EXPLAINING AWAY THE OBVIOUS: THE INFEASIBILITY OF CHARACTERIZING THE SECOND AMENDMENT AS A NONINDIVIDUAL RIGHT

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Although the Second Amendment of the U.S. Constitution has guaranteed the right to keep and bear arms for more than 200 years, the U.S. Supreme Court has never formally declared to whom the right belongs. Each side of the gun debate—one holding that the Amendment guarantees a right to individuals, the other that states possess the right—supports its position with ostensibly solid precedential, historical, and textual arguments. This Note approaches the issue from the opposite direction, asking how many precedential, historical, and textual obstacles each side must explain away and examining the relative strength of those explanations. Under this analysis, the individual right prevails.

INTRODUCTION

The Second Amendment to the U.S. Constitution reads, "A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed."[1] It is "hardly a model of clarity," at least per modern parlance.[2] The same can be said of *United States v. Miller*,[3] the only U.S. Supreme Court case in nearly

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1. U.S. Const. amend. II; 1 Stat. 21 (1789). Scholars often refer to other versions of the Second Amendment with different comma placement. *See, e.g.*, Adam Freedman, *Clause and Effect*, N.Y. Times, Dec. 16, 2007, at D10. The version used in this Note is the one shown in the *Statutes at Large*, "the official source for the laws and resolutions passed by Congress." Library of Congress, Statutes at Large Homepage, http://memory.loc.gov/ammem/amlaw/lwsl.html (last visited Feb. 17, 2008); *see also infra* note 556.

2. Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 Val. U. L. Rev. 107, 115 (1991). See *infra* Part III for the argument that the Second Amendment was clear at the founding.

3. 307 U.S. 174 (1939).

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seventy years that deals directly with the Second Amendment.[4] The debate over the meaning of the Second Amendment has led to the establishment of two primary schools of thought: the "individual right" model, which holds that the Amendment guarantees to private citizens the right to own weapons, and the "collective right" model, which holds that the Amendment guarantees to state governments the power to arm their militias.[5]

The question of which model is "correct" has been contested for decades. Enough historical material, constitutional text, and case law exists to allow each side to make a strong argument in its favor;[6] however, this Note analyzes the Second Amendment using the converse approach: it examines the strength of each model through the lens of the historical, textual, and precedential evidence against it.

Part I of this Note recounts the Second Amendment's history, including its preadoption background, legislative history, and postadoption statutory and constitutional developments. Part II explores the arguments in support of the individual and collective right models. Particular attention is paid to the roughly parallel analytical approaches taken by the circuit courts in *Parker v. District of Columbia*,[7] *Silveira v. Lockyer* (*Silveira I*),[8] and *United States v. Emerson*,[9] as these are the most recent and thorough cases that discuss the topic and are likely to shape Second Amendment jurisprudence in the near future. Part III explores the gun debate in light of both the recent federal circuit split[10] and the efficacy with which each side answers the other's strongest positions. Part III concludes that, because the collective right model is unable to explain away the evidence against it, while the individual right model effectively accounts for evidence that at

4. *See* Kevin T. Streit, *Can Congress Regulate Firearms?:* Printz v. United States *and the Intersection of the Commerce Clause, the Tenth Amendment, and the Second Amendment*, 7 Wm. & Mary Bill Rts. J. 645, 664 (1999) ("Only three decisions since *Miller* have touched upon the Second Amendment to any degree, and none directly."). *But cf.* David B. Kopel, *The Supreme Court's Thirty-Five* Other *Gun Cases: What the Supreme Court Has Said About the Second Amendment*, 18 St. Louis U. Pub. L. Rev. 99 (1999) (assaying a number of U.S. Supreme Court mentions of the Second Amendment).

5. Parker v. District of Columbia, 478 F.3d 370, 379 (D.C. Cir. 2007), *cert. granted sub nom.* District of Columbia v. Heller, 128 S. Ct. 645 (2007); Silveira v. Lockyer (*Silveira I*), 312 F.3d 1052, 1060 (9th Cir. 2002); United States v. Emerson, 270 F.3d 203, 218–20 (5th Cir. 2001); *see infra* notes 7–9. The models are also referred to as the "standard" and "states' right" models, respectively. *Emerson*, 270 F.3d at 218, 220.

6. For example, individual right adherents typically rely on the fact that the Amendment mentions "people," while those espousing the collective right view rely on the presence of "militia" to limit the personal right.

7. 478 F.3d at 395 (adopting the individual right model).

8. 312 F.3d at 1061 (stating, before performing its own analysis, and well before *Parker* came down, that "with the sole exception of the Fifth Circuit's *Emerson* decision there exists no thorough judicial examination of the amendment's meaning" and adopting the collective right model).

9. 270 F.3d at 264 (adopting the individual right model).

10. *See supra* notes 7–9; *infra* notes 162–65.

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first seems to contradict it, the Second Amendment grants an individual right to bear arms.[11]

I. HISTORY OF THE SECOND AMENDMENT

This part examines the history surrounding the adoption of the Constitution and the Second Amendment. First, it discusses the relevant statutory and constitutional background, including the events leading up to the adoption of the original Constitution, the Second Amendment's legislative history, and the presence of arms-bearing provisions in state constitutions. Next, the Note examines the philosophical background of the Amendment, starting with American political commentary supporting each side of the debate, followed by commentary relating to the right to self-defense and freedom from tyranny.

A. *Statutory and Constitutional History*

1. The 1788 Constitution and the Federalist/Anti-Federalist Tug of War

By 1787, it had become clear that the United States' governing document, the Articles of Confederation, created an unacceptably weak central government.[12] The absence of a reliable national military left the new nation vulnerable to foreign invasion and internal "anarchy and confusion" brought on by rebellion.[13] A Constitutional Convention therefore convened with the initial intent of revising the Articles of Confederation.[14] The convention's focus soon shifted to replacing the Articles with a new governing document.[15]

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11. This Note examines the competing models and advocates the individual right model based on the history and text of the Second Amendment. It does not rely on modern gun control policy arguments about the costs and benefits of gun ownership because both sides have an ample set of competing statistics supporting their views, which effectively cancel each other out. *Compare* Don B. Kates & Gary Mauser, *Would Banning Firearms Reduce Murder and Suicide? A Review of International and Some Domestic Evidence*, 30 Harv. J.L. & Pub. Pol'y 649 (2007), *and* Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. Crim. L. & Criminology 150 (1995), *with* Stevens H. Clarke, *Firearms and Violence: Interpreting the Connection*, Popular Gov't, Winter 2000, at 3, *and* Andrew J. McClurg, *"Lotts" More Guns and Other Fallacies Infecting the Gun Control Debate*, 11 J. Firearms & Pub. Pol'y 139 (1999). Further, each case in the circuit split analyzed the issue from the originalist perspective. Therefore, this Note references modern events and cases only in the context of evaluating the continued applicability of the original motivations behind the adoption of the Second Amendment.

12. *See* Akhil Reed Amar, America's Constitution: A Biography 28–29 (2005); Joyce Lee Malcolm, To Keep and Bear Arms: The Origins of an Anglo-American Right 151 (1994).

13. Letter from George Washington to Thomas Jefferson (May 30, 1788), *in* 3 The Records of the Federal Convention of 1787, at 31, 31 (Max Farrand ed., 1911).

14. Paul Finkelman, *"A Well Regulated Militia": The Second Amendment in Historical Perspective*, 76 Chi.-Kent L. Rev. 195, 195–96 (2000); Paul M. Thompson, *Is There*

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The nation had not forgotten, however, that it waged the American War for Independence[16] in large part because the King of England had kept, "in times of peace, standing armies without the consent of our legislatures. He [had] affected to render the military independent of, and superior to the civil power."[17] Thus, while the framers sought a stronger national government, they understood that it was to have "limited and enumerated powers only, lest the cure be worse than the disease."[18] Indeed, "there was a widespread fear that a national standing Army posed an intolerable threat to [both] individual liberty and [state sovereignty.]"[19] The founders sought a federal government that had enough direct access to the use of force to defend the nation,[20] but that was also subject to "civilian control" so that tyranny of the type the colonists endured under the crown would not recur.[21]

The nation was divided as to the proper balance of power between the federal and state governments, and the people themselves, and the delegates to the Constitutional Convention devoted substantial attention to this issue.[22] The Federalists favored more power in the hands of the federal government, while the Anti-Federalists sought to ensure that the states and the people retained enough control over the instruments of violence that the federal government could not become tyrannical.[23]

The Federalists dominated the convention, and the proposed Constitution that emerged understandably gave more power to the federal government than many would have liked.[24] These features served as rallying points for the Anti-Federalists.

First, while the new federal government was supposedly one of limited powers, the Constitution was so vague that it could be interpreted to enumerate any powers that Congress "*in [its] wisdom or wickedness . . . think[s] proper to assume*."[25] The Anti-Federalists wanted a bill of rights enumerating fundamental individual rights that could not be infringed by

Anything "Legal" About Extralegal Action? The Debate over Dorr's Rebellion, 36 New Eng. L. Rev. 385, 410 (2002).

15. Finkelman, *supra* note 14, at 196.

16. At the time, the American Revolution was commonly referred to as the "American War for Independence." *See* David C. Williams, *The Constitutional Right To "Conservative" Revolution*, 32 Harv. C.R.-C.L. L. Rev. 413, 428 (1997). The relevance of this distinction is made clear in Part III. *See infra* notes 415–20 and accompanying text.

17. The Declaration of Independence para. 12–13 (U.S. 1776); 1 Stat. 2 (1776).

18. United States v. Emerson, 270 F.3d 203, 236 (5th Cir. 2001); *see also* Finkelman, *supra* note 14, at 216.

19. Perpich v. Dep't of Defense, 496 U.S. 334, 340 (1990).

20. Under the Articles of Confederation, the federal government relied on the states to voluntarily contribute their militias to the defense of the nation. *See* Malcolm, *supra* note 12, at 151.

21. *Id.*

22. Amar, *supra* note 12, at 34–38, 40–44.

23. Malcolm, *supra* note 12, at 151–56.

24. *See* United States v. Emerson, 270 F.3d 203, 237 (5th Cir. 2001).

25. *An Old Whig*, Indep. Gazetteer (Phila.), Oct. 17, 1787, at 2; *see* Amar, *supra* note 12, at 110 (referring to the Necessary and Proper Clause).

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the federal government,[26] much like the Bill of Rights protecting their English ancestors and former countrymen[27] and the bills of rights already present in most state constitutions.[28]

Next, the Anti-Federalists took issue with the federal government's monopoly on the use of force and its enabling instruments.[29] The new Constitution gave Congress power to "raise and support armies," "provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions," and "organiz[e], arm[], and disciplin[e] the militia, and [to] govern[] such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress."[30] The states were also forbidden "without the consent of Congress" to "keep troops . . . or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."[31]

The Anti-Federalists were particularly wary of the provisions authorizing Congress to exercise control over the arming and management of state militias.[32] They understood the grant of power to Congress over the militia to be exclusive,[33] thus giving it the power effectively to destroy the militia by failing to arm it,[34] disarming it,[35] otherwise neglecting it,[36] or creating a select militia.[37] They were concerned, of course, that the federal government could weaken the militia, making it impossible for the states and their citizens to defend themselves against a federal army.[38]

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26. Malcolm, *supra* note 12, at 157; *see* The Origin of the Second Amendment *passim* (David E. Young ed., 2d ed. 1995).

27. Robertson v. Baldwin, 165 U.S. 275, 281 (1897); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204, 235–39 (1983).

28. Malcolm, *supra* note 12, at 146–48; Stephen P. Halbrook, *The Right of the People or the Power of the State: Bearing Arms, Arming Militias, and the Second Amendment*, 26 Val. U. L. Rev. 131, 139, 144, 172 (1991); *see infra* Part I.A.3.

29. Malcolm, *supra* note 12, at 154.

30. U.S. Const. art. I, § 8, cl. 12, 15, 16; 1 Stat. 14 (1787).

31. U.S. Const. art. I, § 10, cl. 3; 1 Stat. 15 (1787).

32. Halbrook, *supra* note 28, at 136–41.

33. *Id.* at 155–61. The Federalists maintained that Congress's power to arm the militias was concurrent with that of the states, but this was never written into the Constitution as the Anti-Federalists wanted. *Id.*

34. *Id.* at 155–57.

35. *See* The Origin of the Second Amendment, *supra* note 26, at 331, 365–66, 401; Halbrook, *supra* note 28, at 137–63.

36. *See* The Origin of the Second Amendment, *supra* note 26, at 301–02, 401–02.

37. Halbrook, *supra* note 28, at 141–42, 152–53, 159–60, 174, 183. A select militia is a military body "not much unlike regular troops," like our National Guard, specially trained and armed by the government. *Id.* at 152; *see also* The Federalist No. 29, at 180 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (referring to a "select" militia as being considered dangerous because it is too much like an army of regular troops).

38. *See* The Origin of the Second Amendment, *supra* note 26, at 91, 145–46, 192, 224, 354–55. Note the concern with both state and individual freedom.

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Before ratification, the Anti-Federalists wanted the proposed constitution to address the issues of the lack of a bill of rights, federal control over state militias, and federal power to maintain a standing army.[39] The Federalists, wanting the document ratified, argued that a bill of rights was unnecessary because the draft Constitution did not grant the federal government the power to infringe on fundamental rights, an enumeration of certain rights may imply a lack of protection for others, and Americans would not allow their rights to be infringed despite the lack of a bill of rights.[40] The Federalists responded to Anti-Federalists' concerns about federal tyranny and oppression, arguing that Congress's power to arm the militias was concurrent with that of the states, and that the American population was armed and could resist a federal army if required.[41] Most notably, James Madison and Alexander Hamilton wrote *Federalist* papers to this effect:

> Let a regular army, fully equal to the resources of the country . . . be entirely at the devotion of the federal government: still it would not be going too far to say that the State governments with the people on their side would be able to repel the danger. . . . To [a federal army] would be opposed a militia amounting to near half a million of citizens with arms in their hands. . . . Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of. Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms. And it is not certain that with this aid alone they would not be able to shake off their yokes.[42]

Referring to the difficulty of arming a militia composed of the population, Hamilton wrote,

> Little more can reasonably be aimed at with respect to the people at large than to have them properly armed and equipped; and in order to see that this be not neglected, it will be necessary to assemble them once or twice in the course of a year.[43]

The debate between the Federalists and Anti-Federalists continued to be played out during the adoption of the Second Amendment.

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39. United States v. Emerson, 270 F.3d 203, 240 (5th Cir. 2001).

40. *See* The Origin of the Second Amendment, *supra* note 26, *passim*.

41. *See id. passim*. The Federalists also responded that Congress's power over the militia obviated the need for a standing army. The Federalist No. 29 (Alexander Hamilton), *supra* note 37, at 183; *see* The Origin of the Second Amendment, *supra* note 26, at 400–04. However, as discussed, part of the Anti-Federalists' concern was this very power over the militia. *See supra* text accompanying notes 32–38.

42. The Federalist No. 46 (James Madison), *supra* note 37, at 295–96.

43. The Federalist No. 29 (Alexander Hamilton), *supra* note 37, at 180–81.

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2. Legislative History of the Second Amendment

The Second Amendment's legislative history effectively began when Congress forwarded the proposed Constitution to the states. The Pennsylvania ratification convention, at which Federalists outnumbered Anti-Federalists two to one, ratified the Constitution, but not before the Anti-Federalist minority proposed an amendment that "no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals."[44] During the Massachusetts ratification debates, Samuel Adams, an Anti-Federalist who many believe deserves much of the credit for the Bill of Rights,[45] proposed an amendment that the "Constitution be never construed to authorize Congress . . . to prevent the people of the United States, who are peaceable citizens, from keeping their own arms."[46] New Hampshire ratified the Constitution, but also proposed twelve amendments, of which one read, "Congress shall never disarm any citizen, unless such as are or have been in actual rebellion."[47] Virginia also ratified, but proposed a number of amendments, one of which stated that "the people have a right to keep and bear arms; that a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state . . . ."[48] Patrick Henry, a Virginia delegate and Anti-Federalist who declined appointment to the U.S. Senate,[49] argued during the Virginia ratification debates that "[t]he great object is, that every man be armed. . . . When this power is given up to Congress without limitation or bounds, how will your militia be armed? You trust to chance; for sure I am that nation which shall trust its liberties in other hands cannot long exist."[50] New York ratified and proposed a number of amendments, one of which stated that "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."[51]

North Carolina refused to ratify the proposed Constitution until the First Congress proposed a bill of rights and, in the meantime, demanded the same amendments as those proposed by Virginia.[52] Finally, Rhode Island,

44. Pennsylvania and the Federal Constitution 1787–1788, at 422 (John Bach McMaster & Frederick D. Stone eds., Lancaster, Inquirer Printing & Publishing Co. 1888).

45. Kates, *supra* note 27, at 224.

46. Halbrook, *supra* note 28, at 147 (quoting The Debates of the Massachusetts Convention of 1788, at 86–87, 266 (Boston, William White 1856)).

47. *Id.* at 148 (quoting 1 Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 326 (Wash., 1836)).

48. *Id.* at 161 (quoting 3 Elliot, *supra* note 47, at 657–59).

49. Finkelman, *supra* note 14, at 201; Biographical Directory of the United States Congress: Patrick Henry, http://bioguide.Congress.gov/scripts/biodisplay.pl?index=H000511 (last visited Feb. 25, 2008).

50. 3 Elliot, *supra* note 47, at 386.

51. John-Peter Lund, *Do Federal Firearms Laws Violate the Second Amendment by Disarming the Militia?*, 10 Tex. Rev. L. & Pol. 469, 477 n.40 (2006).

52. Halbrook, *supra* note 28, at 163; *see supra* text accompanying note 48.

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the last to ratify, proposed a number of amendments, one of which had a portion identical to that proposed by New York.[53]

Connecticut, Delaware, Georgia, Maryland, New Jersey, and South Carolina ratified the Constitution without proposing any changes relevant to this discussion. Massachusetts, New Hampshire, New York, North Carolina, Pennsylvania, Rhode Island, and Virginia included with their ratifications proposals to limit the federal government's control over standing armies and militias.[54]

As the state conventions imply, the Federalists and Anti-Federalists formed a bargain whereby the Constitution would be ratified in exchange for the adoption of a bill of rights by the new government.[55] Madison almost immediately proposed amendments after the First Congress convened, which he intended would leave the "structure & stamina of the Govt. as little touched as possible" and aimed to make explicit that which was assumed.[56]

Madison's original proposal to the House of Representatives of the text that would become the Second Amendment read, "The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms shall be compelled to render military service in person."[57] He proposed that it be inserted into Article I, Section 9, between Clauses 3 and 4.[58] Madison's proposal was altered by a House

53. Halbrook, *supra* note 28, at 194; *see supra* text accompanying note 51.

54. United States v. Emerson, 270 F.3d 203, 241–44 (5th Cir. 2001).

55. Kris W. Kobach, *May "We the People" Speak?: The Forgotten Role of Constituent Instructions in Amending the Constitution*, 33 U.C. Davis L. Rev. 1, 63 (1999) (noting that the bargain originated in the Massachusetts ratifying convention, and Massachusetts, New York, Rhode Island, and South Carolina explicitly mentioned the bargain in their ratification messages to Congress); *see* Nancy C. Staudt, *Constitutional Politics and Balanced Budgets*, 1998 U. Ill. L. Rev. 1105, 1134–35 (mentioning that states had much more influence over national affairs at the founding).

56. Finkelman, *supra* note 14, at 213 (quoting Letter from James Madison to Edmund Randolph (June 15, 1789), *in* 12 The Papers of James Madison 219, 219 (Charles F. Hobson et al. eds., 1979)). In other words, the Bill of Rights would not change the allocation of military power between state and federal governments. Clayton E. Cramer & Don B. Kates, What (If Any) Arms Does the Second Amendment Guarantee to the General Populace? (n.d.) (unpublished manuscript, on file with the Fordham Law Review) (stating that the Bill of Rights was not a compromise which renegotiated the military and militia provisions of the original Constitution).

57. 1 Annals of Cong. 451 (Joseph Gales ed., 1834) (proceedings of June 8, 1789).

58. *Id.* Clauses 2 and 3 guard individuals against unjustified writs of habeas corpus, bills of attainder, and ex post facto laws. U.S. Const. art. I, § 8, cls. 2–3; 1 Stat. 15 (1787). James Madison also proposed that what were to become the First, Third, Fourth, Eighth, and Ninth Amendments, portions of the Fifth Amendment (double jeopardy, self incrimination, due process, just compensation), and portions of the Sixth Amendment (speedy public trial, right to confront witnesses, right to be informed of charges, right to favorable witnesses, right to counsel) also be inserted there. 1 Annals of Cong. at 451–52. He proposed that the remainder of the Fifth (grand jury), Sixth (jury trial), and the Seventh Amendments be inserted into Article III, which deals with the judiciary; that what would become the Tenth Amendment be inserted as a new article between Articles VI and VII; that the future Twenty-seventh Amendment limiting congressional pay raises be inserted into Article I,

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committee to read, "A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms."[59] The entire House considered this version, and Congressman Elbridge Gerry, an Anti-Federalist, future Vice President under Madison, and member of both the First and Second Congresses,[60] objected to the "religiously scrupulous" clause on the grounds that Congress may use it as an excuse to disarm anyone it deemed "religiously scrupulous," and that "[a] well-regulated militia being the best security of a free State, admitted an idea that a standing army was a secondary one," but the House nonetheless adopted the clause.[61] The congressmen then did not discuss the future Second Amendment for three days, at which point Congressman Thomas Scott again objected to the "religiously scrupulous" clause, echoing Congressman Gerry's concerns and adding that inclusion of the clause "would lead to the violation of another article in the constitution, which secures to the people the right of keeping arms, and in this case recourse must be had to a standing army."[62] After some discussion, the House added the phrase "in person" to the end of the clause, and then adopted it.[63] The House made no other changes before forwarding the Amendment to the Senate four days later.[64]

Section 6; and that Article I, Section 10 contain a prohibition that "[n]o State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." *Id.* at 451–53.

59. 1 Annals of Cong. at 778 (proceedings of Aug. 17, 1789) (internal quotation marks omitted).

60. Biographical Directory of the United States Congress: Elbridge Gerry, http://bioguide.Congress.gov/scripts/biodisplay.pl?index=G000139 (last visited Feb. 25, 2008); Official Website of the Commonwealth of Massachusetts, http://www.mass.gov/ (search for "Elbridge Gerry"; then follow first hyperlink) (last visited Feb. 25, 2008).

61. 1 Annals of Cong. at 778–80 (proceedings of Aug. 17, 1789). Congressman Aedanus Burke also proposed an amendment reading,

> A standing army of regular troops in time of peace is dangerous to public liberty, and such shall not be raised or kept up in time of peace but from necessity, and for the security of the people, nor then without the consent of two-thirds of the members present of both Houses; and in all cases the military shall be subordinate to the civil authority.

Id. at 780–81 (proceedings of Aug. 17, 1789). Ostensibly rejected due to its supermajority requirement, another likely reason for its rejection was incompatibility with the Federalist/Anti-Federalist bargain. *See supra* text accompanying notes 55–56.

62. 1 Annals of Cong. at 796 (proceedings of Aug. 20, 1789).

63. *Id.*

64. *Id.* at 796–809 (proceedings of Aug. 20–24, 1789). *Emerson* states that the "religiously scrupulous" portion of the version forwarded to the Senate read, "[B]ut no one religiously scrupulous of bearing arms, shall be compelled to render military service in person." United States v. Emerson, 270 F.3d 203, 249 (5th Cir. 2001) (citing The Origin of the Second Amendment, *supra* note 26, at 707). While this is not supported by the House's records in the *Annals of Congress*, it is supported by other House records, The Origin of the Second Amendment, *supra* note 26, at 707, and we do know that the Senate considered this version on the following day. *See* 1 Annals of Cong. at 796–809 (proceedings of Aug. 20–24, 1789); 1 Journal of the First Session of the Senate 63–64 (1820) (proceedings of Aug.

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The Senate conducted its debates on the Amendment in secret, so precise details are unavailable.[65] However, we do know that (1) the Senate removed the entire religiously scrupulous clause and the phrase "composed of the body of the people,"[66] (2) it replaced "the best" with "necessary to the," (3) the Senate rejected a proposal to add the words "for the common defence" after "the right of the people to keep and bear arms,"[67] (4) it rejected a proposed amendment giving states the power to arm and train their militias,[68] and (5) it rejected a proposed addition to the House's language requiring a supermajority to keep a standing army in time of peace.[69] No further action was taken on the future Second Amendment between the time the Senate sent it back to the House and Congress sent it to the states.[70] The required number of states ratified the Second Amendment by 1791.[71]

The Militia Act of 1792, adopted by the Second Congress, which contained many of the same members as the First Congress, defined "militia" by declaring,

> That each and every free able-bodied white male citizen . . . who is or shall be of the age of eighteen years, and under the age of forty-five years . . . shall severally and respectively be enrolled in the militia, by [his commanding officer, and such] commanding officer . . . shall without delay notify such citizen of the said enrolment . . . . That every citizen so enrolled and notified, shall, within six months thereafter, provide himself

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25, 1789) [hereinafter First Senate Journal]. In any case, the change is immaterial to the analysis presented herein.

65. Halbrook, *supra* note 28, at 186.

66. *Compare* First Senate Journal, *supra* note 64, at 63 (proceedings of Aug. 25, 1789) (showing the future Second Amendment containing the text in question), *with* First Senate Journal, *supra* note 64, at 71 (proceedings of Sept. 4, 1789) (showing the Amendment with the text removed).

67. *Id.* at 77 (proceedings of Sept. 9, 1789).

68. *Id.* at 75 (proceedings of Sept. 8, 1789). The rejected language read,

> That each state, respectively, shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same; that the militia shall not be subject to martial law, except when in actual service, in time of war, invasion, or rebellion; and when not in the actual service of the United States, shall be subject only to such fines, penalties, and punishments, as shall be directed or inflicted by the laws of its own state.

Id.

69. *Id.* at 71 (proceedings of Sept. 4, 1789). The rejected language read,

> That standing armies, in time of peace, being dangerous to liberty, should be avoided, as far as the circumstances and protection of the community will admit; and that in all cases the military should be under strict subordination to, and governed by, the civil power; that no standing army or regular troops shall be raised in time of peace, without the consent of two-thirds of the members present in both Houses; and that no soldier shall be enlisted for any longer term than the continuance of the war.

Id.

70. 1 Annals of Cong. 923–48 (Joseph Gales ed., 1834) (proceedings of Sept. 10–24, 1789); First Senate Journal, *supra* note 64, at 88 (proceedings of Sept. 25, 1789).

71. Sol Bloom, History of the Formation of the Union Under the Constitution 62 (1941).

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> with a good musket or firelock, [and] not less than twenty-four cartridges, . . . or with a good rifle, [and] twenty balls suited to the bore of his rifle, and a quarter of a pound of powder; and shall appear, so armed, accoutred and provided, when called out to exercise, or into service . . . .
>
> . . . .
>
> . . . That out of the militia enrolled, as is herein directed, there shall be formed [certain units.][72]

The current definition of the "militia" reads,

> The militia of the United States consists of all able-bodied males at least 17 [and] . . . under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are members of the National Guard.
>
> . . . .
>
> . . . [T]he organized militia . . . consists of the National Guard and the Naval Militia; and
>
> . . . the unorganized militia . . . consists of the members of the militia who are not members of the National Guard or the Naval Militia.[73]

Thus far, this Note has discussed the history surrounding the Federal Constitution. Also useful to the discussion are the provisions of ratification-era state constitutions.

3. State Constitutional Guarantees

As many as six states' constitutions contained or had contained provisions protecting the right to bear arms when the national Constitution was ratified, and two other states that did not have constitutions at the time included such protections upon adopting their first constitutions.[74]

Pennsylvania's Constitution of 1776 stated "[t]hat the people have a right to bear arms for the defence of themselves and the state,"[75] and its revised 1790 version declared that "the right of citizens to bear arms, in defence of themselves and the State, shall not be questioned."[76] Connecticut operated without a true constitution until 1818;[77] however, its first constitution

72. 1 Stat. 271–72 (1792); *see also* Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 Emory L.J. 1139, 1205 n.313 (1996) (distinguishing militia laws from those requiring militia service and stating that colonial militia laws required all households, even those without militia-aged men, to have a gun).

73. 10 U.S.C. § 311 (2000).

74. *See infra* notes 75–86.

75. Pa. Const. of 1776, art. XIII.

76. Pa. Const. of 1790, art. IX, § 21.

77. Wesley W. Horton, Conn. State Library, Connecticut Constitutional History: 1776–1988 (1988), http://www.cslib.org/cts4ch.htm#3.

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included a Declaration of Rights ensuring that "[e]very citizen has a right to bear arms in defense of himself and the State."[78] Massachusetts's 1780 Constitution declared that "[t]he people have a right to keep and to bear arms for the common defence."[79] South Carolina's 1778 Constitution did not contain a provision relating to arms;[80] however, its constitution of two years earlier referred to the "colonists[']. . . necessity of taking up arms, to repel force by force, and to defend themselves and their properties against lawless invasions and depredations."[81] New Hampshire's 1784 Constitution stated that "[a]ll men have certain natural, essential, and inherent rights; among which are . . . defending life and liberty."[82] Virginia's 1776 Constitution, in a style similar to Madison's original proposals for the Second Amendment,[83] proclaimed "[t]hat 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."[84] North Carolina's 1776 Constitution declared "[t]hat the people have a right to bear arms, for the defence of the State."[85] Rhode Island did not have a constitution until 1842, when it adopted one with a provision that tracked the second half of the Second Amendment: "The right of the people to keep and bear arms shall not be infringed."[86]

Also relevant are the ratification-era constitutions of Vermont and Kentucky, the two states to join the union just after the original thirteen in 1791 and 1792, respectively.[87] Vermont's Constitution of 1786, which the state maintained as its governing document until 1793, guaranteed "[t]hat the people have a right to bear arms, for the defence of themselves and the State."[88] Kentucky's Constitution of 1792, which had been revised since

78. Conn. Const. of 1818, art. I, § 17.

79. Mass. Const. of 1780, pt. 1, art. XVII. The Massachusetts Supreme Judicial Court interpreted this right as an individual one at least twice in the 1800s, but has most recently interpreted it as a collective one in 1976. Nicholas J. Johnson, *A Second Amendment Moment: The Constitutional Politics of Gun Control*, 71 Brook. L. Rev. 715, 729 (2005).

80. S.C. Const. of 1778.

81. S.C. Const. of 1776, pmbl.

82. N.H. Const. of 1784, art. I, § II. New Hampshire made this guarantee more explicit in 1982 when it adopted its current provision reading, "All persons have the right to keep and bear arms in defense of themselves, their families, their property and the state." N.H. Const. pt. 1, art. 2-a.

83. *See supra* note 59.

84. Va. Const. of 1776, Bill of Rights, § 13.

85. N.C. Const. of 1776, A Declaration of Rights, art. XVII.

86. R.I. Const. of 1842, art. I, § 22.

87. Bloom, *supra* note 71, at 60.

88. Vt. Const. of 1786, ch. I, art. XVIII. The 1793 constitution contained an identical declaration. Vt. Const. of 1793, ch. I, art. 16. Vermont has a very interesting history: It declared itself an independent republic in 1777 while being claimed by New York and New Hampshire, both of which it was fighting. It shared close ties to the colonies, adopting as one of its mottos *Quarta decima stella* (Fourteenth star) and sharing the colonies' connection to and eventual separation from England. Gordon Dritschilo, *When Vt. Hated N.Y. More Than King George*, Rutland Herald, Nov. 5, 2005, at B1; Vt. Dep't of Libraries, The Great Seal of Vermont, http://www.libraries.vermont.gov/www/html/emblems/seal.htm (last visited Feb. 17, 2008).

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1784 in a total of ten constitutional conventions,[89] stated in unequivocal language that "the right of the citizens to bear arms in defense of themselves and the State shall not be questioned."[90]

There are presently forty-four states with arms-bearing guarantees in their constitutions.[91] Of this number, forty-one are decidedly individual rights,[92] two secure individual rights per the most recent precedent on the topic,[93] and one grants a collective right.[94]

B. *Philosophical History*

1. Historical Commentary

Many prominent political figures made statements relating to the future Second Amendment before, during, and after the Constitution and Bill of Rights were debated and adopted.[95] Some of the commentary is best read in light of the standing army controversy brewing at the time,[96] and some as an autonomous expression of the speaker's principles.

a. *Commentary Relied upon by Both the Individual and Collective Right Models*

George Mason, a Virginia delegate and Anti-Federalist,[97] who is often referred to as the "Father of the Bill of Rights,"[98] said during Virginia's ratification convention that when Britain decided to "enslav[e] America" its Parliament was advised to gradually disarm the colonists.[99] He went on to

89. Ky. Gov't, Informational Bulletin No. 137, at 11–12 (rev. 2003).

90. Ky. Const. of 1792, art. XII, § 23.

91. Johnson, *supra* note 79, at 723–47.

92. Eugene Volokh, State Constitutional Right to Keep and Bear Arms Provisions, http://www.law.ucla.edu/volokh/beararms/statecon.htm (last visited Feb. 17, 2008).

93. *Id.* Kansas has conflicting case law and Virginia has conflicting attorney general opinions as to whether their state constitutions grant an individual right. *Id.*

94. *Id.* Massachusetts is the lone holdout. *See supra* note 79.

95. A representative sample of those statements are listed here. For a surfeit of additional commentary, see, for example, *United States v. Emerson*, 270 F.3d 203, 236–59, 265–72 (5th Cir. 2001), and Halbrook, *supra* note 28. Commentary relating to the standing army controversy, discussed in Part I.A.1, is not directly included here as both sides of the debate agree on its details. *See* Parker v. District of Columbia, 478 F.3d 370, 396–97 (D.C. Cir. 2007); *id.* at 405–07, 405 n.10, 406 n.12 (Henderson, J., dissenting); Silveira v. Lockyer (*Silveira I*), 312 F.3d 1052, 1076–86 (9th Cir. 2002); *Emerson*, 270 F.3d at 237–59, 265–67, 270–72; *see also supra* Part I.A.1.

96. *See supra* Part I.A.1.

97. Halbrook, *supra* note 28, at 136, 153.

98. *E.g.*, Bradley S. Tupi, *Religious Freedom and the First Amendment*, 45 Duq. L. Rev. 195, 208 (2007).

99. Michele L. Lombardo, Annigje J. Buwalda & Patricia Bast Lyman, *Terrorism, Material Support, the Inherent Right to Self-Defense, and the U.S. Obligation to Protect Legitimate Asylum Seekers in a Post-9/11, Post-PATRIOT Act, Post-Real ID Act World*, 4 Regent J. Int'l L. 237, 248 (2006) (quoting George Mason, Debates During the

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say, "Who are the militia? They consist now of the whole people . . . [b]ut I cannot say who will be the militia of the future day. If [the Constitution] gets no alteration, the militia of the future day may not consist of all classes, high and low, and rich and poor."[100] He also said, "[I]n case the general government should neglect to arm and discipline the militia, there should be an express declaration that [states might do so]. If the clause stands . . . it will take from the state legislatures what divine Providence has given to every individual—the means of self-defence."[101]

Richard Henry Lee, an Anti-Federalist and senator from Virginia when Congress adopted the Bill of Rights,[102] wrote,

> "A militia . . . are in fact the people themselves, and render regular troops in a great measure unnecessary . . . . [T]he constitution ought to secure a genuine [militia] and guard against a select militia, by providing that the militia shall . . . include . . . all men capable of bearing arms; and that all regulations tending to render this general militia useless and defenseless, by establishing select corps of militia . . . be avoided. . . . [T]o preserve liberty, it is essential that the whole body of the people always possess arms . . . ."[103]

References to the popular character of the militia, self-defense, and the undesirability of a select militia support the individual right model, while the references to states arming militias support the collective right model.

b. *Commentary Relied upon by the Individual Right Model*

Thomas Jefferson stated that "laws that forbid the carrying of arms . . . disarm only those who are neither inclined nor determined to commit crimes," making the innocent defenseless.[104] The references to carrying arms, crime, and self-defense imply a personal right.

Some statements referred directly to individual rights. William Grayson, Virginia delegate, Anti-Federalist, and senator when Congress adopted the Bill of Rights,[105] wrote to Patrick Henry that "a string of amendments were presented to the lower House; these altogether respected personal

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Constitutional Convention (1787), *in* 3 Jonathan Elliot, Debates in the Several State Conventions on the Adoption of the Federal Constitution 380, 425 (1888)).

100. 3 Elliot, *supra* note 47, at 425–26.

101. Silveira v. Lockyer (*Silveira I*), 312 F.3d 1052, 1083 (9th Cir. 2002).

102. Biographical Directory of the United States Congress: Richard Henry Lee, http://bioguide.congress.gov/scripts/biodisplay.pl?index=L000201 (last visited Feb. 25, 2008).

103. Halbrook, *supra* note 28, at 152 (second, third, and fifth alterations in original) (quoting Richard H. Lee, Additional Letters from the Federal Farmer 169 (1788)).

104. Ronald S. Resnick, *Private Arms as the Palladium of Liberty: The Meaning of the Second Amendment*, 77 U. Det. Mercy L. Rev. 1, 47 n.142 (1999) (quoting Thomas Jefferson, The Commonplace Book of Thomas Jefferson 314 (G. Chinard ed., 1926)).

105. Biographical Directory of the United States Congress: William Grayson, http://bioguide.congress.gov/scripts/biodisplay.pl?index=G000403 (last visited Feb. 25, 2008).

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liberty."[106] Joseph Jones, Virginia delegate, wrote to Madison that the Bill of Rights was "calculated to secure the personal rights of the people."[107] Fisher Ames, Massachusetts delegate, Federalist, and congressman when the Bill of Rights was adopted,[108] referring to the Bill of Rights, wrote that the right to bear arms is "declared to be inherent in the people."[109] Noah Webster, a Connecticut citizen and founder of the dictionary bearing his name,[110] wrote in the first major pamphlet supporting the Constitution that the federal government cannot enforce unjust laws because the "body of the people are armed."[111]

There were also statements indicating that the people at large were the militia. Tench Coxe, Federalist, Pennsylvania delegate, cabinet member, and friend of James Madison,[112] wrote that the militia consists of "*the effective part of the people at large*."[113] He also wrote, in responding to the "Pennsylvania minority's" attempt to add its individual right amendment,[114] that the militia consists of the people, that Congress has no power to disarm the militia, and that being armed is "*the birthright of an American*."[115] Finally, he wrote in a "widely reprinted" piece for the *Federal Gazette* that "as the military forces . . . might pervert their power . . . the people are confirmed by the next article [of amendment] in their right to keep and bear their private arms."[116] Coxe sent a copy of this article to Madison, who endorsed Coxe's statements.[117] Webster's and Coxe's statements, and Madison's endorsement, show that these founders envisioned a popular

106. Halbrook, *supra* note 28, at 174 (quoting Letter from William Grayson to Patrick Henry (June 12, 1789), *in* 3 Patrick Henry 391 (1951)).

107. Letter from Joseph Jones to James Madison (June 24, 1789), *in* Creating the Bill of Rights: The Documentary Record from the First Federal Congress 253, 253 (Helen E. Veit et al. eds., 1991).

108. Biographical Directory of the United States Congress: Fisher Ames, http://bioguide.congress.gov/scripts/biodisplay.pl?index=A000174 (last visited Feb. 25, 2008).

109. Letter from Fisher Ames to George Richards Minot (June 12, 1789), *in* 1 Works of Fisher Ames 53, 54 (Seth Ames ed., Boston, Little, Brown & Co. 1854).

110. The Noah Webster House & West Hartford Historical Society, http://noahwebsterhouse.org (last visited Feb. 17, 2008).

111. Halbrook, *supra* note 28, at 139–40 (quoting Noah Webster, An Examination of the Leading Principles of the Federal Constitution 43 (Phila., Prichard & Hall 1787)).

112. *Id.* at 140; Biographical Directory of the United States Congress: Tench Coxe, http://bioguide.Congress.gov/scripts/biodisplay.pl?index=C000842 (last visited Feb. 25, 2008).

113. Halbrook, *supra* note 28, at 174 (quoting 13 The Documentary History of the Ratification of the Constitution: Commentaries on the Constitution 435 (John Kaminski & Gaspare Saladino eds., 1981)).

114. *See supra* text accompanying note 44.

115. Tench Coxe, *A Pennsylvanian III*, Penn. Gazette (Phila.), Feb. 20, 1788, *reprinted in* The Origin of the Second Amendment, *supra* note 26, at 275, 276.

116. Halbrook, *supra* note 28, at 174 (quoting Federal Gazette (Phila.), June 18, 1789, at 2); *see also* Malcolm, *supra* note 12, at 164 (stating that the article was "later reprinted in New York and Boston"). There is no known instance of anyone disputing Tench Coxe's assertion that the Second Amendment protected an individual's right to "private arms." Halbrook, *supra* note 28, at 174 (quoting Federal Gazette (Phila.), *supra*).

117. Halbrook, *supra* note 28, at 174–75.

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militia whose members possessed their own arms, with which they could defend against federal tyranny. In addition, Alexander White, Virginia delegate, Federalist, and congressman when the Bill of Rights was adopted,[118] confirmed Coxe's reference to private arms ownership in a strong reply to the Pennsylvania minority, regarding their objection as "bordering on the dishonest, for Congress clearly had no power over rights such as the private bearing of arms."[119]

David Ramsay, South Carolina delegate and Federalist, published his *History of the American Revolution* in 1789 while he was a member of the Continental Congress in the 1780s with James Madison.[120] He wrote extensively on the colonists' history of firearms use, Britain's attempted disarming of the colonies, and the colonists' expertise with firearms leading to their victory over British forces during the War for Independence.[121] Ramsay's writings bear witness to both the early Americans' history of individual arms ownership and the use of those arms by the population as a defense against tyranny. Echoing the unified defense theme, but adding to it purely private uses of weapons, Samuel Nasson, Massachusetts delegate and Anti-Federalist, wrote to Congressman George Thatcher explaining that the Second Amendment "secured the right to keep arms for Common and Extraordinary Occations such as to secure ourselves against the wild Beast and also to amuse us by fowling and for our Defence against a Common Enemy."[122] An individual conception of the right was expressed by a 1789 newspaper article by Samuel Bryan, author of the Pennsylvania minority dissent, stating that the proposed Second Amendment "only makes the observation, 'that a well regulated militia, composed of the *body* of the people, is the best security of a free state;' it does not ordain, or constitutionally provide for, the establishment of such a one."[123] Bryan's article assumed both a popular militia and an armed population.

118. Biographical Directory of the United States Congress: Alexander White, http://bioguide.Congress.gov/scripts/biodisplay.pl?index=W000352 (last visited Feb. 25, 2008).

119. Halbrook, *supra* note 28, at 150. Alexander White stated that the "rights of bearing arms for defence, or for killing game—the liberty of fowling, hunting and fishing" are "clearly out of the power of Congress." *Id.* (quoting Winchester Gazette (Va.), Feb. 22, 1788, *reprinted in* 8 The Documentary History of the Ratification of the Constitution: Ratification of the Constitution by the States 401, 404 (John Kaminski & Gaspare Saladino eds., 1988)).

120. *Id.* at 166.

121. *Id.* at 166–68.

122. Letter from Samuel Nasson to George Thatcher (July 9, 1789), *in* Creating the Bill of Rights: The Documentary Record from the First Federal Congress, *supra* note 107, at 260, 261.

123. Halbrook, *supra* note 28, at 185 (quoting *Centinel, Revived., No. XXIX*, Indep. Gazetteer (Phila.), Sept. 9, 1789, at 2).

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The 1800s also yielded some commentary on the Second Amendment.[124] St. George Tucker, a prominent ratification-era statesman and abolitionist,[125] applying Blackstone's Commentaries to the U.S. Constitution, said, "[The Second Amendment] may be considered as the true palladium of liberty. . . . Wherever . . . the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction."[126]

Thomas Cooley, Michigan Supreme Court justice,[127] mentioning that the Second Amendment was based on the English Bill of Rights, stated that "[i]t might be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent."[128] However, because the militia can be defined narrowly or neglected by the federal government, defeating the Amendment's purpose of holding the government in check, "[t]he meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms; and they need no permission or regulation of law for the purpose."[129] Thus, the individual right model finds support for its view in ratification-era political commentary.

c. *Commentary Relied upon by the Collective Right Model*

The collective right model also finds support in political commentary of the time. John Adams, the second President, Federalist, and author of the Massachusetts Declaration of Rights, wrote of

> his belief in the need for an individual, but "qualified," or conditional, right to keep and bear arms:
>
> > "To suppose arms in the hands of citizens, to be used at individual discretion, except in private self-defence, or by [government order], is to demolish every constitution, and lay the laws prostrate, so that

124. Only those nineteenth-century sources cited in *Emerson*, *Silveira I*, and *Parker* are outlined here. For a more thorough discussion, see David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. Rev. 1359, and *infra* notes 143, 159 and accompanying text.

125. Colonial Williamsburg, St. George Tucker, http://www.history.org/Almanack/people/bios/biotuck.cfm (last visited Feb. 17, 2008).

126. 1 St. George Tucker, Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia 300 (Phila., William Young Birch & Abraham Small 1803) (first ellipsis in original); *see also* Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 Yale L.J. 995, 1011 (1995) (reviewing Malcolm, *supra* note 12) (discussing the importance William Blackstone attached to the right to arms in his original work).

127. Michigan Supreme Court Historical Society, Thomas M. Cooley, http://www.micourthistory.org/resources/tmcooley.php (last visited Feb. 17, 2008).

128. Thomas Cooley, The General Principles of Constitutional Law in the United States of America 271 (1880).

129. *Id.*

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> liberty can be enjoyed by no man; it is a dissolution of the government."[130]

Aside from John Adams's qualified statement, there is no ratification-era commentary available indicating that an individual right is not what the framers envisioned.[131]

2. Natural Right of Self-Defense

The concept of a right to self-defense to which Mason, Jefferson, and Adams alluded[132] is millennia old, and the ancient writings of such philosophers as Cicero, Plato, and Aristotle influenced the founders.[133] In 52 B.C. the Roman orator Cicero, serving as defense attorney for an accused murderer, prepared an argument in his client's defense that stated that "there exists a law . . . inborn in our hearts . . . which comes to us . . . from nature itself . . . that, if our lives are endangered by . . . violence . . . a man who [uses] arms in self-defense is not regard[ed as] having carried with a homicidal aim."[134]

More directly related to our modern form of democracy, Thomas Hobbes and John Locke both spoke of the right to self-defense. Hobbes wrote in 1651 England that "[a] Covenant not to defend my selfe from force, by force, is always voyd. . . . For man by nature chooseth the . . . danger of death in resisting . . . than . . . certain and present death in not resisting."[135] Similarly, Locke wrote in his 1690 *Second Treatise of Government*, that "by the fundamental law of nature . . . the safety of the innocent is to be preferred: and one may destroy a man who makes war upon him."[136] He went on to speak of the right to self-defense in a society of laws:

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130. Kevin D. Szczepanski, *Searching for the Plain Meaning of the Second Amendment*, 44 Buff. L. Rev. 197, 212 n.92 (1996) (quoting 6 The Works of John Adams, Second President of the United States 197 (Charles F. Adams ed., Boston, Charles C. Little & James Brown 1851)); *see* Silveira v. Lockyer (*Silveira I*), 312 F.3d 1052, 1085 (9th Cir. 2002) (leaving off a portion of John Adams's statement).

131. William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 Duke L.J. 1236, 1243 n.19 (1994). "[*N*]*o known writing surviving from the period between 1787 and 1791 states such a thesis.*" *Id.* (quoting Stephen P. Halbrook, That Every Man Be Armed: The Evolution of a Constitutional Right 83 (1984)).

132. *See supra* text accompanying notes 101, 104, 130.

133. Arthur M. Schlesinger, Sr., The Imperial Presidency 8 (1973) ("[T]he Founding Fathers were more influenced by Locke than by any other political philosopher."); Kates, *supra* note 27, at 230–35.

134. Gun Control & Gun Rights: A Reader & Guide 113–14 (Andrew J. McClurg, David B. Kopel & Brannon P. Denning eds., 2002) (quoting Cicero, In Defence of Titus Annius Milo, *in* Selected Political Speeches of Cicero 215, 222 (Michael Grant ed. & trans., 1969)). Ironically, troops loyal to his client's enemy (the deceased in the case), presumably better armed than Cicero, intimidated him into silence by surrounding the courtroom in which he intended to give his speech. *Id.*

135. Thomas Hobbes, Leviathan 199 (C.B. Macpherson ed., Penguin Books 1968) (1651).

136. John Locke, Second Treatise of Government § 16 (C.B. Macpherson ed., Hackett Publ'g Co. 1980) (1690).

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> [T]he law, which was made for my preservation, where it cannot interpose to secure my life from present force, which, if lost, is capable of no reparation, permits me my own defence, and the right of war, a liberty to kill the aggressor, because the aggressor allows not time to appeal to . . . the decision of the law, for remedy . . . .[137]

Prominent members of early American society also recognized a natural right to self-defense. A 1747 sermon in Philadelphia equated the failure to defend oneself, which it referred to as stemming from nature, with suicide: "He that suffers his life to be taken from him by one that hath no authority for that purpose, when he might preserve it by defense, incurs the Guilt of self murder . . . . Nature itself teaches every creature to defend itself."[138] James Madison, recognizing the existence of "natural right[s]," spoke of some proposed amendments, such as the right to trial by jury, as stemming from the social compact, while others, presumably including the Second Amendment, secured "the pre-existent rights of nature."[139]

St. George Tucker, again drawing on Blackstone, informed his readers that

> [t]he right of self defence is the first law of nature: in most governments it has been the study of rulers to confine this right within the narrowest limits possible. . . . In England, the people have been disarmed, generally, under the specious pretext of preserving the game . . . though calculated for very different purposes. True it is, their bill of rights seems at first view to counteract this policy: but the right of bearing arms is confined to protestants, and the words . . . have been interpreted . . . [s]o that not one man in five hundred can keep a gun in his house without being subject to a penalty.[140]

In referring to the Second Amendment, William Rawle, U.S. district attorney, historian, and abolitionist,[141] after speaking of the general desirability of an effective militia, divorced the militia clause from the arms bearing one: "[A] well regulated militia is necessary to the security of a free state . . . . The corollary from the first position is, that the right of the people to keep and bear arms shall not be infringed."[142] He continued, "No clause in the constitution could by any rule of construction be conceived to give to congress a power to disarm the people," contrasting the United States with England, where "the right was secured to protestant subjects only . . . and it is cautiously described to be that of bearing arms for their defence 'suitable to their conditions, and as allowed by law.'"[143]

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137. *Id.* § 19.
138. Jeffrey R. Snyder, *A Nation of Cowards*, 113 Pub. Interest 40, 41–42 (1993).
139. 1 Annals of Cong. 454 (Joseph Gales ed., 1834) (proceedings of June 8, 1789).
140. Tucker, *supra* note 126, at 300.
141. Univ. of Penn., William Rawle, http://www.archives.upenn.edu/histy/features/1700s/people/rawle_wm.html (last visited Feb. 17, 2008).
142. William Rawle, A View of the Constitution of the United States of America 121–22 (Phila., H.C. Carey & I. Lea 1825).
143. *Id.* at 122.

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The English Bill of Rights of 1689, to which Tucker, Rawle, and Cooley refer and the founders looked for example, contained an individual right to arms, albeit one limited as described.[144] Ratification-era newspapers echoed these thoughts, referring to Rome's rendering its conquered people defenseless.[145]

Finally, Congressman Egbert Benson specifically referred to the Second Amendment as ensuring natural rights in Congress when he opposed the inclusion of Madison's proposed "religiously scrupulous" exception,[146] stating that "no man can claim this indulgence of right. . . . [I]t is no natural right . . . ."[147] Closely related to the natural right of self-defense is the right and means to protect oneself from tyranny.

3. Safeguard Against Tyranny

Many of the philosophers to whom the founders looked for guidance[148] also wrote of the necessity of an armed population to resist tyranny. Plato, as early as 360 B.C., in *The Republic*, described the move from democracy to tyranny.[149] Under Plato's theory, a democracy eventually succumbs to demagogy, and a would-be tyrant comes to power.[150] The tyrant, while still possessing the population's trust, disarms it, and then uses violence to keep it oppressed.[151] His student, Aristotle, in *The Politics*, said, "As of oligarchy so of tyranny . . . . Both mistrust the people, and therefore deprive them of their arms."[152]

Locke, again in his *Second Treatise on Government*, wrote that "men can never be secure from tyranny," and "have not only a right to get out of it, but to prevent it."[153] Locke posited that a people may overthrow and replace their government if it becomes tyrannical or does not follow the people's will.[154]

In addition to the widely expressed general concern about the federal government's ability to be tyrannical with a standing army,[155] prominent Americans also spoke directly of Americans raising arms against an overbearing government. Thomas Jefferson actively approved of the

144. *See* Kates, *supra* note 27, at 235–39, 237 n.144. *See generally* Malcolm, *supra* note 12 (discussing the English influence on the Second Amendment); *supra* text accompanying notes 129, 140, 143.

145. Halbrook, *supra* note 28, at 165 n.165.

146. *See supra* text accompanying note 57.

147. 1 Annals of Cong. 780 (Joseph Gales ed., 1834) (proceedings of Aug. 17, 1789).

148. *See supra* text accompanying note 133.

149. David B. Kopel, Paul Gallant & Joanne D. Eisen, *Firearms Possession by "Non-state Actors": The Question of Sovereignty*, 8 Tex. Rev. L. & Pol. 373, 377 (2004).

150. *Id.*

151. *Id.* at 377–78.

152. *Id.* at 379 (alteration in original) (quoting Aristotle, The Politics 137 (Stephen Everson ed., Benjamin Jowett trans., 1988)).

153. Locke, *supra* note 136, § 220.

154. *Id.* §§ 211–212; *see id.* §§ 199–243.

155. *See supra* note 95; *see also supra* Part I.A.1.

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periodic use of arms to keep the government in check: "God forbid we should ever be twenty years without such a rebellion. . . . And what country can preserve its liberties, if its rulers are not warned from time to time, that this people preserve the spirit of resistance? Let them take arms. . . . [L]iberty must be refreshed from time to time."[156] John Adams,[157] Thomas Paine, author of the proindependence pamphlet "Common Sense,"[158] and Justice Joseph Story[159] all wrote that tyrants disarm their people before oppressing them.

It is against this historical backdrop that modern-day Second Amendment models have developed. Part II of this Note describes the specifics of each model's interpretation of this history, along with Second Amendment precedent and the Amendment's text.

II. COMPETING SECOND AMENDMENT MODELS

Those adhering to the individual right model maintain that "the Second Amendment protects a right of individuals to possess arms for private use," while collective right model adherents argue that the "Amendment protects only a right of the various state governments to preserve and arm their militias."[160] A third model, the "sophisticated collective right" model, is functionally equivalent to the collective right model,[161] and this Note treats it as such unless stated otherwise.

Up until 2001, every federal circuit court of appeals that ruled on the issue had adopted the collective right approach.[162] This changed in 2001 when the U.S. Court of Appeals for the Fifth Circuit issued its decision in *United States v. Emerson*,[163] where it directly addressed the issue and adopted the individual right view. Then in 2002, the U.S. Court of Appeals for the Ninth Circuit, in *Silveira I*, came down squarely on the side of the collective right view.[164] Finally, in March 2007, in *Parker v. District of Columbia*, the U.S. Court of Appeals for the D.C. Circuit articulated an individual right to bear arms in the context of the District of Columbia's handgun ban, coming to a conclusion diametrically opposed to that of the

156. Halbrook, *supra* note 28, at 165–66 (quoting Letter from Thomas Jefferson to William S. Smith (Nov. 13, 1787), *in* Thomas Jefferson, On Democracy 31–32 (S. Padover ed., 1939)).

157. *Id.* at 164–65. Adams refers to Aristotle in his writing. *Id.*; *see supra* text accompanying note 152.

158. Lombardo, Buwalda & Lyman, *supra* note 99, at 254.

159. *Id.* at 255.

160. Parker v. District of Columbia, 478 F.3d 370, 379 (D.C. Cir. 2007).

161. Cottrol & Diamond, *supra* note 126, at 1003 ("The sophisticated collective rights view acknowledges that the Second Amendment was designed to protect individual ownership of arms, but then argues that this individual guarantee was inextricably linked to the maintenance of the militia. . . . Because the militia of the whole has essentially disappeared, then the individual right has ceased to exist.").

162. *See Parker*, 478 F.3d at 381; Silveira v. Lockyer (*Silveira I*), 312 F.3d 1052, 1063 & n.11 (9th Cir. 2002).

163. 270 F.3d 203, 260 (5th Cir. 2001).

164. *Silveira I*, 312 F.3d at 1087.

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Ninth Circuit.[165] This part examines these cases' arguments in support of their respective positions.

A. *Individual Right Model*

Under the individual right model, the Second Amendment protects the right of individuals, whether engaged in any form of military service or not, to own firearms that are "suitable as personal, individual weapons"[166] and that are "in common [military] use at the time."[167] Further, the present-day absence of founding-era militias mentioned in the Amendment's preamble does not render it a "dead letter" because the preamble is a "philosophical declaration" safeguarding militias and is but one of multiple "civic purpose[s]" for which the Amendment was enacted.[168] Individual right adherents contend that Second Amendment court rulings, history, and text support this view.

1. Stare Decisis

United States v. Emerson and *Parker v. District of Columbia* are the most recent and in-depth federal circuit court decisions adopting the individual right approach. In *Emerson*, the defendant was indicted for possessing a firearm, contrary to federal law, while under a restraining order prohibiting certain enumerated acts with respect to his estranged wife.[169] Timothy Joe Emerson challenged the indictment, arguing, inter alia, that the law violated his Second Amendment right to arms.[170] The district court granted Emerson's motion to dismiss, and the government appealed.[171] The Fifth Circuit analyzed the Amendment's precedent, text, and history and held that it granted an individual right to bear arms, subject to reasonable restrictions.[172] However, the court also held that Emerson presented a credible threat to his wife and thus fell within a "narrowly tailored specific exception[]" whereby he could be constitutionally prohibited from being armed.[173]

In *Parker*, six private citizens with no association with a military organization brought a Second Amendment challenge to the District of Columbia's firearm prohibitions.[174] Five citizens' claims were dismissed due to lack of standing, but one citizen, who applied for and was denied a

165. *Parker*, 478 F.3d at 395.
166. *Emerson*, 270 F.3d at 260.
167. *Id.* at 225 (quoting United States v. Miller, 307 U.S. 174, 179 (1939)); *see id.* at 224–26.
168. *Parker*, 478 F.3d at 378; *Emerson*, 270 F.3d at 247; *see also id.* at 243–44, 246–48.
169. *Emerson*, 270 F.3d at 211.
170. *Id.* at 212.
171. *Id.*
172. *Id.* at 218–61. The court offered an especially robust historical analysis. See the remainder of Part II.A for the specific arguments raised by the court.
173. *Id.* at 260–64.
174. Parker v. District of Columbia, 478 F.3d 370, 373–74 (D.C. Cir. 2007).

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firearm registration certificate, was held to have standing.[175] The court built on *Emerson*'s analysis and likewise held that the Second Amendment granted an individual right to bear arms, again subject to reasonable restrictions, striking down the challenged law as unconstitutional.[176]

Prior to *United States v. Miller*, the Supreme Court had not rendered any holding with regard to the Second Amendment and the federal government.[177] Consistent with most scholars' views, pre-*Miller* decisions interpreted the founders' intent to be that the Bill of Rights only restrained federal action.[178] *United States v. Cruikshank* held that the right of the people to keep and bear arms "is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress."[179] The Court again considered a Second Amendment challenge to a state law in *Presser v. Illinois*, where Herman Presser was convicted under a state law prohibiting groups from drilling or otherwise assembling militarily without permission from the governor.[180] The *Presser* Court first stated that "the sections under consideration, which only forbid bodies of men to associate together as military organizations . . . do not infringe the right of the people to keep and bear arms."[181] It went on to state that the Second Amendment applies only to the national government, not the states.[182]

While these federal-only limitations of *Cruikshank* and *Presser* were not relevant in either *Emerson* or *Parker* because federal statutes were being challenged,[183] *Emerson* did state that, because those cases were decided "well before the Supreme Court began the process of incorporating . . . amendments into the Due Process Clause of the Fourteenth Amendment,"

175. *Id.* at 375–76.

176. *Id.* at 381–401. The court offered an especially robust analysis of precedent and constitutional text. See the remainder of Part II.A for the specific arguments raised by the court.

177. *Emerson*, 270 F.3d at 221.

178. Gun Control & Gun Rights: A Reader & Guide, *supra* note 134, at 157.

179. United States v. Cruikshank, 92 U.S. 542, 553 (1875). The Supreme Court still has not incorporated the Second Amendment to the states.

180. Presser v. Illinois, 116 U.S. 252, 253 (1886).

181. *Id.* at 264–65.

182. *Id.* at 265. The Court continued,

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

Id. at 265–66.

183. Parker v. District of Columbia, 478 F.3d 370, 407 n.13 (D.C. Cir. 2007) (noting also that the District of Columbia is a federal enclave, making the incorporation question irrelevant); United States v. Emerson, 270 F.3d 203, 212–13(5th Cir. 2001).

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their rationales are no longer valid.[184] Individual right adherents also note that the original intent of the Fourteenth Amendment was to compel states to respect the "great fundamental guarantees" of the first eight Amendments, including the right to keep and bear arms.[185]

Dred Scott v. Sanford, reviled for holding that freed slaves were not citizens,[186] based its decision on the ground that citizenship "would give to persons of the negro race . . . the right . . . to keep and carry arms wherever they went," along with other "rights of person," or "individual rights," like freedom of speech and movement, that whites had.[187] Congress's power to "deny to the people the right to keep and bear arms [is] in express and positive terms, denied to the General Government."[188] The Supreme Court explicitly recognized that Congress may not "deny to the people the right to keep and bear arms" any more than it can deny them any other fundamental rights.[189]

In *Miller*, the Supreme Court's most recent case directly addressing the Second Amendment, the defendant challenged his conviction for violating the National Firearms Act of 1934 (NFA), which prohibited possession of, among other weapons, a sawed-off shotgun without first paying a federal tax.[190] The government made two arguments for the NFA's constitutionality under the Second Amendment: First, it argued that the Amendment "gave sanction only to the arming of the people as a body to defend their rights against tyrannical and unprincipled rulers" and "did not permit the keeping of arms for purposes of private defense."[191] Thus, the right was "only one which exists where the arms are borne in the militia or some other military organization provided for by law and intended for the

184. *Emerson*, 270 F.3d at 221 n.13.

185. *Id.* at 229 n.27; Van Alstyne, *supra* note 131, at 1252 ("There was no dissent from this description . . . ." (quoting Cong. Globe, 39th Cong., 1st Sess. 2765 (1866))).

186. Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 395 (1856). This holding has been overruled by the Thirteenth through Fifteenth Amendments to the U.S. Constitution.

187. *Id.* at 417, 450, 631–32.

188. *Id.* at 450. *Dred Scott* presented a hideous problem for Chief Justice Roger B. Taney and slavery advocates because they could not accept that blacks would have the same rights against the federal government as whites. The concept of a collective right was alien to Taney, so the only way he could deprive blacks of arms (and other rights) was to hold that they were not people as whites were. If he had considered the Second Amendment a collective right, this would not have been an issue. *See* Barnett & Kates, *supra* note 72, at 1158–59. Abolitionists, starting with the assumption that blacks were people just as whites were, argued that slavery was unconstitutional for exactly this reason, although in the converse: it deprived slaves of individual rights, including the right to bear arms, guaranteed by the Constitution. Because the "right of a man 'to keep and bear arms,' is a right palpably inconsistent with the idea of his being a slave," slavery is unconstitutional. *Id.* at 1159 n.87 (internal quotation marks omitted).

189. Parker v. District of Columbia, 478 F.3d 370, 391 (D.C. Cir. 2007) (citing *Dred Scott*, 60 U.S. at 450) (emphasis in *Parker* omitted); *see supra* text accompanying notes 187–88.

190. United States v. Miller, 307 U.S. 174, 174–75 (1939).

191. Brief of the United States at 12, United States v. Miller, 307 U.S. 174 (1939) (No. 38-696).

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protection of the state."[192] Second, the government argued that "the term 'arms' . . . refers only to those weapons which are ordinarily used for military or public defense purposes and does not relate to those weapons which are commonly used by criminals."[193]

The Court relied on the government's second argument in holding that the NFA was constitutional.[194] The Court went on to say that the Second Amendment "must be interpreted and applied" in synergy with "assur[ing] the continuation and . . . effectiveness" of the militia over which Article I, Section 8 granted Congress power.[195] Finally, the Court, citing ratification debates, legislative history, and "approved commentators," defined the term "militia" as "civilians primarily, soldiers on occasion": "[T]he Militia comprised all males physically capable of acting in concert for the common defense. . . . And further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time."[196]

The D.C. Circuit interpreted *Miller* to imply an individual right view by defining the militia as a popular one.[197] In addition, both the *Parker* and *Emerson* courts noted that *Miller* never refers to the fact that neither defendant in the case was or would ever be a member of a government-organized military unit, implying that lack of such membership was not the ground for its decision, and thus not a requirement of the Second Amendment.[198] The Supreme Court's having ruled based on the government's secondary weapons-based position bolsters the inference that a military affiliation is not required.[199] The Fifth and D.C. Circuits thus found that *Miller*, by examining the connection between the weapon—not the person—and the militia implicitly adopted the individual right model.[200]

192. *Id.* at 15.
193. *Id.* at 18.
194. *Miller*, 307 U.S. at 178.
195. *Id.*; *see supra* note 30 and accompanying text. The Supreme Court has also held that state power over the militia is subordinate to federal power. Perpich v. Dep't of Defense, 496 U.S. 334, 352–54 (1990) (holding that state militias may be called into federal service over state objection); Selective Draft Law Cases, 245 U.S. 366, 374–83 (1918) (holding that Congress has the authority to abolish a state militia by bodily incorporating it into the federal army); Martin v. Mott, 25 U.S. (12 Wheat.) 19, 28–33 (1827) (holding that the President has the power to call the militia from state control into federal service); Houston v. Moore, 18 U.S. (5 Wheat.) 1, 24 (1820) (holding that federal militia legislation preempts state legislation).
196. *Miller*, 307 U.S. at 179. See *id.* at 179–82 for material cited by the Court, which resemble that discussed in Parts I.A and I.B.
197. *See* Parker v. District of Columbia, 478 F.3d 370, 386 (D.C. Cir. 2007) (citing *Miller*, 307 U.S. at 178–79); *see supra* text accompanying note 196.
198. *Parker*, 478 F.3d at 393; United States v. Emerson, 270 F.3d 203, 224 (5th Cir. 2001).
199. *Parker*, 478 F.3d at 393; *Emerson*, 270 F.3d at 224; *see supra* text accompanying notes 193–94.
200. *Parker*, 478 F.3d at 394; *Emerson*, 270 F.3d at 226–27; *see infra* text accompanying note 287.

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The Supreme Court has mentioned the Second Amendment peripherally in other cases, most of which are not directly relevant to this analysis.[201] One, however, is relevant because, as *Miller* did with "militia," it defines the term "people" as used in the Constitution.[202] In *United States v. Verdugo-Urquidez*, the Court stated that "people" should be read uniformly across the Bill of Rights, implying an individual right[203]:

> "[T]he people" seems to have been a term of art employed in select parts of the Constitution. . . . The Second Amendment protects "the right of the people to keep and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "the people." [This] suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.[204]

Both the *Parker* and *Emerson* courts found it unlikely that the Supreme Court would have grouped the Second Amendment together with other Amendments acknowledged to secure individual rights if the Second Amendment only protects a collective right.[205]

2. The Individual Right Model's View of History

The individual right model maintains that the Second Amendment's adoption history shows that people of the time understood it to preserve an individual right to possess arms.[206] The Anti-Federalists, who feared a strong federal government, were reluctant to endorse the newly proposed Constitution.[207] They wanted the Constitution modified prior to ratification to include a Bill of Rights, an explicit grant to states of the power to arm their militias, and a limit on the federal government's power to maintain a standing army.[208] Because the Constitution could only be ratified in its existing form, the Federalists, who dominated the Constitutional Convention, resisted making any changes before ratification.[209] They argued that neither a bill of rights nor a limitation on the federal government's military powers were needed.[210] Thus, the Fifth Circuit in *Emerson* concluded that "[t]he Federalist position as to the militia and

201. *See* Kopel, *supra* note 4, *passim* (arguing that most of these secondary cases declare or imply an individual right).
202. *See supra* note 196 and accompanying text.
203. *Parker*, 478 F.3d at 381 (citing United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990)); *Emerson*, 270 F.3d at 228 (same).
204. *Verdugo*, 494 U.S. at 265.
205. *Parker*, 478 F.3d at 381–82; *Emerson*, 270 F.3d at 228–29.
206. *Emerson*, 270 F.3d at 236.
207. *See supra* Part I.A.1.
208. *Emerson*, 270 F.3d at 240; *see supra* notes 26–39 and accompanying text.
209. *Emerson*, 270 F.3d at 237, 240.
210. *Id.*; *see supra* notes 40–43 and accompanying text.

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standing army issues depended upon the people being armed."[211] The Federalists and Anti-Federalists ultimately struck a bargain whereby the Constitution would be ratified in its proposed form in exchange for postadoption amendments.[212]

The individual right model maintains that the Anti-Federalists feared that the federal government would use its newly granted power over state militias to destroy them, making the population defenseless when faced with the standing army that the new Constitution authorized the federal government to maintain.[213] The First Congress, controlled by Federalists, passed a series of amendments that sought to give the Anti-Federalists the bill of rights they asked for while leaving unchanged the balance of military power between the federal and state governments.[214] According to the Fifth Circuit, Congress and the states enacted the Second Amendment to guarantee an individual right to arms, which would advance the effectiveness of state militias in light of the new federal control over military power.[215]

The Fifth Circuit reads the Second Amendment's legislative history to confirm that it guaranteed an individual right and to validate the Anti-Federalists' fear that the original Constitution left no room for states to arm their militias. *Emerson* relies on the initially proposed placement of the Second Amendment among clauses of the new Constitution protecting individual rights, along with the placement there of other acknowledged individual rights guarantees,[216] as well as the original wording proposed by Madison and the changes made to it in the House of Representatives,[217] to show that the Second Amendment applies to individuals.

Scholars agree with the Fifth Circuit's view that the Senate rejected the amendment that would have granted to the states the power to arm and train their militias.[218] Individual right proponents argue that not only did Congress explicitly reject the collective right model, but in doing so, it also showed that it was serious about maintaining the new Constitution's balance of military power, and thus affirmed the Anti-Federalists' fear of vulnerability to federal tyranny.[219]

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211. *Emerson*, 270 F.3d at 240; *see supra* text accompanying notes 41–42, 109, 113, 115–16, 119, 121.

212. *See supra* note 55 and accompanying text.

213. *Emerson*, 270 F.3d at 237–44; *see supra* text accompanying notes 39, 50, 54, 100, 103.

214. *Emerson*, 270 F.3d at 259; *see supra* notes 55–56 and accompanying text.

215. *Emerson*, 270 F.3d at 236–37; *see supra* notes 57–71 and accompanying text.

216. *Emerson*, 270 F.3d at 246 & n.54; *see supra* note 58 and accompanying text.

217. *Emerson*, 270 F.3d at 246–47. The court did not know what to make of Congressman Thomas Scott's statement. *Id.* at 248; *see supra* note 62 and accompanying text.

218. *Emerson*, 270 F.3d at 249–50, 249 n.57, 255; Halbrook, *supra* note 28, at 189; *see supra* note 68.

219. Halbrook, *supra* note 28, at 189.

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Given the common understanding of the nature of the militia and the fact that a select militia was as abhorrent to the Anti-Federalists as a standing army, and that they would have opposed it as vigorously as the other limits on state military power, the Fifth Circuit found that the Senate likely considered the phrase "composed of the body of the people" redundant.[220] The House's approval of the Senate's version without opposition suggests that it understood no such limitation, especially in light of the Senate's likely rejection of "for the common defence," so as not to limit the substantive guarantee to the people of the right to arms.[221] *Emerson* and scholars agree that the Senate's replacement of "best" with "necessary to the" strengthened the philosophical declaration's support for a militia and answered Congressman Gerry's objection to a standing army securing the nation.[222] The Fifth and D.C. Circuits agree that the political dialogue of the time confirms that the nation believed it was getting an individual right.[223]

The D.C. Circuit, following up on *Emerson*, found that the Second Amendment protects a preexisting natural right "'inherited from our English ancestors'" which was "not created by government, but rather preserved by it," as confirmed by its legislative history, language (which implies that the right predated the Constitution and not that the Constitution created it), and the Supreme Court.[224] It held that the interests thus protected include the "lawful, private purposes for which people of the time [own] and [use] arms," defense against "lawless individuals" and a tyrannical government, and hunting.[225] It was a "commonplace assumption" that people would use their arms for both private purposes and any militia service required of them.[226] The D.C. Circuit and scholars maintain that the use of arms for self-defense is intuitive considering that the country lacked a professional police force at the time.[227] Finally, Judge Alex Kozinski of the Ninth Circuit noted that the fact that a modern state has technologically advanced weaponry at its disposal is irrelevant under any normative interpretation because history has shown that individuals

220. *Emerson*, 270 F.3d at 250–51, 250 n.58; *see supra* text accompanying notes 66–67, 70.

221. *Emerson*, 270 F.3d at 251–52; *see supra* text accompanying notes 67, 70.

222. *Emerson*, 270 F.3d at 251; 1 Annals of Cong. 780 (Joseph Gales ed., 1834) (proceedings of Aug. 17, 1789); Halbrook, *supra* note 28, at 190; *see infra* text accompanying note 251.

223. Parker v. District of Columbia, 478 F.3d 370, 383 (D.C. Cir. 2007); *Emerson*, 270 F.3d at 251–59; *see supra* Part I.B.1.

224. *Parker*, 478 F.3d at 382, 392 (citing Robertson v. Baldwin, 165 U.S. 275, 281–82 (1897)); *Emerson*, 270 F.3d at 223 n.17, 248 n.55 (citing *Robertson*, 165 U.S. at 281–82, and The Origin of the Second Amendment, *supra* note 26, at 697); *see supra* Part I.B.1.

225. *Parker*, 478 F.3d at 382–83; *see also Emerson*, 270 F.3d at 259–60; *supra* Part I.B.

226. *Parker*, 478 F.3d at 383; *see supra* Parts I.A.2, I.B.2.

227. *Parker*, 478 F.3d at 383 n.9 (citing Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637, 646 & n.46 (1989)).

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with private small arms can effectively resist tyranny even today,[228] and the "deterrent effect of a well-armed populace is surely more important than the probability of overall success in a full-out armed conflict."[229]

3. The Amendment's Structure, Placement, and Text

The D.C. Circuit found that the Second Amendment's placement within the Bill of Rights among avowed individual rights further reinforces its individual nature; it would otherwise be an "inexplicable aberration."[230] Its originally proposed placement among rights exercised by citizens as individuals reaffirms this conclusion.[231] The Fifth Circuit also noted that throughout the Constitution, "rights" are always reserved to "people" while "powers," but never "rights," generally belong to governments.[232]

The courts agree that the civic purpose/philosophical declaration declared in the Second Amendment's preamble was not the exclusive reason for its enactment.[233] While the Amendment is unique among its sister Amendments in that it contains a preamble, its structure was not otherwise unusual considering the use of preambles in state constitutions and in ratification conventions.[234] In fact, "[t]he recorded debates in the First Congress do not reference the operative clause, a likely indication that the drafters took its individual guarantee as rather uncontroversial."[235]

Parker notes that the drafters are not likely to have used the language they did if they intended to protect "'the right of militiamen to keep and bear arms,'" rather than the right of "the people."[236] It was "an expression of the drafters' view that the people possessed a natural right to keep and bear arms, and that the preservation of the militia was the right's most

228. Silveira v. Lockyer (*Silveira II*), 328 F.3d 567, 569–70 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc) (citing examples).

229. *Parker*, 478 F.3d at 383 n.9.

230. *Id.* at 383.

231. United States v. Emerson, 270 F.3d 203, 246 (5th Cir. 2001); *see supra* note 58 and accompanying text.

232. *Emerson*, 270 F.3d at 228. The Tenth Amendment is the sole place where "powers" are given to "people," language likely resulting from a desire to approve quickly an otherwise acceptable Amendment. U.S. Const. amend X; 1 Stat. 21–2 (1789); *see infra* text accompanying note 538; *see also* Halbrook, *supra* note 28, at 172, 188.

233. *Parker*, 478 F.3d at 386, 389; *Emerson*, 270 F.3d at 233–36, 244–48, 251–52.

234. *Parker*, 478 F.3d at 389 ("It was quite common for prefatory language to state a principle of good government that was narrower than the operative language used to achieve it." (citing Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. Rev. 793, 801–07 (1998))); *Emerson*, 270 F.3d at 233–34, 233 n.32. *See generally* Volokh, *supra*. Scholars debate whether the Second Amendment is the only constitutional provision with a preamble. *Compare infra* note 323 and accompanying text (noting that the Second Amendment's preamble is unique in the Constitution), *and infra* note 325 (same), *with infra* text accompanying note 426 (arguing that another constitutional provision contains prefatory language), *and infra* note 430 and accompanying text (referring to the prefatory language in the Copyright Clause).

235. *Parker*, 478 F.3d at 391. The operative clause is the portion after the comma. *See* U.S. Const. amend. II; 1 Stat. 21 (1789).

236. *Id.* at 390.

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salient political benefit—and thus the most appropriate to express in a political document."[237] The inclusion of the preamble is understandable given the existing conflict over federal military power, in which the Anti-Federalists wanted to ensure the continuing health of state militias.[238] The Federalists, who controlled the First Congress and were not willing to weaken the federal government which they worked so hard to establish, "offered the Second Amendment's preamble to palliate Anti-Federalist concerns about the continued existence of the popular militia."[239] The Federalists also relied on the existence of an armed citizenry in attempting to assuage concerns of oppression by a militarily strong federal government.[240]

Parker and *Emerson* agree that the substantive guarantee is thus broader than the single civic purpose in the preamble, and the individual right model provides a reading of the Second Amendment that gives the preamble a meaning that is in harmony with the substantive guarantee.[241] This Note now examines the individual right model's interpretation of the Amendment's text.

a. *Interpreting "Militia"*

Parker and *Emerson* note that *Miller*, confirming the plethora of founding-era statements, defined the militia to include "all males physically capable of acting in concert for the common defence" who "when called for service . . . were expected to appear bearing arms supplied by themselves."[242] This definition shows that the militia included a vast segment of the population rather than just the subset actively engaged in military service or part of "select" units.[243] Not securing private ownership of arms would have made it impossible for citizens to appear for duty with their own arms, effectively destroying the militia.[244]

The courts also note that the Second Congress, which contained many members of the First Congress who drafted the Bill of Rights, understood to what the "militia" of the Second Amendment referred and incorporated this into the Militia Act of 1792, which defined the militia broadly in

237. *Id.*; *see supra* Parts I.B.1–2.
238. *Parker*, 478 F.3d at 390.
239. *Id.*; *see supra* text accompanying notes 55–71.
240. *Parker*, 478 F.3d at 390; *Emerson*, 270 F.3d at 234–35, 240; *see supra* text accompanying notes 41–42, 111, 113–17, 119, 121, 211.
241. *Parker*, 478 F.3d at 389–90, 399; *Emerson*, 270 F.3d at 233, 234 & n.33, 236 ("There is no need to torture the meaning of [the Second Amendment's] substantive guarantee into [a collective right model] which is so plainly inconsistent with the substantive guarantee's text, its placement within the bill of rights and the wording of the other articles thereof and of the original Constitution as a whole.").
242. *Parker*, 478 F.3d at 386 (quoting United States v. Miller, 307 U.S. 174, 178–79 (1939)); *Emerson*, 270 F.3d at 234 (same); *see supra* text accompanying notes 50, 100, 103, 113, 115.
243. *Parker*, 478 F.3d at 394; *Emerson*, 270 F.3d at 226.
244. *Parker*, 478 F.3d at 394; *Emerson*, 270 F.3d at 235.

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accordance with the individual rights view.[245] "[T]here was no organizational condition precedent to the existence of the 'Militia' . . . [which was] the raw material from which an organized fighting force was to be created."[246] The current congressional definition of the "militia" is likewise broad, specifically referring to both the "organized militia" and the "unorganized militia."[247] Finally, the Fifth Circuit also notes that the Constitution's text recognizes a difference between the "militia" which has not been "call[ed] forth" and "the militia . . . in actual service."[248]

b. *Interpreting "State"*

First, *Parker* and *Emerson* agree that "State," as used in the Second Amendment, more likely refers to a "hypothetical polity" than an actual state of the union.[249] This is supported by the originally proposed use of "country" instead of "State" in the Amendment's text, and the lack of commentary on the change.[250]

Second, Congressman Gerry, criticizing the use of the word "best" in the proposed amendment's language during House debates, showed that he feared that the existence of a standing army would become acceptable.[251] Gerry's objection assumed that "a free State" refers to the new nation as a whole, as evidenced by his reference to a standing army: If he thought the Amendment referred to states' power over their militias, he would not be worried about the way in which the federal government could abuse it.[252] Consistent with the original reason for adopting a new constitution, it was the entire nation that a standing army was needed to defend.[253]

Finally, the use of the indefinite article "a" and the modifier "free" with the word "State" further supports this understanding. Other portions of the Constitution use the definite article "the" or the adjective "each" when referring to members of the union.[254]

c. *Interpreting "Well Regulated"*

In accord with the Militia Act of 1792, the D.C. Circuit understands "well regulated" to mean that citizens included in its definition of the militia would be enrolled by their state-appointed officers and would be subject to organization by these officers; the Act assumed that the citizens

245. *Parker*, 478 F.3d at 387, 394; *see also Emerson*, 270 F.3d at 234 n.33.
246. *Parker*, 478 F.3d at 387–88.
247. *Id.* at 388 (citing 10 U.S.C. § 311 (2000)); *Emerson*, 270 F.3d at 234 n.33 (same).
248. U.S. Const. art. I, § 8, cl. 15; U.S. Const. amend. V; 1 Stat. 14 (1787); 1 Stat. 21 (1789); *Emerson*, 270 F.3d at 228.
249. *Parker*, 478 F.3d at 396; *see Emerson*, 270 F.3d at 235.
250. *Parker*, 478 F.3d at 396; *see supra* text accompanying notes 57, 59.
251. *See supra* text accompanying note 61.
252. *Emerson*, 270 F.3d at 247–48; *see Parker*, 478 F.3d at 396.
253. *Parker*, 478 F.3d at 396; *see Emerson*, 270 F.3d at 247–48.
254. *Parker*, 478 F.3d at 396.

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would supply their own arms, not be armed by their states.[255] State armament would mean that the militia was a select one, unacceptable to Anti-Federalists,[256] rather than the popular militia defined in the Act.[257]

The Fifth Circuit interprets the frequent founding-era references to a "well regulated militia" consisting of "the body of the people" and similar language to show that the phrase "well regulated" intended to state that discipline and training is necessary for the militia to function effectively, rather than to limit its scope to a subset of the population.[258] Thus, reasonable restrictions, like limiting firearm access to criminals and the insane, may be consistent with a "well regulated Militia."[259]

d. *Interpreting "People"*

The individual right model assigns the same everyday meaning to "people" that common parlance and the other contemporaneously ratified Amendments of the Bill of Rights do, as the Supreme Court declared in *Verdugo-Urquidez*.[260] *Parker* and *Emerson* agree that it has never been doubted that the term as used in the First, Fourth, Ninth, and Tenth Amendments protects individual interests from governmental encroachment.[261]

The founders also took care, both in the Bill of Rights and the original Constitution, to refer to "people" when they meant individuals and "states" when they meant a political entity; "people" has never been used to refer to either a subset of the people, like a select militia, or to the states.[262] Further, the Equal Protection Clause of the Fourteenth Amendment has corrected any shortcomings with respect to the consideration of nonwhites and others as "people."[263]

Individual right adherents also maintain that construing "people" to mean "states" or "select militia," is also in conflict with Article I, Section 8, Clause 16 of the Constitution, which grants Congress the power to arm militias.[264] Reading the Second Amendment as granting militia-arming power to states would mean that it repealed or modified Article I, Section 8,

255. *Id.* at 388–89 (citing 1 Stat. 271 (1792)).
256. *See supra* notes 37, 103 and accompanying text.
257. *Parker*, 478 F.3d at 388 (citing the Militia Act's directive that "out of the militia" units must be formed); *see supra* text accompanying note 72.
258. *Emerson*, 270 F.3d at 234–36, 234 n.34, 235 nn.36–37; *see supra* text accompanying notes 48–53, 59, 84, 123.
259. *Parker*, 478 F.3d at 399; *Emerson*, 270 F.3d at 227 n.21, 261.
260. *Parker*, 478 F.3d at 381 (citing United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990)); *Emerson*, 270 F.3d at 227–28 (same); *see supra* text accompanying notes 202–05.
261. *Parker*, 478 F.3d at 381; *Emerson*, 270 F.3d at 227–28.
262. *Parker*, 478 F.3d at 381–82; *Emerson*, 270 F.3d at 228–29.
263. *Parker*, 478 F.3d at 382.
264. U.S. Const. art. I, § 8, cl. 16; 1 Stat. 14 (1787); *Emerson*, 270 F.3d at 227.

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Clause 16.[265] However, there is no record of anyone considering this, and such a concept would conflict with the intent of the framers that the Bill of Rights leave the powers allocated by the Constitution untouched.[266] Thus, the right guaranteed must be individual.[267]

e. *Interpreting "Bear"*

The *Parker* and *Emerson* courts found that while the phrase "bear arms" can have a military connotation, this is not the only sense in which it can validly be used.[268] At the founding, the word "bear" was a synonym for "carry," and the idiomatic military usage of "bear arms" related only to a secondary meaning.[269]

Both circuits also found the abundant use of the phrase "bear arms" in state constitutional provisions and ratification-era discourse manifestly guaranteeing an individual right to support the view that a military reading is not the only valid one.[270] That the Tennessee Supreme Court held in 1840 that "bear" had only a military meaning is of no moment because the Tennessee Constitution that it interpreted contained language qualifying its right to bear arms as being "for their common defense."[271]

The D.C. and Fifth Circuits also found it compelling that four members of the Supreme Court recognized the primary meaning of "bear" ("to carry") in the phrase "bear arms":

> "a most familiar meaning [of carrying a firearm] is, as the Constitution's Second Amendment ('keep and *bear* Arms') . . . indicate[s]: 'wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person." [Thus], the operative clause includes a private meaning for "bear Arms."[272]

265. Glenn Harlan Reynolds & Don B. Kates, *The Second Amendment and States' Rights: A Thought Experiment*, 36 Wm. & Mary L. Rev. 1737, 1743–49 (1995).

266. *Id.*; *see supra* note 56 and accompanying text; *see also supra* text accompanying note 195.

267. *Emerson*, 270 F.3d at 229; *see* Reynolds & Kates, *supra* note 265.

268. *Parker*, 478 F.3d at 384; *Emerson*, 270 F.3d at 229–31. Madison's original conscientious objector clause did use the phrase in the military sense. *See supra* text accompanying note 58; *see also infra* Part II.B.3.e.

269. *Parker*, 478 F.3d at 384 (citing Silveira v. Lockyer (*Silveira II*), 328 F.3d 567, 573 (9th Cir. 2003) (Kleinfeld, J., dissenting from denial of rehearing en banc)); *Emerson*, 270 F.3d at 229–32.

270. *Parker*, 478 F.3d at 384; *Emerson*, 270 F.3d at 230–32, 230 n.29; *see supra* Parts I.A.3, I.B.1.b.

271. *Emerson*, 270 F.3d at 229–30 (citing Aymette v. State, 21 Tenn. (2 Hum.) 154 (1840)); *see infra* text accompanying notes 340–41.

272. *Parker*, 478 F.3d at 385 (citing Muscarello v. United States, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting, joined by Rehnquist, C.J., Scalia and Souter, JJ.)); *Emerson*, 270 F.3d at 232 (same).

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f. *Interpreting "Keep"*

Parker held that the word "keep" must be given "independent significance."[273] Dictionaries of the time confirm that the word "keep" then, as now, has the common meaning relating to possession, and its use in the Second Amendment thus implies "ownership or possession of a functioning weapon by an individual for private use."[274] The Tennessee Supreme Court also construed "keep" and "bear" independently in *Aymette v. State*, holding that "citizens have *the unqualified right to keep* the weapon . . . [*b*]*ut the right to bear arms is not of that unqualified character*."[275]

g. *Interpreting "Arms"*

Miller confirms that the framers envisioned a militia composed of "civilians primarily, soldiers on occasion," who, when called for service, "were expected to appear *bearing arms supplied by themselves and of the kind in common use at the time*."[276] *Parker* and *Emerson* held that the arms protected, in accord with the Amendment's civic purpose, are those suitable for individual military use, not weapons of mass destruction or those commonly used only by criminals.[277] Handguns and long guns are common military arms bearing a reasonable relationship to the efficiency of a well-regulated militia, and they are in "common use" today.[278]

B. *Collective Right Model*

Under the collective right model, "federal and state governments have the full authority to enact prohibitions and restrictions on the use and possession of firearms."[279] The "militia" clause of the Amendment limits any substantive right guaranteed to the context of state military service, making the conclusion that an individual right was guaranteed unjustifiable.[280] The model's adherents contend that Second Amendment court rulings, history, and text support this view.[281]

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273. *Parker*, 478 F.3d at 385–86.

274. *Id.* (citing Silveira v. Lockyer (*Silveira II*), 328 F.3d 567, 573–74 (2003) (Kleinfeld, J., dissenting from denial of rehearing en banc); *Emerson*, 270 F.3d at 232 & n.31).

275. *Emerson*, 270 F.3d at 232 n.31 (citing *Aymette*, 21 Tenn. (2 Hum.) at 154) (emphasis in *Emerson*).

276. *Parker*, 478 F.3d at 394 (citing United States v. Miller, 307 U.S. 174, 179 (1939)) (emphasis in *Parker*).

277. *Id.* at 395; *see Emerson*, 270 F.3d at 222, 260.

278. *Parker*, 478 F.3d at 398; *Emerson*, 270 F.3d at 260 (noting that the arms must be in accord with the types specified by *Miller*).

279. Silveira v. Lockyer (*Silveira I*), 312 F.3d 1052, 1060 (9th Cir. 2002).

280. *Id.* at 1075.

281. *Id.* at 1060–87.

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1. Stare Decisis

Silveira I is the most recent and in-depth federal circuit court decision adopting the collective right approach. In that case, nine plaintiffs challenged California's 1999 assault weapons ban on, inter alia, Second Amendment grounds.[282] After performing an analysis similar to *Emerson*'s, the court reached the opposite conclusion: the Second Amendment grants a collective, as opposed to an individual, right to bear arms.[283] Because plaintiffs were individuals, the court held that they lacked standing to bring a Second Amendment claim and upheld the district court's dismissal of their suit.[284]

The Ninth Circuit agrees that "*Cruikshank* and *Presser* rest on a principle that is now thoroughly discredited."[285] However, in finding a collective right, the court found it unnecessary to address the incorporation issue.[286] *Silveira I* further found that *Miller*'s holding that the Second Amendment does not guarantee the right to keep and bear a sawed-off shotgun because "it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense" strongly implies a nonindividual right.[287] This interpretation, combined with the lopsided way in which other circuit courts have ruled, shows that "'the Second Amendment guarantees a collective rather than an individual right.'"[288] "[A] weapons-based theory of the amendment" that permits possession of any weapon having a "'legitimate use in the hands of private individuals,'"[289] "regardless of the relationship of the individual or the weapon to militia service," is incompatible with *Miller*.[290] The Ninth Circuit also cites *Verdugo-Urquidez* in support of its position that "militia" be read consistently throughout the Constitution,[291] as well as with other Supreme Court cases with peripheral Second Amendment mentions.[292]

Unlike federal appellate courts,[293] state appellate courts are rather evenly split on their interpretations of the Second Amendment of the Federal

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282. *Id.* at 1059.

283. *Id.* at 1060–87, 1092–93. See the remainder of Part II.B for the specific arguments raised by the court.

284. *Silveira I*, 312 F.3d at 1087.

285. *Id.* at 1067 n.17; *see supra* text accompanying notes 177–84. *But see* Parker v. District of Columbia, 478 F.3d 370, 407 n.13 (D.C. Cir. 2007) (Henderson, J., dissenting) (noting that the Second Amendment has not been incorporated to the states).

286. *Silveira I*, 312 F.3d at 1066 n.17.

287. *Id.* at 1061 (citing United States v. Miller, 307 U.S. 174, 178 (1939)).

288. *Id.* at 1063 (quoting Hickman v. Block, 81 F.3d 98, 102 (9th Cir. 1996)); *see supra* notes 162–65 and accompanying text.

289. *Silveira I*, 312 F.3d at 1060 n.8 (citing United States v. Emerson, 270 F.3d 203, 223 (5th Cir. 2001)).

290. *Id.* at 1064 n.13.

291. *Id.* at 1069–70, 1070 n.25; *cf. supra* notes 202–04 and accompanying text.

292. *Silveira I*, 312 F.3d at 1061–63. *But see* Kopel, *supra* note 4, *passim* (arguing that most secondary Supreme Court cases declare or imply an individual right).

293. *See supra* notes 162–65 and accompanying text.

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Constitution.[294] Further, state court decisions relating to a right to bear arms tend to focus on their respective states' constitutions' arms guarantees.[295] However, two state cases, *State v. Buzzard* and *City of Salina v. Blaksley*, are worth examining.[296]

In 1842, the majority in *Buzzard*, interpreting both the Second Amendment and the Arkansas Constitution, upheld a ban on carrying concealed weapons, reasoning that the law did not interfere with the people's ability, via their militias, to secure the "public liberty and the free institutions of the state."[297] A concurring opinion went farther than the majority, however, stating that "[t]he provision of the Federal constitution . . . is but an assertion of that general right of sovereignty belonging to independent nations, to regulate their military force."[298] This concurring opinion was the first reference to a nonindividual interpretation of the Second Amendment.[299]

Some sixty years later, *Blaksley* became the first holding by a court to adopt the collective right view, though only with reference to the Kansas Constitution: "The provision [of the Kansas Constitution] 'that the people have the right to bear arms . . .' refers to the people as a collective body."[300] Not only do collective right advocates maintain that longstanding precedent supports their view, but they hold that it also accords with history.

2. The Collective Right Model's View of History

The collective right model agrees with the individual model that the Second Amendment was enacted in order to allay Anti-Federalists' fears that the federal government would destroy the states' militias, setting the stage for tyranny.[301] However, it maintains that the Amendment's only purpose was to protect the people from the federal government via their militias: "The amendment protects the people's right to maintain an effective state militia, and does not establish an individual right to own or possess firearms for personal or other use."[302]

Under the Articles of Confederation, the responsibility of providing and arming the forces to defend the nation belonged to the states, not to

294. Parker v. District of Columbia, 478 F.3d 370, 380 n.6 (D.C. Cir. 2007) (compiling state appellate court decisions).

295. *See supra* notes 91–94 and accompanying text.

296. State v. Buzzard, 4 Ark. 18 (1842); City of Salina v. Blaksley, 83 P. 619 (Kan. 1905).

297. *Buzzard*, 4 Ark. at 19–25 (reasoning that all natural rights not explicitly retained by citizens are surrendered to the government, that an absolute right to arms would allow even criminals to be armed, and that, because such an absolute right is unacceptable, there is no right outside the militia context).

298. *Id.* at 32 (Dickinson, J., concurring).

299. *See* Kopel, *supra* note 124, at 1422–24.

300. *Blaksley*, 83 P. at 620; *see* Kopel, *supra* note 124, at 1510–12.

301. Silveira v. Lockyer (*Silveira I*), 312 F.3d 1052, 1076 (9th Cir. 2002); *see supra* text accompanying notes 32–38, 213.

302. *Silveira I*, 312 F.3d at 1066.

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Congress or the militiamen.[303] *Silveira I* argues that the Constitutional Convention was convened primarily to address the need for a national army, as confirmed by the amount of time spent by the delegates debating the federal/state balance of military power.[304] All agreed that effective militias were crucial, and the "compromise" ultimately reached "prevent[ed]" the phenomenon of "large standing armies" by strengthening the militias through granting Congress responsibility for their management (arming, organizing, and disciplining) while ensuring that they remained essentially state military entities (states appointed officers and trained the militia according to "Congressional dictates").[305]

The provision granting Congress the power to arm the militias troubled the Anti-Federalists most, the disagreement being whether that power should be exclusive or concurrent with a state power to provide such arms.[306] Despite the compromise reached during the convention, Federalist assurances to the contrary,[307] and the fact that "[t]he text of Article I" says that "Congress 'may' arm the militia," and is thus nonexclusive, the Anti-Federalists still feared a congressional monopoly on military power.[308] This fear remained their primary objection to the ratification of the new Constitution.[309] In addition, the Ninth Circuit contends that preserving the states' militia-arming right in the face of the federal government's "dominant control over the national defense" was the sole reason that the Second Amendment became part of the Federalist/Anti-Federalist bargain.[310]

The *Silveira I* court asserted that the founders' statements also implied that they contemplated a state military power rather than an individual right. Madison's references to militias and states in *Federalist No. 46* show that he was referring to a collective right.[311] Statements by, among others, Patrick Henry, George Mason, and Richard Henry Lee about the exclusivity or concurrence of the power to arm militias also support the collective right view.[312] In fact, although George Mason and Richard Henry Lee published objections to the new Constitution, they never advocated a "purely private right to arms."[313] Thomas Jefferson's failure to suggest an individual right to arms in a letter about the Bill of Rights to Madison also implies a

303. *Id.* at 1077; *see supra* note 20.
304. *Silveira I*, 312 F.3d at 1077–78; *see supra* Parts I.A.1–2.
305. *Silveira I*, 312 F.3d at 1078–79; *see supra* text accompanying note 30. *But see supra* text accompanying notes 31–38, 41.
306. *Silveira I*, 312 F.3d at 1079–81; *see supra* notes 33–37 and accompanying text.
307. *See supra* text accompanying notes 40–43.
308. *Silveira I*, 312 F.3d at 1080–81, 1081 n.43; *see supra* text accompanying note 32.
309. *Silveira I*, 312 F.3d at 1080–81.
310. *Id.* at 1077–78, 1086.
311. *Id.* at 1079; *see supra* note 42.
312. *Silveira I*, 312 F.3d at 1080–83, 1082 n.45; *see supra* text accompanying notes 49–50, 97–103.
313. *Silveira I*, 312 F.3d at 1082 n.45 (citing H. Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 Chi.-Kent L. Rev. 403, 411–13 (2000)).

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collective right.[314] "The Anti-Federalists viewed the state militias as providing the only true opportunity for the people to bear arms."[315] Furthermore, Federalist John Adams's statement about "arms in the hands of citizens" not only implies a collective right, but "ridicule[s] the concept of [an individual right]."[316]

Silveira I also finds support in the Second Amendment's congressional legislative history, which shows "that the amendment was designed to ensure that the people retained the right to maintain effective state militias, the members of which could be armed by the states as well as by the federal government."[317] The court went on to declare that "*not a single statement in the Congressional debate about the proposed amendment . . . indicates that any Congressman contemplated that it would establish an individual right to possess a weapon*."[318]

Similarly, the original Constitution's ratification debates in New York, North Carolina, Rhode Island, Virginia, whose proposed amendments were worded similarly to the Second Amendment in its final form, were "almost entirely—but not completely—devoid of any mention of an individual right."[319] In fact, "[n]one of the major proposals for a Bill of Rights included any provision affording individuals such a right."[320] "[O]nly a few isolated voices" advocated an individual right, and only New Hampshire's ratifying convention proposed an amendment explicitly establishing an individual right to arms.[321] The argument follows that because New Hampshire's wording was so different from that of other states' arms-related proposals, the other states must have proposed a collective right.[322]

3. The Amendment's Structure, Placement, and Text

The Ninth Circuit found the Second Amendment "particularly striking" because it contains a prefatory clause, unique in the Constitution, that must be a part of its interpretation.[323] "[T]he first clause does more than simply state the amendment's purpose or justification: it also helps shape and define the meaning of the substantive provision contained in the second clause," and "[*i*]*t must be interpreted . . . with that end in view*."[324] To do otherwise would be to "read the first clause out of the amendment

314. *Id.*
315. *Id.* at 1081.
316. *Id.* at 1085; *see supra* note 130 and accompanying text.
317. *Silveira I*, 312 F.3d at 1085; *see supra* notes 56–71 and accompanying text.
318. *Silveira I*, 312 F.3d at 1085.
319. *Id.* at 1081–82; *see supra* text accompanying notes 44–54.
320. *Silveira I*, 312 F.3d at 1082 n.45.
321. *Id.* at 1083; *see supra* text accompanying note 47.
322. *Silveira I*, 312 F.3d at 1083.
323. *Id.* at 1068–69, 1068 n.23 (claiming also that the Copyright and Patent Clause does not have a preamble).
324. *Id.* at 1075 & n.33 (citing United States v. Miller, 307 U.S. 174, 178 (1939)) (emphasis in *Silveira I*).

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altogether."[325] Proponents of the collective right model hold that the most plausible interpretation of the Amendment is that it sought to safeguard state militias from federal interference, and nothing more.[326]

According to the Ninth Circuit, the fact that every other Bill of Rights Amendment establishes individual rights is immaterial because certain portions of the adopted Amendments refer to other matters.[327] Moreover, the recently adopted Twenty-seventh Amendment was also among the proposals made to the states, and it did not protect individual rights.[328]

a. *Interpreting "Militia"*

In addition to its structural arguments, this model also maintains that the Second Amendment's text implies a collective right, as set forth below.

The collective right model argues that, based on ordinary meaning and its usage in other portions of the Constitution, "militia" refers to a "state military force . . . not to the people of the state as a whole."[329] Use of the term in Articles I and II of the Constitution makes clear that the founders were referring to a "government-established and -controlled military [force]" which was to be "'essentially organized and under control of the states, but subject to regulation by Congress and to "federalization" at the command of the president.'"[330] "'[M]ilitia' refers to state military organizations and not to their members or potential members throughout these two Articles."[331] The term's use in the Fifth Amendment, which guarantees defendants a right to grand jury indictment "except in cases arising in . . . the Militia, when in actual service in time of War or public danger," also implies that a militia is a "state entity, and not [a] collection of individuals who may participate in it."[332]

Some collective right advocates, like the appellee in *Parker*, also claim that "the Framers' militia has faded into insignificance," and that the applicability of the Second Amendment to individuals has therefore done the same.[333] Ultimately, however, the state right advocates also find support in the Second Amendment's text.

325. *Id.* at 1069 n.24. Prefatory clauses in state constitutions are treated as having "limited significance"; however, that is not a reason to treat them the same way in the Federal Constitution, where the Second Amendment's preamble is unique. *Id.*

326. *Id.* at 1075; *see supra* text accompanying note 310.

327. *Silveira I*, 312 F.3d at 1085 n.51.

328. *Id.* at 1085 & n.51; *see supra* note 58.

329. *Silveira I*, 312 F.3d at 1069–70, 1070 n.25 (citing United States v. Verdugo-Urquidez, 494 U.S. 259 (1990)).

330. *Id.* at 1070 (quoting Finkelman, *supra* note 14, at 204).

331. *Id.* at 1070.

332. *Id.* at 1070–71 (quoting U.S. Const. amend. V).

333. Parker v. District of Columbia, 478 F.3d 370, 386 (D.C. Cir. 2007); United States v. Emerson, 270 F.3d 203, 231 n.30 (5th Cir. 2001); *see supra* note 161 and accompanying text.

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b. *Interpreting "State"*

Using the word "state" in this phrase instead of Madison's originally proposed "best security of a free country," proponents argue, shows that the founders must have intended the term "militia" to refer to a permanent state militia because it "emphasized the primacy of the state militia over the federal standing army."[334] *Silveira I* cites Congressman Gerry's statement about a standing army during the House debates in support of this reasoning.[335]

c. *Interpreting "Well Regulated"*

The Ninth Circuit held that the phrase "well regulated" shows that "'the Amendment does not apply to just anyone,'" but rather to a military force "established and controlled by a governmental entity."[336] Presumably, only the state could "regulate" the militia.

d. *Interpreting "People"*

Silveira I does not address the meaning of the term "people" in the Second Amendment except to suggest in a footnote that it must be construed identically throughout the Bill of Rights.[337]

e. *Interpreting "Bear"*

Silveira I found that during the founding era, the term "bear arms" generally referred to the use of arms in a military context rather than a private one.[338] A number of ratification-era sources support this understanding, including use of the term in the Declaration of Independence and Madison's proposed exemption of the "religiously scrupulous" from bearing arms in his originally proposed version of the Amendment.[339] Because no state at the time or earlier ever compelled people to carry weapons in a private capacity, Madison's use of the term must have referred to the carrying of arms in service of the state.[340]

This interpretation is confirmed by an analysis of the term in the 1840 case of *Aymette v. State*, which stated that, as the term is used in the Tennessee Constitution, "[a] man in pursuit of deer, elk and buffaloes might carry his rifle every day for forty years, and yet it would never be said of him that he had borne arms."[341] "Further, the Oxford English Dictionary

334. *Silveira I*, 312 F.3d at 1071; *see supra* text accompanying note 57.
335. *Id.*; *see supra* text accompanying note 61.
336. *Silveira I*, 312 F.3d at 1072 (quoting Finkelman, *supra* note 14, at 234).
337. *Id.* at 1070 n.25.
338. *Id.* at 1072–73.
339. *Id.* at 1072–73; *see supra* text accompanying note 57.
340. *Silveira I*, 312 F.3d at 1073–74 (citing Finkelman, *supra* note 14, at 228).
341. *Id.* at 1073 (quoting Aymette v. State, 21 Tenn. (2 Hum.) 154 (1840)).

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defines 'to bear arms' as 'to serve as a soldier, do military service, fight.'"[342] Thus, proponents claim, use of "bear" shows that a military, and therefore state-controlled, function was intended.

f. *Interpreting "Keep"*

The Ninth Circuit held that the most reasonable reading of "keep and bear" is to construe it as a "unitary phrase that relates to the maintenance of arms for military service."[343] Because "[t]he only right to use arms specified in the Constitution is the right to 'bear' them," the term must not be "broader in scope than the term 'bear.'"[344] However, "keep" may refer to a state right to possess arms.[345] In any case, "it [is] highly significant . . . that the second clause does not purport to protect the right to 'possess' or 'own' arms, but rather to 'keep and bear' arms."[346]

g. *Interpreting "Arms"*

The term "arms" has a military connotation, and therefore must refer to a state's right to arm its military forces.[347]

C. *Summary*

The individual right model maintains that Supreme Court precedent and history strengthen what the Second Amendment's text directly declares: that the Amendment conveys an individual right to arms. The collective right model maintains that, when read in accordance with Supreme Court precedent, the rest of the Constitution, and history, the Second Amendment can only be construed to convey a collective right.

Each model convincingly argues that historical evidence and its half of the text, in a vacuum at least, support its view. The surfeit of historical commentary mentioning individual firearm use and the substantive guarantee's use of terminology that the Constitution and framers always used in reference to individuals imply an individual right.[348] The founding era's concern with state military independence and the "militia" clause, viewed separately, indicate a purely collective military motivation behind the Second Amendment.[349]

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342. *Id.* at 1073 (quoting 1 Oxford English Dictionary 634 (John A. Simpson & Edmond S.C. Weiner eds., 2d ed. 1989)).
343. *Id.* at 1074.
344. *Id.*
345. *Id.* (citing Finkelman, *supra* note 14, at 234).
346. *Id.* at 1072.
347. *Id.* at 1073 (citing English v. State, 35 Tex. 473, 476 (1872); State v. Workman, 14 S.E. 9, 11 (W. Va. 1891)). The court says no more about this term than to cite these cases.
348. *See supra* Part II.A.
349. *See supra* Part II.B.

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III. THE INDIVIDUAL RIGHT MODEL: A MORE PLAUSIBLE RESPONSE

This part examines the Second Amendment debate primarily from the historical and originalist viewpoints. In doing so, it shows that the founders secured an individual right, and that the reasons for securing an individual right in 1789 still apply today.[350] The individual right model successfully accounts for the portions of history, text, and precedent that support a collective right view, while the collective right model is unsuccessful at explaining away its weaknesses.

A. *Popular Militias and Individual Rights*

1. Internally Consistent Reading of the Constitution

The collective right view is inconsistent with Article I, Sections 8 and 10 of the Constitution. Article I, Section 8 gives Congress the power to call forth, arm, organize, discipline, and proscribe training methods for the militia.[351] Article I, Section 10 prohibits states from keeping troops, but allows them to wage war if invaded or if imminent danger requires.[352] Recall that the Anti-Federalists claimed that Article I, Section 8, Clause 16 gave Congress the exclusive power to arm the militias,[353] while the Federalists claimed that it was concurrent with the states' power,[354] and that Madison's proposed amendments sought to leave the balance of power between the federal and state governments untouched while making explicit certain principles that were implicit in the original Constitution.[355]

If Congress's power over the militia was exclusive, which is the more likely assumption given that the Senate rejected the proposed amendment explicitly granting states the power to arm their militias,[356] then the collective right model effectively holds that the Second Amendment repealed Article I, Section 8. This would conflict with the intent of the Amendments;[357] *Miller*'s decree that the Second Amendment must be read in harmony with Article I, Section 8, Clause 16;[358] and Supreme Court precedent that federal power over the militia is plenary, with state authority existing only insofar as it is consistent with federal authority.[359]

350. *See supra* note 11.
351. *See* U.S. Const. art. I, §8, cls. 15, 16; 1 Stat. 14 (1787).
352. *See* U.S. Const. art. I, §10, cl. 3; 1 Stat. 15 (1787).
353. *See supra* text accompanying notes 32–33.
354. *See supra* text accompanying note 41.
355. *See supra* note 56 and accompanying text.
356. *See supra* note 68.
357. *See supra* note 56 and accompanying text.
358. *See supra* text accompanying notes 195, 266.
359. *See supra* note 195; *infra* note 511 (describing how the President has the power to take control of the National Guard, removing it from state control).

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The collective right model also assumes a state-run select militia.[360] State maintenance of such military forces is prohibited by Article I, Section 10, which forbids states from keeping troops.[361] Further, a select militia, feared as much as a standing army, would not be consistent with the Federalist/Anti-Federalist bargain.[362] Thus, with the states out of the picture, only the people were left as a counterweight to the federal government's monopoly on military power, fulfilling the bargain's concern with tyranny. This description fits with the Bill of Rights' intent to clarify what is implied—that the people were already presumed to have arms.[363]

The collective right model proposes that Congress's power over the militia was concurrent with that of the states because the original Constitution made no mention of such a state power, and the Second Amendment merely reaffirms the right of states to secure themselves against the federal government per the Federalist/Anti-Federalist bargain.[364] However, this proposition was *already* explicitly provided for by Article I, Section 10, which allowed states to go to war if invaded.[365] There is no reason to presume that this exception to going to war did not apply to attack by the federal government. If the states can defend themselves when attacked but cannot keep troops, the only remaining possibility is that an armed population must be relied upon. This is what the Second Amendment explicitly reaffirms, not a state right that is inconsistent with at least one, and perhaps both, of the Constitution's existing group arms-bearing provisions,[366] which no one claims were repealed. Thus, the Second Amendment can only have referred to an individual right.

2. History Supports an Individual Right

The vast array of historical material supporting the individual right model overwhelms the evidence supporting a nonindividual, collective right. The individual right model is consistent with the collective right model's focus on the preservation of state militias.[367] Anti-Federalist concerns about the federal government's monopoly over the tools of violence relied upon by the collective right model[368] are addressed by the individual ownership of arms: if individuals are armed, the federal government no longer has its monopoly and the population can resist tyranny.[369] The satisfaction of the

360. See *supra* note 37 for a definition of "select militia" and Part II.B.2 for the collective right model's conformity with the definition. *See also* Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 Ala. L. Rev. 103, 106 (1987).

361. U.S. Const. art. I, § 10, cl. 3; 1 Stat. 15 (1787); *see supra* text accompanying note 31.

362. *See supra* notes 37, 103, 220 and accompanying text.

363. *See supra* text accompanying notes 41–43.

364. *See supra* text accompanying notes 55–56, 310.

365. *See supra* text accompanying note 31.

366. U.S. Const. art. 1, §§ 8, 10; 1 Stat. 14–15 (1787).

367. *See* Lund, *supra* note 360, at 106. *See generally* Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 Ga. L. Rev. 1 (1996).

368. *See supra* Part II.B.2.

369. *See supra* text accompanying notes 213, 215.

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Anti-Federalist side of the Federalist/Anti-Federalist bargain as to the militia/standing army controversy depended upon the people being armed.[370] Founding-era statements and commentary must be considered in this light.

The Amendment's legislative history is filled with evidence supporting an individual right. State ratification history of the original Constitution shows that the Anti-Federalists both wanted and thought they were getting an individual right later on as part of their bargain with the Federalists.[371] Madison's original wording and the House of Representatives' approved wording clearly granting an individual right,[372] along with the Senate's rejection of limiting language, support this view.[373]

Congressman Scott's statement during the House debates is perhaps the clearest indication that the Second Amendment secured an individual right.[374] Congressman Scott very likely referred to the version of the Amendment adopted three days earlier, which he correctly assumed would be ratified and thus guarantee an individual right.[375] He feared that the individual right could be eviscerated by Congress declaring people religiously scrupulous, forcing the nation to rely on a standing army.[376]

Direct statements of the Amendment's drafters, as well as those on the periphery and those of the nonelite commenting in newspapers and elsewhere, are likewise rife with statements assuming[377] or explicitly describing[378] an individual right—either directly or via a popular militia—to possess weapons, and not a state-controlled select militia. That these views were widespread and undisputed speaks for itself.[379]

The relevant commentary is not restricted to the federal military monopoly context. Jefferson's statement relating to defense and crime makes no reference to federal tyranny,[380] and there is no reason to refer to "wild Beast[s]" and "fowling" in relation to a provision granting state power.[381] There is simply no intellectually honest way to interpret the plethora of statements about the Amendment from both Federalists and Anti-Federalists as not assuming an underlying individual right to possess a weapon.

370. *See supra* text accompanying notes 41–42, 107, 113, 115–16, 119, 121, 211, 240.
371. *See supra* notes 44–55 and accompanying text.
372. *See supra* text accompanying notes 57–59, 217.
373. *See supra* text accompanying note 67.
374. *See supra* text accompanying note 62.
375. *See supra* notes 59, 61–62 and accompanying text.
376. *See supra* text accompanying notes 62, 217.
377. *See supra* text accompanying notes 42–43, 104, 106, 107, 111, 121, 123.
378. *See supra* text accompanying notes 50, 100–01, 103, 109, 113, 115–17, 119, 122, 130.
379. *See, e.g.*, *supra* notes 111, 116, 123 and accompanying text.
380. *See supra* text accompanying note 104.
381. *See supra* notes 119, 122 and accompanying text.

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The abundance of arms-bearing provisions in state constitutions indicates that the concept of individual arms ownership was not new to the nation.[382] The state constitutional guarantees had to be individual ones because there is no entity lower on the "stepladder" to which the right could be secured: at the national level, where state governments exist between the federal government and the people, the concept of a state right may be concocted (by ignoring the substantive guarantee and the Amendment's history) by claiming that the Constitution reserved the right to the states. However, at the state level, where no such middleman exists, such a concept is implausible. Indeed, Vermont, while still an independent nation, explicitly guaranteed its people an individual right to bear arms years before the United States did.[383]

Bills of rights in state constitutions reinforce the general understanding, by both Federalists and Anti-Federalists, that the Bill of Rights secured individual rights as opposed to state powers.[384] Federalists endorsed this view with respect to the Second Amendment by taking it for granted that Americans were armed;[385] Anti-Federalists did so by explicitly asking for a bill of rights guaranteeing individual rights.[386]

Dred Scott's assumption of an individual right,[387] *Presser*'s distinguishing the personal right to keep and bear arms from the state's authority to drill militarily,[388] and *Miller*'s weapon-based holding[389] all bespeak an individual right. That a collective right was contrived over fifty years after the Second Amendment's adoption, and first appeared in a holding over sixty years after that, shows how foreign it was to the founding era.[390]

3. Natural Rights, Tyranny, and the American Dream

The founding-era view of the Bill of Rights is consistent with its precursor, the English Bill of Rights, and the natural law concepts underlying it.[391] The natural right to self-defense, both against individual aggressors and tyrannical states, has been acknowledged for millennia.[392] Hobbes and Locke ingrained it into Anglo-American jurisprudence, and it so permeated American legal culture that, in addition to profoundly influencing the founders, it explicitly appeared in state constitutions, ratification debates, congressional debates on the Bill of Rights, and

382. *See supra* Part I.A.3.
383. *See supra* note 88 and accompanying text.
384. *See supra* text accompanying notes 28, 106–22.
385. *See supra* text accompanying notes 41–43, 119, 121, 130.
386. *See supra* text accompanying notes 25–28, 39, 52, 55, 122.
387. *See supra* text accompanying notes 187–88.
388. Gun Control & Gun Rights: A Reader & Guide, *supra* note 134, at 160; Kates, *supra* note 27, at 246; *see supra* text accompanying notes 180–82.
389. *See supra* text accompanying notes 193–94, 199–200, 287.
390. *See supra* text accompanying notes 296–300.
391. *See supra* text accompanying notes 128, 140, 143–44.
392. *See supra* Part I.B.2.

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political commentary.[393] Thus, one cannot doubt that the Second Amendment secured this preexisting natural right.

The Supreme Court has endorsed this understanding, both generally with respect to the Bill of Rights,[394] and specifically with regard to the Second Amendment in *Cruikshank* by recognizing that the right to bear arms predates the Constitution and is not dependent on it for its existence.[395] This is perfectly understandable in the common law system that the early Americans inherited. The Federalist/Anti-Federalist fight was over the army and militia; under the individual right view, the Second Amendment confirmed what people already expected.[396] The collective right model proposes a new dynamic with respect to the control of violence that runs counter to centuries of Anglo-American history.[397]

The founders, their predecessors, and contemporaries spoke of individuals directly protecting themselves from tyranny without a governmental intermediary, implying an individual right.[398] Their foresight has proven itself accurate given that there are no cases of the federal government unjustifiably attacking any states[399] but plenty of cases of it oppressing individuals directly.[400] The internment of Japanese Americans during World War II is perhaps the most infamous of these, with the Supreme Court holding the detention constitutional in *Korematsu v. United States*.[401] Neither California, Fred Toyosaburo Korematsu's state, nor any of the other coastal states where the internment order was in effect, did anything to protect their citizens from the federal government.[402]

During the 1992 Ruby Ridge incident in Idaho, camouflaged government forces attacked a family in an Idaho backwoods cabin, killing a fourteen-year-old boy and his mother in front of the mother's other children.[403] The

393. *See supra* text accompanying notes 48–53, 76, 82, 84, 88, 90, 135–44, 146–47, 224–27.

394. *See supra* note 224 and accompanying text.

395. *See supra* notes 179, 224 and accompanying text.

396. *See supra* note 56 and accompanying text; *see also supra* Part I.A.1.

397. *See supra* text accompanying notes 224–29; *see also supra* Parts I.B.2, I.B.3.

398. *See supra* text accompanying notes 41–42, 111, 115; *see also supra* Part II.B.3. *But see* text accompanying note 130 (discussing Adams's statement that implied that he held the contrary view).

399. Some consider the Civil War an exception on the grounds that secession is legal. *See generally, e.g.*, Jefferson Davis, The Rise and Fall of the Confederate Government (1881). The Supreme Court held otherwise. Texas v. White, 74 U.S. (7 Wall.) 700 (1868).

400. *See, e.g.*, *infra* notes 401–14.

401. 323 U.S. 214, 223–24 (1944).

402. *See generally, e.g.*, Dean Masaru Hashimoto, *The Legacy of* Korematsu v. United States*: A Dangerous Narrative Retold*, 4 Asian Pac. Am. L.J. 72 (1996) (examining *Korematsu v. United States* and Japanese internment in detail, but not mentioning states coming to any citizen's aid).

403. Idaho v. Horiuchi, 253 F.3d 359, 362–63, 362 n.1 (9th Cir. 2001) (en banc), *vacated as moot*, 266 F.3d 979 (9th Cir. 2001) (en banc). The boy was shot in the back while he was fleeing, and the mother was shot in the face while holding her baby. *Id.*; Gordon Witkin, *The Nightmare of Idaho's Ruby Ridge: As a New Inquiry Begins, Questions Linger*, U.S. News & World Report, Sept. 11, 1995, at 24, 29, 30.

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family fought back with its private arms, resulting in a federal marshal's death.[404] The father and a family friend, who fired at the marshal, were acquitted on all charges relating to the agent's death.[405] A jury also acquitted the father, on entrapment grounds, of the original charge which brought the federal force to the cabin in the first place.[406] After declarations of unconstitutional actions,[407] a Senate investigation finding that the federal government had weakened the trust between itself and its citizens,[408] a court holding that "the FBI had shown a 'callous disregard for the rights of defendants and the interests of justice,'"[409] numerous agent suspensions,[410] and a conviction,[411] the end result was that the government's procedures were changed so that such an event would not recur.[412] In this instance, the individuals involved did not need the assistance of state governments to protect themselves from tyranny. That day, Idaho did nothing to protect its citizens,[413] just as California did nothing for Korematsu fifty years earlier.[414]

Though both individual and collective right adherents agree that protection from federal tyranny was an important concern, others outside the present circuit split argue that the Constitution forbids rebellion, and it

404. *Horiuchi*, 253 F.3d at 362.

405. Timothy Egan, *Idaho Prosecutor Charges 2 in Killings at Ruby Ridge*, N.Y. Times, Aug. 22, 1997, at A14; *State Charges Dismissed in Ruby Ridge Standoff*, N.Y. Times, Oct. 3, 1997, at A13.

406. Witkin, *supra* note 403, at 24. One can only imagine how egregiously the government acted for an entrapment defense to succeed. To make matters worse, there were later cover-ups within the Federal Bureau of Investigation (FBI). Tim Weiner, *U.S. Will Bring No More Criminal Charges Against F.B.I. Officials in Ruby Ridge Siege*, N.Y. Times, Aug. 16, 1997, at 6.

407. *Horiuchi*, 253 F.3d at 377 (stating that the "wartime rules" of engagement adopted by the federal government were "patently unconstitutional"); *id.* at 363 n.2, 364 n.5, 373, 377 n.28; Witkin, *supra* note 403, at 30 (stating that the shot killing the mother was unconstitutional because the FBI agent taking the shot was not in imminent danger as his target was running away).

408. David Johnston, *Senate Report Faults F.B.I. and Other Agencies on Idaho Incident*, N.Y. Times, Dec. 22, 1995, at A35.

409. Witkin, *supra* note 403, at 30.

410. Weiner, *supra* note 406; Witkin, *supra* note 403, at 30.

411. Egan, *supra* note 405 (reporting that an agent was convicted of obstruction of justice for attempting to destroy FBI records of the event).

412. *Examining Certain Federal Law Enforcement Actions with Regard to the 1992 Incident at Ruby Ridge, ID: Hearing Before the Subcomm. on Terrorism, Technology, and Government Information of the S. Comm. on the Judiciary*, 104th Cong. 998, 1001–09 (1995) (statement of Louis J. Freeh, Director, Federal Bureau of Investigation); *see U.S. Officials Say Firearms Agency Has Made Reforms*, N.Y. Times, Nov. 1, 1995, at A19. The 1993 Waco, Texas, disaster, where a "botched" federal assault on a religious sect resulted in a fire that killed eighty sect members, including children, also resulted in reforms to federal procedures. *U.S. Officials Say Firearms Agency Has Made Reforms*, *supra*; Weiner, *supra* note 406.

413. In fact, it later attempted to prosecute its citizens for their self-defense. *See* Egan, *supra* note 405.

414. *See supra* note 402 and accompanying text. This example may partly explain why only a minority of Americans wants to ban guns. *See* Johnson, *supra* note 79, at 762–63, 785 n.394.

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thus makes no sense that a constitutional provision would protect it.[415] However, the rebellion protected is not necessarily a destructive one that extinguishes the existing government, but rather a "conservative" one that restores constitutional order from a government exceeding its enumerated powers.[416] This is what happened on a small scale at Ruby Ridge: the government took unconstitutional actions,[417] those having their rights trammeled fought back,[418] and constitutional order was restored by the correction of governmental policies.[419] The founders likely looked at their "war for independence" similarly, and wrote the Second Amendment to protect their posterity's right to individual use of force against the government, but only to the extent that tyrannical conduct is held at bay.[420]

4. The Second Amendment's Preamble Evinces an Individual Right

When looked at in context, the Second Amendment is not as unclear as one might initially believe. Its placement among nine Amendments protecting individual interests implies that it has a similar purpose.[421] This understanding is greatly strengthened by Madison's originally proposed insertion of the Amendment, along with every other portion of the Bill of Rights, into a section of the Constitution limiting governmental power and adjacent to clauses specifically protecting individual rights.[422]

This placement is consistent with the understanding that the Amendment's preamble is a philosophical declaration of one of the civic purposes that it was meant to secure.[423] Given the Federalist/Anti-Federalist controversy over the control of military power,[424] it is logical that the framers chose to mention a militiacentric civic purpose.

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415. *See generally* Henigan, *supra* note 2.

416. *See* Williams, *supra* note 16, *passim*.

417. *See supra* notes 403, 407 and accompanying text; *see also supra* notes 406, 409 and accompanying text.

418. *See supra* text accompanying note 404.

419. *See supra* note 412 and accompanying text.

420. *See supra* note 16 and accompanying text. Considerations of individual defense from tyranny are also still relevant outside the United States. Recognizing that it is a delicate topic that touches many deeply, the atrocity of the Holocaust is worth briefly considering in this context. One cannot legitimately argue that Jews being taken away by the Gestapo had no right to fight back then and there, especially given their ultimate destination. As Judge Alex Kozinski very aptly said, "If a few hundred Jewish fighters in the Warsaw Ghetto could hold off the Wehrmacht for almost a month with only a handful of weapons, six million Jews armed with rifles could not so easily have been herded into cattle cars." Silveira v. Lockyer (*Silveira II*), 328 F.3d 567, 570 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc). He rightly called the Second Amendment a "doomsday provision" to be relied on in those "exceptionally rare" circumstances when government fails its people entirely. *Id.* Thomas Jefferson would not have even waited for an exceptionally rare occurrence, actually wanting periodic rebellions. *See supra* text accompanying note 156.

421. *See supra* text accompanying note 230.

422. *See supra* notes 58, 231 and accompanying text.

423. *See supra* text accompanying notes 233–41.

424. *See supra* Part I.A.1.

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Philosophical declarations were common at the time of the founding. Despite the Ninth Circuit's claim to the contrary,[425] the Constitution contains another preamble declaring a civic purpose: "To promote the Progress of Science and useful Arts."[426] Numerous state constitutions contained such philosophical declarations,[427] as did amendments proposed by both houses of Congress to be sent to the states with the Bill of Rights.[428] The original version of the Sixth Amendment right to a jury trial also contained a philosophical declaration: "[T]rial by jury as one of the best securities to the rights of the people, ought to remain inviolate."[429] The framers never intended the Second Amendment's preamble, or the proposed preamble to the right to a jury trial and the preamble to the Copyright Clause, to limit its substantive guarantee.[430]

Suppose that the First Amendment contained a sentence reading, "A well-schooled electorate, being necessary to the security of a free State, the right of the people to keep and read Books, shall not be infringed."[431] Freedom-loving Americans would never interpret the sentence "to restrict the right to keep and read books to a well-schooled electorate—say, registered voters with a high-school diploma."[432] To do so would be grammatically and linguistically incorrect.[433]

The Second Amendment's structure indicates that its preamble does not detract from its assumption of the existence of the substantive right, nor is anything in the preamble a prerequisite for it.[434] Use of an indefinite article in the "a free State" portion of the preamble rather than one of the definite articles used elsewhere in the Constitution also supports the idea that it is a philosophical declaration.[435] The founding-era understanding confirms that the preamble is merely an observation without binding character.[436]

Thus, it is clear that the final adopted version of the Second Amendment is essentially shorthand of the original House version of what was so obvious at the time as to go without saying: individuals had a right to arms, and militias were important.[437] Numerous contemporary statements and

425. *See supra* notes 323, 325 and accompanying text.
426. U.S. Const. art. I, § 8, cl. 8; 1 Stat. 14 (1787).
427. *See supra* note 325.
428. *See supra* notes 61, 69.
429. 1 Annals of Cong. 453 (Joseph Gales ed., 1834) (proceedings of June 8, 1789).
430. Silveira v. Lockyer (*Silveira II*), 328 F.3d 567, 582 (9th Cir. 2003) (Kleinfeld, J., dissenting from denial of rehearing en banc) (stating that it is indefensible "to limit the Congressional power to grant copyrights only to those writings that actually do 'promote the Progress of Science and useful Arts'").
431. Resnick, *supra* note 104, at 4.
432. *Id.*
433. *Id.* at 2–11.
434. *See id.* at 7.
435. *See supra* text accompanying note 254.
436. *See supra* text accompanying note 123.
437. Malcolm, *supra* note 12, at 161 (noting that Congress streamlined the Amendment's language because there was a shared understanding of its meaning). In fact, a similar abbreviation, of the Judiciary Act of 1789, was taking place practically concurrently with the adoption of the Bill of Rights, in which the Senate reduced forty-five words to twelve.

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their underlying assumptions confirm this understanding.[438] Madison's referring to "other accustomed requisites" regarding the future Sixth Amendment shows that the intent was to include that which was so obvious or a part of tradition that it did not need to be spelled out in great detail.[439]

The Second Amendment protects the militia by granting the right to bear arms directly to citizens, rather than to a potentially ineffectual state middleman.[440] The individual right model thus reads the Second Amendment's phrases as coexisting rather than conflicting—the preamble promotes and justifies the substantive guarantee, but does not weaken it.[441] However, as the remainder of this section shows, even if the Amendment consisted only of its preamble, an individual—and likely nearly universal—right would be guaranteed.

a. *Understanding "Militia"*

It is abundantly clear that "militia," both at the founding and now, refers to a vast segment of the population rather than a limited militarily affiliated subset. The term has been defined explicitly by the Second Congress through the Militia Act of 1792, the Supreme Court in *Miller*, and current statute.[442] The understanding that the militia is a popular one is reinforced by the Second Amendment's legislative history, where states (via their ratification conventions) and Congress made such an understanding clear,[443] as well as by the array of contemporary and subsequent commentary on the nature of the militia.[444]

There is no organizational precedent to the existence of the militia, either at the founding or today. The Constitution itself differentiates between the active and inactive militia,[445] and both the 1792 and current militia definitions include active/organized and inactive/unorganized members.[446] *Miller* also assumed that virtually all people have the requisite connection with the militia.[447]

One question that remains open is whether women and men outside the age range specified by the current militia definition could possess arms under only the preamble. If legislative history and commentary of the time

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Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 84–88 (1923). Recall that it was the same Senate that abridged the House's more elaborate formulation of the Second Amendment. *See supra* text accompanying notes 65–69.

438. *See supra* Part I.B.1.

439. 1 Annals of Cong. 452 (Joseph Gales ed., 1834) (proceedings of June 8, 1789).

440. *See supra* note 241 and accompanying text; *supra* text accompanying notes 413–14; *see also supra* Part II.B.3.

441. *See supra* note 241 and accompanying text.

442. *See supra* text accompanying notes 72–73, 196, 242–47.

443. *See supra* Part I.A.2.

444. *See supra* text accompanying notes 100, 103, 113, 115, 129.

445. *See supra* note 248. *But see supra* text accompanying note 332.

446. *See supra* text accompanying notes 72–73.

447. *See supra* notes 196, 200. The Court presumably excluded criminals, and perhaps others, including women. *See supra* notes 193, 196.

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is the guide, then the whole "body of the people" may possess arms[448] because a government-defined militia would cause the Second Amendment's "purpose [to be] defeated altogether."[449] In addition, *Parker* held that equal protection doctrines would ensure the right to all citizens.[450] Judge Andrew Kleinfeld, in his *Silveira v. Lockyer* (*Silveira II*) dissent, opined that Congress could never define the militia more narrowly than *Miller* did, but could expand the definition, as the current statute has.[451] In any case, the right to bear arms inheres to a very large segment of the population.

b. *Understanding "State"*

The term "State" refers to a sovereign government rather than a state of the union. Madison's originally proposed use of the word "country" in the Amendment supports this understanding,[452] and Congressman Gerry's objection confirms it.[453] Thomas Sheridan's popular dictionary, published in 1789, also defined "state" as, inter alia, "the community, the publick, the commonwealth."[454] On the other hand, the overwhelming use of "state" to refer to a member of the union in the Constitution cuts against this interpretation: of the 119 times the word appears, 116 refer to a state of the union,[455] while only two refer to a "hypothetical polity."[456]

However, this debate becomes moot with respect to the individual right model if the preamble is a philosophical declaration or if the clauses are coexisting.[457] In the former case, the individual substantive guarantee is unaffected. In the latter case, the question becomes of which "state"—national or of the union—the substantive guarantee is intended to ensure the security, leaving the nature of the right unaffected.

448. *See supra* text accompanying notes 50, 59, 100, 103, 115.

449. Cooley, *supra* note 128, at 271; *see supra* notes 72, 129 and accompanying text.

450. Parker v. District of Columbia, 478 F.3d 370, 395 (D.C. Cir. 2007) ("To the extent that non-whites, women, and the propertyless were excluded from the protections afforded to 'the people,' the Equal Protection Clause of the Fourteenth Amendment is understood to have corrected that initial constitutional shortcoming.").

451. Silveira v. Lockyer (*Silveira II*), 328 F.3d 567, 581–82 (9th Cir. 2003) (Kleinfeld, J., dissenting from denial of rehearing en banc); *see supra* text accompanying note 73.

452. *See supra* text accompanying note 57.

453. *See supra* text accompanying notes 251–53 (discussing the U.S. Court of Appeals for the D.C. and Fifth Circuits' interpretations of Elbridge Gerry's remarks). *But see supra* text accompanying notes 334–35 (discussing the U.S. Court of Appeals for the Ninth Circuit's interpretation of Gerry's remarks). The Ninth Circuit's leap of logic with respect to Congressman Gerry's statement is a stretch; the D.C. and Fifth Circuits' logic is much more internally cohesive.

454. Thomas Sheridan, A General Dictionary of the English Language (Phila., Young 1789).

455. *Parker*, 478 F.3d at 405 (Henderson, J., dissenting).

456. *See supra* text accompanying note 249. Article I, Section 9, Clause 8 and the Eleventh Amendment are the two such references.

457. *See supra* text accompanying notes 233–41, 423–35, 441.

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c. *Understanding "Well Regulated"*

It is clear that the militia's popular nature does not evaporate by becoming well regulated.[458] As Hamilton's *Federalist* paper and the Militia Act of 1792 show, the regulation referred to by the Second Amendment was not the disarmament of the people when they were not actively fighting; rather, it was the requirement that, even when not fighting, the people arm themselves and be ready for muster according to the standards set by Congress under its Article I, Section 8, Clause 16 militia power.[459]

The understanding of the word "regulate" supports this view. Sheridan's dictionary defines it as "to adjust by rule or method; to direct."[460] This definition presupposes something to regulate before the regulation takes place. Thus, the popular militia could be directed or adjusted by rules, but not disarmed or made nonexistent. The militia is, after all, "necessary."[461]

B. *"People" Does Not Mean "States"*

The collective right model only has a basis in reality if "people" is read to mean "states." However, as demonstrated in this section, "people" does not mean "states."

1. Internally Inconsistent Reading of the Constitution

The collective right model suffers a fatal blow by interpreting the Second Amendment in conflict with Article I, Sections 8 and 10 of the Constitution.[462] As discussed, disharmony exists whether the collective right model construes the Amendment to grant a new right to states to arm their militias, or merely to reaffirm the existence of the right.[463]

The collective right model, as presented in and adopted by *Silveira I*, also attempts to drown out an acknowledged individual right by couching it in collective terms. It is difficult to comprehend what "the people's right to maintain an effective state militia"[464] and similar statements[465] might mean if not an individual right of some sort. Statements such as "the Second Amendment . . . seeks to ensure the existence of effective state militias in which the people may exercise their right to bear arms," and "the amendment was enacted to guarantee that the people would be able to maintain an effective state fighting force—that they would have the right to

458. *See supra* text accompanying notes 255–59.

459. *See supra* text accompanying notes 30, 43, 56, 214–19; *supra* notes 68–69, 72 and accompanying text; *see also supra* Part III.A.1.

460. Sheridan, *supra* note 454.

461. *See* U.S. Const. amend. II; 1 Stat. 21 (1789).

462. *See supra* Part III.A.1.

463. *See supra* Part III.A.1.

464. Silveira v. Lockyer (*Silveira I*), 312 F.3d 1052, 1066 (9th Cir. 2002); *see supra* text accompanying note 302.

465. *See supra* text accompanying notes 315, 317.

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bear arms in the service of the state" also recognize an individual right of some sort.[466] The meaning of these statements ultimately depends on the definition of "militia." As shown, the bargain struck at the founding precluded the existence of a select militia or other state fighting entity;[467] Article I, Section 10 forbids the keeping of state troops anyway;[468] and anything but a popular militia would be inconsistent with statute and Supreme Court precedent.[469] Further, it is inconsistent with the collective right model's own claim that governments have "full authority" to regulate the right[470]—else it would not be a "right."

2. History Does Not Support a Collective Right

The collective right model's contention that the Second Amendment exists to allow states to arm their select militias so that they could defend the people from the federal government is nothing more than the individual right model with a middleman.

The idea that the new Constitution accomplished everything that both the Federalists and Anti-Federalists desired, including strengthening the militia by giving Congress power over it[471] is untenable. If Congress has power to manage the militias and dictate how the states should act, then the states' fears of having lost all military power are realized and there is no "compromise."[472] In fact, even if Congress and the states are assumed to have concurrent power to organize and arm the militias, the state power would nonetheless be useless because, as recognized by Madison, the Necessary and Proper Clause would allow Congress to override any state actions with respect to their militias.[473] This was certainly no compromise to the Anti-Federalists, and it explicitly undermines the Federalists' claim that no bill of rights was necessary because the government was one of enumerated powers only.[474]

The idea that the Second Amendment clarified that Congress's power over the militia was not exclusive is likewise untenable. Both sides agree that the Amendment did not alter the balance of federal/state military

466. *Silveira I*, 312 F.3d at 1075, 1076. In any case, "[t]he 'right' to be a soldier . . . [is] hardly a cherished right" that would have been constitutionally protected. Leonard W. Levy, Origins of the Bill of Rights 134–35 (1999).

467. *See supra* Parts I.A, III.A.

468. *See supra* text accompanying note 31. *But see supra* text accompanying note 330.

469. *See supra* text accompanying notes 72–73, 196. *But see supra* text accompanying notes 329, 332.

470. *See supra* notes 279 and accompanying text.

471. *See supra* text accompanying note 305.

472. *See supra* text accompanying notes 32–38, 305. The Supreme Court has confirmed that Congress's militia power is plenary. *See supra* notes 195, 359 and accompanying text.

473. U.S. Const. art. 1, § 8, cl. 18; 1 Stat. 14 (1787); *see* 1 Annals of Cong. 455–56 (Joseph Gales ed., 1834) (proceedings of June 8, 1789) (recognizing that delegated federal powers could be used to infringe on state powers).

474. *See* 1 Annals of Cong. at 790 (proceedings of Aug. 18, 1789) ("[I]t was impossible to confine a Government to the exercise of express powers; there must necessarily be admitted powers by implication."); *supra* text accompanying notes 25, 40.

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power.[475] Thus, if this is the case, then the Second Amendment did nothing to alter the unacceptable (to the Anti-Federalists) arrangement described in the previous paragraph. Next, the Ninth Circuit's claim that the original Constitution made clear that Congress's power over the militia was nonexclusive because it "may" arm the militias fails because the "may" in Article I, Section 8, Clause 16 has nothing to do with arming, but rather with the possibility that some of the militia "may" be federalized.[476] The lack of nonexclusivity is confirmed by the explicit rejection of the amendment allowing states to arm their militias.[477] Under this scenario, the Second Amendment would likewise not have effectuated the compromise with the Anti-Federalists. This leaves an individual right to fulfill the Federalists' obligation to the bargain.[478]

The collective right model claims that all militia-related discussion was in the context of arming power being taken from the states by the new Constitution, and that the discussion indicates that the Second Amendment was intended to remedy this imbalance of power.[479] This argument is refuted by both legislative history and political commentary. The clearest indication of the falsity of this view is the Senate's rejection of an amendment stating as much.[480] Again, the only option left at this point is an interpretation supporting an individual right. The claim that only a "few isolated voices" during the ratification debates wanted an individual right is false, as the records of amendment proposals show.[481]

Further, that the New York, North Carolina, Rhode Island, Virginia ratification debates, which produced arms proposals most similarly worded to the Second Amendment, only briefly discussed an individual right[482] does not militate in favor of a collective construction of their proposals, and thus the Second Amendment. First, failure to acknowledge references to both an individual right and a popular militia in these proposals is disingenuous, given the concession that there was some talk of an individual right and the everyday, noncontroversial nature of arms ownership at the time.[483] In addition, it is not at all surprising that the bulk of debate related to the fight over a standing army and militia control, as that issue was at the forefront while an individual right to arms was assumed.[484]

475. *See supra* note 56 and accompanying text.
476. *See supra* text accompanying notes 30, 308.
477. *See supra* note 68 and accompanying text.
478. *See supra* text accompanying notes 218–19.
479. *See supra* text accompanying notes 311–22.
480. *See supra* note 68 and accompanying text.
481. *Compare supra* text accompanying notes 44–53 (describing the amendment proposals), *with supra* text accompanying note 321 (describing the Ninth Circuit's "few isolated voices" claim).
482. *See supra* text accompanying note 319.
483. *See supra* text accompanying notes 42, 48–53, 76–90, 121.
484. *See supra* note 483 and accompanying text; *see also supra* Part I.A.1.

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The assertion that there were no statements during the congressional debates supporting an individual right[485] is not only false, but also misleading. First, the history of the Amendment's wording itself shows that the framers envisioned both an individual right and a popular militia.[486] Next, Congressman Scott explicitly referred to an individual right to arms in conjunction with the future Second Amendment.[487] Finally, the assertion is misleading because the Senate debates were closed, making it impossible for one to refer to specific statements by senators.[488]

The utter nonexistence of any third-party statements supporting a nonindividual intent behind the "right of the people to keep and bear arms" speaks loudly for itself.[489] Given that the Second Amendment refers so explicitly to "the people," one would expect both insiders and outsiders to the political process to clarify that it provided a collective right if one were intended.[490] Such clarification is exactly what routinely and explicitly took place with respect to the meaning of "militia."[491]

In particular, the statements upon which the Ninth Circuit relies are taken grossly and selectively out of context. First, in claiming that Madison's *Federalist No. 46* words referred to state-run militias bearing arms in the service of state governments,[492] the Ninth Circuit (1) bypasses with convenient ellipses the phrase referring to "a militia amounting to near half a million of citizens with arms in their hands"; (2) does not acknowledge that state governments are referred to as having the people on their side, implying that the people are the militia allying with the state; (3) does not acknowledge that its reference to "militia" only connects the militias to state governments via the appointment of officers; and (4) leaves out the portion of the text noting that, unlike the United States, European kingdoms were afraid to trust their people with arms.[493]

Next, the Ninth Circuit's claim that Patrick Henry, George Mason, and Richard Henry Lee speaking of the danger to militias in the context of the militia/standing army controversy supports the collective right model[494] ignores the fact that all three of these statesmen spoke of the militia

485. *See supra* text accompanying note 318.
486. *See supra* text accompanying notes 57–59.
487. *See supra* text accompanying notes 62, 374–76.
488. *See supra* text accompanying note 65.
489. U.S. Const. amend II; 1 Stat. 21 (1789); *see supra* note 131 and accompanying text.
490. *See supra* text accompanying note 235. The author contacted the Brady Center to Prevent Gun Violence (formerly Handgun Control, Inc.) via telephone and e-mail on October 24, 2007, and November 5, 2007, requesting assistance in locating commentary supporting the collective right model. To date, no response has been received. *See supra* note 131.
491. *See supra* text accompanying notes 50, 100, 103, 115.
492. *See supra* text accompanying note 311.
493. *See supra* text accompanying note 42. The rub is that the court then accuses individual right theorists of taking the passage out of context. Silveira v. Lockyer (*Silveira I*), 312 F.3d 1052, 1080 n.41 (9th Cir. 2002).
494. *See supra* text accompanying note 312.

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consisting of the population as a whole.[495] Mason specifically spoke of an individual right as well, while Lee explicitly decried the idea of a select militia which the court claims his statements support.[496] The court further states that Mason and Lee never advocated a "purely private right to arms."[497] This objection ignores the fact that the individual right was, in part, supposed to ensure the existence of the militia, making it understandable that they discussed the two concepts together.[498] When the court suggests that John Adams ridiculed the concept of an individual right,[499] it artfully leaves out of its citation the portion of President Adams's statement recognizing a right to arms for "private self-defense."[500] Adams's statement contradicts the assertion that the framers only considered a nonindividual purpose for the Second Amendment. Finally, that Jefferson never mentioned an individual right in his letter to Madison[501] is not proof of its nonexistence, especially given the common nature of arms ownership at the time,[502] and his inclusion of an arms-bearing guarantee in the model state constitution he wrote for Virginia in 1776.[503]

3. Misplaced Reliance on State Governments for Protection

While there is a fair amount of dispute over whether the Second Amendment actually grants a right or merely acknowledges rights that already exist,[504] the collective right model does not rely on the argument one way or the other. The *Silveira I* court does recognize that a purpose of the Second Amendment was to prevent tyranny by the federal government, but it assumes that only the states were entitled to resist.[505] It further skirts the issue by implying that the individual right model assumes that an "'unregulated' mob," like the farmers of Shays's rebellion or another private conglomeration, will be left exercising the preserved right.[506]

Two implications follow from the collective right model's unwillingness or inability to directly rebut the natural right arguments put forth by individual right adherents. First, the model effectively concedes that the Anglo-American natural right tradition cuts strongly against its arguments.

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495. *See supra* text accompanying notes 50, 100, 103.
496. *See supra* text accompanying notes 101, 103.
497. *See supra* text accompanying note 313.
498. *See supra* text accompanying notes 195, 233–41.
499. *See supra* text accompanying note 316.
500. *See supra* text accompanying note 130.
501. *See supra* text accompanying note 314.
502. *See supra* text accompanying notes 42, 48–53, 76–90, 121, 396.
503. *See* Kates, *supra* note 27, at 229.
504. *Compare, e.g.*, Cottrol & Diamond, *supra* note 126, at 1003 (arguing that the Second Amendment preserved a preexisting right), *with* Steven J. Heyman, *Natural Rights and the Second Amendment*, 76 Chi.-Kent L. Rev. 237 (2000) (arguing that no natural right was preserved by the Second Amendment).
505. *See supra* Parts I.A.1, II.B.2.
506. Silveira v. Lockyer (*Silveira I*), 312 F.3d 1052, 1072 (9th Cir. 2002).

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Second, it implies that individuals have nothing to fear from their state governments. However, states have proven that they are not to be relied upon when the federal government assails their citizens.[507] Madison, speaking of his proposed amendment limiting the power of states to violate the rights of conscience, press, or jury trial during the House ratification debates, recognized that "there is more danger of . . . powers being abused by the State Governments than by the Government of the United States."[508] Similarly, though the Second Amendment has never been incorporated,[509] the framers of the Fourteenth Amendment intended that Amendment to compel the states to respect the Second Amendment along with the other fundamental individual guarantees of the first eight Amendments.[510]

Even if the states right model is accepted, the ultimate resort to the use of violence for protection against the federal government does not disappear. For example, under the states right model, Arkansas gets to fight back in 1957 Little Rock.[511] Thus, as in Madison's time,[512] there is still significant doubt whether state governments can be trusted with a monopoly on the use of violence with respect to their people.[513]

Again granting the state right model, its proponents do not explain why the roughly forty-three states whose constitutions contain individual arms guarantees[514] have complete authority to regulate private arms ownership.[515] Madison himself, during the Second Amendment's congressional debates, spoke of state constitutions guaranteeing rights and

507. *See supra* text accompanying notes 399–414; *see also* Letter from Tom Washington, President, Nat'l Rifle Ass'n, to George Bush, Former President of the United States (May 10, 1995), *in* N.Y. Times, May 15, 1995, at A11 (paid advertisement by the Nat'l Rifle Ass'n) (citing federal abuses of power against individuals and noting that a poll found that "fifty-two percent of those questioned agreed that ' . . . *the federal government has become so powerful that it poses a threat to the rights and freedoms of citizens*'").

508. 1 Annals of Cong. 458 (Joseph Gales ed., 1834) (proceedings of June 8, 1789); *see id.* at 784 (proceedings of Aug. 17, 1789); *supra* note 58.

509. *See supra* notes 178–82, 184, 285–86. The *Parker* dissent, assuming that the Amendment refers to a state of the union, makes the argument that it does not restrict the District of Columbia's actions because it is not a state. Parker v. District of Columbia, 478 F.3d 370, 404–09 (D.C. Cir. 2007) (Henderson, J., dissenting). The dissent thus implicitly adopts an "explicit incorporation" stance, saying that the Second Amendment applies to the states by its very terms. While individual right adherents would relish such a concept, it is in obvious conflict with the incorporation doctrine.

510. *See supra* note 185 and accompanying text.

511. During the crisis at Central High School, the governor of Arkansas, citing "states rights," called out the National Guard to prevent nine students from attending the school as per an integration plan mandated by *Brown v. Board of Education*, 347 U.S. 483 (1954). Nat'l Park Serv., Crisis Timeline, http://www.nps.gov/chsc/historyculture/timeline.htm (last visited Feb. 17, 2008). In response, President Dwight D. Eisenhower took control of the Arkansas National Guard and sent in federal troops to escort the students into school. *Id.*

512. *See supra* text accompanying note 508.

513. Under the collective right model, states would be entitled to possess even atomic weapons to oppose federal tyranny. *See* Reynolds & Kates, *supra* note 265, at 1756.

514. *See supra* notes 91–93 and accompanying text.

515. *See supra* text accompanying note 279.

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the federal Constitution not infringing on them.[516] In other words, in a system where the federal government cannot infringe on state power,[517] these forty-three states, via their state constitutions, have either delegated their Second Amendment power to their citizens, or independently granted the right to arms to their citizens

4. The Second Amendment's Substantive Guarantee Speaks for Itself

Despite the collective model's claims to the contrary, the Second Amendment's substantive guarantee could not be clearer or more straightforward.

The collective right model interprets the Second Amendment's preamble to obviate entirely its substantive guarantee.[518] It relies primarily on the portion of *Miller* stating that the weapon in question must have some reasonable relation to the preservation of the militia.[519] However, this stance ignores the fact that *Miller* adopted a weapon-based argument, rejecting the defendant's constitutional claim on the grounds that his weapon did not relate to a militia.[520] Thus, rather than "read the first clause out of the amendment,"[521] the individual right view adopts one of two items *Miller* made clear: the preamble's purpose is to define the type of arms that may be owned.[522]

The collective model's claim that the preamble is not a philosophical declaration or civic purpose because one does not appear elsewhere in the Constitution fails primarily because it is based on a faulty premise: another civic purpose does appear in the Constitution, in the Copyright Clause.[523] Thus, because the Constitution contains another preamble that is interpreted similarly to those in state constitutions, the presence of preambles in state constitutions becomes relevant.[524] This view is strengthened by Madison's likely having looked at state constitutions to come up with his phrasing,[525] the greater role states played in national affairs at the time of the

516. 1 Annals of Cong. 456 (Joseph Gales ed., 1834) (proceedings of June 8, 1789) ("[T]his Government has not repealed those declarations of rights which are added to the several State constitutions . . . .").

517. U.S. Const. amend. X; 1 Stat. 21–22 (1789) ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."); *see supra* text accompanying notes 18, 25–27, 40; *see also infra* text accompanying note 537.

518. *See supra* Part II.B.3.

519. *See supra* text accompanying note 287, 289–90.

520. *See supra* text accompanying notes 193–94, 198–200.

521. *See supra* text accompanying note 325.

522. *Miller* also defined the militia. *See supra* text accompanying notes 196, 242–47, 442.

523. *See supra* text accompanying note 423; *supra* notes 426, 430 and accompanying text. *But see supra* note 323 and accompanying text; *supra* note 325.

524. *But see supra* note 323 and accompanying text; *supra* note 325.

525. Gun Control & Gun Rights: A Reader & Guide, *supra* note 134, at 212.

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founding,[526] and the fact that *Miller* referred to state constitutions in its analysis.[527]

The argument that the Second Amendment's placement among other Amendments granting individual rights is irrelevant to proving that the Second Amendment grants an individual right because (1) the Bill of Rights includes nonpersonal elements and (2) the entirely nonpersonal Twenty-seventh Amendment was among the originally proposed amendments would on its own have some merit.[528] However, it ultimately fails because Madison's originally proposed placement of the Second Amendment, along with the other Bill of Rights Amendments guaranteeing individual rights, into a portion of the Constitution already guaranteeing individual rights, clearly indicates that he intended an individual right.[529] This original placement combined with its existing envelopment among individual right guarantees validates its personal nature.

a. *Understanding "Right of the People"*

The Supreme Court has declared that the term "people" should be construed identically everywhere in the Constitution.[530] This renders untenable the argument that the Second Amendment protects a governmental interest unless, for example, the First Amendment is also interpreted as a collective right over which states have "full authority."[531] The sophisticated collective right model[532] is as close as one can come to rebutting the individual right model's understanding of "people." However, more credible than positing that the individual right guaranteed vanished with the militia it was meant to ensure, would be the position that the right to arms remained, and that the "necessary" militia should be brought back

526. *See supra* note 55.

527. United States v. Miller, 307 U.S. 174, 182 (1939) ("Most if not all of the States have adopted provisions touching the right to keep and bear arms.").

528. *See supra* text accompanying note 328.

529. *See supra* note 58 and accompanying text. Madison's originally proposed placement of the Twenty-seventh Amendment also indicates that he did not intend it to be an individual right. *Id.*

530. *See supra* text accompanying notes 202–04. The Ninth Circuit notes that this is the correct way to interpret "people," but this only weakens its argument for the validity of the collective right model. *See supra* text accompanying note 337.

531. *Silveira I* cites *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990), for the proposition that "militia" must be construed identically throughout the Constitution, but *Verdugo*'s definition of "people" weakens the Ninth Circuit's argument that the Second Amendment reserves a state power. Silveira v. Lockyer (*Silveira I*), 312 F.3d 1052, 1069–70, 1070 n.25 (9th Cir. 2002); *see supra* note 329 and accompanying text. *But see supra* text accompanying notes 203–05. Construing "militia" identically everywhere does not weaken the individual right model given its official and commonly understood meanings. *See supra* Part III.A.4.a.

532. *See supra* note 161 and accompanying text.

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(perhaps in whatever form sophisticated collective right model adherents imagine it).[533]

It is also salient that the Constitution consistently uses the term "right" to refer to a protected personal interest and "power" to refer to an enumerated governmental prerogative.[534] This usage was equally consistent during the congressional debates, including the rejected proposal granting states the power to arm their militias.[535] One particularly clear portion of the debates made the distinction clear: "[T]he constitution is a bill of powers, the great residuum being the rights of the people."[536] The unique constitutional reservation of power to the people by the Tenth Amendment is understandable in as much as the government is one of enumerated powers, with any remaining powers residing in the governed.[537] The Tenth Amendment's legislative history also indicates that the phrase "or to the people" was added onto the end of the Tenth Amendment to assure Congressman Thomas Tucker that the people were the source of the government's power.[538]

b. *Understanding "Bear"*

The collective right model's best argument, but one that ultimately fails and is irrelevant, is that the phrase "bear arms" has a military connotation other than the mere carrying of a weapon, and therefore the Second Amendment refers only to the use of arms in a state-run military context.[539]

While the phrase can have a military connotation, this is neither its only nor its primary meaning.[540] *Silveira I*'s use of the 1989 edition of the *Oxford English Dictionary* to define the term[541] in its originalist analysis is not only unusual, but misleading. Using a modern dictionary to define a term as it was used 200 years earlier is suspect in itself. The first definition of "bear" in Sheridan's 1789 dictionary is "to carry," and there is no definition relating to arms.[542] In addition, even if a modern dictionary's definition is acceptable, *The New Oxford American Dictionary* defines the phrase "bear arms" as "carry firearms" and makes no reference to soldiering.[543] *Silveira I*'s definition "is correct as far as it goes, but it is

533. The assertion that the militia no longer exists is itself unwarranted. *See supra* note 73 and accompanying text.
534. *See supra* note 232 and accompanying text.
535. *See supra* note 68.
536. 1 Annals of Cong. 455 (Joseph Gales ed., 1834) (proceedings of June 8, 1789); *see id.* at 458 (stating that no state of the union or government should have the power to violate certain individual rights).
537. *See supra* text accompanying notes 18, 40; *supra* note 517.
538. 1 Annals of Cong. at 790 (proceedings of Aug. 18, 1789).
539. *See supra* text accompanying notes 338–42.
540. *See supra* note 268.
541. *See supra* note 342 and accompanying text.
542. Sheridan, *supra* note 454.
543. The New Oxford American Dictionary 142 (Elizabeth J. Jewell & Frank Abate eds., 2001).

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also misleading, because the OED says that the 'main sense' of 'bear' is 'to carry.'"[544] Justice Ruth Bader Ginsburg and three concurring Justices also defined "bear" in its usual sense while referring to the Second Amendment.[545]

In the final analysis, however, even a military definition of the term is not inconsistent with the individual right model given the Second Amendment's role as a defense against federal tyranny,[546] its civic purpose,[547] the definition of "militia,"[548] and its accompaniment by the authorization to "keep" arms.[549]

c. *Understanding "Keep"*

The collective right model's dismissal of "keep" is utterly unreasonable. To assert that "keep" does not refer to possession[550] is inconsistent with both founding-era and modern definitions. Sheridan's first two definitions of "keep" are "to retain" and "to have in custody," and a later definition is "to have in the house";[551] New Oxford American's first definition follows suit by defining it as "have or retain possession of."[552]

Reading "keep and bear" as a "unitary phrase"[553] is akin to saying that we do not know or do not like what this word means, so we will assume it is equivalent to our already-tortured definition of "bear."[554] First, "keep" was often used in the Second Amendment context independently of "bear," as evidenced by Congressman Scott's statement.[555] Its presentation in the original *Statutes at Large*,[556] where a margin note refers to the Second Amendment as the one allowing people to "bear and keep" arms, confirms that the words were used individually and "keep and bear" is therefore not a unitary phrase.[557]

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544. Silveira v. Lockyer (*Silveira II*), 328 F.3d 567, 573 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc) (citing 2 Oxford English Dictionary, *supra* note 342, at xxxviii–xxix, 20).

545. *See supra* note 272 and accompanying text.

546. *See supra* Parts I.A.3, III.A.3.

547. *See supra* text accompanying notes 233–35, 423–41.

548. *See supra* Parts II.A.3.a, III.A.4.a.

549. U.S. Const. amend II; 1 Stat. 21 (1789); *see infra* Part III.B.4.c.

550. *See supra* text accompanying note 346.

551. Sheridan, *supra* note 454.

552. The New Oxford American Dictionary, *supra* note 542, at 929.

553. *See supra* text accompanying note 344.

554. Going on to claim that "keep" does in fact have a separate meaning with reference to states is likewise indefensible. *See supra* text accompanying note 345.

555. *See supra* text accompanying note 62.

556. "The United States Statutes at Large is legal and permanent evidence of all the laws enacted during a session of Congress." Nat'l Archives, U.S. Statutes at Large, http://www.archives.gov/federal-register/publications/statutes.html (last visited Feb. 17, 2008); *see also supra* note 1.

557. 1 Stat. 21 (1789).

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It is more reasonable to give "keep" its own meaning, as the Tennessee Supreme Court did, rather than simply equate it with "bear."[558] Given the presence of the conjunction "and," the Amendment should be construed to secure both a right to "keep" arms and to "bear" arms.

d. *Understanding "Arms"*

The collective model's claim that the individual right model ignores *Miller* in that it does not adequately define "precisely what type of arms" are protected[559] is false. In accordance with *Miller*, the individual right model only claims protection for individual weapons in common use at the time and suitable for military use.[560] However, the protection of weapons with a military use, with which the collective right model presumably agrees,[561] is not inconsistent with the individual right model.[562]

CONCLUSION

The individual right model is a better interpretation of the Second Amendment than the collective right model because it accounts for and reconciles both halves of the Amendment. The vast array of historical evidence supporting an individual right, and the absence of evidence to the contrary, speaks for itself.

The closest one can come to a collective right model is that the founders intended the tools of violence to be in the hands of individuals, who can come to the aid of their states if the states are threatened by the federal government. The founders did not intend the combination of state and federal governments to have an oligopoly over the tools of violence. While the Anti-Federalists would have loved to have armed the states as well, in their bargain they only managed to make explicit what everyone already knew: that individuals had a preexisting right to be armed. The individual right model is consistent with the militia orientation of the collective right model—armed individuals can serve their militias. Under the collective right model, there remain serious questions as to the wisdom and propriety of limiting arms-bearing to states.

If the nation as a whole ultimately decides that an individual right is ill-advised, it can amend the Constitution. Indeed, the states possess independent constitutional power to initiate the amendment process and are not reliant on Congress in this respect.[563]

The Second Amendment does not read, "The privilege (at government discretion) of people in service of the state to bear, but not keep, arms

558. *See supra* note 275 and accompanying text.
559. *See supra* text accompanying notes 289–90.
560. *See supra* Part II.A.3.g.
561. *See supra* note 347 and accompanying text.
562. *See supra* text accompanying notes 546–49.
563. U.S. Const. art. V; 1 Stat. 19 (1787).

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(except firearms), shall be revocable at will." Properly understanding "well regulated Militia" to refer to the armed and ready body of the people, and considering the founders' concern with tyranny, the Second Amendment can be translated into modern parlance: "Armed and ready citizens being necessary to prevent tyranny, the right of the people to keep and bear arms shall not be infringed."[564]

564. This interpretation arose out of a suggestion by David T. Hardy.

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