

Fordham Law School

FLASH: The Fordham Law Archive of Scholarship and History

Faculty Scholarship

2019

The Power Side of the Second Amendment Question: Limited, Enumerated Powers and the Continuing Battle over the Legitimacy of the Individual Right to Arms

Nicholas J. Johnson

Follow this and additional works at: https://ir.lawnet.fordham.edu/faculty_scholarship



Part of the [Law Commons](#)

The Power Side of the Second Amendment Question: Limited, Enumerated Powers and the Continuing Battle over the Legitimacy of the Individual Right to Arms

NICHOLAS J. JOHNSON[†]

Roughly a decade has passed since the Supreme Court's decision in District of Columbia v. Heller and the battle over the basic legitimacy of the right to keep and bear arms continues. A significant segment of the academy, the Bar, and the judiciary remains skeptical about the constitutional bona fides of the individual right to arms. A primary source of that skepticism is the view pressed most forcefully by professional historians that the Second Amendment had nothing to do with individual self-defense and at best protects an "individual militia right" that has no practical application in modern America. This Article will show that the historians' account is deeply flawed historiography and a dubious rebuttal to the individual rights view because it ignores the role of limited power in the understanding of rights under the original Constitution.

[†] Professor of Law, Fordham University School of Law. I would like to thank Ellen Johnson, Alex Haberman, and Jeremy Kaplan for their excellent research assistance. I also would like to thank George Mocsary, Marc Arkin, Clare Huntington, Jack Krill, Robert Cottrol, Andrew Kent, Bob Kaczorowski, Jed Shugerman, Saul Cornell, the participants in the Fordham Law School *Behind the Book* program, and the participants in the Fordham Constitutional History Workshop for their comments and reactions to the ideas and early drafts of this Article.

TABLE OF CONTENTS

INTRODUCTION	719
I. THE POSITIVIST MISTAKE OF THE HISTORIANS' CREATIONIST ACCOUNT OF THE SECOND AMENDMENT	725
II. THE RIGHTS-PROTECTING LIMITED POWER STRUCTURE OF THE ORIGINAL CONSTITUTION	729
A. THE LINKAGE BETWEEN INDIVIDUAL RIGHTS AND LIMITED FEDERAL POWER AS UNDERSTOOD IN THE RATIFICATION PERIOD.....	729
B. AN ILLUMINATING EXAMPLE OF THE LINKAGE BETWEEN INDIVIDUAL RIGHTS AND LIMITED POWER IN THE POST-RATIFICATION PERIOD	736
III. THE EXPLICIT LINKAGE BETWEEN LIMITED POWER AND THE SECOND AMENDMENT: A CONVERSATION DISSERVED BY PROFESSIONAL HISTORIANS.....	738
A. WILLIAM RAWLE'S <i>A VIEW OF THE CONSTITUTION</i> IN CONTEXT WITH AN ALLUSION TO ST. GEORGE TUCKER.....	739
B. WILLIAM RAWLE ON THE SECOND AMENDMENT	742
C. WILLIAM RAWLE ON THE SECOND AMENDMENT AND HISTORIANS THROWING STONES	743
IV. THE LINKAGE BETWEEN LIMITED POWER AND THE RIGHT TO ARMS CONTINUES INTO THE TWENTIETH CENTURY	748
A. LIMITED POWER DICTATES THE STRUCTURE OF THE FIRST FEDERAL GUN CONTROL LEGISLATION: THE NATIONAL FIREARMS ACT OF 1934	750
B. SOME REMINDERS ABOUT THE MODERN COMMERCE POWER AND AN ILLUMINATING SEARCH FOR POWER IN OTHER PLACES—WHAT ABOUT THE MILITIA POWER?	758
1. <i>The Commerce Clause</i>	758
2. <i>The Militia Power and the Historians' Telling Concession</i> ..	760
V. INTEGRATING LIMITED POWER INTO RIGHT TO ARMS JURISPRUDENCE: A KEENER LENS ON <i>HELLER</i>	764
A. THE <i>HELLER</i> DISSIDENTS' "INDIVIDUAL MILITIA RIGHT"	765
B. THE LIMITED POWER CRITIQUE REVEALS THE DEEP FLAWS IN THE INDIVIDUAL MILITIA RIGHT THEORY	768
CONCLUSION.....	769

INTRODUCTION

Roughly a decade has passed since the Supreme Court's decision in *District of Columbia v. Heller*,¹ and the battle over the basic legitimacy of the right to keep and bear arms continues. Liberal Justices on the Court have criticized *Heller* as a mistake and expressed the hope that it will be overturned. Justice Ginsburg has described *Heller* as "a very bad decision."² Justice Breyer pressed the point in an interview where he contended that the dissenting opinion of retired Justice Stevens reflected the best view of the substance of the Second Amendment.³ In 2014, after his retirement, Justice Stevens published a book that extended his argument that the Second Amendment only protects a right to arms while serving in the militia.⁴

In the lower courts, the prevailing standard for deciding Second Amendment claims bears no resemblance to *Heller*'s pronouncement that guns in common use are constitutionally protected. In a 2014 Harvard Law Review forum, Alan Gura (who represented Dick Anthony Heller before the Court in 2008) lamented the generally accurate boast by a former Brady Center attorney that the intermediate scrutiny filter urged in Justice Breyer's *Heller* dissent "appears headed for an unexpected triumph" in the lower courts.⁵ Gura complained that "[m]any lower court judges have simply not reconciled themselves to *Heller* and *McDonald*, and can be counted upon to resist rather than implement these decisions."⁶ According to Gura, the mechanism for this resistance is an "analytical approach" that reflects "Justice Breyer's sentiments about Second Amendment claims far more than those of Justice Scalia or the other members of the Court who formed the majorities in *Heller* and *McDonald*."⁷

Members of the majorities in *Heller* and *McDonald v. City of Chicago*⁸ have sharply criticized the lower courts' treatment of the precedents. Justice Thomas's 2015 dissent (joined by Justice Scalia) in the Court's denial of certiorari in *Jackson v. City of San Francisco* described the Second Amendment jurisprudence of the lower federal courts as something more pernicious than simple disagreement about how to administer ambiguity

1. 554 U.S. 570 (2008).

2. See Opinion, *Ruth Ginsburg's Victory Lap*, WALL ST. J. (July 11, 2016, 7:20 PM), <http://www.wsj.com/articles/ruth-ginsburgs-victory-lap-1468279234>.

3. See Interview by Charlie Rose with Justice Stephen Breyer (Oct. 6, 2016), <https://charlierose.com/vld.eos/29278> (describing the dissenters' agreement with Justice Stevens).

4. JOHN PAUL STEVENS, SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION (2014); see also John Paul Stevens, Opinion, *The Five Extra Words that Can Fix the Second Amendment*, WASH. POST (Apr. 11, 2014), https://www.washingtonpost.com/opinions/the-five-extra-words-that-can-fix-the-second-amendment/2014/04/11/f8a19578-b8fa-11e3-96ae-f2c36d2b1245_story.html?utm_term=.968b186113ff.

5. Alan Gura, *The Second Amendment as a Normal Right*, 127 HARV. L. REV. F. 223, 224 (2014) (internal quotation marks omitted) (quoting Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 707 (2012)).

6. *Id.*

7. *Id.* at 224–25 (quoting Rostron, *supra* note 5, at 756).

8. 561 U.S. 742 (2010).

within *Heller* and *McDonald*.⁹ The San Francisco ordinance seemed very much like one of the restrictions overturned in *Heller* in that it required handguns to be locked away and thus unavailable for immediate self-defense in the home, except when carried on the person.¹⁰ The Ninth Circuit acknowledged that this burdened self-defense. However, by passing the question through “means-ends” scrutiny analysis, the court concluded that the state interest in preventing suicides and interfamily violence was a significant counterbalancing justification.¹¹

Thomas complained that no instruction to apply scrutiny analysis to the Second Amendment can be found in *Heller* or *McDonald*, and the lower courts’ application of it shows that “something was seriously amiss.”¹² Thomas criticized that “[d]espite the clarity with which we described the Second Amendment’s core protection for the right of self-defense, lower courts, including the ones here, have failed to protect it.”¹³

Thomas’s dissent (joined by Justice Gorsuch) in the Court’s 2017 denial of certiorari in *Peruta v. California* was even more forceful.¹⁴ The case came up on en banc reversal of a panel conclusion that the Second Amendment required a state to permit some form of carrying firearms for self-defense outside the home. According to Thomas, the Ninth Circuit’s en banc reversal of the panel decision was “indefensible” and the Supreme Court’s denial of certiorari in the case showed that the Second Amendment is evolving into a “disfavored right.”¹⁵

9. 135 S. Ct. 2799, 2799 (2015) (Thomas, J., dissenting from denial of certiorari). The Ninth Circuit denied a motion for preliminary injunction against a San Francisco ordinance requiring that handguns in the home be locked away except when carried on the person. *Jackson v. City of San Francisco*, 746 F.3d 953 (9th Cir. 2014). Petitioners challenged that the law impairs their core right of self-defense because, among other things, it requires them to lock their guns away while sleeping, bathing, etc., and thus impedes or prevents effective self-defense in a substantial range of scenarios. *Id.* at 963–64.

10. *Jackson*, 135 S. Ct. at 2800 (Thomas, J., dissenting from denial of certiorari).

11. *Jackson*, 746 F.3d at 966.

12. *Jackson*, 135 S. Ct. at 2801 (Thomas, J., dissenting from denial of certiorari).

13. *Id.* at 2799 (Thomas, J., dissenting from denial of certiorari).

14. 137 S. Ct. 1995, 1996–2000 (2017) (Thomas, J., dissenting from denial of certiorari).

15. *Id.* at 1999 (Thomas, J., dissenting from denial of certiorari) (“The Court’s decision to deny certiorari in this case reflects a distressing trend: the treatment of the Second Amendment as a disfavored right. The Constitution does not rank certain rights above others, and I do not think this Court should impose such a hierarchy by selectively enforcing its preferred rights. The Court has not heard argument in a Second Amendment case in over seven years—since March 2, 2010, in *McDonald v. City of Chicago*. Since that time, we have heard argument in, for example, roughly 35 cases where the question presented turned on the meaning of the First Amendment and 25 cases that turned on the meaning of the Fourth Amendment. This discrepancy is inexcusable, especially given how much less developed our jurisprudence is with respect to the Second Amendment as compared to the First and Fourth Amendments.” (citations omitted)).

For other assessments that the Second Amendment has been treated as a second class right, see Robert J. Cottrol & George A. Mocsary, *Guns, Bird Feathers, and Overcriminalization: Why Courts Should Take the Second Amendment Seriously*, 14 GEO. J.L. & PUB. POL’Y 17 (2016); Nicholas J. Johnson, *Heller as Miller: Court Decisions Dealing with Firearms*, in 1 GUNS AND CONTEMPORARY SOCIETY: THE PAST, PRESENT, AND FUTURE OF FIREARMS AND FIREARM POLICY 83, 83–102 (Glenn. H. Utter ed., 2016); David Kopel, Opinion, *The 2nd Circuit’s Second-Class Second Amendment Intermediate Scrutiny*, WASH. POST (Oct. 23, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/10/23/the-2nd-circuits-second-class-second-amendment-intermediate-scrutiny/?utm_term=.c8a1e564fd14.

One explanation for the continuing conflict over the basic legitimacy of the individual right to arms is consequentialist. The right to own and carry a gun can conflict with and have a tremendous impact on other important interests. But that does not account for everything.

Another part of the explanation is conceptual. A significant segment of the academy, the Bar, and the judiciary remains skeptical about the constitutional bona fides of the individual right to arms. *Heller*, many still say, rests on fundamental errors. The most damning criticism comes from professional historians who almost uniformly consider *Heller* to be a mistake.

In 2015, for example, historian Paul Finkelman—a longtime critic of *Heller*—published an article criticizing that “the Court’s historical analysis could not get a passing grade in any serious college history course.”¹⁶ This sort of critique by professional historians continues to fuel the intellectual opposition to *Heller*.

This Article will engage these critical assessments of *Heller* by showing that the account of the Second Amendment offered by professional historians is crucially flawed because it ignores the role of limited power in the understanding of rights under the original Constitution, and that this failure has led to an erroneous, positivist account of the right to arms.¹⁷

We sometimes need reminding that the U.S. Constitution did not create individual rights. The document that emerged from the Constitutional Convention in September 1787, and was ratified in 1788, protected individual rights through a structure of limited, enumerated powers. The limited grant of jurisdiction to the new federal government was widely viewed as equally, if not more, effective than a positive declaration of rights.¹⁸ That protection did not disappear when the Bill of Rights was ratified in 1791.

The professional historians who have entered the field of Second Amendment advocacy have almost uniformly asserted that the Amendment had nothing to do with individual self-defense and at best protects some sort of individual militia right that has no practical application in modern America. But that account ignores the backdrop of limited, enumerated federal power and its impact on the understanding of rights during the Founding Era—a theme that

16. Paul Finkelman, *The Living Constitution and the Second Amendment: Poor History, False Originalism, and a Very Confused Court*, 37 CARDOZO L. REV. 623, 624 (2015).

17. A variety of works by professional historians present the creationist account of the Second Amendment. This Article critiques them in two ways. Several of those works are critiqued in the text. See, e.g., *infra* text accompanying notes 114–126. Six other representative works are critiqued in the footnotes accompanying relevant text. See *infra* notes 37, 135, 203, 210, 233. These six works are deemed representative because Justice Breyer’s dissent in *McDonald v. City of Chicago* cites them for the view that professional historians have shown that *Heller* is a mistake. 561 U.S. 742, 914–17 (2010) (Breyer, J., dissenting).

18. See, e.g., THE FEDERALIST NO. 84, at 512–13 (Alexander Hamilton) (Clinton Rossiter ed., 1961); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1390 (1987) (“Hamilton treated jurisdiction as a more effective guarantor of individual rights than a bill of rights, because he believed that it provided clear and powerful lines to keep government from straying beyond its appointed limits.”).

historians in other contexts generously acknowledge.¹⁹ This is ironic because professional historians have claimed a special role as translators of the Second Amendment, arguing that their unique training guarantees a richer treatment of context and texture than one finds in “law office histories.”²⁰ So it is striking that the prevailing account by professional historians fails to engage one of the most powerful rights-protecting themes of the early Republic.

One of the most pointed demonstrations of this failing is in the Professional Historians’ Amicus Brief in *Heller*, which was submitted in opposition to the claim that the Second Amendment protects an individual right to arms for self-

19. The historians’ creationist account of the Second Amendment is fundamentally at odds with the general historical account of the Bill of Rights, which plainly acknowledges the essential linkage between individual rights and limited power under the early Constitution. Colleen Sheehan’s 2016 Salmon P. Chase Lecture at the U.S. Supreme Court is illustrative. Sheehan lays the basic ground work for her commentary with a summary that explains James Madison’s reservations about adding a bill of rights to the Constitution:

Madison was not originally in favor of adding a bill of rights to the Constitution. He was especially anxious about the push for a second convention in order to include a bill of rights in the document

Madison was also concerned that a written catalogue of rights might have the practical effect of narrowing the scope of some essential rights, *Since the United States Constitution was one of enumerated powers, all powers not delegated to the central government are reserved to the people or to the states. Thus it makes sense to enumerate the specific powers of government in the Constitution rather than attempt to list the broad reservoir of individual rights. In contrast, a bill of rights made good sense in the British constitution, in which the rights and liberties of the subjects were gradually carved out from the sovereign Crown and later from Parliament.* In the United States Constitution, the government does not grant rights to the people. Instead, the sovereign people grant power to the government. . . . Madison believed the potential danger emanating from a bill of rights in a constitutional system was that some might assume that rights not listed are rights not possessed.

Colleen A. Sheehan, Speech at the Third Annual Salmon P. Chase Lecture & Colloquium (Dec. 2, 2016), in Colleen A. Sheehan, *Third Annual Salmon P. Chase Lecture: The Measure and Elegance of Freedom: James Madison and the Bill of Rights*, 15 GEO. J.L. & PUB. POL’Y 513, 514 (2017) (emphasis added) (footnotes omitted).

Elsewhere, Richard Fallon has demonstrated how, conceptually, “[w]e have no way of thinking about constitutional rights independent of what powers it would be prudent or desirable for government to have.” Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 344 (1993). Fallon worried that “the claim that individual rights are too conceptually interconnected with government powers to function as independent constraints may seem so obvious as to be unilluminating.” *Id.* More than two decades ago I argued that modern expansive conceptions of federal power explained the then outcast status of the Second Amendment. See Nicholas J. Johnson, *Plenary Power and Constitutional Outcasts: Federal Power, Critical Race Theory, and the Second, Ninth, and Tenth Amendments*, 57 OHIO ST. L.J. 1555, 1580–85 (1996).

20. See, e.g., Brief of Amici Curiae Jack N. Rakove, Saul Cornell, David T. Konig, William J. Novak, Lois G. Schworer et al. in Support of Petitioners at 33–34, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290) (internal quotation marks omitted) [hereinafter *Historians’ Brief*] (“Historians can best contribute to the resolution of contemporary constitutional disputes by recovering and reconstructing the context within which the adopters of particular clauses thought and acted. The process of recovering and reconstructing what the past was like must pay close attention to the value of particular *texts*, the statements that bear most directly on the matter in dispute. But equally important, it must also convey a sense of *context*, which requires locating particular pieces of historical evidence within a framework that best allows us to evaluate their probative value. The historian’s recurring complaint about ‘law office history,’ as it is colloquially disparaged, is that it routinely indulges in the selective and uncritical use of quotations, stripped from the context in which they were uttered, and given meanings that contemporaries would have been astounded to learn they carried. Because of the exceptional passions surrounding the Second Amendment, this one realm of constitutional controversy appears more susceptible to this kind of misuse than any other.” (citation omitted)).

defense. The Historians' Brief not only acknowledges, but forcefully asserts, that at the time of the Framing, "[o]utside the question of whether militia members would be armed at national, state, or personal expense, *there was no credible basis upon which the national government could regulate possession of firearms.*"²¹

So how can the Historians' Brief admit that the new national government could not prohibit individual possession of firearms and still present a "historical" analysis concluding that there was no constitutional right to arms for self-defense? The answer is that it (1) offers a narrow positivist account that ignores the linkage between individual rights and limited federal power, and (2) tacitly injects twentieth-century notions of federal power into its nominally eighteenth-century analysis of the right to arms.

The Historians' Brief—like the scholarship that fuels it—hopes to show that few people were worried about the federal government restricting private firearms in 1789, and therefore it is a mistake to conclude that individual rights were on the agenda when the Second Amendment was proposed and ratified.²² But this approach misunderstands our constitutional structure. It presumes that the constitutional rights were *created* by the positive act of constitutional amendment in 1791.

This "creationist" account is fundamentally flawed. The Bill of Rights did not *create* individual rights. It simply affirmed a select list drawn from a broad spectrum of rights already protected in 1788 by virtue of the limited power granted to the new federal government. Limited, enumerated power prevented the new government from acting in ways that would infringe the rights of individuals and the prerogatives of the states.

The historians' positivist misstep leads to a core analytical mistake. Rather than examining the Second Amendment in the context of the limited federal power environment of the eighteenth century, the historians' creationist account treats it like a slender, affirmative grant of rights by a federal government that, two hundred years later, wields power over anything remotely related to commerce.

The best that might be said for the historians' creationist account is that it focuses on refuting particular individual rights claims that are themselves positivist in nature.²³ But that explanation is no absolution. Indeed, it is an indictment. The historians' myopic focus on repudiating "law office histories" has resulted in an abdication of the obligation to present a fulsome and evenhanded historical assessment.

Understanding the right to arms in historical context demands that one view the Second Amendment as a function of the limited, enumerated powers of the

21. *Id.* at 31 (emphasis added).

22. *Id.* at 35.

23. *See, e.g.,* Finkelman, *supra* note 16, at 629–30 (criticizing Don Kates and Stephen Halbrook and arguing that these "individual rights advocates . . . are not trained historians, and many [] [] are funded, hired, or otherwise supported by the NRA . . .").

newly created federal government. The linkage between individual rights and limited federal power was one of the most pervasive rights-protecting themes of the Founding Era and is presented by William Rawle,²⁴ one of the leading commentators of the post-Ratification period as a core aspect of the constitutional right to arms. This understanding of the Second Amendment extended well into the twentieth century. Indeed, it is a primary driver of the first federal gun control law, the 1934 National Firearms Act, which was structured as a prohibitive tax on the view that Congress had no outright constitutional authority to ban “gangster weapons.”

Integrating limited power into the historical assessment of the Second Amendment generates important returns. It shows that the historians’ creationist account is a deeply-flawed and dubious rebuttal to the view that the Second Amendment protects an individual right to arms. Also, thinking about the Second Amendment’s linkage to limited federal power offers a keener assessment of the Supreme Court’s decision in *Heller*. Integrating limited power sharpens the evaluation of competing accounts of the Second Amendment offered by the *Heller* majority and dissenters. It leaves one skeptical about the dissenters’ “individual militia right” because that right must exist in a space where the Constitution expressly grants the federal government plenary power (over the militia). Moreover, it fortifies the *Heller* majority’s affirmation of a preexisting individual right to arms for self-defense—a right that thrives in a space where even the Historians’ Brief admits there was no eighteenth-century federal power to act.²⁵

Integrating limited power also shines a better light on one of the most criticized aspects of *Heller*. Critics have argued that *Heller* is poor originalism. Some of the sharpest criticisms have focused on *Heller*’s validation of most modern federal gun regulation as presumptively lawful without even a hint of historical analysis.²⁶ Some cynics have dubbed this the “Kennedy paragraph,” speculating that these concessions were a blunt capitulation necessary to gain the vote of Justice Anthony Kennedy.

Recognizing the linkage between limited power and the right to arms dampens this criticism. It shows the Kennedy paragraph as a response to the challenge of conducting an originalist assessment of rights, against a backdrop of federal power that shifted dramatically over time. The *Heller* majority meets this challenge by explaining the Second Amendment as an affirmation of a pre-existing right that is not constrained by any motive for codification expressed in the prefatory Militia Clause.²⁷ That construction flows naturally from the

24. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 125 (2d ed., William S. Hein & Co., Inc. 2003) (1829).

25. See Historians’ Brief, *supra* note 20, at 31.

26. See e.g., Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1356 (2009); Sanford Levinson, *United States: Assessing Heller*, 7 INT’L J. CONST. L. 316, 316 (2009).

27. *District of Columbia v. Heller*, 554 U.S. 570, 577–78 (2008).

Constitution's original commitment to firm boundaries on government authority—boundaries that help delineate individual rights.

On the other hand, judicial administration of the modern right to arms must accommodate the reality that the federal government now wields vastly more power than was contemplated by the original constitutional design—power sufficient to consume virtually any claim of rights, so long as the government interest is sufficiently compelling. *Heller* accommodates that reality by deeming most of the federal firearms regulation that has emerged since the New Deal to be presumptively lawful.²⁸

This Article elaborates these points in five parts. Part I details the mistakes of the historians' creationist account of the Second Amendment. Part II demonstrates the linkage between constitutional rights and limited power with a focus on the ratification debates and early post-Ratification disputes about the exercise of federal power. Part III examines the explicit linkage between the right to arms and limited power as articulated in early constitutional commentary. Part III also shows how historians have ignored and obscured that linkage. Part IV shows how the linkage remained central to the understanding of the Second Amendment well into the twentieth century and explains the limited reach of the first federal gun control law (the 1934 National Firearms Act). Part IV also demonstrates how the historians' creationist account rests on a view of federal power that did not emerge until the middle of the twentieth century. Finally, Part V shows how the linkage between the right to arms and limited power offers a neutral tool for evaluating the competing views of the Second Amendment articulated by the majority and dissenters in *Heller*.

I. THE POSITIVIST MISTAKE OF THE HISTORIANS' CREATIONIST ACCOUNT OF THE SECOND AMENDMENT

In a 1990 dissent, Justice William Brennan, joined by Justice Thurgood Marshall, provided a reminder about the origin and structure of rights under our constitution:

In drafting both the Constitution and the Bill of Rights, the Framers strove to create a form of Government decidedly different from their British heritage. Whereas the British Parliament was unconstrained, the Framers intended to create a Government of limited powers. The colonists considered the British Government dangerously omnipotent. . . . Americans vehemently attacked the notion that rights were matters of "favor and grace," given *to* the people *from* the Government.

Thus, the Framers of the Bill of Rights did not purport to "create" rights. Rather, they designed the Bill of Rights to prohibit our Government from infringing rights and liberties presumed to be pre-existing.²⁹

28. *Id.* at 626–27.

29. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 287–88 (1990) (Brennan, J., dissenting) (citations omitted).

Brennan was urging an expansive view of the Fourth Amendment that many readers will find attractive. But his point is not limited to the Fourth Amendment. It is a warning against the mistake of viewing individual rights as something *created* by the Bill of Rights.

The Framers and ratifiers of the Constitution and Bill of Rights viewed the limited, enumerated powers of the new federal government established in 1788 as a driving influence on the scope of individual rights. As a general matter, professional historians acknowledge this. However, the small band of historians who have entered the Second Amendment debate systematically ignore the influence of limited power and instead advance a fundamentally-flawed creationist account of the right to arms.

The historians' creationist account fuels the continuing skepticism of *Heller*. Justice Breyer's dissent in the follow-up case of *McDonald v. City of Chicago* illustrates this influence:

Since *Heller*, historians, scholars, and judges have continued to express the view that the Court's historical account was flawed.

Consider as an example of these critiques an *amici* brief filed in this case by historians who specialize in the study of the English Civil Wars. They tell us that *Heller* misunderstood a key historical point. *Heller*'s conclusion that "individual self-defense" was "the *central component*" of the Second Amendment's right "to keep and bear Arms" rested upon its view that the Amendment "codified a *pre-existing* right" that had "nothing whatever to do with service in a militia." That view in turn rested in significant part upon Blackstone having described the right as "the right of having and using arms for self-preservation and defence," which reflected the provision in the English Declaration of Right of 1689 that gave the King's Protestant "subjects" the right to "have Arms for their defence suitable to their Conditions, and as allowed by Law." The Framers, said the majority, understood that right "as permitting a citizen to 'repe[l] force by force' when 'the intervention of society in his behalf, may be too late to prevent an injury.'"

The historians now tell us, however, that the right to which Blackstone referred had, not *nothing*, but *everything*, to do with the militia. As properly understood at the time of the English Civil Wars, the historians claim, the right to bear arms "ensured that *Parliament* had the power" to arm the citizenry: "to defend the realm" in the case of a foreign enemy, and to "secure the right of 'self-preservation,'" or "self-defense," should "*the sovereign* usurp the English Constitution." Thus, the Declaration of Right says that private persons can possess guns only "as allowed by law." Moreover, when Blackstone referred to "the right of having and using arms for self-preservation and defence," he was referring to the right of the people "*to take part in the militia* to defend their political liberties," and *to the right of Parliament* (which represented the people) to *raise a militia* even when the King sought to deny it that power. *Nor can the historians find any convincing reason to believe that the Framers had something different in mind than what Blackstone himself meant.*³⁰

30. *McDonald v. City of Chicago*, 561 U.S. 742, 914–17 (2010) (Breyer, J., dissenting) (alteration in original) (last emphasis added) (citations omitted) (first quoting *Heller*, 554 U.S. at 599, 592–93; then quoting *id.* at 593–94; then quoting *id.* at 595; then quoting Historians' Brief, *supra* note 20, at 3, 8–13, 23–24; then quoting *id.* at 13; and then quoting *id.* at 4, 24–27). At the beginning of this passage, Justice Breyer cites six works by professional historians in support of the proposition that *Heller*'s historical account is wrong. *Id.* at

Justice Breyer neatly summarizes the historians' creationist account, and his critique of the preexisting right to arms reflects the core mistake of the analysis he cites. Breyer's argument rests on historical accounts that simply push the creationist story back in time. They suggest that the preexisting constitutional right to armed self-defense would have been created earlier by some positive act, and then embraced by Americans who then codified it in the Second Amendment. Breyer's review of the literature shows the pervasiveness of the historians' positivist mistake. The historians, Breyer explains, cannot "*find any convincing reason to believe that the Framers had something different in mind than what Blackstone himself meant.*"³¹

On this point, Breyer has been led astray by historians who have abandoned the search for context. As demonstrated in Part II below, there is abundant evidence that the Framers and ratifiers of the Constitution and the Bill of Rights saw constitutional rights as the prerogatives that thrived in the vast territory outside the national government's jurisdiction. It was the scheme of limited, enumerated powers, not Blackstone, that protected individual rights from infringement by the new federal government. Rights were secured because the new government had no authority to infringe on myriad individual prerogatives.

In the intervening years since *Heller* was decided, proponents of the historians' creationist account of the Second Amendment have maintained their attack on terms that invite judges to treat *Heller* as an unfortunate mistake. Paul Finkelman's recent critique, *The Living Constitution and the Second Amendment: Poor History, False Originalism, and a Very Confused Court*, conveniently distills that literature and carries the argument forward.³² Finkelman has been a strident critic of the individual rights view, was a signatory to the Historians' Brief in *Heller*, and was cited prominently in Justice Breyer's dissent in *McDonald v. City of Chicago*.

Finkelman's analysis is a classic and revealing demonstration of the creationist account and its positivist mistake. After an introduction that is harshly

914 (Breyer, J., dissenting). This Article will present and engage the historians' creationist account in a more detailed way through a series of footnotes critiquing representative examples of that work, including the six works cited by Justice Breyer. This Article will summarize and critique those works in context *infra* note 37 (Nathan Kozuskanich & William Merkel), note 135 (Saul Cornell), note 203 (Paul Finkelman), note 210 (Patrick Charles), and note 233 (David Konig). Additionally this Article engages three other renditions of the historians' creationist account. See *infra* text accompanying notes 32–36 & 149–150 (Paul Finkelman); *infra* text accompanying notes 117–119 & 129–130 (addressing two articles by Saul Cornell).

The list of six works in the order cited by Justice Breyer in *McDonald* is: David Thomas Konig, *Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America*, 56 UCLA L. REV. 1295 (2009); Paul Finkelman, *It Really Was About a Well Regulated Militia*, 59 SYRACUSE L. REV. 267 (2008); PATRICK J. CHARLES, *THE SECOND AMENDMENT: THE INTENT AND ITS INTERPRETATION BY THE STATES AND THE SUPREME COURT* (2009); William G. Merkel, *The District of Columbia v. Heller and Antonin Scalia's Perverse Sense of Originalism*, 13 LEWIS & CLARK L. REV. 349 (2009); Nathan Kozuskanich, *Originalism in a Digital Age: An Inquiry into the Right to Bear Arms*, 29 J. EARLY REPUBLIC 585 (2009); Saul Cornell, *St. George Tucker's Lecture Notes, the Second Amendment, and Originalist Methodology: A Critical Comment*, 103 NW. U. L. REV. 1541 (2009).

31. *McDonald*, 561 U.S. at 916 (Breyer, J., dissenting) (emphasis added).

32. See generally Finkelman, *supra* note 16.

critical of *Heller*, Justice Scalia, and “standard model” scholars,³³ Finkelman engages the Framing story in a way that carefully elides the linkage between rights and power. Take for instance his claim that James Madison, Alexander Hamilton, and John Jay “casually dismissed” calls for a bill of rights in the *Federalist Papers* because, “the Antifederalists could not all agree on what protections of liberty they wanted.”³⁴ This is profoundly misleading. As demonstrated in Part II, the *Federalist Papers*, as well as the ratification debates and surrounding correspondence, show that the core objection to a bill of rights was that rights already were protected by the limited grant of power to the new federal government, and, further, that any attempt to list individual rights would create the false impression that rights not enumerated did not exist.

Not only does Finkelman elide the function of limited power in defining and protecting rights, he goes a step further to offer a more obscure replacement. Finkelman plainly acknowledges that Madison had in mind some mechanism other than a bill of rights that would protect individual liberty.³⁵ But according to Finkelman, Madison believed that liberty would be adequately protected in absence of a bill of rights through “the competing interests caused by diversity of the people.”³⁶ It is telling that he presents the “diversity of the people” as a complete remedy and simply ignores the widely-articulated view that individual rights were protected by the express limits on the powers of the new federal government.³⁷

33. Finkelman uses insult quotes to describe standard model “scholars,” who he then characterizes as “gun rights propagandists” and unserious purveyors of law office histories who have failed to present competent history or analysis. *Id.* at 624–27.

34. *Id.* at 638 (citing THE FEDERALIST NO. 38 (James Madison)).

35. *Id.* (“In *Federalist 48* Madison argued that a bill of rights would be useless.”).

36. *Id.* (citing THE FEDERALIST NO. 51 (James Madison)).

37. Justice Breyer’s *McDonald* dissent cites with approval Nathan Kozuskanich’s, *Originalism in a Digital Age: An Inquiry into the Right to Bear Arms. McDonald*, 561 U.S. at 914–17 (Breyer, J., dissenting); see also Kozuskanich, *supra* note 30. Kozuskanich presses the creationist account of the right to keep and bear arms based on a literal counting of the uses of the term “bear arms” in early records. *Id.* at 587. Like Finkelman, Kozuskanich subtly elides the context of limited power in which the Framers understood rights against the new federal government. After chiding that Justice Scalia’s opinion in *Heller* “has little use for relevant context,” Kozuskanich repeats that sin with a single, glancing allusion to the limited power theme. *Id.* at 589. Kozuskanich claims that the Bill of Rights emerged “as a way to appease men who were not satisfied to let the separation of powers guarantee their liberties.” *Id.* at 597. Kozuskanich’s suggestion that separation of powers was the foundation of individual rights prior to ratification of the Bill of Rights ignores the vital rights-protecting role of limited power under the early Constitution. This subtle omission is essential to sustaining the historians’ creationist account of the Second Amendment.

This criticism is illuminated by comparing Kozuskanich’s explanation to a standard historical critique of how the Constitution protected rights absent a bill of rights. Jeff Broadwater’s explanation of Madison’s initial opposition to a bill of rights (in an analysis unrelated to the Second Amendment) is illustrative: “[Madison] thought the Constitution’s elaborate system of checks and balances, its division of power between the state and federal governments, and its careful enumeration of congressional prerogatives adequately protected individual rights.” Jeff Broadwater, *George Mason, James Madison, and the Evolution of the Bill of Rights*, 15 GEO. J.L. & PUB. POL’Y 547, 560–61 (2017).

Note how Broadwater integrates limited power as an important factor in the protection of individual rights along with the checks and balances that Kozuskanich references. Note also how checks and balances are brakes on factionalism, and address worries about majoritarian abuse of powers plainly granted (the sort of thing

Finkelman broadly reflects the work of professional historians with creationist arguments that focus minutely on the text of comparable state arms provisions, on the view that what was created by the states was also created under the federal Constitution.³⁸ As the balance of this Article will show, that aspect of the creationist account ignores the fact that, unlike the state governments, the new federal government had very defined and limited powers. The protection of rights against federal action was a far different thing from the protection of rights against state governments wielding general police powers.

Part II demonstrates in detail how the historians' creationist account of the Second Amendment ignores perhaps the most powerful rights-protecting theme of the Framing Era.

II. THE RIGHTS-PROTECTING LIMITED POWER STRUCTURE OF THE ORIGINAL CONSTITUTION

The scheme of limited, enumerated federal powers was the primary mode of protecting individual rights under the original Constitution, and the rights-protecting function of limited power is integral to understanding the Second Amendment in historical context. Subparts II.A and II.B illustrate this theme as it was debated prior to ratification of the Constitution and applied in the post-Ratification period.

A. THE LINKAGE BETWEEN INDIVIDUAL RIGHTS AND LIMITED FEDERAL POWER AS UNDERSTOOD IN THE RATIFICATION PERIOD

The proposal that emerged from the Constitutional Convention in September 1787, and was ratified in 1788, did not include a bill of rights. But that did not mean that it failed to protect individual rights. The Constitution was presented as an instrument that protected individual rights through a limited grant of power to the new federal government.

Madison worried about in *Federalist 51*). But Kozuskanich fails to mention the system of limited enumerated powers that protected the liberties that the Constitution gave Congress no power to infringe. One cannot know exactly why Kozuskanich's presentation is crafted this way. But we can say that ignoring limited power sidesteps the most serious flaw in Kozuskanich's dismissive account of the individual right to arms.

Another glaringly obvious problem with Kozuskanich's analysis is that it focuses entirely on the phrase "bear arms" as if the right to "keep" is simply not part of the text. Here, Kozuskanich is extending the work of William Merkel, one of the other historians that Justice Breyer cites in support of the claim that *Heller* rests on unsound historiography. See Merkel, *supra* note 30. Merkel's is an unabashedly creationist account grounded, he says, on "syntax, the debates in the first Congress, and historical context to make the claim that the two parts of the [Second] Amendment were logically and linguistically dependent." *Id.* at 365. Merkel also engages the inevitable criticism that even if bear arms has a military connotation, what should one make of the right to keep. According to Merkel, "The text describes one right, coupled syntactically to the militia and to the security of a free State, and that right is to 'keep and bear Arms'—not own guns and carry weapons." *Id.* at 367. While Merkel savages Justice Scalia for ignoring context (one of his headings is "Failure, Fraud and Originalism"), *id.* at 378, Merkel makes not one mention of the limited power environment of the original Constitution or the importance of limited power to the understanding of rights against the new federal government.

38. See, e.g., *infra* notes 114–134 and accompanying text.

Alexander Hamilton's *Federalist 84*, urging ratification of the Constitution *without* a bill of rights—just as it emerged from the Convention—is a classic presentation of the rights-protecting function of limited power. Reflecting numerous articulations of the jurisdictional boundaries of the new federal government, Hamilton explained how a bill of rights was inapt in a Constitution that protected individual rights through a scheme of limited powers:

[A] minute detail of particular rights is certainly far less applicable to a Constitution like that under consideration, which is merely intended to regulate the general political interests of the nation, than to a constitution which has the regulation of every species of personal and private concerns.³⁹

Hamilton distinguished between the new Constitution, and other pacts that contained bills of rights. The proposed American Constitution was different, he said, from those comparatively weak instruments and their reservations of rights because the grant of power to the American government would be comparatively limited:

It has been several times truly remarked that bills of rights are, in their origin, stipulations between kings and their subjects, abridgements of prerogative in favor of privilege, reservations of rights not surrendered to the prince. Such was MAGNA CARTA, . . . Such, also, was the Declaration of Right presented by the Lords and Commons to the Prince of Orange in 1688, and afterwards thrown into the form of an act of Parliament called the Bill of Rights. It is evident, therefore, that, according to their primitive signification, they have no application to constitutions, professedly founded upon the power of the people and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing; and as they retain everything they have no need of particular reservations . . .⁴⁰

Madison pressed this same theme in *Federalist 14*, emphasizing that the new American government was constrained by an express and limited grant of powers: “[I]t is to be remembered that *the general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects . . .*”⁴¹

In a famous passage, Hamilton argued that an affirmative bill of rights actually would endanger rights by ostensibly creating exceptions (that is, rights) to powers that were never granted. Notice below how he links rights and powers and presents limited power as a more robust protection of rights than enumeration:

I go further and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution but would even be dangerous. They would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?⁴²

39. THE FEDERALIST NO. 84, *supra* note 18, at 513.

40. *Id.* at 512–13.

41. THE FEDERALIST NO. 14, at 102 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added).

42. THE FEDERALIST NO. 84, *supra* note 18, at 513.

Note how Hamilton describes “rights” as “exceptions to powers.” Then, in the last sentence, he explains how a bill of rights would be a superfluous declaration “that things shall not be done, which there is no power to do.” This framing presents individual rights and limited power as inexorably linked.

Madison and Hamilton provide some of the most famous articulations of this principle, but other supporters of the new Constitution also urged reliance on the rights-protecting function of limited power. James Wilson of Pennsylvania forcefully argued that a bill of rights was superfluous and even dangerous compared to the rights-protecting function of limited power. Speaking in Philadelphia in October, 1787, less than a month after the new Constitution had been submitted to the states for ratification, Wilson asserted that it would have been “superfluous and absurd” for the Federal convention “to have stipulated with a federal body of our own creation, that we should enjoy those privileges, of which we are not divested either by the intention or the act that has brought that body into existence.”⁴³

Then, in November 1787, at the Pennsylvania ratifying convention, Wilson pressed the point further in language that emphasized the linkage between individual rights and limited power:

[I]n a government consisting of enumerated powers, such as is proposed for the United States, a bill of rights would not only be unnecessary, but, in my humble judgment, highly imprudent. In all societies, there are many powers and rights which cannot be particularly enumerated. *A bill of rights annexed to a constitution, is an enumeration of the powers reserved.* If we attempt an enumeration, every thing [sic] that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government; and the rights of the people would be rendered incomplete.⁴⁴

Wilson finished with an aggressive rendition of the full range of individual rights that were protected against the federal government by the scheme of limited, enumerated powers: “To every suggestion concerning a bill of rights, the citizens of the United States may always say, we reserve the right to do what we please.”⁴⁵

Half a year later, George Washington credited Wilson’s caution as an example of a widespread sentiment. In an April 1788 letter to the Marquis de Lafayette, Washington stated that there was unanimity at the Constitutional Convention on the importance of protecting individual rights.⁴⁶ Any

43. Hon. James Wilson, Substance of an Address to a Meeting of the Citizens in Philadelphia, in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787–1788, at 97, 97 (Paul Leicester Ford ed., Brooklyn 1888) (emphasis added).

44. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 409 (Jonathan Elliot ed., Philadelphia, J. B. Lippincott Co., 2d ed. rev. 1836) [hereinafter ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION] (emphasis added) (“an enumeration of the powers” emphasis in original).

45. *Id.* at 410 (emphasis added).

46. George Washington’s April 1788 letter to Lafayette suggests unanimity at the Convention on the importance of protecting individual rights, but disagreement over whether the express limits on federal power

disagreement was over whether the structure of limited, enumerated powers was the proper and exclusive mechanism:

[T]here was not a member of the convention, I believe, who had the least objection to what is contended for by the advocates for a *Bill of Rights* and *Trial by Jury*. The first, where the people evidently retained every thing [sic], which they did not in the express terms give up, was considered nugatory, as you will find to have been more fully explained by Mr. Wilson and others;⁴⁷

In North Carolina, James Iredell, a future Justice of the Supreme Court, advanced Wilson's point this way:

[W]hen it is evident that the exercise of any power not given up would be an usurpation, it would be not only useless, but dangerous, to enumerate a number of rights which are not intended to be given up; because it would be implying in the strongest manner, that every right not included in the exception might be impaired by the government without usurpation, and it would be impossible to enumerate every one. Let anyone make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it.⁴⁸

James Madison pressed the idea that limited power was the best protection of individual rights at the Virginia Convention in an attempt to win support from a stubborn group of Anti-federalists led by Patrick Henry. Madison urged that the limited grant of power to the new government made an explicit declaration of rights unnecessary:

[T]he powers granted by the proposed constitution, are the gift of the people, [N]o right of any denomination, can be cancelled, abridged, restrained or modified, by the general government, or any of its officers, *except in those instances in which power is given by the constitution for these purposes*. There cannot be a more positive and unequivocal declaration of the principle of the adoption—that every thing [sic] not granted is reserved. This is obviously and self-evidently the case, without the declaration.⁴⁹

Henry objected, arguing that the logical steps required to appreciate how limits on federal power protected individual rights against the new government might be lost on some members of the new Republic. Simpler minds, he claimed (seriously or not), would only be comforted by an affirmative expression of rights:

were sufficient protection. Letter from George Washington to the Marquis de Lafayette (Apr. 28, 1788), in 11 THE WRITINGS OF GEORGE WASHINGTON, 1785–1790, at 254, 256 (Worthington Chauncey Ford ed., New York & London, G.P. Putnam's Sons 1891).

47. *Id.* (emphasis omitted).

48. 4 ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION, *supra* note 44, at 174. Iredell ultimately lost the point that a bill of rights was a greater risk. An equal or greater worry was creeping expansion of power. Witness Timothy Bloodworth's response to Iredell. "I still see the necessity of a bill of rights. Gentlemen use contradictory arguments on this subject, if I recollect right. Without the most express restrictions, congress may trample on your rights. Every possible precaution should be taken when we grant powers. Rulers are always disposed to abuse them." *Id.*

49. 3 *id.* at 559–60 (emphasis added). Further, Madison cautioned, the Bill of Rights would be dangerous because at some future point usurpers might argue that "every thing [sic] omitted, is given to the general government." *Id.*

Wherefore is religious liberty not secured? One honorable gentleman, who favors adoption, said that he had had his fears on the subject. If I can well recollect, he informed us that he was perfectly satisfied, by the powers of reasoning, (with which he is so happily endowed,) that those fears were not well grounded. There is many a religious man who knows nothing of argumentative reasoning; there are many of our most worthy citizens who cannot go through all the labyrinths of syllogistic, argumentative deductions, when they think that the rights of conscience are invaded. This sacred right ought not to depend on constructive, logical reasoning.⁵⁰

Patrick Henry, George Mason, and others at the Virginia Convention urged making ratification of the Constitution conditional on the first Congress passing individual-rights amendments. Madison countered with a promise that he would submit amendments guaranteeing individual rights if the Virginia Convention would ratify the Constitution without explicit conditions.⁵¹ Federalists in New York, North Carolina, and Rhode Island made similar concessions.⁵² Madison kept his promise. He campaigned for the House of Representatives on the assurance that he would seek amendments protecting essential rights.⁵³ By the time he introduced individual-rights amendments to the first Congress, he seemed firmly committed to the idea.⁵⁴

The opposition by Henry, Mason, and other Anti-federalists underscores a crucial point about the pervasiveness of the limited power theme. The Anti-federalists either opposed the new federal government entirely or thought that it had been delegated too much power. Federalist advocates of the new Constitution took the most sanguine view of the new government and its powers. So it is telling, for our purposes, that Federalist proponents of the new federal government are such vociferous advocates of the limited power theme.

One might question whether statements in pamphlets, speeches, and private correspondence are fully representative of prevailing views.⁵⁵ The state ratification debates blunt that criticism and show plainly that the people's representatives saw limited federal power as crucial to the understanding of individual rights. Hamilton, Madison, Wilson, and others argued forcefully that any attempt to fashion a bill of rights would actually diminish the protection of individual rights that was built into the scheme of limited, enumerated powers. And while the case against a bill of rights did not prevail, the argument did prompt the ratifying conventions to endorse the Constitution and amendments in a way that underscored the link between limited power and individual rights.

50. *Id.* at 302–03.

51. *O'Neil v. Vermont*, 144 U.S. 323, 370 (1892) (stating that the Constitution was ratified without a bill of rights upon the expectation “encouraged by its leading advocates, that, immediately upon the organization of Government of the Union” a bill of rights would be introduced and adopted); *see also* James F. Kelley, Comment, *The Uncertain Renaissance of the Ninth Amendment*, 33 U. CHI. L. REV. 814, 819–23 (1966).

52. ROBERT ALLEN RUTLAND, *THE ORDEAL OF THE CONSTITUTION* 37, 193 (1966).

53. Kelley, *supra* note 51, at 819 n.23.

54. *Id.*

55. For example, when I presented this Article at a 2017 Fordham Legal History Colloquium, Professor Saul Cornell objected that James Wilson was a rich aristocrat whose views and interests could not be presumed to represent those of the broader community.

Virginia responded to the warnings that a bill of rights might diminish the protection of individual rights that was built into the scheme of limited powers with language that explicitly rejected any such implication. Along with its ratification of the Constitution, Virginia cautioned:

That those clauses which declare that congress shall not exercise certain powers [referring to proposals for explicit enumeration of certain of rights], be not interpreted in any matter whatsoever; to extend the powers of congress; but that they be construed either as making exceptions to the specified powers where this shall be the case, or otherwise, *as inserted merely for greater caution.*⁵⁶

Note how Virginia's ratification statement treats individual rights and limits on federal power as synonymous. Also note the demand for assurance that the protection of rights already inherent in the Constitution's limited power structure not be diminished by any explicit enumeration of certain rights.

Virginia's was the first in a line of similar proposals. New York offered its own proposed amendments to the Constitution and, like Virginia, made it clear that explicitly enumerated rights were "to be construed either as exceptions to certain specified powers, or as *inserted merely for greater caution.*"⁵⁷

The linkage between rights and powers is demonstrated vividly by the North Carolina Convention, which described its individual rights proposals using the language of limited power. The North Carolina rights proposals were cast as "*those clauses which declare that congress shall not exercise certain powers.*"⁵⁸ Like Virginia, the North Carolina Convention also cautioned that its proposals for enumerated rights were "*inserted merely for greater caution.*"⁵⁹

Rhode Island offered a similar cautionary language. Like the others, it used the language of limited power to describe nascent declarations of rights. Rhode Island also made clear that any explicit declarations of rights should not constitute a grant of additional powers, and that rights were still protected by the enumerated limits on federal power:

[T]hose clauses in the said Constitution, which declare that Congress shall not have or exercise certain powers, do not imply that Congress is entitled to any powers not given by the said Constitution, but such clauses are not to be construed either as exceptions to certain specified powers, or as inserted merely for greater caution.⁶⁰

The Pennsylvania Convention also underscored the importance of the new government's limited jurisdiction. The state proposed an amendment stating that "congress shall not exercise any powers whatever, but such as are expressly given to that body by the constitution of the United States."⁶¹

56. DEBATES AND OTHER PROCEEDINGS OF THE CONVENTION OF VIRGINIA 475 (2d ed. Richmond, Enquirer-Press 1805) (emphasis added).

57. 1 ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION, *supra* note 44, at 361 (emphasis added).

58. 4 *id.* at 242 (emphasis added).

59. *Id.* (emphasis added).

60. HON. WILLIAM R. STAPLES, RHODE ISLAND IN THE CONTINENTAL CONGRESS: WITH THE JOURNAL OF THE CONVENTION THAT ADOPTED THE CONSTITUTION, 1765-1790, at 675 (Reuben Aldridge Guild ed., Providence, Providence Press Co. 1870).

61. 2 ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION, *supra* note 44, at 503.

The ratifying conventions caused advocates of the new Constitution to reconsider the importance of a bill of rights. James Madison's thinking about the linkage of individual rights and limited power by the end of the Virginia Convention is demonstrated in his October 17, 1788 letter to Thomas Jefferson, who was then serving as Minister to France.⁶² Jefferson wrote Madison in July arguing that a bill of rights was essential. Madison's response is consistent with his commitment at the Virginia Convention to propose a bill of rights in the first congress. Recall Paul Finkelman's claim that Madison objected to a bill of rights because Anti-federalists could not decide what rights they wanted.⁶³ Here, in contrast, we see Madison expressing more serious structural concerns, rooted in the linkage between individual rights and enumerated powers:

[T]here are some who wish for further guards to public liberty and individual rights. As far as these may consist of a constitutional declaration of the most essential rights, it is probable they will be added; though there are many who think such addition unnecessary, and not a few who think it misplaced in such a Constitution. . . . My own opinion has always been in favor of a bill of rights, provided it be so framed as not to imply powers not meant to be included in the enumeration. At the same time, I have never thought the omission a material defect

I have not viewed it in an important light—1. *Because I conceive that in a certain degree, though not in the extent argued by Mr. Wilson, the rights in question are reserved by the manner in which the federal powers are granted.* 2. *Because there is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude. I am sure that the rights of conscience in particular, if submitted to public definition, would be narrowed much more than they are likely ever to be by an assumed power.*⁶⁴

Madison took seriously the concern that enumerating rights would diminish the protections inherent in the scheme of limited powers, by implying that rights not enumerated were surrendered. His response was a proposal that eventually became the Ninth Amendment. The initial proposal read this way:

The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.⁶⁵

62. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 14 THE PAPERS OF THOMAS JEFFERSON 16, 18 (Julian P. Boyd ed., 1958).

63. Finkelman, *supra* note 16, at 632–35.

64. THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 156–57 (Marvin Meyers ed., rev. ed. 1973) (emphasis added). Other observers detail a variety of political motives for Madison's transition to advocate of a bill of rights. See, e.g., Carol Berkin, *To "Counteract the Impulses of Interest & Passion": James Madison's Insistence on a Bill of Rights*, 15 GEO. J.L. & PUB. POL'Y 527, 530 (2017) (stating that Madison sought to "drive a wedge" between Anti-federalist leaders and their followers by ensuring that the Federalists got credit for passing a bill of rights); Broadwater, *supra* note 37, at 563 (noting that Madison sought among other things to encourage North Carolina and Rhode Island to ratify the Constitution); Jud Campbell, *Judicial Review and the Enumeration of Rights*, 15 GEO. J.L. & PUB. POL'Y 569, 571 (2017) (finding that Madison considered the enumeration of rights important to the practical and political task of judging).

65. 1 ANNALS OF CONG. 452 (1789) (Joseph Gales ed., 1834).

The final version of the Ninth Amendment declares that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”⁶⁶

Madison’s correspondence on the Ninth Amendment demonstrates the continuing linkage between individual rights and limited power. In a letter to George Washington, written shortly after Congress had proposed the Bill of Rights, Madison commented on Edmund Randolph’s objection to the wording of the Amendment.⁶⁷ Randolph worried about the phrasing of “retained” rights. “His argument,” Madison explained to Washington,

was applied in this manner—that as the rights declared in the first ten of the proposed amendments were not all that a free people would require the exercise of, and that as there was no criterion by which it could be determined whether any other particular right was retained or not, it would be more safe and more consistent with the spirit of the 1st & 17th amend[ments] proposed by Virginia that this reservation ag[ainst] constructive power, should operate rather as a provision ag[ainst] extending the powers of Cong[ress] by their own authority, than a protection to rights reducible to no definite certainty.⁶⁸

Madison’s critique of this objection suggests how limiting power and declaring rights were different ways of stating the same thing:

[O]thers, among whom I am one, see not the force of this distinction,

. . . If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing, whether the latter be secured by declaring that they shall not be abridged, or that the former shall not be extended.⁶⁹

B. AN ILLUMINATING EXAMPLE OF THE LINKAGE BETWEEN INDIVIDUAL RIGHTS AND LIMITED POWER IN THE POST-RATIFICATION PERIOD

The boundaries on the jurisdiction of the new federal government were important components of the debates and controversies of the post-Ratification era. One of the most prominent was the controversy surrounding the 1798 Alien and Sedition Acts.⁷⁰ That debate is pertinent here because it demonstrates the linkage between individual rights and limited power in a way that mirrors the right to arms question.

The Sedition Act criminalized, among other things, making false statements critical of the federal government.⁷¹ Madison, Jefferson and others argued that the Sedition Act violated the First Amendment.⁷² But their

66. U.S. CONST. amend. IX.

67. Letter from James Madison to George Washington (Dec. 5, 1789), in 5 THE WRITINGS OF JAMES MADISON 431–32 (Gaillard Hunt ed., 1904).

68. *Id.* at 431.

69. *Id.* at 431–32.

70. The 1798 Alien and Sedition Acts include: Naturalization Act, ch. 54, 1 Stat. 566 (1798); Alien Friends Act, ch. 58, 1 Stat. 570 (1798); Alien Enemy Act of 1798, ch. 66, 1 Stat. 577; Sedition Act, ch. 74, 1 Stat. 596 (1798).

71. Sedition Act, 1 at 596–97.

72. See O. John Rogge, “Congress Shall Make No Law . . .,” 56 MICH. L. REV. 331, 344–65, 367–74 (1958).

arguments were not limited to text or history of the positive declarations in the First Amendment. Their assessment of the First Amendment right was linked directly to the proposition that Congress had no *power* to impose the Sedition Act.⁷³

Madison also forcefully rejected the notion that powers implied under the Necessary and Proper Clause could justify the Sedition Act, arguing that the power to suppress insurrections did not imply a power to prevent insurrections by “punishing whatever may *lead or tend* to them.”⁷⁴ This approach pervades the Virginia Resolution of 1798, drafted by Madison and adopted as the Virginia Legislature’s formal declaration that the Sedition Act was unconstitutional.⁷⁵ That critique is a model for understanding constitutional rights as a function of limited federal power.

[T]he General Assembly doth particularly protest against the palpable and alarming infractions of the constitution, in the two late cases of the “alien and sedition acts,” . . . the first of which exercises a power no where delegated to the federal government; . . . and the other of which acts, exercises in like manner *a power not delegated by the constitution, but on the contrary expressly and positively forbidden by one of the amendments thereto*; a power which more than any other ought to produce universal alarm, because it is levelled against that right of freely examining public characters and measures, and of free communication among the people thereon, . . .⁷⁶

The Kentucky Resolution is an equally famous rebuke of the Alien and Sedition Acts, and another vivid demonstration of the link between individual rights and limited federal power.⁷⁷ Thomas Jefferson ultimately acknowledged authorship, but the Kentucky Resolution (like the Virginia Resolution) represents the sentiment of a people articulated by their elected representatives:

Resolved, that the several states composing the United States of America, . . . constituted a General Government for special purposes, delegated to that Government certain definite powers, . . .

. . . .

. . . that it is true as a general principle, and is also expressly declared by one of the amendments to the Constitution that “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;” and *that no power over the freedom of religion, freedom of speech, or freedom of the press being delegated* to the United States by the Constitution, nor prohibited by it to the states, all lawful powers respecting the same did of right remain, and were reserved to the states, or to the people: . . . *that in addition to this general principle and express*

73. *Id.* at 336–37.

74. *Id.* at 350 (internal quotation marks omitted) (quoting 6 THE WRITINGS OF JAMES MADISON 383–84 (Gaillard Hunt ed., 1906)).

75. *Virginia Resolutions, 21 December 1798*, NAT’L ARCHIVES: FOUNDERS ONLINE, <http://founders.archives.gov/documents/Madison/01-17-02-0128> (last visited Mar. 17, 2019).

76. *Id.* (emphasis added).

77. *Resolutions Adopted by the Kentucky General Assembly*, PRINCETON U., <https://jeffersonpapers.princeton.edu/selected-documents/resolutions-adopted-kentucky-general-assembly> (last visited Mar. 17, 2019).

*declaration, another and more special provision has been made by one of the amendments to the Constitution which expressly declares, that "Congress shall make no law respecting an Establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press,"*⁷⁸

Notice how both resolutions reflect the cautions and expectations of the ratification conventions that the enumeration of particular rights should not diminish the protection of rights that was inherent in the scheme of limited powers. They describe free speech as a right protected by both the scheme of limited powers as well as the affirmative declaration of the First Amendment. Applied to the Second Amendment, that template would dictate that the codified right to arms be understood in the context of the eighteenth-century federal power to infringe it.

The controversy surrounding the Virginia and Kentucky Resolutions also helps illuminate the spectrum of views about the legitimate scope of federal power. The Alien and Sedition Acts were a tool of the Federalist Party to disenfranchise and deport supporters (mainly Frenchmen) of the burgeoning opposition party (the Jeffersonian Republicans).⁷⁹ President John Adams, who signed the Acts into law, would go to his grave claiming that they were the work of an extreme faction of congressional Federalists and never really had his support.⁸⁰ But the fact that these infamous laws *were* enacted suggests that many people disagreed with or were willing to disregard the themes of the Virginia and Kentucky Resolutions.⁸¹ Indeed, disagreement about the authority and direction of the federal government would fuel an estrangement between President Adams and his Vice-President, Jefferson, that would last for more than a decade.⁸²

This rift and the disagreements that followed fueled a diversity of views about the boundaries of federal power. And that diversity confirms the importance of positioning particular evidence that the Second Amendment should be understood as a function of limited federal power on the spectrum of early views about the authority of the new federal government. The next Part engages that task.

III. THE EXPLICIT LINKAGE BETWEEN LIMITED POWER AND THE SECOND AMENDMENT: A CONVERSATION DISSERVED BY PROFESSIONAL HISTORIANS

Granting the general proposition that the eighteenth-century Constitution used limited power as a protection of individual rights, skeptics still might demand some direct indication that the Second Amendment should be

78. *Id.* (emphasis added).

79. JOSEPH J. ELLIS, *FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION* 190 (2000).

80. *Id.* at 191.

81. *See id.* at 198. Both resolutions were forwarded to legislators in other states with the hope that they would join the fight for repeal. No other states were willing to join, and several legislative bodies expressly condemned the idea that state legislatures had the authority to nullify federal action. *See* Berkin, *supra* note 64, at 544.

82. ELLIS, *supra* note 79, at 198, 205–25.

illuminated by that principle. The sharpest answer comes from one of the most influential constitutional law treatises of the early Republic, William Rawle's *A View of the Constitution of the United States of America*, first published in 1825. Rawle's presentation of the Second Amendment hinges explicitly on the principle that "[n]o clause in the Constitution could by any rule of construction be conceived to give to congress a power to disarm the people."⁸³

Rawle's linkage of limited power with the Second Amendment is important for three reasons. First, because Rawle rejected Jeffersonian strict construction in favor of a broader, more supple view of federal power. Second, because of the clarity with which Rawle demonstrates the linkage between limited federal power and the constitutional right to arms. Third, because Rawle's integration of limited power into understanding the Second Amendment has been affirmatively obscured by a leading professional historian whose work fueled the dissenters' arguments in *Heller* and *McDonald*. These three points are elaborated in Subparts III.A, III.B, and III.C below.

A. WILLIAM RAWLE'S *A VIEW OF THE CONSTITUTION* IN CONTEXT WITH AN ALLUSION TO ST. GEORGE TUCKER

Rawle provides an explicit, period confirmation that the eighteenth-century right to arms must be understood in the context of the limited federal power environment of the time. His assessment gains resonance when we consider his place among the luminaries of the Revolutionary Era.

Rawle's family was colonial Quaker aristocracy. His great-grandfather represented Pennsylvania in the provincial assembly.⁸⁴ The Rawle clan balked at armed resistance against the British and Rawle's stepfather served as Mayor of Philadelphia during the British occupation of the city in 1777 through 1778.⁸⁵ By 1778, Rawle's stepfather had been declared a traitor by the Revolutionary Assembly.⁸⁶ When the British army evacuated Philadelphia in the summer of 1778, Rawle's family fled to New York, which was still under British control. William was about nineteen at the time.⁸⁷

In New York, Rawle read law with a loyalist lawyer and in 1781 sailed to England for further study.⁸⁸ After Washington's victory at Yorktown, William returned to America and swore allegiance to the revolutionary government.⁸⁹ By 1783 he was ensconced as a member of the Bar in his native Philadelphia.⁹⁰

83. RAWLE, *supra* note 24, at 125 (emphasis added).

84. H. Jefferson Powell, *Editor's Introduction to the Second Edition of WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* xi, xiii (H. Jefferson Powell ed., Carolina Academic Press 2009) (2d ed. 1829).

85. *Id.* at xiv.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

Rawle was a talented lawyer with a long social pedigree and he quickly rose to prominence. Benjamin Franklin invited him into the exclusive Society of Political Inquiries where he socialized with men like Gouverneur Morris, Benjamin Rush, and George Washington.⁹¹

During the debates over ratification of the new Constitution, Rawle aligned with the Federalists.⁹² In 1791, President Washington appointed him U.S. Attorney for Pennsylvania, where Rawle litigated a series of high-profile cases, including the prosecution of the leaders of the Whiskey Rebellion.⁹³

As one might expect from his experience, Rawle's view of the Constitution and, particularly, the boundaries on federal power was more expansive than many competing views. His view of federal power stands in sharp contrast, for example, to St. George Tucker's 1803 treatise, *View of the Constitution of the United States* ("Tucker's View") (a title appropriated by Rawle with evident intent to strike a contrast with Tucker).⁹⁴

Tucker's *View* was published as an appendix to his annotated presentation of *Blackstone's Commentaries*. Tucker's adaptation of Blackstone was the singular restatement of American law in the Jeffersonian Era⁹⁵ and vigorously advanced the Jeffersonian model of strict construction of federal powers.⁹⁶

Tucker urged that proper interpretation of the Constitution must proceed from the premises that "[t]he powers delegated to the federal government, are, in all cases, to receive *the most strict construction that the instrument will bear, where the rights of a state or of the people, either collectively, or individually, may be drawn in question*"⁹⁷ and that the federal government "can possess no legitimate power, but such as is absolutely necessary for the performance of a duty, prescribed and enjoined by the constitution."⁹⁸

Tucker also presents the Second Amendment as an individual right; he is an important marker for placing Rawle on the spectrum of views about the legitimate scope of federal power during the Founding Era.⁹⁹

Tucker's edition of *Blackstone's Commentaries* included numerous annotations showing how the English tradition was narrower than the American conception of rights. Blackstone wrote that Englishmen had a right to arms "for their defence suitable to their condition and degree, and such as allowed by law."¹⁰⁰ Tucker emphasized that the American right to arms contained no

91. *Id.* at xv.

92. *Id.*

93. *Id.* at xvi; *United States v. Mitchell*, 2 U.S. (2 Dall.) 348 (1795).

94. Powell, *supra* note 84, at xxi.

95. *Id.*

96. This is exhibited, for example, in the Kentucky Resolution and in Jefferson's worries about the constitutional foundation for the Louisiana Purchase.

97. Powell, *supra* note 84, at xxii–xxiii (emphasis added) (internal quotation marks omitted) (quoting 1 ST. GEORGE TUCKER, *BLACKSTONE'S COMMENTARIES WITH NOTES OF REFERENCE* app. at 154 (Philadelphia, William Young Birch & Abraham Small 1803) [hereinafter TUCKER'S BLACKSTONE]).

98. *Id.* at xxiii (citing TUCKER'S BLACKSTONE, *supra* note 97, at 170).

99. 2 TUCKER'S BLACKSTONE, *supra* note 97, at 143–44.

100. *Id.* at 143 (footnote omitted).

qualification as to condition or degree. Tucker's annotation 41 also criticized that Blackstone's qualification "as allowed by law" was a conduit for disarming Englishmen under the guise of game laws.¹⁰¹

Tucker's Appendix describes the American right to keep and bear arms as "the true palladium of liberty."¹⁰² He contrasts it with the English right, which had been eroded on the "specious pretext of preserving the game . . . [s]o that not one man in five hundred can keep a gun in his house without being subject to penalty."¹⁰³ Tucker made a similar point about the American right to arms bearing by way of contrast to the English law of treason.¹⁰⁴ English law applied a rebuttable presumption that a gathering of armed men was motivated by treason and insurrection.¹⁰⁵ In America by contrast, "the right to bear arms is recognized and secured in the constitution itself."¹⁰⁶ Further, Tucker explained, "[i]n many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than a[] European fine gentleman without his sword by his side."¹⁰⁷

Compared to Rawle, Tucker advanced a narrower view of federal power and was especially cautious where power conflicted with individual rights. He actually used the right to arms to demonstrate how federal power should be narrowly construed when it conflicts with individual rights. Tucker presented a strict formula for interpreting the Necessary and Proper Clause that seeks to preserve enumerated rights against untrammelled assertions of power. He laid out two steps: First, whether Congress is asserting a clearly expressed power; and second,

[i]f it be not expressed, the next enquiry must be, whether it is properly an incident to an express power, and necessary to it's [sic] execution. . . .

. . . [T]his construction of the clause in question ["necessary and proper"], [] is calculated to operate as a powerful and immediate check upon the proceedings of the federal legislature To which we may add, that this interpretation of the clause is indispensably necessary to support that principle of the constitution, which regards the judicial exposition of that instrument, as the bulwark provided against undue extension of the legislative power.¹⁰⁸

Tucker demonstrated the proper application of this approach by showing how the Necessary and Proper Clause could not be construed to nullify the right to keep and bear arms, even when the root authority was Congress's power to prevent insurrections:

If, for example, congress were to pass a law prohibiting any person from bearing arms, as a means of preventing insurrections, the judicial courts, under the

101. *Id.* at 143–44 & n.41; *see also* NICHOLAS J. JOHNSON ET AL., FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 231–35 (2012).

102. 1 TUCKER'S BLACKSTONE, *supra* note 97, app. at 300.

103. *Id.*

104. 5 *id.* app. at 19.

105. *Id.*

106. *Id.*

107. *Id.*

108. 1 *id.* app. at 288.

construction of the words necessary and proper, here contended for, would be able to pronounce decidedly upon the constitutionality of these means. *But if congress may use any means, which they choose to adopt, the provision in the constitution which secures to the people the right of bearing arms, is a mere nullity; and any man imprisoned for bearing arms under such an act, might be without relief . . .*¹⁰⁹

Tucker took a narrower view than Rawle about the scope of federal power. According to Rawle, the Constitution's "known intention" was to grant "all the powers necessary for the attainment of the great objects" outlined in the Preamble.¹¹⁰ H. Jefferson Powell, one of the foremost twentieth-century authorities on Rawle, explains that Rawle's treatise from the title onward¹¹¹ argues against Tucker's strict constructionism in favor of a constitutionalism that "[justif[ied] a much broader understanding of national power than Jeffersonian orthodoxy admitted."¹¹² Thus, the comparison to Tucker is important because it places Rawle among the more generous interpreters of federal power to infringe individual rights.

B. WILLIAM RAWLE ON THE SECOND AMENDMENT

Rawle's constitutional law treatise became widely acknowledged as a leading specimen of the genre. Supreme Court Justice Joseph Story, writing as a member of the Harvard Law School faculty, praised Rawle's treatise and cited it repeatedly in his own 1933 treatise.¹¹³ Rawle's treatise continued to be used as a text at Harvard Law School even after Story had published his own commentaries.¹¹⁴

Here is Rawle's full treatment of Second Amendment:

In the second article, it is declared, that a *well regulated militia is necessary to the security of a free state*; a proposition from which few will dissent. Although in actual war, the services of regular troops are confessedly more valuable; yet, while peace prevails, and in the commencement of a war before a regular force can be raised, the militia form the palladium of the country. They are ready to repel invasion, to suppress insurrection, and preserve the good order and peace of government. That they should be well regulated, is judiciously added. A disorderly militia is disgraceful to itself, and dangerous not to the enemy, but to its own country. The duty of the state government is, to adopt such regulations as will tend to make good soldiers with the least interruptions of the ordinary and useful occupations of civil life. In this all the Union has a strong and visible interest.

The corollary, from the first position, is, that *the right of the people to keep and bear arms shall not be infringed*.

109. *Id.* app. at 289 (emphasis added).

110. Powell, *supra* note 84, at xxviii (internal quotation marks omitted) (quoting RAWLE, *supra* note 24, at 29–30).

111. *Id.* at xxi.

112. *Id.* at xxviii.

113. *Id.* at xi–xii, xi n.1 (citing 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 245 (Boston, Hilliard, Gray & Co. 1833)).

114. *Id.* at xiii.

The prohibition is general. No clause in the Constitution could by any rule of construction be conceived to give to congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretence by a state legislature. But if in any blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both.

In most of the countries of Europe, this right does not seem to be denied, although it is allowed more or less sparingly, according to circumstances. In England, a country which boasts so much of its freedom, the right was secured to protestant subjects only, on the revolution of 1688; and it is cautiously described to be that of bearing arms for their defence, “suitable to their conditions, and as allowed by law.” An arbitrary code for the preservation of game in that country has long disgraced them. A very small proportion of the people being permitted to kill it, though for their own subsistence; a gun or other instrument, used for that purpose by an unqualified person, may be seized and forfeited. Blackstone, in whom we regret that we cannot always trace the expanded principles of rational liberty, observes however, on this subject, that the prevention of popular insurrections and resistance to government by disarming the people, is oftener meant than avowed, by the makers of forest and game laws.

This right ought not, however, in any government, to be abused to the disturbance of the public peace.

An assemblage of persons with arms, for an unlawful purpose, is an indictable offence, and even the carrying of arms abroad by a single individual, attended with circumstances giving just reason to fear that he purposes to make an unlawful use of them, would be sufficient cause to require him to give surety of the peace. If he refused he would be liable to imprisonment.¹¹⁵

Rawle’s understanding of the right to arms as a function of limited federal power is especially telling considering his disagreement with Tucker’s strict construction of federal power. Rawle was far more willing than Tucker to acknowledge implied federal power where it was necessary and proper to the pursuit of some legitimate national end. Even Rawle, however, could discern no federal power that would allow the federal government to prohibit individuals from keeping and bearing private arms for self-defense.

C. WILLIAM RAWLE ON THE SECOND AMENDMENT AND HISTORIANS THROWING STONES

Rawle’s explicit affirmation of the linkage between limited power and the meaning of the Second Amendment directly contradicts the historians’ creationist account, and the treatment of Rawle by proponents of the creationist account is telling. One of the most prominent advocates of the creationist account is historian Saul Cornell, whose scholarship is cited by dissenters in *Heller* and *McDonald*.¹¹⁶ Cornell has acknowledged that Rawle was “an

115. RAWLE, *supra* note 24, at 125–26 (footnotes omitted).

116. *District of Columbia v. Heller*, 554 U.S. 570, 671 (2008) (Stevens, J., dissenting); *id.* at 685 (Breyer, J., dissenting); *McDonald v. City of Chicago*, 561 U.S. 742, 900, 901 n.44, 914, 933 (2010) (Stevens, J., dissenting).

influential lawyer and constitutional commentator.”¹¹⁷ But given Rawle’s clarity on the linkage between the right to arms and limited federal power, Cornell’s substantive analysis of Rawle is remarkable.

In a Fordham Law Review article that was cited in Justice Breyer’s *Heller* dissent, Cornell claims that Rawle “viewed the right to bear arms as *inextricably linked to the militia*.”¹¹⁸ As shown above, Rawle does discuss the militia in his first paragraph. Indeed, Rawle’s discussion is fully consistent with the explanation in *Heller* that the militia depends on an armed citizenry.¹¹⁹

However, Rawle also plainly states that on the question of whether federal power can infringe the right of the people to keep and bear arms, “[t]he prohibition is general.”¹²⁰ He continues, “[n]o clause in the Constitution could by any rule of construction be conceived to give to congress a power to disarm the people.”¹²¹ It is a mystery how Cornell extracts from this an endorsement by Rawle of a right to arms “inextricably linked to the militia.”¹²²

The mystery deepens when we consider Rawle’s explicit examples of individual arms-bearing outside the context of the militia. Individual arms-bearing is embedded in Rawle’s caveat that the right “ought not . . . be abused to the disturbance of the public peace.”¹²³ The exceptions articulated in Rawle’s last paragraph are even more telling:

An assemblage of persons with arms, for an unlawful purpose, is an indictable offence, *and even the carrying of arms abroad by a single individual*, attended with circumstances giving just reason to fear that he purposes to make an unlawful use of them, would be sufficient cause to require him to give surety of the peace.¹²⁴

Rawle acknowledges exceptions to the right, in the case of an armed assemblage of “for an unlawful purpose.”¹²⁵ The general subject of this exception is the corresponding lawful “assemblage of persons with arms.”¹²⁶ This was no casual concession for the man who prosecuted the perpetrators of the Whiskey Rebellion.¹²⁷

The corresponding principle of the stated exception to individual arms-bearing is even more telling. Rawle explains that “even the carrying of

117. Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 *FORDHAM L. REV.* 487, 503 (2004).

118. *Id.* at 504 (emphasis added).

119. *Id.* at 503–04.

120. RAWLE, *supra* note 24, at 125 (emphasis added).

121. *Id.* (emphasis added).

122. Cornell & DeDino, *supra* note 117, at 504.

123. RAWLE, *supra* note 24, at 126.

124. *Id.* (emphasis added).

125. *Id.*

126. *Id.*

127. Carl Bogus, a longstanding critic of the individual rights view of the Second Amendment has argued that George Washington’s comments about and response to the Whiskey Rebellion refute the idea that the Second Amendment anticipated armed resistance to tyranny. See Carl T. Bogus, *There’s No Right of Revolution in a Democracy*, CNN (Jan. 27, 2011, 8:30 AM), <http://www.cnn.com/2011/OPINION/01/27/bogus.right.rebel/index.html>.

arms abroad by a single individual” might be punished upon a showing of unlawful purpose.¹²⁸ This exception is carved out of the protected sphere of lawful carrying of arms abroad by a single individual.

What does Cornell say about Rawle’s presentation of the Second Amendment as function of limited federal power and the individual rights that correspond to Rawle’s description of unlawful arms bearing? Absolutely nothing. He ignores it. The balance of Cornell’s analysis describes state and local arms regulations (but tellingly, no federal ones) on the assumption that they prove something about the Second Amendment. His analysis seems oblivious to the fact that federal power over individual arms was a different question from local or state regulation grounded on sweeping police powers.

This error is highlighted by Cornell’s critique of Rawle excerpted here:

In contrast to modern gun rights theory, Rawle believed that there could be no right to bear arms without regulation.

Gun rights legal scholars have made a number of remarkable, almost phantasmagorical claims about the meaning of the term “well regulated.” . . . This version of early American history more closely resembles the Bizarro world described in Superman comic books and rendered in hilarious terms in America’s best-loved postmodern situation comedy *Seinfeld*, than it does the constitutional thought of the Founding Era. . . . Finding evidence to show that the Bizarro Second Amendment is a fiction created by modern gun rights scholarship, and not an accurate representation of early American history, is not difficult. If one simply looks at the gun laws adopted in the Founding Era and early Republic, the evidence for robust regulation is extensive. *If American history fit the Bizarro model, then gun regulation after the adoption of the Second Amendment would have virtually disappeared.*¹²⁹

Cornell’s contention that the Second Amendment should have caused state and local gun regulation to disappear ignores or is oblivious to the fact that the Amendment operated in the context of limited, enumerated *federal powers*, powers that were (and nominally still are) far narrower than the police powers exercised by the states. The modest early gun laws Cornell discusses are mostly state or local regulations.¹³⁰ His claim that an individual right to arms against the federal government should have caused those state and local laws to disappear demonstrates a fundamental disregard for the context in which the Second Amendment emerged.

The problem becomes critical when we appreciate that Cornell has steered Justices of the Supreme Court toward a similar misstep. Consider for example Justice Breyer’s *Heller* dissent. With a citation to Cornell, Breyer repeats this mistake almost exactly. Here is Breyer:

[C]olonial history itself offers important examples of the kinds of gun regulation that citizens would then have thought compatible with the “right to keep and bear arms,” *whether embodied in Federal or State Constitutions, or the background*

128. RAWLE, *supra* note 24, at 126.

129. Cornell & DeDino, *supra* note 117, at 504–05 (emphasis added) (footnotes omitted).

130. Many of these regulations are more akin to safe storage or zoning laws than direct arms restrictions. *See generally id.* at 502–03.

common law. And those examples include substantial regulation of firearms in urban areas, including regulations that imposed obstacles to the use of firearms for the protection of the home.

Boston, Philadelphia, and New York City, the three largest cities in America during that period, all restricted the firing of guns within city limits to at least some degree. . . .

Furthermore, several towns and cities (including Philadelphia, New York, and Boston) regulated, for fire-safety reasons, the storage of gunpowder, a necessary component of an operational firearm. Boston's law in particular impacted the use of firearms in the home very much as the District's law does today.¹³¹

Cornell has been a strident critic of “law office histories” that conjure up “Bizarro World” claims of an individual right to arms.¹³² In a 2013 article, he characterized the majority opinion in *Heller* as a “scam” resting on “manipulations and misrepresentations.”¹³³ In the first part of that article, Cornell offers a series of lessons about context and reminds us how important it is for scholars to “pay attention to what an author said, but . . . also ask what an author was doing by making a particular statement on a given occasion.”¹³⁴ In his treatment of Rawle, Cornell violates these basic tenets by eliding Rawle's statement about the absence of federal power to disarm Americans and ignoring the rights-protecting theme of limited federal power that pervaded the Founding Era.

Cornell has played an outsized role in the litigation over the meaning of the Second Amendment. He has described being in the room with counsel and representatives from the District of Columbia as the preparation for the *Heller* litigation was underway and was a primary force behind the Historians' Brief.¹³⁵

131. *District of Columbia v. Heller*, 554 U.S. 570, 683–85 (2008) (Breyer, J., dissenting) (emphasis added) (citations omitted).

132. See generally Cornell & DeDino, *supra* note 117.

133. Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 *FORDHAM L. REV.* 721, 740–42 (2013).

134. *Id.* at 730.

135. In November 2016 Saul Cornell and I appeared together at the Fordham Law School program, *Behind the Book*. Professor Cornell offered a detailed account of his participation in the planning and preparation for the District's presentation before the Supreme Court in *Heller*. Professor Cornell repeated that account at a Fordham Legal History Colloquium in February 2017, where we both appeared and I discussed this Article.

Professor Cornell is one of the historians cited in Justice Breyer's *McDonald* dissent for the proposition that *Heller* is fundamentally flawed. *McDonald v. City of Chicago*, 561 U.S. 742, 914–17 (Breyer, J., dissenting) (citing Cornell, *supra* note 30).

Cornell's article is a classic example of the historians' creationist account and the positivist mistake. Cornell repeats and may be one source of the positivist mistake highlighted in the introduction of this Article. Recall the assertion in the Historians' Brief that at the time of the Framing, “Outside the question of whether militia members would be armed at national, state, or personal expense, there was no credible basis upon which the national government could regulate the possession of firearms.” Historians' Brief, *supra* note 20, at 31.

The Historians' Brief hoped to show that few people were worried about the federal government restricting private firearms in 1789, and therefore it is a mistake to conclude that individual rights were on the agenda when the Second Amendment was proposed and ratified. But that approach presumes that constitutional rights were *created* by the positive act of constitutional amendment in 1791.

That brief demonstrates how, as a group, professional historians have failed to incorporate limited power into their assessment of the constitutional right to arms.

This failure has broad implications because some in the judiciary have elevated the role of professional historians in translating the right to arms. For example, Justice Breyer, citing the historians' creationist account, argued in *McDonald* that the Court got it wrong in *Heller* and that should be enough to reverse the decision or at least not extend it.¹³⁶ Historians themselves have claimed that the right to arms rests on "law office histories" that are insufficiently textured and fail to account for context and complexity.¹³⁷

These sorts of critiques suggest that professional historians are neutral arbiters of balls and strikes, whose more fulsome analysis will put the Second Amendment in proper context. But "historical" accounts that ignore the limited power context of the eighteenth-century right to arms are just advocacy under the false banner of neutrality.¹³⁸

A militia-centric approach does not absolve one from engaging the limited power component of the right to arms question. Assume *arguendo* that the motivation for codifying the right of the people to keep and bear arms was to protect a well-regulated militia. Now consider the definition of "militia" articulated in *United States v. Miller*—the 1939 Supreme Court decision that Justice Stevens and individual rights skeptics say is a better view of the Second

Cornell's 2009 article repeats this mistake almost exactly. Through an interpretation of St. George Tucker, Cornell not only acknowledges but forcefully asserts that "the scope of federal power was limited to the 'protection and defence of the community against foreign force and invasion' and to the equally important role of suppressing 'insurrections among ourselves.' All matters related to individual self-defense, by contrast, fell within the scope of state authority." Cornell, *supra* note 30, at 1547 (footnote omitted) (quoting Brutus, *Essays of Brutus*, in 2 THE COMPLETE ANTI-FEDERALIST 400–01 (Herbert J. Storing ed., 1981)). This only makes sense under a view that rights against the federal government, including the right to arms, were created by an affirmative grant from government. That is simply false.

136. Dissenting in *McDonald*, Justice Breyer criticized *Heller* this way:

The Court based its conclusions almost exclusively upon its reading of history. But the relevant history in *Heller* was far from clear: Four dissenting Justices disagreed with the majority's historical analysis. And subsequent scholarly writing reveals why disputed history provides treacherous ground on which to build decisions written by judges who are not expert at history.

Since *Heller*, historians, scholars, and judges have continued to express the view that the Court's historical account was flawed. . . .

. . . .
 . . . *The historians concede that at least one historian takes a different position, but the Court, they imply, would lose a poll taken among professional historians of this period, say, by a vote of 8 to 1.*

If history, and history alone, is what matters, why would the Court not now reconsider *Heller* in light of these more recently published historical views?

McDonald, 561 U.S. at 914–16 (Breyer, J., dissenting) (emphasis added) (citations omitted).

137. See, e.g., Historians' Brief, *supra* note 20, at 33.

138. For the false claim of neutrality, see Cornell, *supra* note 133, at 742 ("*Heller's* manipulations and misrepresentations of the past are not simply a function of a failure to sample enough sources. Scalia's opinion does not lack evidence, but the sources are selected for ideological reasons, not according to any *neutral* scholarly criteria." (emphasis added)).

Amendment than *Heller*.¹³⁹ *Miller* underscores that *the militia is the body of the people bearing their own private arms*. Here is the operative passage from *Miller*:

The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators. These show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense. “A body of citizens enrolled for military discipline.” 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*.¹⁴⁰

Even granting a militia-centric view of the Second Amendment, the crucial question remains: What could Americans do with the private arms that *Miller* presumes, when they were not engaged with the militia? An honest search for the answer must consider the limits on federal action built into the scheme of limited powers, how rights were understood within that scheme, and the power (or lack of it) of the federal government to regulate arms-use and arms-bearing outside the context of the militia.

IV. THE LINKAGE BETWEEN LIMITED POWER AND THE RIGHT TO ARMS CONTINUES INTO THE TWENTIETH CENTURY

Rawle’s 1825 assessment of the Second Amendment as a function of limited federal power was fully in accord with the sentiment of the times. Early congressional debates offer striking examples of what it means to take the limited federal power seriously. These debates included contentious arguments over the power to legislate, the time and manner of administering certain oaths of office,¹⁴¹ the power of the President to remove executive branch officers,¹⁴² the power to provide charitable relief to foreign refugees,¹⁴³ the power to spend

139. 307 U.S. 174 (1939).

140. *Id.* at 179 (emphasis added).

141. 4 ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION, *supra* note 44, at 343–45.

142. *Id.* at 350–403. In the debates on the Bill for Establishing an Executive Department to be Denominated the Department of Foreign Affairs, Representative Smith from South Carolina demonstrated the skeptics position this way: “I am clear that the President alone has not the power. . . . this inference is supported by that clause in the Constitution, *which provides* that all civil officers of the United States shall be removed from office on impeachment . . .” *Id.* at 351 (emphasis added).

143. On the Memorial of the Relief Committee of Baltimore, for the Relief of St. Domingo Refugees, Mr. Madison remarked that

the government of the United States is a definite government, confined to specified objects. It is not like the state governments, whose powers are more general. Charity is no part of the legislative duty of the government. It would puzzle any gentleman to lay his finger on any part of the Constitution which would authorize the government to interpose in the relief of the St. Domingo sufferers. The report of the committee, he observed, involved this constitutional question—whether the money of our constituents can be appropriated to any other than specific purposes.

Id. at 431.

money to encourage certain occupations,¹⁴⁴ a rebuff by President Madison of the power to “set apart . . . funds for internal [infrastructure] improvements”¹⁴⁵ (action that today one would say is at the core of the commerce power), and even a dispute about the power of Congress to correspond with foreign nations.¹⁴⁶

These exacting early critiques of federal power set the tone for evaluating Rawle’s explanation that the Second Amendment’s “prohibition” on Congress infringing the right to arms was “general” because “[n]o clause in the Constitution could by any rule of construction be conceived to give to congress

144. On the Bill to Encourage Cod Fisheries by Granting Bounties (Feb. 3, 1792), Representative Giles stated: “[I]n no part of the Constitution could he, in express terms, find a power given [t]o Congress to grant bounties on occupations.” *Id.* at 426. James Madison pressed the objection this way:

It is supposed by some gentlemen, that Congress have authority . . . to grant bounties [even] . . . under a power by virtue of which they may do any thing [sic] which they may think conducive to the general welfare! . . .

. . . [T]his is not an indefinite government, deriving its powers from the general terms prefixed to the specific powers—but a limited government, tied down to the specified powers, which explain and define the general terms.

. . . .

. . . .

. . . .

. . . If Congress can employ money indefinitely to the general welfare, . . . in short, every thing [sic], from the highest object of state legislation down to the most minute object of police, would be thrown under the power of Congress

The language held in various discussions of this house is a proof that the doctrine in question was never entertained by this body. Arguments, wherever the subject would permit, have constantly been drawn from the peculiar nature of this government, as limited to certain enumerated powers, instead of extending, like other governments, to all cases not particularly excepted.

Id. at 427–29.

145. *Id.* at 468. The Bonus Bill pledged certain surpluses toward “a fund for constructing roads and canals, and improving the navigation of watercourses, in order to facilitate . . . internal commerce among the several states.” *Id.* On March 3, 1817, President Madison returned the Bank Bonus Bill to the House of Representatives with a statement of objection that provided in part:

I am constrained, by the insuperable difficulty I feel in reconciling the bill with the Constitution of the United States, to return it, with *that objection*

. . . [I]t does not appear that the power, proposed to be exercised by the bill, is among the enumerated powers; or that it falls, by any just interpretation, within the power to make laws necessary and proper for carrying into execution those or other powers vested by the Constitution in the government of the United States.

The power to regulate commerce among the several states cannot include a power to construct roads and canals, and to improve navigation of watercourses, in order to facilitate . . . commerce To refer the power in question to the clause “to provide for the common defence and general welfare,” would be contrary to the established and consistent rules of interpretation Such a view of the Constitution would have the effect of giving to Congress a general power of legislation, instead of the defined and limited one hitherto understood to belong to them

Id. at 468–70.

146. *See id.* at 434 (discussing the Motion of Mr. Tazewell to Strike Out a Complimentary Reply to the French Republic, January 6, 1796).

a power to disarm the people."¹⁴⁷ Rawle's assessment was fully apiece with the times.

Still, the skeptic might seek more direct evidence of Rawle's assessment in action; some pointed treatment by lawmakers explicitly linking the right to arms and limited federal power. That demand is answered by the first ever attempt at federal gun control—the proposal for the National Firearms Act of 1934 (NFA).¹⁴⁸ Both the timing of the NFA (enacted more than a century after the publication of Rawle's *A View of the Constitution of the United States of America*) and its structure (fashioned as a tax rather than a prohibition) are consistent with Rawle's 1825 assessment of the right to arms as a function of limited power.

Presented during the first year of Franklin Roosevelt's presidency, the NFA bill was guided by an analysis from the Justice Department that underscores the flawed assumptions about federal power that the historians' creationist account tacitly infuses into criticisms of *Heller*. Subpart IV.A demonstrates that point through an account of the enactment of the NFA. Subpart IV.B provides a discussion of the modern Commerce Clause that shows how the historians' creationist account tacitly infuses mid-twentieth-century notions of federal power into its nominally historical account of the Second Amendment.

A. LIMITED POWER DICTATES THE STRUCTURE OF THE FIRST FEDERAL GUN CONTROL LEGISLATION: THE NATIONAL FIREARMS ACT OF 1934

Well into the twentieth century, limited federal power remained a core influence on the understanding of the scope and application of the individual right to arms. The Second Amendment, understood as a function of limited federal power, was a primary factor dictating the structure of the NFA. The legislative history of the NFA is a withering rebuttal to the charge by professional historians that the individual rights view of the Second Amendment is a modern fabrication. Historian Paul Finkelman illustrates that criticism with the claim upon which the Supreme Court's decision in *Heller* rests:

[T]he Court has essentially adopted the modern, ahistorical reinterpretation of the Second Amendment that its supporters arrogantly call the "Standard Model." *This is not an interpretation that any legal scholar or constitutional theorist would have recognized before the 1990s.* And it is an interpretation that almost no serious historians have accepted.

*Until the 1960s, almost no organization (much less any Court) had argued that the Second Amendment prohibited firearms regulations by either the national government or the states.*¹⁴⁹

Finkelman's criticism of the "Standard Model" simply ignores the consensus of nineteenth-century constitutional commentators and the plain

147. RAWLE, *supra* note 24, at 125 (emphasis added).

148. National Firearms Act, ch. 757, Pub. L. No. 73-474, 48 Stat. 1236 (1934).

149. Finkelman, *supra* note 16, at 626 (emphases added) (footnotes omitted).

evidence that proponents and ratifiers of the Fourteenth Amendment aimed to extend the individual right to arms for self-defense to freedmen.

Even more remarkable is Finkelman's affirmative citation of two sentences from the volumes of testimony in the 1934 NFA hearings.¹⁵⁰ Those hearings resoundingly refute Finkelman's claim and underscore how the understanding of the Second Amendment as a function of limited federal power, articulated by William Rawle in 1825, prevailed well into the twentieth century.

The 1934 NFA aimed to address the problem of "gangster weapons" that had been used in the notorious violence of the Prohibition Era.¹⁵¹ Although a drop in gun crime followed the repeal of Prohibition in 1933, the Roosevelt Administration had, in its first year, already developed the NFA proposal. A version of that proposal was ultimately enacted into law and continues today as the primary law regulating machine-guns, silencers, and other esoteric firearms.¹⁵²

In testimony before the House Ways and Means Committee, U.S. Attorney General Homer Cummings, sponsor of the bill, explained that the proposal did not ban any guns outright. Cummings was skeptical about the constitutional authority for an outright ban. Instead, Cummings explained, the NFA would rest mainly on the taxing power.¹⁵³

Cummings made clear that the NFA had "been drafted with an eye to constitutional limitations" explaining, "we have established in our Department an organization to . . . concentrate on a program that is constitutional."¹⁵⁴ Addressing a committee question about extending the scope of the bill, Cummings offered this illuminating summary of the constitutional obstacles:

We are confronted, gentlemen, with a very serious problem, and if the committee, . . . could devise a way of dealing with these armaments . . . *if that could be made a matter of prohibition under some theory that permits the Federal Government to handle it, this would be of great assistance. But there is some difficulty there, you see.*

. . . .

*It would be quite all right with me; but, of course, we have no inherent police powers to go into certain localities and deal with local crime. It is only when we can reach those things under the interstate commerce provision, or under the use of the mails, or by the power of taxation, that we can act.*¹⁵⁵

150. *Id.* ("In 1934 the chief lobbyist for the NRA asserted in testimony before Congress, 'I do not believe in the general promiscuous toting of guns. I think it should be sharply restricted and only under licenses.'" (quoting MICHAEL WALDMAN, *THE SECOND AMENDMENT: A BIOGRAPHY* 88 (2014))).

151. JOHNSON ET AL., *supra* note 101, at 529, 530.

152. *See id.* at 353–72.

153. *The National Firearms Act of 1934: Hearings on H.R. 9066 Before the H. Comm. on Ways & Means*, 73d Cong. 6, 13, 19 (1934) [hereinafter *Hearings on H.R. 9066*] (statement of Hon. Homer S. Cummings, U.S. Att'y Gen.). Among other things the Act would impose a \$200 tax (more than 3,000 in today's dollars) on the regulated class of guns and regulated items. *Id.* at 12.

154. *Id.* at 4, 5.

155. *Id.* at 8 (emphases added).

In a separate colloquy, Cummings was pressed by Representative Hill about how much power could be garnered from the Commerce Clause to justify the various restrictions in the proposed NFA. Note that this was before today's expansive interpretation of the Commerce Clause had emerged:

MR. HILL. Now you are proceeding under two provisions of the Constitution as a basis for this legislation. One is the taxing power and the other is the regulation of interstate commerce.

ATTORNEY GENERAL CUMMINGS. Yes.

MR. HILL. How far does the character of interstate commerce follow a firearm? For instance, with a gun that is imported, of course that would be international commerce and would come under this provision; but take a domestic product. A manufacturer ships a gun into another State from that in which it is manufactured. It is in interstate commerce. Now if the person receiving that gun, purchasing that gun, sells it to some other person within the same State as he is, does the interstate commerce character still obtain?

ATTORNEY GENERAL CUMMINGS. Well we would get that person, if he is a criminal, under the taxing provision.¹⁵⁶

This exchange shows the Justice Department's skepticism about the scope of federal power to infringe private, intrastate possession and transfer of firearms.¹⁵⁷

Similarly instructive is Cummings's answer to Representative James McClintic's question of whether registration of existing pistols (the initial proposal extended to handguns) might be added to the bill. Cummings responded, "*We were afraid of that, sir,*" and "*I am afraid it would be unconstitutional.*"¹⁵⁸ This concern would be repeated and illuminated by the subsequent testimony of Assistant U.S. Attorney General Joseph Keenan.

One of the most direct discussions of the linkage between the Second Amendment and limited federal power appears in an exchange between Cummings and Representative David Lewis of Maryland. This colloquy presents the individual right to arms as a function of the power to restrict it. Notice first, how Lewis describes the right to arms as a constraint on legislative power and, second, how Cummings presents the NFA as a legitimate exercise of the enumerated taxing power that avoids conflict with the Second Amendment.

156. *Id.* at 23–24. Hill's question and Cummings' response reflect the then-prevailing Supreme Court jurisprudence that commerce was buying and selling but not simply manufacturing. *See* *Hammer v. Dagenhart*, 247 U.S. 247, 272 (1918) ("The production of articles, intended for interstate commerce, is a matter of local regulation."). This approach to commerce would fuel the Court's 1935 decision in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 498 (1935) (concluding that once poultry shipped from other states reached the Schechter facility interstate commerce ended and subsequent regulation of the goods inside the state was a matter of state jurisdiction).

157. The practical effect of the taxing power was limited in that taxing might add expense to gun ownership, but could not prohibit it. Cummings made it clear that the theory of the roughly one-hundred percent tax on NFA guns was mainly to aid prosecution of gangsters who likely would not pay the tax or acquire an NFA license. *Hearings on H.R. 9066, supra* note 153, at 10, 12.

158. *Id.* at 13 (emphasis added).

MR. LEWIS. What I have in mind mostly, General, is this: The theory of individual rights that is involved. . . .

. . . .

MR. LEWIS. . . . Lawyer though I am, I have never quite understood how the laws of the various States have been reconciled with the provision in our Constitution denying the privilege to the legislature to take away the right to carry arms. Concealed-weapons law, of course, are familiar in the various States; there is a legal theory upon which we prohibit the carrying of weapons—the smaller weapons.

ATTORNEY GENERAL CUMMINGS. Of course we deal purely with concealable weapons. Machine guns, however, are not of that class. Do you have any doubt as to the power of the Government to deal with machine guns as they are transported in interstate commerce?

MR. LEWIS. I hope the courts will find no doubt on a subject like this, General; but I was curious to know how we escaped that provision [the Second Amendment] in the Constitution.

ATTORNEY GENERAL CUMMINGS. Oh, we do not attempt to escape it. We are dealing with another power, namely, the power of taxation, and of regulation under the interstate commerce clause. You see, if we made a statute absolutely forbidding any human being to have a machine gun, you might say there is some constitutional question involved. But when you say “We will tax the machine gun” and when you say that “the absence of a license showing payment of the tax has been made indicates that a crime has been perpetrated,” you are easily within the law.¹⁵⁹

The NFA hearings spanned five days over two months in the spring of 1934. Attorney General Cummings was the first witness at the opening of the hearings on April 16. Subsequently, Assistant Attorney General Keenan represented the Justice Department. Keenan’s testimony on May 16, 1934 is a strong affirmation of the linkage between limited power and keeping private arms. The first example is in an exchange with Representative Allen Treadway of Massachusetts. It shows Treadway’s sense that Congress should ban machine guns without any concern for constitutional authority and Keenan’s reminder that the federal government is one of limited, enumerated powers:

MR. TREADWAY. What benefit is there in allowing machine guns to be legally recognized at all? Why not exclude them from manufacture?

MR. KEENAN. *We have not the power to do that under the Constitution of the United States. Can the Congressman suggest under what theory we could prohibit the manufacture of machine guns?*

MR. TREADWAY. You could prohibit anybody from owning them.

MR. KEENAN. *I do not think we can prohibit anybody from owning them. I do not think that power resides in Congress.*¹⁶⁰

Keenan’s caution to Treadway is repeated in an exchange with Representative Claude Fuller of Arkansas and Representative Fred Vinson of Kentucky. Notice here how Keenan acknowledges the vast difference between

159. *Id.* at 18–19.

160. *Id.* at 100 (emphases added).

the powers of the federal government compared to the authority of states wielding general police powers:

MR. FULLER. What would you think of a law which prohibits the manufacture or sale of pistols to any person except the Government or an officer of the law?

MR. KEENAN. I think that would be an excellent provision *if the Congress had power to enact such legislation*. We think it would be a good thing. The way that can be attacked, naturally, is by some action of the State assemblies.

MR. FULLER. We could enact a law declaring it a felony to sell them.

MR. KEENAN. *I do not think that power resides in the Congress. The Federal Government has no police powers.*

MR. FULLER. It could require them to be registered and pay them full value and then destroy the weapons.

MR. KEENAN. *I do not think that power resides in Congress.*

MR. VINSON. It is because of that lack of power that you appear in support of the bill to do something indirectly through the taxing power which you cannot do directly under the police power?

MR. KEENAN. *I would rather answer that we are following the Harrison [Narcotics] Act, and the opinions of the Supreme Court.*¹⁶¹

Later in the hearing, Keenan emphasized the function of limited power in defining the scope of federal arms regulation by way of comparison. In an exchange with Representatives Vinson and Hill about the constitutionality of establishing a sweeping registration provision using the taxing power, Keenan emphasized that the U.S. Congress does not have the sort of broad power wielded by the British Parliament:

Referring again to the British law, they have no difficulty; they do not have the same constitutional limitations and constitutional questions that we have. . . . [T]he point I am trying to make is we are struggling with a difficult problem, with limited powers of the Federal Government.¹⁶²

The Committee also received testimony from Charles Imlay, representing the National Conference of Commissioners on Uniform State Laws. Imlay testified in favor of regulation within the scope of the commerce power, but his exchange with Representatives Treadway and Reed shows his agreement with the Justice Department about the limits of that power:

161. *Id.* at 101–02 (emphases added). The NFA was modeled on the 1914 Harrison Narcotics Tax Act, which used the federal taxing power to impose stringent controls on the possession or sale of cocaine and opiates. Harrison Narcotics Tax Act, Pub. L. No. 63-223, 38 Stat. 785 (1914). The Supreme Court upheld this use of the taxing power, by a 7–2 vote. *United States v. Doremus*, 249 U.S. 86 (1919); *United States v. Jin Fuey Moy*, 241 U.S. 394 (1916). Later, the 1970 Controlled Substances Act would be modeled on the Gun Control Act of 1968. *Compare* Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, with Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-153, 84 Stat. 1236. In *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937), the Court rejected the argument that the NFA tax was a sham because it was not intended to raise revenue. In recent decades, the Supreme Court has become more vigorous about policing the boundary between a tax and a criminal penalty. *See, e.g., Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 565–70 (2012); *Dep't of Revenue v. Kurth Ranch*, 511 U.S. 767, 784 (1994).

162. *Hearings on H.R. 9066, supra* note 153, at 134. *Compare id., with Sheehan, supra* note 19 (summarizing the very different context in which rights are understood in the United States versus the United Kingdom).

MR. IMLAY. I am in favor of State laws that forbid the manufacture of machine guns except for those few uses [need by police and guards in banks or government buildings].

MR. TREADWAY. *You cannot go as far as to say that we can sidestep the Constitution sufficiently to prevent their manufacture?*

MR. IMLAY. I think not. I think you can pass a bill which says you cannot ship machine guns across State lines. That is as far as the Mann Act goes.

....

....

MR. REED. . . . Do you know of any power other than the taxing power and the power to regulate interstate commerce by which we could prevent the manufacture of firearms?

MR. IMLAY. I know of no other power.¹⁶³

So here, solidly into the twentieth century, we find an important practical application of William Rawle's 1825 description of the right to arms as a function of limited federal power.¹⁶⁴ The 1934 NFA hearings proceeded on a view of federal power prevailing at the passage of the 1914 Harrison Narcotics Act, on which the NFA was modeled.¹⁶⁵ Franklin Roosevelt (FDR) had been in

163. *Hearings on H.R. 9066, supra* note 153, at 150 (emphasis added).

164. Similar worries surrounded the passage of the 1938 Federal Firearms Act (FFA), which had the modest goals of requiring that those engaged in the transfer of firearms in interstate commerce obtain a federal license. Federal Firearms Act, Pub. L. No. 75-785, 52 Stat. 1250 (1938). Sympathetic commentary from 1939 noted the continuing concern about the source of federal authority for regulation of private firearms under the NFA (1934) and the FFA (1938), and laments the limited authority of the federal government to regulate private firearms toward the end of crime control:

The transition of crime from a chiefly local problem to one of interstate and even international proportion has been taking place since the World War. This gradual change, necessarily resulting in a partial disability of local law enforcement, engendered the clamor for federal crime control. Accordingly, in 1933, the Senate directed the Committee on Commerce to investigate the *subjects of kidnapping, "racketeering,"* and other forms of crime, and to recommend the necessary remedial legislation. To the layman it might seem that the only authority required for passage of such laws would be the police power but actually, the United States Government is, in this respect, under the very burdensome restraint of the Tenth Amendment. The national government has no police power except that expressly or impliedly granted it by the Constitution.

The important powers through which Congress may try to curb crime are the power to tax, the power over interstate and foreign commerce, and the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." The power to tax has been responsible for the control of narcotics and machine guns [the latter a reference to the NFA], while the power over interstate and foreign commerce has resulted in the control over kidnapping, white slavery, stolen motor vehicles, and opium for smoking purposes.

Alfred M. Ascione, *The Federal Firearms Act*, 13 ST. JOHN'S L. REV. 437, 437-38 (1939) (emphasis added) (footnotes omitted) (quoting U.S. CONST. art. I, § 8, cl. 18). Alfred M. Ascione served as New York City Tax Commissioner, New York Municipal and Civil Court Judge, and, for more than two decades, as a New York Supreme Court Judge. Obituary, *Alfred M. Ascione, 73, Retired Judge, Is Dead*, N.Y. TIMES, Mar. 16, 1989, at B16.

165. The NFA still operates today as the primary source of regulation of machine guns, short barreled long guns, silencers, and other uncommon devices. See JOHNSON ET AL., *supra* note 101.

office for little more than a year, and the battle to implement his transformative New Deal was just ramping up.¹⁶⁶

Soon the Supreme Court's rebuff of early New Deal legislation in cases like *A.L.A. Schechter Poultry Corp. v. United States*¹⁶⁷ and *Carter v. Carter Coal Co.*¹⁶⁸ would fuel the brinkmanship of Roosevelt's 1937 court packing plan. Ultimately, what FDR criticized as the "horse and buggy"¹⁶⁹ view of the Commerce Clause would succumb to the "butterfly effect"¹⁷⁰ version that prevails today. By 1942, the Supreme Court would conclude that the Commerce Clause granted Congress power over the amount of wheat a farmer could grow for private consumption because the cumulative impact might affect the national price of wheat, which Congress had an interest in controlling.¹⁷¹

Still, decades more would pass before Congress would claim the sort of power over private firearms that is tacitly infused into the historians' supposedly eighteenth-century account of the Second Amendment. An early marker of that move is the Supreme Court's 1971 decision in *United States v. Bass*,¹⁷² which evaluated the asserted source of federal power for the Gun Control Act of 1968 (GCA).¹⁷³ The 1968 GCA was different from the NFA in that it applied to all modern firearms (around 350 million guns today, versus a few hundred thousand esoteric guns regulated under the NFA).¹⁷⁴

The 1968 Omnibus Crime Act included explicit restrictions that attempted to disarm a narrow class of citizens, including any felon who "receives, possesses, or transports [a firearm] in commerce or affecting commerce . . ."¹⁷⁵ The defendant in *Bass* was indeed a felon who had possessed a gun.¹⁷⁶ But "[t]here was no allegation in the indictment and no attempt by the prosecution

166. After winning the 1932 election, Roosevelt took office in March 1933.

167. 295 U.S. 495 (1935).

168. 298 U.S. 238 (1936) (invalidating the Bituminous Coal Conservation Act on the view that commerce was trade, so buying and selling of coal was commerce, but coal mining itself was not).

169. Press Release, President Franklin D. Roosevelt, Press Conference No. 209, at 320 (May 31, 1935), http://www.fdrlibrary.marist.edu/_resources/images/pc/0022.pdf (discussing *Schechter Poultry*).

170. See generally JOHN P. KRILL, JR., *FEDZILLA VS. THE CONSTITUTION: HOW A GOVERNMENT OF LIMITED POWER MUTATED INTO A MONSTER TRAMPLING THE CONSTITUTION* (2014). Jack Krill deploys this term to great effect in his critique of modern commerce clause jurisprudence. The butterfly effect is a theory that a very small change in a complex system can dramatically affect outcomes—for example, the flap of a butterfly's wings might, along with other variables, affect the trajectory of a storm. Krill shows how this sort of reasoning mirrors judicial validations of congressional action grounded on the commerce power.

171. *Wickard v. Filburn*, 317 U.S. 111 (1942) (marking a period of broad Supreme Court deference to federal regulation of matters that indirectly affect interstate commerce).

172. 404 U.S. 336 (1971), *aff'g* 434 F.2d 1296 (2d Cir. 1970).

173. Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1213 (codified as amended at 18 U.S.C. §§ 921–28 (2012)).

174. See JOHNSON ET AL., *supra* note 101, at 454–87.

175. *Bass*, 404 U.S. at 337 (internal quotation marks omitted) (quoting the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 1201, 82 Stat. 197). The firearms regulated under the GCA are the ordinary rifles shotguns and handguns that make up the vast majority of the roughly 350 million guns owned in the United States. JOHNSON ET AL., *supra* note 101, at 454–87. The NFA by comparison governs only a few hundred thousand relatively esoteric firearms. *Id.*

176. *Bass*, 404 U.S. at 337–38.

to show that either firearm had been possessed ‘in commerce or affecting commerce.’”¹⁷⁷ The government proceeded on the assumption that the statute “banned all possessions and receipts of firearms by convicted felons, and that no connection with interstate commerce had to be demonstrated in individual cases.”¹⁷⁸

The Second Circuit reversed Bass’s conviction, reasoning that the Government’s construction of the statute would raise substantial doubt about its constitutionality.¹⁷⁹ After a lengthy textual analysis, the Supreme Court upheld the Second Circuit, but on substantively different grounds. The Court’s first justification was the preference for resolving ambiguous criminal statutes in favor of leniency. The Court’s second rationale illuminates our subject here:

Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States. . . . [T]he broad construction urged by the Government renders traditionally local criminal conduct a matter for federal enforcement and would also involve a substantial extension of federal police resources. Absent proof of some interstate commerce nexus in each case, § 1202(a) dramatically intrudes upon traditional state criminal jurisdiction. . . . Absent a clearer statement of intention from Congress than is present here, we do not interpret § 1202(a) to reach the “mere possession” of firearms.¹⁸⁰

The Court’s analysis is couched in terms of federal and state division of power. But it is plain how limits on federal power impact claims of individuals against the exercise of federal authority. Recall the declarations by luminaries of the Founding Era that limited jurisdiction guaranteed individual rights against the federal government.¹⁸¹

The 1968 GCA, evaluated in *Bass*, would be amended over time to include a variety of new restrictions, including, in 1994, an ostensible ban on a narrow class of guns classified as “assault weapons.”¹⁸² Prior renditions of the 1968 GCA made it illegal for felons and other untrustworthy people to buy or possess guns. The 1994 Assault Weapon Ban was the first federal gun prohibition that applied to everyone.¹⁸³ Like most federal gun control laws, it was grounded on the commerce power, which by 1994 had been stretched to the point that there was no serious dispute about Congress’s authority to enact the ban.

So finally, in 1994, a full two centuries after the framing of the U.S. Constitution, we encounter the sort of assertion of federal power over private firearms that the historians’ creationist account implicitly injects into its

177. *Id.* at 338.

178. *Id.*

179. *Id.* at 349–50.

180. *Id.* (footnotes omitted) (citations omitted). The Court then emphasized that the Government could easily meet its evidentiary burden in these cases and offered a series of examples as guidance to prosecutors. *Id.* at 350.

181. *See supra* Part II.

182. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110102, 108 Stat. 1796, 1996–2010.

183. *See id.*

supposedly eighteenth-century analysis of Second Amendment. This modern vision of federal power is wildly at odds with the original constitutional design. And it goes without saying that the injection of this twentieth-century conception of federal power into “historical” assessments of the right to arms is deeply flawed historiography. This is a far-reaching mistake whose details and implications are examined in the next Subpart.

B. SOME REMINDERS ABOUT THE MODERN COMMERCE POWER AND AN ILLUMINATING SEARCH FOR POWER IN OTHER PLACES—WHAT ABOUT THE MILITIA POWER?

The previous Part criticized the historians’ creationist account of the Second Amendment for tacitly infusing twentieth-century views about federal power into a supposedly “historical” assessment of the eighteenth-century right to arms. This Part will demonstrate just how drastically that twentieth-century view of federal power departs from the eighteenth-century design. Subpart IV.B.1 summarizes the critical assessments of the modern commerce power. Subpart IV.B.2 examines the possibility of arms-regulation under the federal militia power, toward the end of illuminating the erroneous assumptions about federal power that undergird the creationist account of the Second Amendment.

1. *The Commerce Clause*

The commerce power is the foundation of the modern regulatory state. Article 1, Section 8 of the U.S. Constitution grants Congress the power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”¹⁸⁴ Writing it out this way suggests something less sweeping than the “commerce power” so glibly referenced as the source of federal authority today.

One gets a full flavor of the narrower view from James Madison’s critique of the Bank Bonus Bill. In March of 1817, Madison, now President Madison, declined to sign a congressional proposal to set aside surplus funds to build infrastructure “in order to facilitate, promote, and give security to internal commerce among the several states.”¹⁸⁵ Madison sent back the bill with the objection that:

The power to regulate commerce among the several states cannot include a power to construct roads and canals, and to improve navigation of watercourses, in order to facilitate, promote, and secure, such a commerce, without a latitude of construction departing from the ordinary import of the terms, strengthened by the known inconveniences [trade protectionism] which doubtless led to the grant of this remedial power to Congress.¹⁸⁶

184. U.S. CONST. art. 1, § 8, cl. 3.

185. 4 ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION, *supra* note 44, at 468.

186. *Id.* at 469. Madison goes on to explain that the bill also cannot be sustained by the power to “provide for the common defence and general welfare.” *Id.* (emphasis added) (internal quotation marks omitted) (quoting U.S. CONST. art. 1, § 8). This sort of construction said Madison would render the “special and careful

Madison went on to explain that the bill also could not be sustained by the power to “provide for the common defence and general welfare.”¹⁸⁷ That sort of construction, said Madison, would render the

special and careful enumeration of powers which follow the clause nugatory and improper. Such a view of the Constitution would have the effect of giving to Congress a general power or [sic] legislation, instead of the defined and limited power hitherto understood to belong to them.¹⁸⁸

For moderns steeped in the jurisprudence of the twenty-first-century regulatory state, this is a startlingly narrow construction of federal power. Expansive interpretation of the commerce power is the foundation for much of what we take for granted as the proper role of the federal government and it is the express authority for modern federal regulation of firearms.¹⁸⁹

There is virtually no disagreement that the modern conception of federal power is far broader than the original understanding. Originalists such as Robert Bork, Justice Antonin Scalia, Justice Clarence Thomas, Randy Barnett, and Richard Epstein argue that much of the modern regulatory state is highly suspect. Their conclusions vary from the claim that much of the regulation we take for granted is unconstitutional, to pragmatic capitulation to the power-expanding precedents of the New Deal.¹⁹⁰

Even staunch supporters of expansive federal power such as Bruce Ackerman acknowledge that the reading of the Commerce Clause on which it rests is at odds with the “Founder’s Constitution.” Ackerman has argued that this assertion of power was validated by an unofficial amendment to the Constitution that was implicit in the politics of the New Deal.¹⁹¹ Ackerman candidly acknowledges the vast differences between conceptions of federal power before and after the New Deal.

For our purposes, this shows again why the 1934 NFA hearings, just a year in to Roosevelt’s first term, would engage the right to arms as a function of limited power in the way that it was articulated by William Rawle in 1825. This underscores how the historians’ creationist account fails to match up eighteenth-century notions of rights and powers and rests on conceptions of federal power that did not emerge until the middle of the twentieth century.

Toward the same end as Ackerman, Jack Balkin argues that the commerce power has legitimately expanded over time.¹⁹² He argues that “fidelity to original meaning does not require fidelity to the original expected applications of text

enumeration of powers which follow the clause nugatory and improper. Such a view of the Constitution would have the effect of giving to Congress a general power or legislation, instead of the defined and limited one hitherto understood to belong to them.” *Id.*

187. *Id.* (internal quotation marks omitted) (quoting U.S. CONST. art. 1, § 8).

188. *Id.*

189. See *United States v. Bass*, 404 U.S. 336 (1971).

190. See, e.g., Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 3 (2010) (positioning Justices Scalia, Thomas, Barnett, and Epstein on a spectrum of views about the commerce power).

191. Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 457–59 (1989).

192. See generally Balkin, *supra* note 190.

and principle.”¹⁹³ But Balkin still acknowledges that “[t]he doctrinal structure that emerged by the mid-1940s was drastically different from the expectations of the founding generation.”¹⁹⁴ This is the doctrinal structure, born in the 1940s, that the historians’ creationist account must presume in order to make the claim that the individual right to arms is a scam.¹⁹⁵

2. *The Militia Power and the Historians’ Telling Concession*

With the commerce power ruled out, a search for some power under the early Constitution allowing the federal government to bar Americans from having private, defensive firearms might look to the Militia Clause. It is, after all, the one place within the enumerated powers where Congress is explicitly authorized to do something regarding citizens and firearms. The Militia Clause in Article 1, Section 8, allows Congress

[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress; . . .¹⁹⁶

From this, one might attempt to fashion an argument that the militia power includes some authority to restrict individual firearms for self-defense. Ironically one of the most forceful refutations of that argument is the Historians’ Brief in *District of Columbia v. Heller*. The Historians’ Brief is adamant that the Militia Clause and the debates that swirled around it were not concerned with the “private rights of individuals”:

Even when Anti-Federalists spoke of the militia being disarmed, their expressed concern was not the specter of federal confiscation or prohibition of private weapons, but rather that the national government might neglect to provide arms. They worried that militiamen might be subject to military justice, or marched to faraway locations, to their personal inconvenience and the insecurity of their own communities.¹⁹⁷

. . . .

193. *Id.* at 4.

194. *Id.* at 3. President Franklin Roosevelt also candidly acknowledged the original narrow parameters of the commerce power. Press Release, *supra* note 169, at 321 (discussing *Schechter Poultry*). President Roosevelt stated:

[T]here was quite a fear that each of the thirteen states could impose tariff barriers against each other and they ruled that out. They would not let the states impose tariff barriers but they were afraid that the lawyers of that day would find some other method by which a state could discriminate against its neighbor on one side or the other, . . . Therefore the Interstate Commerce clause was put into the Constitution with the general objective of preventing discrimination by one of these Sovereign States against another Sovereign State.

Id.

195. See Cornell, *supra* note 133, at 740.

196. U.S. CONST. art. 1, § 8, cl. 15.

197. Historians’ Brief, *supra* note 20, at 21–22.

. . . Outside the question of whether militia members would be armed at national, state, or personal expense, there was no credible basis upon which the national government could regulate possession of firearms.¹⁹⁸

The historians' admission that Congress had no authority over private firearms lays bare a core analytical mistake. *How is it that the historians can admit the lack of federal power in the eighteenth century to regulate possession of firearms and still present a "historical" analysis that says the Second Amendment presents no barrier to federal legislation banning handgun possession?* The answer is that the historians tacitly inject a twentieth-century conception of federal power into a supposedly historical analysis of the right to arms as conceived in the eighteenth century.

Fidelity to context demands that historical assessments of constitutional rights be measured against conceptions of federal power from the same period.¹⁹⁹ In this, the historians utterly fail. They are so focused on advancing

198. Historians' Brief, *supra* note 20, at 31. Addressing the worry that the new government would become too powerful and infringe on state prerogatives, Hamilton's summary in *Federalist 17* of federal and state jurisdiction and the inherent subjects of national ambition is broadly consistent with the admission in the Historians' Brief that the federal government had no authority to prohibit possession of firearms for individual self-defense. Hamilton explained that the new government would be concerned with national matters like commerce (meaning trade), finance, negotiation, and war. THE FEDERALIST NO. 17, at 118–20 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The minutia of day-to-day regulation of the "personal interests" of individuals would be left with the states and in any case held no interest for ambitious usurpers. *Id.* at 120.

The regulation of the mere domestic police of a State appears to me to hold out slender allurements to ambition. Commerce, finance, negotiation, and war seem to comprehend all the objects which have charms for minds governed by that passion; and all the powers necessary to those objects ought in the first instance to be lodged in the national depository. The administration of private justice between the citizens of the same State, the supervision of agriculture and of other concerns of a similar nature, all those things, in short, which are proper to be provided for by local legislation, can never be desirable cares of a general jurisdiction. It is therefore improbable that there should exist a disposition in the federal councils to usurp the powers with which they are connected; because the attempt to exercise those powers would be as troublesome as it would be nugatory

. . . .
. . . .
. . . .
. . . .
. . . .

There is one transcendent advantage belonging to the province of the State governments, . . . I mean the ordinary administration of criminal and civil justice. This, of all others, is the most powerful, most universal, and most attractive source of popular obedience and attachment. It is this which, being the immediate and visible guardian of life and property, having its benefits and its terrors in constant activity before the public eye, regulating all those personal interests and familiar concerns to which the sensibility of individuals is more immediately awake, contributes more than any other circumstance to impressing upon the minds of the people affection, esteem, and reverence towards the government. This great cement of society . . . [would render states] at all times a complete counterpoise, and, not unfrequently, dangerous rivals to the power of the Union.

Id. at 118–19, 120.

199. Recall here Madison's explanation that limiting powers and declaring rights were different paths to the same thing. THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON, *supra* note 64, at 156–57.

their creationist view of the right to arms (that the Bill of Rights *created* rights rather than affirmed rights that were already protected by the scheme of limited enumerated powers) that they unwittingly admit the absence of federal power over private defensive firearms. To keep their argument afloat, the historians are then forced to pair their eighteenth-century assessment of rights with a mid-twentieth-century view of federal power.

The Historians' Brief repeats this mistake in a separate effort to discount Ratification-era statements that undoubtedly reference individual arms unrelated to the militia. The historians hope to show that few people were worried about the danger of the federal government confiscating private firearms and, thus, it is a mistake to say that protection of individual firearms was on the agenda for creating rights, and therefore the Second Amendment did not create an individual right. But in the effort to sustain this narrative, the historians just underscore the linkage between limited power and the right to arms.

The context is Noah Webster's response to proposals during the Pennsylvania Ratifying Convention for the addition of a right to arms amendment that was undoubtedly individual in nature. Webster framed his objection with a question. Why not add a further clause, he chided. Why not declare "[t]hat Congress shall never restrain any inhabitant of America from eating and drinking, *at seasonable times*, or prevent his lying on his *left side*, in a long winter's night, or even on his back, when he is fatigued by lying on his *right*."²⁰⁰

The Historians' Brief diminishes Webster's statement as "witheringly sarcastic."²⁰¹ But a more serious critique, incorporating the linkage between individual rights and limited power, shows that Webster was arguing that any assertion that the new federal government could restrict Americans from bearing "arms for defense of themselves"²⁰² was superfluous and absurd—on the order of worrying about the federal government regulating private choices about eating, drinking, sleeping, and myriad other individual prerogatives that were protected against federal interference by the scheme of limited, enumerated powers.²⁰³

200. Historians' Brief, *supra* note 20, at 24 (internal quotation marks omitted) (quoting 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 199 (John Kaminski & Gaspare Saladino eds., 1976)).

201. *Id.*

202. *Id.* at 23.

203. Another analysis by a professional historian cited in Justice Breyer's *McDonald* dissent for the proposition that *Heller* is fundamentally flawed is Paul Finkelman's *It Really Was About a Well Regulated Militia*. Finkelman, *supra* note 30; see also *McDonald v. City of Chicago*, 561 U.S. 742, 914–17 (2010) (Breyer, J., dissenting). Finkelman's article is useful to reference here for two reasons. First, it is another illustration of the flawed creationist view. See Finkelman, *supra* note 30, at 269–70. Second, because it facilitates deeper examination of sources of federal power to regulate firearms. See *id.* at 280–81.

On the first point, Finkelman's analysis is a classic example of the historians' positivist mistake as demonstrated initially by his description of the rights proposals from the ratifying conventions. Finkelman divides these proposals into two distinct categories of amendments "designed to reduce the power of the national government" and those "designed to protect civil liberties." *Id.* at 269–70. This false dichotomy between limiting

The view that the federal government had no power to restrict individual arms for self-defense, suggested by Webster in 1788, is the core of William Rawle's 1825 affirmation of the individual right to arms, and the primary reason that the first federal gun control law, the National Firearms Act of 1934, was framed as a tax rather than a prohibition.²⁰⁴

power and liberty protection demonstrates a failure to understand the linkage between limited power and individual rights that was pervasive during the Framing Era.

At one stage Finkelman's critique actually acknowledges the limited power arguments made by Hamilton in *Federalist 84* and Madison at the Virginia Convention. *Id.* at 272. He even notes Madison's caution that the structure of the Constitution remains the same—it was that structure that protected rights through limited power—but resists its implications for understanding individual rights. *Id.* But Finkelman proceeds as if the ratification of the Bill of Rights eliminated the rights-protecting function of limited power. This ignores the ratification cautions and the entire reason for the Ninth Amendment. *Id.*

On the second point (of federal power to regulate firearms), Finkelman makes an important contribution with sweeping speculation about other sources of federal power over individual firearms. The Historians' Brief and much of the scholarship that fuels it asserts that the original Constitution contained no hint of federal power over the possession or use of private arms for self-defense. Historians' Brief, *supra* note 20, at 8. Nonetheless, Finkelman says that there is a "strong logic" of national government power to engage in some sort of firearms regulation. Finkelman, *supra* note 30, at 280. In support of this proposition, he cites the power to punish piracy and felonies committed on the high seas and offenses against the law of nations, the power to suppress insurrections and repel invasions, the power to suppress the African Slave Trade after January 1, 1880, the power to regulate commerce, and the power under Article IV, Section 4, to guarantee to every state a republican form of government and "to 'protect' each state from 'Invasion' and 'domestic Violence.'" *Id.* at 280–81 (quoting U.S. CONST. art. IV, § 4).

Finkelman's list is an aggressive and creative rendering of possible sources of federal authority for firearms regulation. It is difficult to see how any of these provisions grant any greater power over firearms than is more explicitly granted or implied by the Militia Clause of Article I, Section 8. And as the Historians' Brief forcefully asserts, there was no hint during the Framing debates that this authority would restrict the rights of individuals to possess and use firearms for private self-defense. *See* Historians' Brief, *supra* note 20, at 8. As we have seen, as late as 1934, the consensus view was that the federal government had no such power over individual arms possession, even under the Commerce Clause. As the Department of Justice recounted in the NFA hearings, there was no sense that any other provision of the Constitution provided such power. *See Hearings on H.R. 9066*, *supra* note 153. Not until the jurisprudence of the New Deal had advanced and matured could such a claim be sustained.

204. Another limited power base for arms regulation is suggested by the temporary restrictions and rationing of firearms and ammunition grounded on the war power, during World War II. The first rationing for ammunition was the War Production Board's Limitation Order L-286, 8 Fed. Reg. 5,714 (May 4, 1943). For law enforcement officers, the quarterly quota was 20 centerfire pistol rounds, with no more than 10 in .38 special caliber. *Id.* at 5,715. Ranchers were allowed 140 rifle rounds, and 25 shotgun shells. *Id.* Even rations required written certification by the purchaser that his current stock is inadequate, and that their ammunition would only be used for the authorized purposes. *Id.* at 5,714–15. The U.S. military soon accumulated "astronomical" reserves of ammunition, more than it could store. JOINT MUNITIONS COMMAND, HISTORY OF THE AMMUNITION INDUSTRIAL BASE 17 (2010). Ration allowances for civilians were increased somewhat, and small quantiles were allowed for hunters. *See* 8 Fed. Reg. 11,800 (Aug. 26, 1943); 8 Fed. Reg. 15,488 (Nov. 12, 1943); 9 Fed. Reg. 10,561 (Aug. 30, 1944). Japan surrendered in August 1945, and all ammunition limits were removed in November of that year.

World War II also prompted passage of the Property Requisition Act of 1941., Pub. L. No. 77-274, 55 Stat. 742. The Act gave the President sweeping powers to requisition privately owned "machinery, tools, or materials" that were immediately needed for the national defense, in return for compensation to be paid to the owners. *Id.* The Act also stated that it was not to be construed "to impair or infringe in any manner the right of any individual to keep and bear arms." *Id.* It specifically prohibited the President from "requisitioning or requir[ing] the registration of any firearms [otherwise lawfully] possessed by any individual for his personal protection or sport." *Id.*; *see also* JOHNSON ET AL., *supra* note 101, at 377–78; Stephen P. Halbrook, *Congress*

V. INTEGRATING LIMITED POWER INTO RIGHT TO ARMS JURISPRUDENCE: A KEENER LENS ON *HELLER*

Integrating limited power into the understanding of the eighteenth-century right to arms provides a keener lens for evaluating *Heller* and the competing visions of the Second Amendment reflected by the majority and dissenting opinions that fuel the continuing disagreement over the legitimacy of the constitutional right to arms.

Critics charge that *Heller* is poor originalism.²⁰⁵ Some of the most pointed criticisms have focused on *Heller*'s validation of most modern federal gun regulation as presumptively lawful without even a hint of historical analysis. Justice Breyer's dissent chided, "Why these?"²⁰⁶ Some cynics have dubbed the presumptively lawful language the "Kennedy paragraph," speculating that it was a blunt capitulation necessary to gain Justice Kennedy's vote.

The limited-power critique allows for a less cynical explanation. It helps us understand the "Kennedy paragraph" as a response to the challenge of conducting an originalist assessment of rights against a backdrop of federal power that has shifted dramatically over time. *Heller* meets this challenge in two steps.

On the question of first principles, *Heller* recognizes a preexisting individual right to arms for self-defense that is not constrained by the codifying language.²⁰⁷ Then, in blunt capitulation to the modern reality of expansive federal power, the decision declares that the bulk of existing federal gun regulations—rooted in the Commerce Clause—should be presumed valid.²⁰⁸ Thus, in a very practical way, *Heller* deploys originalism on the core right to arms question, but still accommodates the inescapable fact that notions of federal power on which modern federal gun control rests have expanded dramatically since the eighteenth century.²⁰⁹

Integrating limited power also sharpens analysis of the theoretical alternative to the individual right to arms affirmed in *Heller*—the "individual militia right" advanced by the *Heller* dissenters, and elaborated in Justice Stevens's book and speeches.²¹⁰ That analysis first requires a fuller description of the individual militia right, which is provided in Subpart V.A below.

Interprets the Second Amendment: Declarations by a Co-Equal Branch on the Individual Right to Keep and Bear Arms, 62 TENN. L. REV. 597, 599 (1995).

205. See, e.g., Cornell & DeDino, *supra* note 117.

206. *District of Columbia v. Heller*, 554 U.S. 570, 721 (2008) (Breyer, J., dissenting).

207. *Id.* at 598–602.

208. *Id.* at 626–27.

209. See *supra* Subpart III.B.

210. One of the most ardent advocates of the individual militia right view of the Second Amendment is Patrick Charles. See *McDonald v. City of Chicago*, 561 U.S. 742, 914–17 (2010) (Breyer, J., dissenting) (citing CHARLES, *supra* note 30) (criticizing the unsound historiography of *Heller*). Charles's approach is wholly creationist in nature. Charles's book incorporates views articulated in his earlier work which I critiqued in Nicholas J. Johnson, *Rights Versus Duties, History Department Lawyering, and the Incoherence of Justice Stevens's Heller Dissent*, 39 FORDHAM URB. L.J. 1503, 1513–18 (2012).

A. THE *HELLER* DISSIDENTS' "INDIVIDUAL MILITIA RIGHT"

The primary effort of the dissenters in *Heller* and *McDonald* was to reject the individual rights interpretation. But a credible theory of the Second Amendment also must give positive content to the Amendment; it must explain what the Second Amendment *does* mean. Casual skeptics of the individual right to arms might still hew to the generally abandoned "states' rights" or "collective rights" renditions of the empty Second Amendment,²¹¹ perhaps not even appreciating that the *Heller* dissenters replaced it with a different reading that also would reject most individual rights claims. The linguistic difficulty of transforming a right of the "people" into a right of the "states" was an obvious problem with the states' rights view and seemed even more implausible after the Court's decision in *United States v. Verdugo-Urquidez*,²¹² where the Court concluded that "people," as used in the Bill of Rights (including the Second Amendment), was a term of art in the Constitution referring to "a class of persons who are part of a national community."²¹³ This worry spurred the development of the individual militia right interpretation.

Stevens's *Heller* dissent articulates the individual militia right by first conceding that the Second Amendment protects an individual right.²¹⁴ Then he frames the right as a narrow prerogative to keep and bear arms "for certain military purposes" while serving in the militia.²¹⁵ This theory has obvious utility in dismissing claims to a right to arms for individual self-defense. But it is more instructive to try imagining it operating as a substantive constitutional protection. What exactly does the "right to keep and bear arms for certain military purposes" mean?

The effort to extract anything concrete from the individual militia right renders absurdities. Do you have a "right to keep and bear arms for certain military purposes" even where the government rejects you? Once you are engaged in military service, are you entitled to bear arms, even where you are ordered to peel potatoes? Are you entitled to bear the arm of your choice, even where you are ordered to keep or bear something else or nothing? Can you demand that the government call out, muster, and drill the militia even where the authorities have decided against it and prevail in a lawsuit to enforce your demand?

The individual militia right is sufficiently bizarre that trying to imagine its content prompts a series of facetious questions. Even more telling is the absence of discussion of the "individual militia right"²¹⁶ in a rare, high-profile episode

211. I used the term "empty" Second Amendment in Johnson, *supra* note 210, to describe the multiple different theories that have attempted to empty the Second Amendment of modern content. *Id.* at 1512. The individual militia right is the latest in line, preceded by five earlier variations. *Id.*

212. 494 U.S. 259 (1990).

213. *Id.* at 265.

214. *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008) (Stevens, J., dissenting).

215. *Id.*

216. The individual militia right view also has been called the "civic rights" view of the Second Amendment, which James Lindgren critiques this way:

where one would expect it to appear. The context is Woodrow Wilson's 1917 rebuff of ex-president Theodore Roosevelt's effort to form a volunteer expeditionary force to fight in World War I.

Roosevelt deployed every resource available to him, lobbying Congress, military officers, and foreign ambassadors to intercede with Wilson on his behalf. Roosevelt convinced George Clemenceau, the rising Prime Minister of France, to publish an open letter urging President Wilson to permit Roosevelt to lead a volunteer division in France.²¹⁷ He even persuaded Senators Henry Cabot Lodge and Warren Harding to add an amendment to the 1917 Army Conscription bill authorizing the participation of four divisions of volunteers who were not subject to conscription.²¹⁸

Roosevelt plainly saw service as a matter of government discretion. He wired the War Department to "earnestly ask permission to be allowed to raise a division for immediate service."²¹⁹ Roosevelt was more familiar than most with the surrounding legal issues. As President he had signed the Militia Act of 1903, which, among other things, defined the "unorganized militia" as all able-bodied men between eighteen and forty-five.²²⁰ Secretary of War Newton Baker

[W]ith essentially no original evidence to support their view—and some evidence directly contrary to it—the states' rights academics came up with an entirely new view, which they termed the "civic rights" view. According to this view, the right to keep and bear arms was an individual right, but it could be exercised only with the permission of the state in a militia. This civic rights theory had the advantage of not being directly contradicted by most of the available evidence. Since the civic rights camp was willing to admit that the right was an individual one at bottom, then it could argue that this individual right could be restricted by the state to only those citizens acting as part of a state militia. Under this view, there was no individual right to own a gun outside of service in a militia.

The problem with this view was that, again, there was no contemporary evidence from the Framers' era to support it, and, indeed, no one had ever heard of the civic rights view for the first two centuries of the Second Amendment's existence. The first use of the term "civic right" to describe the Second Amendment in American law reviews appeared in a 2002 article by the historian Saul Cornell. It would be strange if most of the Framers held the civic rights view of the Second Amendment, but kept it a secret from everyone, including the other Framers.

James Lindgren, *Foreword: The Past and Future of Guns*, 104 J. CRIM. L. & CRIMINOLOGY 705, 707–08 (2015) (emphasis added) (footnotes omitted).

217. EDMUND MORRIS, COLONEL ROOSEVELT 495–96 (2010).

218. *Id.* at 483–96. Edmund Morris reports that "the Harding amendment was . . . so hot an issue it had to be settled by a House-Senate conference. The principle argument against letting Roosevelt have his division was that crackpot militiamen across the country might organize and demand that Wilson send them abroad too." *Id.* at 491. The Conscription Bill ultimately passed with the Harding Amendment included. *Id.* at 493–94. Thousands of volunteer applications poured in to Roosevelt from men who were too old or otherwise outside the parameters of the Conscription Act, but ultimately everyone acknowledged that the final decision rested with President Wilson. *Id.* at 494. On May 18, 1917, President Wilson signed the Conscription Bill into law. *Id.* In an accompanying statement he thanked Roosevelt for the offer of service, and then rejected it. *Id.* Wilson's private assessment was that Roosevelt and his volunteers were "too old to render efficient service, and in addition to that fact, he as well as others have shown intolerance of discipline." *Id.* at 495 (internal quotation marks omitted). Nothing in the congressional debates on the 1917 Conscription Bill suggests that anyone thought that there was a constitutional right to serve. 55 CONG. REC. 1368 (1917).

219. PATRICIA O'TOOLE, WHEN TRUMPETS CALL: THEODORE ROOSEVELT AFTER THE WHITE HOUSE 306 (2005).

220. Militia Act of 1903, Pub. L. No. 57-33, 32 Stat. 775.

reminded Roosevelt of the provisions of the 1903 law as the obese, monocular, fifty-seven-year-old persisted in his quest to serve.²²¹

Rebuffed by Secretary Baker, Roosevelt prevailed personally on President Wilson in April 1917. Roosevelt promised that he would recruit volunteers only from men who were exempt from the draft.²²² A War Department memorandum warned that Roosevelt's volunteer division would attract romantics who did not fully understand the hazards ahead.²²³ William Howard Taft (Roosevelt's successor in the White House and future Chief Justice) cautioned Secretary Baker that "hard as it was to 'tear away from the traditions of volunteering handed down to us from the various wars,' . . . the volunteer system had resulted in needless waste and slaughter."²²⁴

Some worried that Roosevelt aimed to revive his war hero status in preparation for a run at the presidency in 1920.²²⁵ In debate on the conscription bill, one senator dismissed any political motivation by Roosevelt, noting that "[t]here is no politics in *begging* to serve one's country."²²⁶ The characterization is apt—Roosevelt came hat in hand and pleaded with everyone who might help him. Finally acknowledging defeat, he lamented, "This is a very exclusive war . . . and I have been blackballed by the committee on admissions."²²⁷

If there was any semblance of a constitutional right to engage in military service—some vague "individual militia right" of the type that Justice Stevens and the historians offer to explain away the Second Amendment—Theodore Roosevelt's attempt to serve in World War I was one of the keenest opportunities in history for it to appear.²²⁸ The fact that neither Roosevelt nor anyone else involved ever mentioned the Second Amendment or the "individual militia right" is fully consistent with James Lindgren's assessment that "no one had ever heard of the civic rights view for the first two centuries of the Second Amendment's existence."²²⁹

221. O'TOOLE, *supra* note 219, at 306, 319. Roosevelt also had proposed raising a volunteer division to fight in the brief hostilities with Mexico in 1916 and candidly acknowledged that his participation would require legislation raising the age limit allowing him to serve. *Id.* at 300.

222. *Id.* at 311.

223. *Id.*

224. *Id.* at 318.

225. *Id.* at 312, 318.

226. *Id.* at 313 (emphasis added) (internal quotation marks omitted).

227. *Id.* (internal quotation marks omitted). Roosevelt's valet James Amos reportedly had never seen him so despondent. MORRIS, *supra* note 217, at 494. "He was truly in a black mood." *Id.* (internal quotation marks omitted).

228. *Id.* at 483–96.

229. See Lindgren, *supra* note 216, at 708.

B. THE LIMITED POWER CRITIQUE REVEALS THE DEEP FLAWS IN THE INDIVIDUAL MILITIA RIGHT THEORY

Perhaps the strongest indictment of the individual militia right is the difficulty of imagining it in operation.²³⁰ The *Heller* majority captures the problem this way: “[I]f petitioners are correct, the Second Amendment protects citizens’ right to use a gun in an organization from which Congress has plenary authority to exclude them.”²³¹ In another permutation, Justice Scalia chides that the formulation is “worthy of the Mad Hatter.”²³²

Understanding the Second Amendment as a function of limited power illuminates the deep flaws of the individual militia right theory in two ways. First, it shows just how difficult it is to fashion an individual right in a space where federal power is plenary. The fundamental weakness of the individual militia right is that it tries to fashion rights in a space where federal power to impose duties on citizens fully occupies the field. The militia power grants Congress broad authority to impose a range of *duties* on American citizens. Militiamen may be required to possess certain arms and accouterments. They may be required to enroll, muster, and drill. Militiamen may be required to take commands, submit to military discipline and march out to battle. They may be required to risk and even sacrifice their lives in service of the nation. In all these ways, militiamen must perform civic duties imposed by the government and can be subject to penalties if they refuse. However, it is tremendously difficult to scratch any sort of individual right out of these various duties.

A focus on the power side of the right to arms equation also provides a similar but more abstract demonstration of the problem. The militia of course is a place where there is an explicit grant of power related to citizens and firearms. Plenary congressional power over the militia in Article 1, Section 8, cuts sharply against an individual militia right.

Justice Stevens’s *Heller* dissent turns the Constitution’s limited power structure on its head. He purports to frame an individual right in a space where plenary federal power consumes any notion of private rights (the militia) and denies any right at all in the sphere of personal self-defense where, even the historians whose work he invokes acknowledge, the original Constitution created no federal power to act.

Second graders learn to test the accuracy of their arithmetic by doing the corresponding addition to verify that their subtraction is accurate. The linkage of rights and powers creates the same dynamic. The individual militia right theory fails because it does not survive the corresponding power analysis. The type of right that Stevens theorizes (an individual right to arms while serving in the militia) evaporates under the Constitution’s explicit grant of plenary power

230. Consider for contrast, the process of envisioning other enumerated constitutional rights. One can easily and immediately envision the core circumstances that trigger the other provisions of the Bill of Rights. And that is equally true for the *Heller* majority’s view of the Second Amendment.

231. *District of Columbia v. Heller*, 554 U.S. 570, 600 (2008).

232. *Id.* at 589.

over the militia to the federal government. That explicit grant of power, against which an individual right just cannot survive, fully earns Scalia's rebuke that the individual militia right is an absurdity "worthy of the Mad Hatter."

Now consider the power side of the individual rights view of the Second Amendment. In the context of our original constitutional structure, the individual right thrived in a space that is comparatively unencumbered by federal authority to restrict private arms.

CONCLUSION

The historians' creationist account is a deeply-flawed and dubious rebuttal to the individual rights view of the Second Amendment. The creationist account has turned the microscope on whether the Second Amendment is an affirmative grant of individual rights. But that account ignores much of what is important in discerning the scope of rights under the original Constitution. How can critics who ardently press the importance of context willfully ignore the rights-protecting function of limited power under the original Constitution? How can they justify injecting a mid-twentieth-century view of federal power into their supposedly historical assessment of the Second Amendment?

The broader implications of the limited power theme on other possible rights remain to be seen. The Second Amendment presents a peculiar opportunity to deploy limited power to illuminate a right whose fundamental original meaning is contested—the equivalent of contesting whether individuals or only government can own or operate printing presses. No other provision of the Bill of Rights has been subject to similar controversy about its core original meaning, so it is unclear how the template here would transfer to other contexts, and how precisely it should be reconciled with other aspects of constitutional jurisprudence.²³³ One hopes that those who care about rights will seek to

233. One obvious question that demands separate analysis is: how does this all fit with the Fourteenth Amendment? A short answer actually appears in one of the historical critiques cited by Justice Breyer in *McDonald* for the position that *Heller* is flawed. See *McDonald v. City of Chicago*, 561 U.S. 742, 914–17 (2010) (Breyer, J., dissenting) (citing Konig, *supra* note 30). Konig embraces the individual militia right as a matter of eighteenth-century interpretation agreeing that "[t]he protection of the right to bear arms in the militia . . . takes on the civic model argued by Saul Cornell and other historians." Konig, *supra* note 30, at 1322. Konig's innovation is that the view and meaning of the right to arms changed over time, to become individual in nature. *Id.* at 1298. The starkest demonstration of this is that by the time of the Fourteenth Amendment the right to arms was considered to be decidedly individual in character. *Id.* at 1337. According to Konig, this undercuts originalist claims that the Second Amendment protects an individual right. He summarizes the point this way: "The need felt by nineteenth-century Americans to articulate what that right had become—an individual right—proves what that right had not been when ratified in 1791." *Id.* at 1338.

Konig's analysis of the right to arms under the original Constitution falls to the same criticism that afflicts the other professional historians' accounts. It is entirely creationist in nature and ignores the rights-protecting function of limited power that William Rawle showed was core to understanding the Second Amendment in context. Note how even Konig's summary of the eighteenth-century right was one of creation of something "ratified in 1791." The body of the article is decidedly creationist in nature, with an exacting focus on the various influences that should impact our assessment of what was created by the words of the Second Amendment in 1791. Konig offers rich context for interpreting those words. But he fails even to mention the

integrate the rights-protecting legacy of limited power into modern constitutionalism.

fact that the federal government was designed to have limited powers and that this limitation was widely considered to be the best protection of individual rights both before and after the ratification of the Bill of Rights.

Konig's analysis does however engage one of the jurisprudential questions that is raised by the claims of this Article—if limited power is crucial to understanding the right to arms under the original Constitution, how does that theme fit with the application of the right to arms to the states? The answer as Konig intimates is that the Fourteenth Amendment was a decidedly positivist act. *Id.* at 1337. Unlike the rights secured by the constraints of limited federal power in 1787, constitutional rights enforced against the states by the Fourteenth Amendment were not a function of some inherent limitations on the authority of the states. Rather, those rights were created by an affirmative grant and a corresponding shift of existing power away from state governments. We can disagree about the precise details. But certainly one powerful account is that the individual right to arms, which Konig would agree was individual in nature by 1870, was established as a right against states pursuant to the Privileges and Immunities Clause. *See generally McDonald*, 561 U.S. at 838–50 (Thomas, J., concurring in part and concurring in the judgment). Notably the effort in *McDonald* to revive the Privileges and Immunities Clause of the Fourteenth Amendment.