurisprudence, see L.A. Powe, Jr., Guns, Words, and Constitutional Interpretation, 38 WM. & MARY L. REV. 1311 (1997).} Speech licensing schemes that confer unfettered discretion on a governmental official to permit or deny speech are presumptively void,\footnote{182. See, e.g., Forsyth County v. The Nationalist Movement, 505 U.S. 123, 136-37 (1992) (finding ordinance did not have constitutionally required standards to guide administrator in setting permit fee); City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 772 (1988) (holding portions of ordinance giving mayor nearly complete discretion to deny permit application unconstitutionally); Lovell v. City of Griffin, 303 U.S. 444, 452 (1938) (striking down municipal ordinance that restricted press and free speech).} while licensing schemes that contain clear standards limiting the denial of licenses to circumstances where the speech could be validly punished after the fact are facially valid, though still subject to constitutional challenge based on application.\footnote{183. See, e.g., Cox v. New Hampshire, 312 U.S. 569, 577 (1941) (deciding that law requiring license for parade was constitutional as applied to group of Jehovah's Witnesses).} The same principle ought to apply to Second Amendment rights. A licensing scheme for possession of firearms suitable for personal self-defense should be presumptively void if it vests unconstrained discretion in the licensing authority to grant or deny such licenses. But a licensing system that limits such official discretion by specifying criteria for a license that would be independently valid ought not be subjected to any greater scrutiny because a license is a prerequisite to lawful gun possession. Thus, a system that restricts firearms licenses to sane, law-abiding adults who have completed a reasonable course in firearms handling
and safety should be presumptively valid and would not likely constitute a material infringement of the individual right to armed self-defense.

Licensing schemes designed to limit the number of people entitled lawfully to carry a concealed weapon pose slightly different problems. Schemes that vest uncontrolled discretion in government officials to grant or deny such permits should be presumptively invalid. Licensing laws that cabin official discretion by directing issuance of "concealed carry" permits only to those persons who have demonstrated some special or exceptional need for personal armed self-defense should also be treated as presumptively invalid. Such laws materially infringe the individual right to armed self-defense because they disable ordinary citizens from exercising their own judgment concerning the necessity of preparations for armed self-defense. Under these laws, citizens must justify their exceptional need for armed self-defense before being allowed to carry a concealed firearm. Reading the Second Amendment to include an individual right to armed self-defense reverses that burden; it is the government that must justify a wholesale bar to the means of armed self-defense in public, the place where it might most be needed. This is not to say that such statutes can never be justified, but it is to say that the government must bear the burden of their justification under heightened scrutiny.

To what level of heightened scrutiny should gun regulations that materially infringe the individual right of armed self-defense be subjected? There are three possibilities. The tiered-scrutiny approach would offer either strict or intermediate scrutiny. The flexible "sliding-scale" approach to equal protection championed by such Justices as Thurgood Marshall and John Paul Stevens would employ a factor-based balancing approach.

Tiered scrutiny is familiar and accepted. It offers the benefit of settled nomenclature if not necessarily settled results. But tiered scrutiny in either form would permit clandestine balancing to occur in the identification of whether or not a given regulation materially infringes the individual right of armed self-defense. This problem would likely be exacerbated if strict scrutiny were selected as the operative standard. While judicial manipulation of the material infringement trigger for heightened scrutiny would likely be reduced with intermediate scrutiny, that would probably occur only because the "substantially related" and "important interest" elements of intermediate scrutiny are themselves extremely indeterminate. But we live with these defects in other, and arguably more important, areas of our constitutional law so there is no reason to think we could not construct a serious Second Amendment jurisprudence in a reasonably principled fashion.

Strict scrutiny places a very high constitutional value on the individual right of armed self-defense and a correspondingly high burden of justifi-
cation upon the government when it acts to infringe that right materially. There is no generally accepted and fully coherent theory of why we treat certain constitutional rights as exceptionally valuable, and thus subject governmental infringements of them to strict scrutiny, other constitutional rights as possessing "ordinary" high value, and thus subject governmental infringements to intermediate scrutiny, and still other constitutional rights as possessing no unusual value, and thus subject governmental infringements to some form of minimal scrutiny. In short, nobody has ever adequately and convincingly explained generally why the right to speak without governmental regulation of the content of the speech is so valuable that government infringements are subject to strict scrutiny, but the right to be free of governmental sex discrimination is so much less valuable that governmental infringements are justifiable under intermediate scrutiny, and the right to receive compensation for governmental regulations of property that devastate the economic value of that property is non-existent so long as the regulations are reasonably related to some legitimate governmental purpose. But some explanation is surely necessary before we place the hitherto unrecognized right to armed self-defense in the most revered niche in the pantheon of constitutional liberties.

A common justification of the necessity of the government affording to citizens the right to assert acts of self-defense as a defense to otherwise criminal acts is the idea that there is a moral entitlement to such action and that, consequently, the government must observe and respect this moral entitlement. Claire Oakes Finkelstein has cogently criticized this claim, concluding that justification "of the State’s obligation to extend a right of self-defense to its citizens must be sought not in moral philosophy, but in the substantive political considerations that establish state legitimacy." The political considerations that argue for state respect of a right to armed self-defense as an obligation of the highest order are weaker than the moral arguments. Opponents of recognizing any individual right of armed self-defense typically claim that any increase in public access to firearms produces higher dangers for the public as a whole. But the weight of the empirical evidence supports the intuitively non-obvious claim that increased access to

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firearms for self-defense purposes actually reduces crime and attendant public danger. 186 This is suggested to be due to the deterrent effect on criminals, who face a higher risk that their chosen victim may be armed and, thus, not easy prey. Perhaps as compared to a state in which no private firearms exist, the presence of private arms for self-defense would increase public danger, but in the highly imperfect society in which we actually live there is no credible evidence that increased access to firearms for self-defense purposes truly increases public danger. 187 The question of whether or not strict scrutiny is appropriate should not, of course, be determined by reference solely to our understanding of the effect of armed self-defense on crime and other public dangers, but those effects should be considered.

The strongest arguments for strict scrutiny are two historical facts. First, the eighteenth century founders generally agreed that the point of the Second Amendment was to secure the means of defense. Plenty of differences existed on important details — whether the defense right was limited to common defense or included individual defense, whether the right was for defense against domestic tyranny or only external aggression, whether the right was possessed by individuals or only states — but there was consensus that the right was all about defense. 188 Second, the Reconstruction framers were definitely of the opinion that the Second Amendment included an individual right to possess arms for self-defense. 189 While they did not propose or adopt the Second Amendment, their understanding of its content at a time of crucial constitutional rearrangement ought to be given considerable respect.

186. See generally Lott, supra note 1 (arguing that private gun ownership reduces crime).

187. For a critical discussion of this literature, focusing on the claimed scientific shortcomings of the studies purporting to show increased risk, see Gary Kleck, Point Blank: Guns and Violence in America (Michael Useem & James D. Wright eds., Aldine de Gruyter 1991); Edgar A. Suter, Guns in the Medical Literature — A Failure of Peer Review, 83 J. Med. Ass’n Ga. 133 (1994).

188. Garry Wills stands out as a leading dissenter from this contention. Wills has made the astonishing claim that the Second Amendment added nothing to the Constitution and the even more unbelievable claim that Madison urged its adoption simply to hoodwink the Anti-Federalists into thinking that something was added to the Constitution. Garry Wills, To Keep and Bear Arms, N.Y. Rev. Books, Sept. 21, 1995, at 62, 72. Even in an age without ideals, the stark cynicism of Wills’s position is remarkable. Wills asks us to believe that Madison’s public statements were calculated lies offered up only for their political appeal. But Madison’s private writings suggest that he was always earnest in his stewardship of the Bill of Rights. See, e.g., Powe, supra note 181, at 1359-65 (examining Wills’s conclusions in light of historical evidence of Madison’s intentions). Despite Wills’s reputation as a fine scholar, his reading of Madison’s motives is simply wrong.

189. See supra note 10 and accompanying text (noting support for contention that founding generation was in agreement that individual right to possess arms existed).
course, we are not bound by the past, but because "it is a constitution we are expounding"\textsuperscript{190} we ought to adopt current interpretations that at least connect with the past, even if they do not exhibit slavish devotion to past views. If the weight of historical opinion favors recognition of an individual right of self-defense it ought to be given respect in our doctrinal taxonomy.

Finally, whatever skepticism may exist concerning the connection between generally accepted moral rights and the obligations of governments to respect those moral rights,\textsuperscript{191} the fact is that our constitutional tradition has long accepted this connection. From the Declaration of Independence to \textit{Calder v. Bull}\textsuperscript{192} to the Ninth Amendment to the confirmation hearings of Robert Bork and Justice Clarence Thomas, American constitutional law has always had a "natural law" element to it, reflected today in the set of constitutionally unenumerated rights that coalesce under the rubric of "fundamental rights" for purposes of equal protection and due process. If anything, the individual right to armed self-defense has a better textual foundation in the Second Amendment than these other rights, infringements of which require governmental justification under the demanding standard of strict scrutiny.

Strict scrutiny, though famously claimed by Gerald Gunther to be "strict in theory and fatal in fact,"\textsuperscript{193} might not always be fatal to governmental regulations materially infringing upon the Second Amendment right. The government's compelling purpose will typically be some variation on the theme of public safety – prevention of the death of or injury to innocent people. Surely this is a compelling interest. What could be of much higher priority? The degree of connection between this laudable objective and the means chosen to achieve it would likely prove to be the litigation battleground.

The government ought not be required to prove that its choice of means is the least restrictive alternative available to it. The individual right to armed self-defense is not an absolute right; carefully calibrated infringements that do in fact substantially increase public safety should be constitutionally acceptable. The government should be required to prove that its chosen means, in purpose and in fact, substantially advance the government's compelling objective. So, for example, if the government thinks that the carrying of concealed weapons by law-abiding people poses an unacceptable danger to public safety

\textsuperscript{190} McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).
\textsuperscript{191} See generally Finkelstein, supra note 185 (criticizing moral entitlement argument).
\textsuperscript{192} Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798).
and acts to ban the practice by private citizens, it will be required to justify its material infringement of the Second Amendment right of armed self-defense by showing that the ban "substantially advances" the government's compelling objective.

Critics will observe that this would have the effect of making the courts the arbiters of the validity of the conflicting empirical evidence on this point. That is likely correct, but I am not convinced that is so bad. I see no reason why legislators possess any greater competence than judges to evaluate this evidence. Indeed, because legislators may be more prone than judges to ignore the constitutional rights of minorities (here, law-abiding citizens so fearful of criminal attack that they wish to carry a lethal weapon around with them) it makes sense to me to vest this power with the judiciary, the body that we have entrusted for over two centuries with primary responsibility for preservation of our constitutional liberties.

Even if an individual right to armed self-defense is recognized and accorded the "semi-strict" scrutiny I propose, the question remains whether it should be enforced only against the federal government or whether it should be made applicable to the states by judicial incorporation into the Fourteenth Amendment's Due Process Clause. As a normative proposition there is much to be said for wholesale incorporation of the entire Bill of Rights into the Fourteenth Amendment's Due Process Clause, but that was an earlier generation's argument,194 and I shall not repeat it here. There is also much to be said for a revival of the Fourteenth Amendment's Privileges and Immunities Clause, surely a more textually convenient vessel into which to pour the Bill of Rights. While an even earlier generation seemed to deflate the Privileges and Immunities Clause entirely,195 and our generation may be pumping some constitutional air back into it,196 I prefer not to enter that speculative thicket and to concentrate instead upon the accepted mechanism for retail incorporation of the provisions of the Bill of Rights into the Fourteenth Amendment's Due Process Clause.

194. Compare Adamson v. California, 332 U.S. 46, 71-72 (1947) (Black, J., dissenting) (arguing that one of Fourteenth Amendment's chief objectives was to make Bill of Rights applicable to states) with Charles Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 STAN. L. REV. 5, 134-39 (1949) (arguing that history does not support contention that Bill of Rights was intended to be applied to states through Fourteenth Amendment).

195. See United States v. Cruikshank, 92 U.S. 542, 553 (1875) (finding that Congress could only protect arms right if it was privilege and immunity of United States citizenship); The Slaughter-House Cases, 83 U.S. (16 Wall.), 36, 81 (1873) (eliminating Privileges and Immunities Clause as basis for incorporating Bill of Rights against states).

Most of the incorporation jurisprudence has involved the procedural rights guaranteed to criminal defendants. In that context, the question is whether the right sought to be incorporated is "fundamental to the American scheme of justice."\(^{197}\) The Court’s approach to determining whether a claimed right is constitutionally fundamental for purposes of assimilation into the Court’s substantive due process jurisprudence focuses on whether the right, "carefully" described so as to be no broader than the facts of the case require,\(^{198}\) is "so rooted in the traditions and conscience of our people as to be ranked as fundamental."\(^{199}\) Taken together, this directs us to undertake an historical examination of the place of an individual right of armed self-defense. As earlier discussed, the individual right of armed self-defense has never been unqualified and largely has been limited to those who constitute the voting polity. But as the Reconstruction demonstrates, as the polity expands the individual right to armed self-defense has been expanded similarly. Indeed, the Reconstruction experience is especially relevant because the Fourteenth Amendment’s Due Process Clause owes its life to Reconstruction politics. If there is one thing that is clear about the framers of the Fourteenth Amendment it is that they were determined to endow newly freed black Americans with all the rights their fellow Americans of white skin enjoyed. One of the most important of those rights, especially given the climate of violence endemic to the South at the time, was the right to arm oneself to repel criminal assault. The fact that some limitations on this right were approved by antebellum state courts does not destroy the historical pedigree of the right, but it does confirm that when the government interest is sufficiently compelling and the government’s chosen infringing means are closely connected to the compelling end, the individual right may be trumped by public necessity. It may be that the "gun culture"of America is largely a nineteenth century construct, as Michael Bellesiles argues,\(^{200}\) although that is a contested historical perception, but the fact is that for a very long period of time, and certainly by 1868, when the Fourteenth Amendment was adopted, we have been a nation that has generally accepted an informal "right" to arm oneself for purposes of self-protection. The Court’s incorporation doctrine requires that arguments for and against incorporation be based on appeals to history. The arguments for incorporation are strong, and the Second Amendment right of


\(^{200}\) Bellesiles, Origins, supra note 1, at 425.
individual armed self-defense ought to be incorporated into the Fourteenth Amendment's Due Process Clause.\textsuperscript{201}

III. Conclusion

Partisan interpreters of the Second Amendment tend to allow their policy preferences to color their judgments of text, history, structure, and the meager doctrine that has accreted to the Second Amendment. Those who abhor firearms and blame them for much of the violence that afflicts our society tend to cling to the "collective rights" explanation of the Second Amendment — the idea that it protects only the states' right to organize and to equip a militia composed of the people, subject to federal control exerted under authority provided in Article I. Those who value firearms tend to offer one or more of several versions of an "individual rights" explanation of the Second Amendment: The arms right, they say, protects an individual and collective right (1) to resist governmental tyranny, (2) to resist external armed threats to the community, and an individual right (3) to resist private criminal aggression and (4) to possess weapons for sporting or other lawful purposes unconnected to defense. Much has been written, perhaps too much, about the historical record that supports either side of the debate, and in this Article I have merely summarized some of the salient features of the debate.

In my view, each side of this debate is partly right and partly wrong. The arms right was conceived in response to multiple and partially conflicting concerns. Some Americans wished to blunt the possibility of a federal standing army by confirming the right of the people to organize themselves, under the auspices of their state governments, into a militia that could defend the nation when necessary. Some Americans wished to be sure that the states would possess an armed force capable of suppressing domestic insurrections like Shays's Rebellion or slave revolts. A very few radicals wished to insure that a right of armed resistance to one's own government was preserved, though these people were always marginal players in the debate. Some Americans wished to preserve the people's right to hold arms both for the common defense and for self-defense. Some Americans, remembering the game laws of England that disarmed the yeomanry to prevent poaching the gentry's game, wanted to protect the people's right to hold and to use arms for purposes of hunting. These groups were not mutually exclusive and very few of these interests are mutually antagonistic.

\textsuperscript{201} For an explicit argument to this effect, see Karen Wai Wong-Ervin, Note, The Second Amendment and the Incorporation Conundrum: Towards a Workable Jurisprudence, 50 Hastings L.J. 177, 199-213 (1998).
To understand the history at all, one must superimpose what early Americans actually did upon this background of theoretical purposes. The militia was ill-organized and poorly equipped until the volcanic convulsion of arms of the Civil War. The militia was always defined as composing the entirety of the adult, but not superannuated, able-bodied men of the polity, although the actual composition of the militia was of a much smaller fragment of the polity. Despite the supposed obligation of militia service, many men shirked the duty. Most if not all states limited firearms possession to those who were bona fide members of the polity, specifically excluding Indians, blacks, criminals, and traitors. But at the same time many states recognized in their own constitutions an individual right to keep arms for self-defense. During this same antebellum period the prevalence of private arms increased; the "gun culture" of America emerged. As states sought to prevent private duels and resolution of private quarrels by resort to arms, they enacted laws prohibiting the carrying of certain concealed weapons, often derringers and Bowie knives. These laws typically were upheld in opinions that made clear that, while there existed an individual right to arms possession, the right was not absolute and could be curtailed when the public interest was sufficiently strong.

In the aftermath of the Civil War, the Reconstruction Congress left excellent evidence of its intention to secure to newly freed blacks all the rights previously enjoyed by white Americans. One of those rights was the individual right of armed self-defense, a particularly important right in the climate of racial violence that was endemic to the defeated Confederacy. The Fourteenth Amendment, created by these same politicians, was part of this general program of protection of the rights of individuals at the expense of state power. Although the full promise of the Fourteenth Amendment was initially hobbled by the Court’s restrictive reading of the Amendment’s Privileges and Immunities Clause, and that reading left its imprint on the Court’s interpretation of the Second Amendment in United States v. Cruikshank and Presser v. Illinois, the Court has never squarely rejected an individual rights reading of the Second Amendment.202

In light of these mixed indicators from history, it is appropriate, in my view, to apply a form of what I have called "constitutional cy pres" to the Second Amendment.203 By raising the level of generality at which we read the amendment, we can reach agreement that the central focus of the amendment

202. See supra notes 151-62 and accompanying text (discussing Cruikshank and Presser decisions).

203. See supra note 173 and accompanying text (noting author’s previous application of "constitutional cy pres").
The common defense element has atrophied by reason of ambient cultural change. We no longer fear a standing army or, if we do, we fear the threats augmented by the absence of a standing army even more. We cannot plausibly argue that the Second Amendment was intended, then or now, merely to guarantee our right to be conscripted into the armed services. This being so, the only defense function left for the Second Amendment to secure is that of individual self-defense. Sadly, this individual defense element of the Second Amendment has not been shrunk by the ambient culture. To be sure, the perceived necessity of armed self-defense may actually be increased by the presence of so many firearms in our culture, but the empirical evidence suggests that in our imperfect society the increased prevalence of firearms for self-defense actually reduces crime.

Reading the Second Amendment as securing an individual right to self-defense does not mean that this right is absolute. In my view, only material infringements of the right ought to trigger the presumption of invalidity that places on the government the burden of justifying the infringement. Many forms of gun regulation or prohibition would likely not constitute material infringements. When a material infringement is established, the government should be required to justify its infringement by proving that the infringing regulation, in purpose and effect, is substantially related to the achievement of a compelling objective. This hybrid form of heightened scrutiny, "semi-strict" scrutiny, if you will, would protect the individual right of armed self-defense while still allowing the state a reasonable and practical opportunity to curtail arms possession when there is clear public necessity for doing so. The occasions for finding such public necessity present may be more frequent than gun enthusiasts would prefer, or they may be less frequent than gun opponents would prefer. That is a battle left for elsewhere.

A possible unintended benefit of this approach is that it might lessen the antagonism of the gun debate. In their fear that gun regulators are all secretly bent upon gun confiscation, gun enthusiasts often gravitate toward absurdly strong claims of firearms entitlement and adamant opposition to even sensible,
and, in my view, constitutionally permissible firearms regulations. By recognizing that there is a constitutional right to individual ownership of firearms some of this fear, which may or may not be irrational, will be reduced. Of course, gun opponents who really do desire the absolute elimination of private possession of firearms will be utterly dismayed by such a development. I can only suggest to them that simply because a "right" is constitutionally protected does not mean that it is a good idea to exercise it. Consider hate speech. We should all hope for, and work toward, the day when neither hate speech nor firearms are culturally relevant. In the meantime, we have a Constitution to tend and respect. Just because the Constitution does not always deliver our preferred outcome does not mean that we should stop caring for it.