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## A Well Regulated Right: The Early American Origins of Gun Control

### Cover Page Footnote

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# HISTORICAL PERSPECTIVES

## A WELL REGULATED RIGHT: THE EARLY AMERICAN ORIGINS OF GUN CONTROL

Saul Cornell\*  
Nathan DeDino\*\*

### INTRODUCTION

It is impossible to discuss gun policy in contemporary America without stumbling over the question of what the Second Amendment means.<sup>1</sup> Few issues in American constitutional law are as bitterly divisive as the meaning of the right to keep and bear arms.<sup>2</sup> Two opposing historical claims have dominated modern Second Amendment debate.<sup>3</sup> Supporters of more robust gun regulation have generally cast the Amendment as a collective right.<sup>4</sup> According to this

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1. Franklin E. Zimring, *Continuity and Change in the American Gun Debate*, in *Evaluating Gun Policy: Effects on Crime and Violence* 441, 450 (Jens Ludwig & Philip J. Cook eds., 2003).

2. Andrew Jay McClurg, *The Rhetoric of Gun Control*, 42 Am. U. L. Rev. 53, 57 (1992); Robert Weisberg, *Values, Violence, and the Second Amendment: American Character, Constitutionalism, and Crime*, 39 Hous. L. Rev. 1, 3 (2002).

3. Generally, the debate has centered around the individual rights versus the collective rights viewpoints. See *infra* notes 4-9. For an introduction to Second Amendment legal scholarship, see *Gun Control and the Constitution: Sources and Explorations on the Second Amendment* (Robert J. Cottrol ed., 1994) [hereinafter *Gun Control and the Constitution*]. For historical writing on the topic, see *Whose Right to Bear Arms Did the Second Amendment Protect?* (Saul Cornell ed., 2000) [hereinafter *Whose Right to Bear Arms*].

4. *Whose Right to Bear Arms*, *supra* note 3.

view, the meaning of the Amendment is shaped by the Preamble affirming the importance of a well regulated militia.<sup>5</sup> Collective rights theorists argue that the Second Amendment makes it possible for the states to preserve their well regulated militias against the threat of disarmament by the federal government.<sup>6</sup> Gun rights advocates have placed greater stress on the latter part of the Amendment, which asserts the right of the people to keep and bear arms.<sup>7</sup> For supporters of this individual rights view, the right to bear arms is comparable to freedom of the press, and the Constitution provides the same level of protection for guns as it does for words.<sup>8</sup> For the most ardent supporters of this view, the Constitution protects the right of individuals to have firearms for self-protection, hunting, or to wage revolution against the government itself.<sup>9</sup>

Many, but certainly not all, advocates of gun rights support the notion that courts ought to interpret the Constitution in terms of the original understanding of the founders.<sup>10</sup> Originalism, however, only accounts for part of the role that history plays in this controversy. Even if one were able to banish originalist arguments from this

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5. On the ambiguous role of preambles in constitutional interpretation, see Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637, 644-45 (1989) (discussing the debates arising from different interpretations of the purpose underlying the text). For a critique of the use of preambles in modern Second Amendment scholarship, see Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. Rev. 793 (1998). Volokh's claims have been challenged as ahistorical by David Konig, who notes that constitutional and legal treatises from the Founding Era did treat proemes and preambles as establishing the correct context for reading a constitutional or legal text. See David Thomas Konig, *The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of "the Right of the People to Keep and Bear Arms,"* 22 Law & Hist. Rev. 119, 154 (2004).

6. Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 Chi.-Kent L. Rev. 3, 4 (2000); Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 Chi.-Kent L. Rev. 291, 293-94 (2000).

7. On the individual rights view, see Levinson, *supra* note 5. See also L.A. Powe, Jr., *Guns, Words, and Constitutional Interpretation*, 38 Wm. & Mary L. Rev. 1311 (1997); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 Tenn. L. Rev. 461 (1995); cf. William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 Duke L.J. 1236, 1243, 1254 (1994) (noting that the right to bear arms may be individual, but it is not absolute).

8. See Powe, *supra* note 7, at 1400-01.

9. See Reynolds, *supra* note 7, at 469, 480, 504-07.

10. For a discussion of originalism, see Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101 (2001) [hereinafter Barnett, *The Original Meaning*], and Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 Loy. L. Rev. 611 (1999) [hereinafter Barnett, *An Originalism for Nonoriginalists*]. Barnett critiques the view of the Second Amendment as militia-centric. See Randy E. Barnett, *The Relevance of the Framers' Intent*, 19 Harv. J.L. & Pub. Pol'y 403, 410 (1996) [hereinafter Barnett, *The Relevance of the Framers' Intent*]; see also Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 Emory L.J. 1139 (1996). For critiques of Second Amendment originalism, see Daniel A. Farber, *Disarmed By Time: The Second Amendment and the Failure of Originalism*, 76 Chi.-Kent L. Rev. 167 (2000), and Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 Chi.-Kent L. Rev. 103 (2000).

debate, history would continue to influence the way Americans understand this issue. To find evidence of the appeal of history, one needs only to search the topic of the Second Amendment on the Internet.<sup>11</sup>

Popular gun rights rhetoric is also deeply originalist in character. This aspect of popular Second Amendment discourse was captured in an amusing episode of America's favorite dysfunctional family sitcom—*The Simpsons*.<sup>12</sup> Indeed, the Second Amendment is probably the only topic in American constitutional law to be featured prominently in this venue. In a remarkable exchange between Homer Simpson and his daughter Lisa, the conflict between the individual and collective rights views of the Amendment was bluntly stated in comic terms:<sup>13</sup>

Homer: "But I have to have a gun! It's in the Constitution!"

Lisa: "Dad! The Second Amendment is just a remnant from revolutionary days. It has no meaning today!"

Homer: "You couldn't be more wrong, Lisa. If I didn't have this gun, the king of England could just walk in here anytime he wants and start shoving you around."<sup>14</sup>

This exchange not only provides one of the most balanced discussions of the Second Amendment in American popular culture, it also underscores the uncanny ability of the Second Amendment to collect and distill popular aspirations and anxieties.

Yet another remarkable example of the importance of history and mythology in this debate is provided by the media attention and public outcry over Michael Bellesiles's controversial and now largely discredited work *Arming America*.<sup>15</sup> Although Bellesiles never had much impact on jurisprudence or public policy, his attack on the myth of universal gun ownership prompted unprecedented public scrutiny and outrage on the part of gun rights advocates and scholars.<sup>16</sup>

11. Such a search produces a variety of websites. See, e.g., <http://www.gunowners.org>; <http://www.keepandbeararms.com>.

12. *The Simpsons: The Cartridge Family* (Fox television broadcast, Nov. 2, 1997).

13. Jonah Goldberg, *Homer Never Nods: The Importance of The Simpsons*, Nat'l Rev., May 1, 2000, at 36, 37. Goldberg believes that the episode dealing with gun rights makes *The Simpsons* the only sitcom in memory to treat gun control with any fairness. *Id.*

14. *Id.*

15. Michael A. Bellesiles, *Arming America: The Origins of a National Gun Culture* (2000).

16. James Lindgren, *Fall from Grace: Arming America and the Bellesiles Scandal*, 111 Yale L.J. 2195 (2002); Danny Postel, *Did the Shootouts over 'Arming America' Divert Attention from the Real Issues?*, Chron. Higher Educ., Feb. 1, 2002, at A12. Although Bellesiles's thesis only had a modest influence on pending cases, John Lott's discredited "more guns, less crime" hypothesis has continued to shape policy. See John J. Donohue III, *The Final Bullet in the Body of the More Guns, Less Crime Hypothesis*, 2 Criminology & Pub. Pol'y 397, 400 (2003). The charges of scholarly

Second Amendment scholarship is now clearly at an important crossroads. While most courts continue to interpret the Second Amendment as a collective right, academic scholarship is more divided. Indeed, the notion that one can describe the current academic debate in terms of a simple dichotomy no longer seems tenable.<sup>17</sup> The current paradigm crisis in Second Amendment scholarship is evidenced in two recent decisions by federal courts that elaborated on two different tri-partite schemes, implicitly abandoning the older dichotomous view that dominated previous jurisprudence and scholarship. In *United States v. Emerson*, the United States Court of Appeals for the Fifth Circuit, the only federal appeals court to embrace an individual rights view of the Amendment, identified three schools of thought on the Second Amendment: the sophisticated collective rights view, the traditional collective rights view, and the individual rights view.<sup>18</sup> In *Silveira v. Lockyer*, the United States Court of Appeals for the Ninth Circuit adopted a different typology, concluding that current scholarship could be divided into the following: the collective rights view, the individual rights view, and the limited individual rights view.<sup>19</sup> Rather than fitting into a simple dichotomy, it now appears that Second Amendment scholarship is arrayed across a considerable spectrum, from an expansive individual right to a narrow collective right of the states to maintain their militias.

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misconduct against Lott have never been investigated. Chris Mooney, *Double Barreled Double Standards*, MotherJones.com, Oct. 13, 2003, at [http://www.motherjones.com/news/feature/2003/10/we\\_590\\_01.html](http://www.motherjones.com/news/feature/2003/10/we_590_01.html).

17. Stuart Banner, *The Second Amendment, So Far*, 117 Harv. L. Rev. 898, 903-05 (2004) (reviewing David C. Williams, *The Mythic Meanings of the Second Amendment: Taming Political Violence in a Constitutional Republic* (2003)).

18. *United States v. Emerson*, 270 F.3d 203, 218-20 (5th Cir. 2001); see also *Parker v. District of Columbia*, 311 F. Supp. 2d 103, 109 (D.D.C. 2004) (dismissing challenge against the constitutionality of Washington, D.C.'s handgun ban and rejecting the individual right to bear arms); *Seegars v. Ashcroft*, 297 F. Supp. 2d 201, 235 (D.D.C. 2004) (upholding the Washington, D.C. handgun ban and rejecting the individual rights theory). Of course, the notion that there is a sophisticated collective rights view and an unsophisticated view is itself a creation of gun rights scholarship. No scholar on the collective rights side of the debate has embraced this type of terminology. The notion appears to have been first suggested by Robert Cottrol. Robert J. Cottrol, *Introduction to Gun Control and the Constitution*, *supra* note 3, at xxxv. Ironically, the sophisticated collective rights view actually rests on an extremely simplistic view of history. See Saul Cornell, "*Don't Know Much About History*": *The Current Crisis in Second Amendment Scholarship*, 29 N. Ky. L. Rev. 657, 661-64 (2002) [hereinafter Cornell, "*Don't Know Much About History*"]. For a critique of the notion that there is a sophisticated and unsophisticated collective rights argument, see Banner, *supra* note 17.

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

## I. THE RIGHT TO BEAR ARMS AS A CIVIC RIGHT: FORGOTTEN CONTEXTS OF THE SECOND AMENDMENT RECONSIDERED

The most interesting and exciting new developments in the field of Second Amendment scholarship have occurred in the middle of this vast spectrum. A number of scholars have suggested that the time may have arrived to abandon both the individual and collective rights models.<sup>20</sup> Although this simple dichotomy may have served the interests of modern gun rights and gun control advocates, this model has become an obstacle to framing a more sophisticated and genuinely historical understanding of the evolution of the constitutional right to bear arms. It may well be that history has little to contribute to this debate.<sup>21</sup> Still, before deciding what relevance, if any, the history might have to the interpretation of the Second Amendment in contemporary constitutional theory, it is important to get the history right.

Rather than give greater weight to only part of the text, recent scholarship strives for a more holistic reading of the Second Amendment.<sup>22</sup> According to this view, the right protected by the Second Amendment is neither a private right of individuals nor a collective right of the states.<sup>23</sup> Perhaps the best way to describe these alternative models would be to characterize them as part of a new paradigm which views the Second Amendment as a civic right.<sup>24</sup> The right to bear arms is one exercised by citizens, not individuals (an important distinction in the Founding Era), who act together in a collective manner, for a distinctly public purpose: participation in a well regulated militia.<sup>25</sup> While issues of federalism and states rights continue to be relevant to understanding the context of the Second Amendment debate, the text fits a civic rights model better than either the individual or collective rights paradigms.

This civic rights model comes the closest to faithfully translating the dominant understanding of the right to bear arms in the Founding Era.<sup>26</sup> One of the most important eighteenth-century contexts for understanding this right was the powerful legal discourse of civic

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20. Saul Cornell, *A New Paradigm for the Second Amendment*, 22 *Law & Hist. Rev.* 161 (2004) [hereinafter Cornell, *A New Paradigm*]; Konig, *supra* note 5; David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 *Mich. L. Rev.* 588, 613-21 (2000); see H. Richard Uviller & William G. Merkel, *The Militia and the Right to Arms, or, How the Second Amendment Fell Silent* 147-211 (2002). See generally Richard A. Primus, *The American Language of Rights* (1999).

21. See Christopher L. Eisgruber, *Moral Principle and the Second Amendment*, in *Guns, Crime, and Punishment in America* 140 (Bernard E. Harcourt ed., 2003).

22. Cornell, *A New Paradigm*, *supra* note 20; Konig, *supra* note 5; Yassky, *supra* note 20.

23. Cornell, *A New Paradigm*, *supra* note 20, at 164.

24. See *id.* at 164-65.

25. See *id.*

26. See Lawrence Lessig, *Fidelity and Constraint*, 65 *Fordham L. Rev.* 1365, 1371-76 (1997) (explaining the idea of translation).

obligation. Historians have long recognized that the Second Amendment was strongly connected to the republican ideologies of the Founding Era, particularly the notion of civic virtue.<sup>27</sup> Other scholars have challenged this claim, arguing that the thought of the founding generation owed more to liberalism than to republicanism.<sup>28</sup> Historical scholarship has abandoned the notion that American political culture can be understood in terms of any single ideological tradition, and has embraced a more pluralistic conception of the intellectual world of the founders.<sup>29</sup> Historical scholarship has come to recognize that in addition to republicanism and liberalism, the founding generation was deeply immersed in a legal tradition derived from English common law jurisprudence.<sup>30</sup>

The constitutionalism of the Founding Era sought to balance rights with obligations. Some obligations were voluntary, while others were mandatory. While American constitutionalism sought to create a set of structures conducive to the emergence of a public sphere of political and legal debate,<sup>31</sup> the state could not compel citizens to speak or publish their views on political or legal matters. While modern constitutional theory has generally focused on the concept of negative liberty, Americans of the Revolutionary Era were equally concerned with promoting a positive conception of liberty.<sup>32</sup> Recast in

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27. Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. Am. Hist. 599 (1982) (finding civic virtue to come from an individual right to bear arms). For a different view, see Lawrence Delbert Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. Am. Hist. 22 (1984) (presenting a communal viewpoint of civic virtue).

28. Joyce Appleby, *Liberalism and Republicanism in the Historical Imagination* 140-41 (1992).

29. On the importance of the ideological interpretation and the debate over republicanism and liberalism in early American history, see *id. passim*; Isaac Kramnick, *The "Great National Discussion": The Discourse of Politics in 1787*, 45 Wm. & Mary Q. 3 (1988); Daniel T. Rodgers, *Republicanism: The Career of a Concept*, 79 J. Am. Hist. 11 (1992).

30. See David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* (1989) (describing England's legal traditions); John Phillip Reid, *Constitutional History of the American Revolution* (abr. ed. 1995).

31. Saul Cornell, *The Other Founders: Anti-Federalism & the Dissenting Tradition in America, 1788-1828*, at 21 (1999); Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* 328-87 (William Rehg trans., MIT Press 1996) (1992); Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* 28 (Thomas Burger trans., MIT Press 1989) (1962); John L. Brooke, *Reason and Passion in the Public Sphere: Habermas and the Cultural Historians*, 29 J. Interdisc. Hist. 43 (1998); William E. Forbath, *Habermas's Constitution: A History, Guide, and Critique*, 23 Law & Soc. Inquiry 969 (1998).

32. In his important essay on the Second Amendment, Sanford Levinson invokes Ronald Dworkin's theory of rights as trumps. Levinson, *supra* note 5, at 657-58; see Ronald Dworkin, *Rights as Trumps*, in *Theories of Rights* 153 (Jeremy Waldron ed., Oxford Univ. Press 1984). The distinction between negative and positive liberty has been treated elsewhere. See Isaiah Berlin, *Two Concepts of Liberty*, in *Four Essays on Liberty* 118-72 (1969). On liberty in the Anglo-American world of the founders, see



less abstract terms, the constitutionalism of the founding generation was concerned with rights and obligations. The close connection between rights and obligations was central to the way Sir William Blackstone conceptualized the nature of liberty: “[T]he rights of persons that are commanded to be observed by the municipal law are of two sorts; first, such as are due from every citizen, which are usually called civil duties; and, secondly, such as belong to him, which is the more popular acceptance of rights . . . .”<sup>33</sup> The learned English jurist then went on to note that allegiance and protection were “reciprocally, the rights as well as duties of each other.”<sup>34</sup> Citizens had both a right and a duty to arm themselves so that they might participate in a militia. Both of these conceptions of rights were bound together in the idea of well regulated liberty. The goal of constitutional government was to constrain arbitrary power, not to hobble government authority. Civil liberty in this scheme, was “no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the publick.”<sup>35</sup>

As minister John Zubly noted in a sermon preached before the Provincial Congress of Georgia on the eve of the American Revolution, the “well regulated liberty of individuals is the natural offspring of laws, which prudentially regulated the rights of whole communities.”<sup>36</sup> Zubly went on to amplify this notion by observing that “all liberty which is not regulated by law is a delusive phantom.”<sup>37</sup> Outside of a well regulated society governed by the rule of law, liberty was nothing more than licentiousness and anarchy.<sup>38</sup> This particular conception of liberty was central to the way the founding generation understood the idea of the right to bear arms.<sup>39</sup> Although the Constitution represented a significant break with many aspects of revolutionary theory, Zubly’s conception of well regulated liberty endured.<sup>40</sup>

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John Phillip Reid, *The Concept of Liberty in the Age of the American Revolution* (1988) and Quentin Skinner, *Liberty Before Liberalism* (1998). For an effort to construct a modern theory of politics and law around republican conceptions of liberty, see Philip Pettit, *Republicanism: A Theory of Freedom and Government* (1997).

33. 1 William Blackstone, Commentaries \*119 (emphasis omitted).

34. *Id.*

35. *Id.* at \*121; see also Reid, *supra* note 32.

36. John J. Zubly, *The Law of Liberty* 26 (Philadelphia 1775).

37. *Id.*

38. *See id.*

39. On the importance of the idea of a well regulated society, see William J. Novak, *The People’s Welfare: Law and Regulation in Nineteenth-Century America* (1996). The founding generation’s concept of well regulated liberty shares many features with modern legal theory’s notion of ordered liberty. See *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

40. See Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (1993).

At the end of the federalist era in 1798, James Sullivan, a prominent lawyer in Massachusetts, contrasted the radically different conceptions of liberty that emerged during the French Revolution with the idea of well regulated liberty enshrined by the American Revolution and perfected by the U.S. Constitution.<sup>41</sup> “[L]iberty in its natural extent,” he wrote, “has nothing to do with civil society.”<sup>42</sup> He went further, declaring “[t]here is in nature the same degree of dissimilarity between natural liberty and those principles of equal security exhibited in a well regulated society as there is between the untouched clay in the earth, and the finer vessels of China.”<sup>43</sup> Constitutional government was not premised on the kind of liberty found in the state of nature, but in the idea of well regulated liberty.<sup>44</sup>

If one acknowledges the centrality of the concept of well regulated liberty to the constitutional thought of the founders, one can readily appreciate the irony of supporters of a modern libertarian creed invoking the ideal of the Minuteman. The ideal of liberty at the root of militia was not part of a radical individualist and anti-statist ideology. The Minuteman ideal was a quintessential expression of the idea of civic obligation and well regulated liberty. The essence of this vision of law and politics has been brilliantly captured by David Hackett Fischer in his wonderful study of Paul Revere’s world.<sup>45</sup> Although modern Americans are apt to think about constitutionalism in terms of individual rights and collective responsibilities, Fischer reminds us that the Minuteman ideal was one in which collective rights and individual responsibilities predominated.<sup>46</sup> Nothing better typified the nature of this conception of constitutionalism than the militia. Each individual had a responsibility to help secure the collective rights of all by sacrificing some measure of their liberty to participate in a well regulated militia.<sup>47</sup>

## II. TO BEAR ARMS IN DEFENSE OF THEMSELVES AND THE STATE

One can see additional evidence for a distinctly civic republican conception of bearing arms if one examines the Pennsylvania Declaration of Rights in the Pennsylvania Constitution of 1776. While the language of the Pennsylvania Declaration of Rights has often been invoked in modern Second Amendment scholarship,<sup>48</sup> it has seldom

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41. James Sullivan, *An Impartial Review of the Causes and Principles of the French Revolution* (Boston, Benjamin Edes 1798).

42. *Id.* at 44.

43. *Id.*

44. *See id.* For a general discussion of natural rights theory, see Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 *Yale L.J.* 907 (1993).

45. *See* David Hackett Fischer, *Paul Revere’s Ride*, at xvii, 149-64 (1994).

46. *See id.* at xvii.

47. *See id.* 149-64.

48. *See* Saul Cornell, *Commonplace or Anachronism: The Standard Model, the*

been properly contextualized.<sup>49</sup> It is a text often cited, but usually misinterpreted, by modern gun rights scholars as positive proof that the right to bear arms in the Founding Era was thought of as an individual right.<sup>50</sup> To understand this text in context, one must resist the tendency to pluck isolated quotes out of context, a practice that has become all too typical in recent Second Amendment scholarship.<sup>51</sup>

The Pennsylvania Declaration of Rights began by affirming the basic Lockean trinity of life, liberty, and property,<sup>52</sup> a theme that had also figured prominently in Blackstone's writings.<sup>53</sup> Section VIII of the Pennsylvania Declaration of Rights modified this statement, presenting an obligation of each citizen to contribute to the protection of others:<sup>54</sup>

That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expence of that protection, and yield his personal service when necessary, or an equivalent thereto: But no part of a man's property can be justly taken from him, or applied to public uses, without his own consent, or that of his legal representatives: Nor can any man who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if he will pay such equivalent, nor are the people bound by any laws, but such as they have in like manner assented to, for their common good.<sup>55</sup>

This provision introduced the obligation to bear arms, a term that clearly signified the use of arms for a distinctly public purpose. One

*Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 Const. Comment. 221, 227 & n.25 (1999) [hereinafter Cornell, *Commonplace or Anachronism*]; Cornell, "Don't Know Much About History," *supra* note 18, at 670 & n.119.

49. For the historical context of Pennsylvania politics, see Douglas M. Arnold, *A Republican Revolution: Ideology and Politics in Pennsylvania, 1776-1790*, at 43 (1989), and Robert L. Brunhouse, *The Counter-Revolution in Pennsylvania, 1776-1790* (1942).

50. Pa. Const. of 1776, Declaration of Rights, *reprinted in* 5 *The Federal and State Constitutions: Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America* 3082-84 (Francis Newton Thorpe ed., Scholarly Press, Inc. 1977) (1909) [hereinafter 5 *The Federal and State Constitutions*].

51. I have explored the context from which the Second Amendment emerged elsewhere. See Saul Cornell, *Beyond the Myth of Consensus: The Struggle to Define the Right to Bear Arms in the Early Republic*, in *Beyond the Founders: New Approaches to the Political History of the Early Republic* (Jeffrey L. Pasley et al. eds., Nov. 2004) [hereinafter Cornell, *Beyond the Myth of Consensus*]. For problematic de-contextualized readings of the Pennsylvania Declaration of Rights, see *infra* note 60.

52. Pa. Const. of 1776, Declaration of Rights, § I, *reprinted in* 5 *The Federal and State Constitutions*, *supra* note 50, at 3082. See generally John Locke, *Two Treatises of Government* (Peter Laslett ed., Cambridge Univ. Press 1960) (1698).

53. See 1 Blackstone, *supra* note 33, at \*121.

54. Pa. Const. of 1776, Declaration of Rights, § VIII, *reprinted in* 5 *The Federal and State Constitutions*, *supra* note 50, at 3083.

55. *Id.*

was obliged to bear arms or contribute in some other comparable manner to the goal of helping society protect each individual. Recognizing that Quakers and several German sects were pacifists, opposed to bearing arms, the Declaration of Rights provided them with an alternative to compulsory military service.<sup>56</sup> Interestingly, this provision of the constitution explicitly exempted the right to bear arms from the prohibition on taking property without compensation.<sup>57</sup> Thus, the state could compel one to serve in the militia, outfit oneself with a weapon, and expend ammunition, while bearing absolutely no legal obligation to compensate citizens for their expenses.<sup>58</sup> In essence, bearing arms was a form of taxation. Rather than stake out a strong claim against government, the original understanding of the right to bear arms gave government a strong claim on the lives and estates of its citizens.

After establishing the obligation to bear arms, Section XIII then stated for the first time in America, a constitutional right of the people to bear arms.<sup>59</sup>

That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power.<sup>60</sup>

The Pennsylvania Declaration of Rights uttered this principle in the same breath as it attacked standing armies and affirmed civilian control of the military, rather than, for example, articulating this right in the same breath as freedom of religion or the press. The text and structure of the provision both support a civic, military reading of the right to bear arms, not an individual right for personal protection.<sup>61</sup>

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56. *See id.*

57. *Id.* (allowing one who was “conscientiously scrupulous of bearing arms” to be exempted from bearing arms by paying the “equivalent”).

58. *See id.*

59. *Id.* § XIII. Earlier state constitutions do not mention this right. *See* Del. Const. of 1776, available at <http://www.yale.edu/lawweb/avalon/states/de02.htm> (last visited Oct. 8, 2004); N.H. Const. of 1776, available at <http://www.yale.edu/lawweb/avalon/states/nh09.htm> (last visited Oct. 8, 2004); N.J. Const. of 1776, available at <http://www.yale.edu/lawweb/avalon/states/nj15.htm> (last visited Oct. 8, 2004); S.C. Const. of 1776, available at <http://www.yale.edu/lawweb/avalon/states/sc01.htm> (last visited Oct. 8, 2004).

60. Pa. Const. of 1776, Declaration of Rights, § XIII, reprinted in 5 *The Federal and State Constitutions*, *supra* note 50, at 3083. For two other individual rights misreadings of this provision, see Stephen P. Halbrook, *That Every Man Be Armed: The Evolution of a Constitutional Right* 64 (1984); and Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* 148 (1994). *See also* David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 B.Y.U. L. Rev. 1359, 1407.

61. Barnett & Kates, *supra* note 10. This false historical claim was repeated in a brief prepared by lawyers from the CATO Institute in *Parker v. District of Columbia*, 311 F. Supp. 2d 103 (D.D.C. 2004). Ironically, the authors of this brief attacked gun

It is certainly true that the right to bear arms was framed as a “right of the people.”<sup>62</sup> Although this term has come to be associated with the notion of individual rights in modern legal thought, in the eighteenth century, the phrase “right of the people” could be used to describe rights held by the people as a collective entity, or as individuals.<sup>63</sup> Thus, the Pennsylvania Declaration of Rights described the right of the people to legislate as a right of the people, a usage that clearly connoted a collective right held by individuals acting in concert for public purposes.<sup>64</sup> This is how Albert Gallatin, a leading Pennsylvanian politician, described the nature of rights affirmed in the Pennsylvania Declaration of Rights in a letter to Judge Alexander Addison.<sup>65</sup> The 1776 constitution, Gallatin observed, wisely included a “declaration of the rights of the people at large or considered as individuals.”<sup>66</sup> Gallatin’s description of the character of the Pennsylvania Declaration of Rights as either something possessed by individuals or the “people at large” illustrates how different the language of rights was in the Founding Era.<sup>67</sup> The right to bear arms was a perfect example of a civic right, a “right[] of the people at large,” a right that citizens exercised when they acted together for a distinctly public purpose.<sup>68</sup>

The Pennsylvania Declaration of Rights also framed freedom of speech and the press as a right of the people.<sup>69</sup> Here the term was more individualistic, but still no less public in orientation. Thus, the right to publish on matters of public concern or to assemble for

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control groups for citing the now discredited work of Michael Bellesiles. See Plaintiff’s Memorandum of Points and Authorities in Response to Amici at 10-11, 15-16, *Parker v. District of Columbia*, 311 F. Supp. 2d 103 (D.D.C. 2004) (No. 03-CV-0213), available at [http://www.alangura.com/parker/amici/response\\_to\\_amici.pdf](http://www.alangura.com/parker/amici/response_to_amici.pdf) (last visited Sept. 17, 2004). Sadly, gun rights advocates do not appear to demand the same historical rigor in work that supports their political agenda that they demand of their opponents.

62. U.S. Const. amend. II.

63. See, e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265-69 (1990); see also David B. Kopel, *The Supreme Court’s Thirty-Five Other Gun Cases: What the Supreme Court Has Said About the Second Amendment*, 18 St. Louis U. Pub. L. Rev. 99, 128-29 (1999) (arguing that *Verdugo-Urquidez* demonstrates that “right of the people” cannot mean right of the state).

64. Pa. Const. of 1776, Declaration of Rights, reprinted in 5 *The Federal and State Constitutions*, supra note 50, at 3082-83.

65. Letter from Albert Gallatin, to Alexander Addison 2 (Oct. 7, 1789), microformed on Papers of Albert Gallatin, Fiche 1 (New York Univ. & Nat’l Historical Publ’ns Comm’n) [hereinafter Gallatin].

66. *Id.* These observations were made in the context of proposals to revise the Pennsylvania Constitution. Halbrook mistakenly treats Gallatin’s letter discussing the nature of the rights protected in the Pennsylvania Declaration of Rights as describing the Federal Bill of Rights. See Halbrook, supra note 60, at 225 n.169.

67. Gallatin, supra note 65.

68. *Id.*

69. Pa. Const. of 1776, Declaration of Rights, § XII, reprinted in 5 *The Federal and State Constitutions*, supra note 50, at 3083.

redress of grievances would be constitutionally protected.<sup>70</sup> The right to stage a play or assemble to view such an event, however, would not have enjoyed such protection. Indeed, Philadelphia actually prohibited the theater because it posed a threat to public morality.<sup>71</sup>

The Pennsylvania Constitution also declared that the right to bear arms existed as a means for the people to act in “defence of *themselves* and the *state*.”<sup>72</sup> Modern gun rights scholarship has consistently misread this phrase as stating an individual, private right of self-defense.<sup>73</sup> The Pennsylvania Constitution did not assert a right of each person to bear arms in defense of himself and the state, but rather framed the right in a collective, as opposed to an individualistic, formulation. It is important to recognize that the militia served to protect communities, as well as the state, against internal and external threats. The militia existed to deal with internal dangers such as riot or insurrection, as well as the threat of invasion.

Additional contextual support for the collective reading of this provision is provided by one of the few contemporary commentaries on constitution-making in Pennsylvania authored by a writer who adopted the pen name Demophilus.<sup>74</sup> Although the exact identity of the author is a mystery, he appears to have been part of the constitutional party that drafted the state constitution.<sup>75</sup> Demophilus echoed the ideas expressed by radical Whig theorists who, in choosing to frame the right to bear arms as a means for citizens to protect themselves and the state, simply followed the standard Whig understanding of the role of the militia as a means of defending *the people* and *the state* against external and internal enemies.<sup>76</sup> Breaking

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70. *Id.* §§ XII, XVI, reprinted in 5 *The Federal and State Constitutions*, *supra* note 50, at 3083-84.

71. On Philadelphia's prohibition of the theater, see Kenneth Silverman, *A Cultural History of the American Revolution* 66 (1976).

72. Pa. Const. of 1776, Declaration of Rights, § XIII, reprinted in 5 *The Federal and State Constitutions*, *supra* note 50, at 3083 (emphasis added).

73. For a good illustration of this sort of anachronistic reading of the Pennsylvania Declaration of Rights, see Volokh, *supra* note 5, at 810-12.

74. Demophilus, *The Genuine Principles of the Ancient Saxon, or English Constitution* (Philadelphia, Robert Bell 1776).

75. Although a number of scholars have attributed this essay to George Bryan, one of the leading members of the constitutionalist party and a prominent future Anti-Federalist, Bryan's biographer has expressed doubts about this attribution. See Joseph S. Foster, *In Pursuit of Equal Liberty: George Bryan and the Revolution in Pennsylvania* 80 (1994).

76. Demophilus, *supra* note 74, at 23. Demophilus wrote,

The best constructed civil government that ever was devised, having but a poor chance for duration, unless it be defended by arms, against external force as well as internal conspiracies of bad men, it will be the next concern of the convention, to put the colony militia on the most respectable footing.

*Id.* For more on this point, see Don Higginbotham, *The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship*, 55 *Wm. & Mary Q.* 39 (1998).

with its own Quaker heritage, the Pennsylvania Constitution defined the militia in the broadest possible terms:

The freemen of this commonwealth and their sons shall be trained and armed for its defence under such regulations, restrictions, and exceptions as the general assembly shall by law direct, preserving always to the people the right of choosing their colonels and all commissioned officers under that rank, in such manner and as often as by the said laws shall be directed.<sup>77</sup>

Modern gun rights advocates argue that it would have made no sense to protect a right to bear arms while not protecting an individual right of self-defense. While this might not make sense to modern lawyers, it would have made perfect sense to an eighteenth-century lawyer.<sup>78</sup> The right of individual self-defense was well-established under common law, but was legally distinct from the constitutional right to bear arms included in the various state constitutions.<sup>79</sup> The failure to include an explicit protection for such a right was hardly anomalous: many protections under common law were not included in bills of rights during the Founding Era.<sup>80</sup> Americans drafted their constitutional protections for the right to bear arms in response to their fear that government might disarm the militia, not restrict the common law right of self-defense.<sup>81</sup> Indeed, if one scans the vast corpus of writings from the ratification debates, virtually every reference to bearing arms occurs within the context of the debate over the militia.<sup>82</sup> Even if one includes the Revolutionary Era and the federalist era, references to anything that might be construed as a constitutional right of individual self-defense are exceedingly rare, and almost always turn out to be statements from dissenting constitutional texts that expressed the point of view of the losers in the great constitutional struggles of the eighteenth century. Thus, one notes that modern individual rights theorists are particularly fond of references to Jefferson's rejected proposal for the Virginia

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77. Pa. Const. of 1776, § 5, reprinted in 5 *The Federal and State Constitutions*, *supra* note 50, at 3084.

78. Nicholas J. Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment*, 24 Rutgers L.J. 1 (1992); Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 Const. Comment. 87 (1992) [hereinafter, Kates, *The Second Amendment*]; Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 Ala. L. Rev. 103 (1987).

79. See 4 Blackstone, *supra* note 33, at \*183-86 (describing common law self-defense in English law); Richard Maxwell Brown, *No Duty to Retreat: Violence and Values in American History and Society* (1991) (examining the right of self-defense).

80. On state bills of rights in the Founding era, see Donald S. Lutz, *A Preface to American Political Theory* 49-88 (1992).

81. On this point, see Konig, *supra* note 5, at 152-53. More generally, see Primus, *supra* note 20, at 101-05.

82. See, e.g., Don Higginbotham, *The Second Amendment in Historical Context*, 16 Const. Comment. 263 (1999).

Declaration of Rights, Samuel Adams's rejected proposal made to the Massachusetts Ratification Convention, and the dissent of the Anti-Federalist minority of the Pennsylvania Ratification Convention.<sup>83</sup>

Another anachronism in contemporary Second Amendment scholarship is the tendency to read modern notions of self-defense into the Founding Era.<sup>84</sup> The linkage between firearms and self-defense in the Founding Era and the early Republic was much more tenuous. This makes sense given that firearms only accounted for a small percentage of homicides in the period before the Civil War.<sup>85</sup> Edged weapons and blunt instruments were better suited to individual self-defense in most situations.<sup>86</sup> There can be little doubt that the founders believed that keeping a musket in one's home, something closely tied to the ideal of a well regulated militia, clearly enjoyed constitutional protection. Weapons with little military value, carried in a civilian context, were treated as another matter entirely.<sup>87</sup> For example, James Madison's proposal for those who violated Virginia's game laws captured the important distinction between civilian and military gun use. In a bill to prevent the killing of deer, Madison proposed that a person who "bear[s] a gun out of his inclosed ground, unless whilst performing military duty" would face penalties of forfeiting their unlawfully killed deer, paying a fine, and being "bound to their good behaviour."<sup>88</sup> The language of this statute provides a remarkable window into the way Madison understood the differences between bearing a gun for personal use and bearing arms for the common defense. Additional evidence that the law treated weapons intended for militia use differently than those used outside of a military context may be found in two New Jersey laws that gave the state broad power to disarm disorderly persons and armed assemblies.<sup>89</sup> The state clearly retained the right to regulate the use of

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83. Modern supporters of the individual rights view of the Second Amendment are particularly fond of quoting these losing voices and treating them as though they articulated the voice of a majority of Americans. In this sense, individual rights scholarship more closely resembles the popular "what-if histories" that explore how the world might look if the South won the Civil War. For a discussion of Second Amendment scholarship as a form of alternate history science fiction fantasy, see Cornell, *A New Paradigm*, *supra* note 20, at 164.

84. See, e.g., Kates, *The Second Amendment*, *supra* note 78; Lund, *supra* note 78.

85. Eric H. Monkkonen, *Murder in New York City* 32 (2001).

86. See *id.* at 27.

87. Act of June 10, 1799, ch. DCCCVI, § 2, 1799 N.J. Laws 561, 562 (punishing disorderly persons who were apprehended while carrying offensive weapons such as pistols); Act of Feb. 24, 1797, ch. DCXXXVII, § 1, 1797 N.J. Laws 179, 179 (punishing rioters who were armed with weapons).

88. A Bill for Preservation of Deer (1785), in 2 *The Papers of Thomas Jefferson* 443-44 (Julian P. Boyd et al. eds., 1950). The bill was presented by Madison to the House, and read twice, but no action was taken. *Id.* at 444. Virginia had enacted two earlier game laws in 1738 and 1772. *Id.*

89. § 2, 1799 N.J. Laws at 562; § 1, 1797 N.J. Laws at 179.



firearms and differentiated between the level of restrictions that might be placed on individuals bearing a gun and those bearing arms.

Some sense of the scope of the concept of self-defense in the Founding Era can be obtained by examining the popular guide books that were consulted by justices of the peace, sheriffs, and constables.<sup>90</sup> Readers of the *Conductor Generalis*, one of the most popular of these lay guides to the law, would have encountered a detailed explication of the common law crime of affray.<sup>91</sup> Under common law, justices of the peace, sheriffs, and constables were empowered to disarm individuals who rode about armed in terror of the peace.<sup>92</sup> Defining exactly what circumstances constituted the crime of affray was precisely the kind of complex, context-bound judgment that defined common law jurisprudence.<sup>93</sup>

The common law not only constrained when and how one might travel with arms, but it defined the limits of legitimate self-defense quite narrowly. Indeed, the military use of arms required citizens to stand and fight, while the civilian requirement was retreat.<sup>94</sup> In contrast to modern notions of self-defense,<sup>95</sup> the law of justifiable homicide in the eighteenth century required a retreat to the wall before responding with deadly force: flight, not fight, defined the meaning of self-defense in the founding generation.<sup>96</sup>

To properly understand how American law dealt with firearms, one must not only reconstruct the neglected context of the common law, but also recognize the robust character of the state's police power in early America.<sup>97</sup> Pennsylvania's Declaration of Rights affirmed that "[t]he people of this State have the sole, exclusive and inherent right of governing and regulating the internal police of the same."<sup>98</sup> Defining the scope of the individual right to self-defense and the right to own firearms for private use was something that fell within the police powers of the state. It was up to the legislature to create a body of laws dealing with aspects of criminal law, including the law of homicide, which would establish when citizens might use deadly force to protect life, liberty, or property. While one could not eliminate the

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90. *E.g.*, *The Conductor Generalis: Or the Office, Duty and Authority of Justices of the Peace, High-Sheriffs, Under-Sheriffs, Coroners, Constables, Gaolers, Jury-men, and Overseers of the Poor* (New York, Hugh Gaine 1788).

91. *Id.* at 10-11.

92. *Id.* at 10-13.

93. *Id.* This widely reprinted guide went through several editions in the period between the American Revolution and the adoption of the Second Amendment.

94. Brown, *supra* note 79, at 4-6.

95. *Id.* at 5.

96. *Id.* at 4-6.

97. Novak, *supra* note 39, at 19-50; see Christopher L. Tomlins, *Law, Police, and the Pursuit of Happiness in the New American Republic*, 4 *Stud. Am. Pol. Dev.* 3 (1990).

98. Pa. Const. of 1776, Declaration of Rights, § III, reprinted in 5 *The Federal and State Constitutions*, *supra* note 50, at 3082.

right of self-defense, the legislature could define the limits of such a right and could enact laws about firearms consistent with the goals of protecting public safety. For instance, states enacted laws about how guns had to be stored, when they could be used for recreational purposes, and when and where citizens could hunt.<sup>99</sup> The right to bear arms and the right to use firearms for personal reasons were clearly separate and distinct under the Pennsylvania Constitution, which dealt with the right to hunt and the right to bear arms in separate provisions.<sup>100</sup>

### III. FROM REGULATION TO PROHIBITION: WEAPONS LAWS IN THE EARLY REPUBLIC

Although much ink has been expended to try to fit the Second Amendment into our modern categories of debate, relatively little attention has been devoted to analyzing the kinds of laws and regulations regarding firearms that were enacted in the Founding Era and subsequent decades. Nor has much effort been devoted to carefully analyzing the decisions of courts trying to make sense of this complex body of laws. Gun rights advocates have claimed that gun control is a modern invention.<sup>101</sup> In reality, a variety of gun regulations were on the books when individual states adopted their arms-bearing provisions and when the Second Amendment was adopted. In the years after the adoption of the Second Amendment, the individual states adopted even more stringent types of regulations. Most gun regulation in the Founding Era and early Republic occurred

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99. See *infra* Part III.

100. See Pa. Const. of 1776, § 43, reprinted in 5 *The Federal and State Constitutions*, *supra* note 50, at 3091.

101. Joyce Lee Malcolm, *Infringement*, 2 *Common-place*, July 2002, at <http://www.common-place.org/vol-02/no-04/roundtable/malcolm.shtml>. Another ideologically distorted claim has alleged that founders were anti-regulation. See David I. Caplan, *Gun Registration*, in 1 *Guns in American Society: An Encyclopedia of History, Politics, Culture, and the Law* 257-58 (Gregg Lee Carter ed., 2002). According to Caplan:

At the time of the adoption of the Constitution in 1788, the American people had an absolute, unqualified right to keep ordinary personal firearms and ammunition for defense of home, community, and country. Registration or its equivalent at most was confined to proving that one possessed one rifle or musket for militia purposes; it did not extend to disclosing how many other firearms one possessed, and it did not extend to pistols at all.

*Id.* at 257. Caplan appears to have not looked at any of the extant gun laws from the period which regulated the possession and use of firearms in a variety of ways. See *infra* Parts III.A-B. No such right or property claim was absolute in American law in the Founding era. A distorted view of the historical record from the opposing ideological perspective was provided by Michael Bellesiles. Michael A. Bellesiles, *Gun Laws in Early America: The Regulation of Firearms Ownership, 1607-1794*, 16 *Law & Hist. Rev.* 567 (1998). He argued that guns were held in trust by individuals for the government. Each of these views, libertarian and collectivist, distorts the historical record, which fits neither the modern individual rights nor collective rights paradigm.

at the state level. Of course, one might argue that gun regulation at the state level has little bearing on how we should understand the meaning of the Second Amendment. Until the emergence of modern incorporation theory, however, the dominant view of the Bill of Rights was laid down in *Barron v. Baltimore*, which held that the Bill of Rights only restrained the federal government, not the individual states.<sup>102</sup> The point of analyzing state gun regulations from the Founding Era and early Republic is not to look for legal precedents that could be applied in a literal fashion; far too much has changed in the nature of federalism in the intervening years to make such a search very probative. Rather, the goal of such an inquiry is to shed light on the historical meaning of the right to bear arms in the Founding Era and early Republic and to see how the notion of arms bearing fits into the idea of a well regulated society.<sup>103</sup> American constitutional law did not end at the founding and it is important to recognize the profound changes that swept over American law in the decades after the ratification of the Constitution.<sup>104</sup> Analyzing past gun regulation at the state level and the litigation it spawned is therefore vital to understanding the complex history of the right to bear arms.

The philosophical connection between state arms-bearing provisions and the Second Amendment would have seemed obvious to Americans in the Founding Era and the early Republic. Both conceptions of arms bearing were tied to the larger concept of a collective self-defense in a well regulated society governed by law. For an influential lawyer and constitutional commentator such as William Rawle, the connection between state arms-bearing provisions and the Constitution was indisputable.<sup>105</sup> Rawle viewed the right to bear arms as “the corollary” of the Preamble’s assertion of the need for a well regulated militia.<sup>106</sup> While Rawle attacked the English game laws for effectively disarming citizens, he argued strongly for the idea

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102. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833). For the views of *Barron* contrarians, see Akhil R. Amar, *The Bill of Rights: Creation and Reconstruction* 145-62 (1998).

103. Gun rights advocates have often cited the language of state constitutional provisions to prove that bearing arms had to be understood as an individual right. See Kopel, *supra* note 60, at 1413-15; Volokh, *supra* note 5, at 810-12. According to this view, the right to bear arms could not be a right of the state because its inclusion in a state bill of rights meant it was a claim against the state. Obviously, trying to fit the eighteenth-century right to bear arms into our modern categories is profoundly anachronistic. Bills of rights in the Founding Era included general statements of principle, constitutional obligations, as well as statements of rights. See *supra* Part II.

104. The changes in the understanding of constitutional law are an important point recently underscored in a thoughtful essay by Sanford Levinson. Sanford Levinson, *The Historians’ Counterattack: Some Reflections on the Historiography of the Second Amendment*, in *Guns, Crime, and Punishment in America*, *supra* note 21, at 91.

105. See William Rawle, *A View of the Constitution of the United States of America* 121 (Philadelphia, H.C. Carey 1825).

106. *Id.* at 122.

of regulation and viewed the right to bear arms as inextricably linked to the militia.<sup>107</sup> In contrast to modern gun rights theory, Rawle believed that there could be no right to bear arms without regulation.<sup>108</sup>

Gun rights legal scholars have made a number of remarkable, almost phantasmagorical claims about the meaning of the term “well regulated.” Perhaps the most far-fetched of these is the suggestion that well regulated did not mean government-controlled, but only properly disciplined and drilled.<sup>109</sup> In the view of Don Kates and Randy Barnett, it makes no sense to read the Second Amendment “as authorizing regulation of arms.”<sup>110</sup> The authors of this curious interpretation of the Second Amendment have constructed a fantasy world where words mean their opposite, and regulation is really anti-regulation. 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.<sup>111</sup> After reading bizarre claims like this, one can readily understand why historian Jack Rakove has likened the world of Second Amendment scholarship to a scholarly Twilight Zone.<sup>112</sup> Arguments such as those of Kates and Barnett are an example of history extra-lite, to borrow Martin Flaherty’s apt characterization of so much legal scholarship produced in an originalist vein.<sup>113</sup> Finding evidence to show that the Bizarro Second Amendment is a fiction

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107. *Id.* at 122-23.

108. *See id.* at 121-22. Individual rights theorists often claim Rawle as a spokesman for their view of the Second Amendment. *See, e.g.*, Kopel, *supra* note 60, at 1384. Apart from the anachronistic quality of this claim, it seriously distorts Rawle’s view of the Second Amendment. Rawle’s view fits neither the modern individual rights nor collective rights models, but comes closer to the civic right. *See supra* Part I.

109. Barnett & Kates, *supra* note 10, at 1210-14.

110. *Id.* at 1209. The research for this particular conclusion was drawn primarily from the dictionary, a rather narrow foundation for such a broad historical claim. In his most recent scholarship, Barnett has expanded the scope of his research somewhat. *Cf.* Barnett, *The Original Meaning*, *supra* note 10. The decision to move beyond the dictionary is commendable, but a serious historical examination of this topic would require surveying a much broader range of primary source materials than Barnett has surveyed to this date. Such an inquiry would need to examine newspapers, pamphlets, sermons, broadsides, and books. Only after completing a systematic and comprehensive survey of the surviving documentary and archival record could one speak with the kind of authority necessary to support Barnett’s revisionist claims.

111. *Seinfeld: The Bizarro Jerry* (NBC television broadcast, Oct. 3, 1996); *see also* Jerry Siegel et al., *Superman: Tales of Bizarro World* (DC Comics 2000). To describe Bizarro Superman to his friend Elaine, Jerry Seinfeld explains: “Bizarro Superman. Superman’s exact opposite who lives in the backwards Bizarro world. Up is down. Down is up. He says ‘hello’ when he leaves, ‘goodbye’ when he arrives.” *Id.* at 4.

112. Jack N. Rakove, *Confessions of an Ambivalent Originalist*, 78 N.Y.U. L. Rev. 1346, 1354 (2003).

113. Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 Colum. L. Rev. 523 (1995).

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.<sup>114</sup> If American history fit the Bizarro model, then gun regulation after the adoption of the Second Amendment would have virtually disappeared.<sup>115</sup> In reality, the decades after ratification of the Second Amendment saw increased, not decreased, levels of regulation.<sup>116</sup>

A variety of laws regulating firearms were already in place during the Founding Era. Militia regulations were the most common form of laws pertaining to firearms.<sup>117</sup> Such laws could be quite intrusive, allowing government not only to keep track of who had firearms, but requiring them to report for a muster or face stiff penalties.<sup>118</sup> Regulations governing the storage of gun powder were also common.<sup>119</sup> States prohibited the use of firearms on certain occasions and in certain locations.<sup>120</sup> A variety of race-based exclusions disarmed slaves, and in some cases, free blacks.<sup>121</sup> Loyalty oaths also disarmed portions of the population during the Founding Era.<sup>122</sup>

This pattern of regulation shifted dramatically in the decades after the adoption of the Second Amendment. In the years after the War

114. See *infra* Parts III.A-B.

115. The Bizarro Second Amendment is another type of alternate history, a sub-genre of science fiction in which an author posits a different history where the American Revolution never happened or the South won the Civil War. For a discussion of the prevalence of such histories in Second Amendment scholarship, see Cornell, *A New Paradigm*, *supra* note 20. Supporters of the Bizarro Second Amendment oftentimes describe their own view as the Standard Model. See Reynolds, *supra* note 7, at 463.

116. See *infra* Parts III.A-B.

117. See *infra* Part III.A.2.

118. See *infra* Part III.A.2.

119. *E.g.*, Act of June 26, 1792, ch. X, 1792 Mass. Acts 208 (regarding the transporting and storage of gun powder in Boston); Act of Apr. 13, 1784, ch. 28, 1784 N.Y. Laws 627 (regarding the storage of gun powder); Act of Dec. 6, 1783, ch. CIV, 1783 Pa. Laws 161, ch. MLIX, 11 Pa. Stat. 209 (concerning the securing of the city of Philadelphia from the danger of gunpowder), available at <http://www.palrb.us/statutesatlarge/17001799/1783/0/act/1059.pdf> (last visited Oct. 10, 2004).

120. See, *e.g.*, Act of April 22, 1785, ch. 81, 1785 N.Y. Laws 152; Act of Nov. 16, 1821, ch. LXLIII, 1821 Tenn. Pub. Acts 78; Act of Jan. 30, 1847, 1846-1847 Va. Acts ch. 79, at 67. The range of colonial regulation of firearms and gun powder is documented. See, *e.g.*, A Collection of all the Laws of the Province of Pennsylvania: Now in Force 13, 39-40, 85, 197-200, 315-17 (1742) (concerning dueling, the storage of gun powder, the carrying of weapons by "Negroes," firing guns in the City of Philadelphia, and hunting).

121. *E.g.*, Act of Feb. 4, 1806, 1805-1806 Va. Acts ch. XCIV, at 51 (concerning the carrying of weapons by free "Negroes and mulattoes").

122. *E.g.*, Act of Mar. 14, 1776, ch. VII, 1775-1776 Mass. Acts 31 (addressing the disarming of persons who were "disaffected to the Cause of America"); Act of Apr. 1, 1778, ch. LXI, §§ 2, 5, 1777-1778 Pa. Laws 123, 126 (requiring white males over the age of eighteen to take an oath of loyalty or be disarmed).

of 1812, a number of states enacted laws against the practice of carrying concealed weapons.<sup>123</sup> The first laws were passed in southern states,<sup>124</sup> but midwestern states such as Indiana also passed similar laws.<sup>125</sup> The first round of laws made it a crime to carry such weapons.<sup>126</sup> Later, several states enacted even more stringent laws, banning the sale of concealed weapons.<sup>127</sup>

### A. Eighteenth-Century Gun Laws

Eighteenth-century statutes regulating the use of firearms can be classified as follows: statutes providing for the confiscation of firearms from persons unwilling to take an oath of allegiance to the state, statutes regulating the use of firearms within the context of militia obligations, and statutes regulating the storage of gunpowder. A smaller number of laws also regulated hunting and the discharge of firearms in certain places. These statutes make clear that regulation of firearms is hardly a modern invention.

#### 1. Loyalty Oaths and the Confiscation of Firearms

During the American Revolution, several states passed laws providing for the confiscation of weapons owned by persons refusing to swear an oath of allegiance to the state or the United States.<sup>128</sup> To deal with the potential threat coming from armed citizens who remained loyal to Great Britain, states took the obvious precaution of disarming these persons. Thus, the security of the community outweighed any right a person might have to possess a firearm.

In Pennsylvania, if a person “refuse[d] or neglect[ed] to take the oath or affirmation” of allegiance to the state, he was required to deliver up his arms to agents of the state, and he was not permitted to carry any arms about his person or keep any arms or ammunition in his “house or elsewhere.”<sup>129</sup> Such a broad provision effectively eliminated the opportunity for someone to violently protest the actions of the Pennsylvania government or defend himself with a firearm. It should be underscored that those refusing to take the oath

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123. See Kopel, *supra* note 60, at 1415-19.

124. *Id.*

125. *Id.* at 1403.

126. See *infra* Part III.B.1.

127. See *infra* notes 182-84 and accompanying text.

128. *E.g.*, Act of Mar. 14, 1776, ch. VII, 1775-1776 Mass. Acts 31; Act of Apr. 1, 1778, ch. LXI, § 5, 1777-1778 Pa. Laws 123, 126.

129. § 5, 1777-1778 Pa. Laws at 126. This provision was contained in a law that also laid out several consequences for those who refused to take the oath or affirmation; for example, lawyers and professors (among others) were not permitted to practice their trades and citizens were unable to “prosecute any suit in equity” or to serve as an “executor or administrator of any person.” *Id.* § 3, at 124; see also Cornell, *Commonplace or Anachronism*, *supra* note 48, at 228.

or affirmation were unable to borrow or even use another person's firearms.

In 1776, Massachusetts passed, at the behest of the Continental Congress, an act that disarmed "such Persons as are notoriously disaffected to the Cause of America, or who refuse to associate to defend by Arms the United American Colonies."<sup>130</sup> The Massachusetts law required "every Male Person above sixteen Years of Age" to subscribe to a "test" of allegiance to the "United American Colonies."<sup>131</sup> One who failed to subscribe to this test was "disarmed . . . [of] all such Arms, Ammunition and Warlike Implements, as by the strictest Search can be found in his Possession or belonging to him."<sup>132</sup>

The Massachusetts law is interesting because it exempts Quakers from signing the test of allegiance administered to all other men.<sup>133</sup> To accommodate their religion, Quakers were provided with a different form of declaration.<sup>134</sup> Thus, under the circumstances, the right for a Quaker to practice his religion outweighed the state's interest in its preferred test of allegiance. The right to bear arms, however, did not outweigh the state's interest in maintaining security through disarmament of those considered dangerous to the state. Instead, the state's interest in public safety dominated.

Disarmament was not limited to the arguably extraordinary period of the American Revolution. In 1787, the Massachusetts legislature passed a law setting out the terms for pardons by the governor for persons who had been involved in Shays's rebellion against the state in the previous year.<sup>135</sup> Those who had taken up arms against the state were, with some exceptions, able to seek a pardon from the governor.<sup>136</sup> To obtain the pardon, however, a person needed to take an oath of allegiance to the state and deliver his arms to the state for a

130. ch. VII, 1775-1776 Mass. Acts at 31.

131. *Id.* The test required, among other things, that the subscribers affirm their belief that the war against Britain was "just and necessary." *Id.* Additionally, subscribers affirmed that they would not aid or assist the British. *Id.*

132. *Id.* at 32.

133. *Id.* at 35.

134. Notably missing are the requirements that the subscriber believe that the war was a just one and the promise to defend the United American Colonies with arms. Instead, Quakers needed to promise that they would not aid, assist, or pass intelligence to the enemy. *Id.*

135. Leonard L. Richards, *Shays's Rebellion: The American Revolution's Final Battle 38-40* (2002).

136. Act of Feb. 16, 1787, ch. VI, 1787 Mass. Acts 555. The law applied to any person or persons, who have acted in the capacity of non-commissioned officers or privates, or persons of any other description, who, since the first day of August, seventeen hundred and eighty-six, have been, now are, or hereafter may be in arms against the authority and Government of this Commonwealth, or who have given or may hereafter give them counsel, aid, comfort or support . . . .

*Id.*

period of three years.<sup>137</sup> In addition, during the same time period, the person would be unable to serve as a juror, hold government office, or vote “for any officer, civil or military.”<sup>138</sup>

The nature of the other disqualifications that went along with disarmament only underscores the civic character of the right to bear arms. Those seeking pardon were not robbed of a right to free speech or free exercise of their religion, rights indisputably associated with individuals. Instead, the penalties deal more with the rights and obligations associated with a citizen’s duty to society: participation in government as a political official, participation in the legal process as a juror, participation in the electoral process as a voter, and participation in the militia.<sup>139</sup> The law demonstrates that in a well regulated society, the state could disarm those it deemed likely to disrupt society. These types of statutes raise serious questions about the claim of some modern Second Amendment scholars that the right to bear arms was somehow intended to facilitate an individual right of revolution.<sup>140</sup> Quite the opposite was the case. To enjoy the right to bear arms, one had to renounce such revolutionary aspirations. While one might argue such a case if the Second Amendment had been authored by Daniel Shays and his supporters, such radical voices were noticeably absent in the First Congress that drafted the Bill of Rights.<sup>141</sup>

## 2. Militia Law in the Eighteenth Century

Some of the most common regulations of firearms in the eighteenth century are the laws regulating a state’s militia.<sup>142</sup> The laws defined

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137. *Id.* at 556.

138. *Id.* The three-year time period could be shortened for these punishments—but not for the disarmament—provided that the person could “exhibit plenary evidence [to the General Court] of their having returned to their allegiance, and kept the peace, and that they possess an unequivocal attachment to the Government.” *Id.*

139. The disqualifications are also similar in nature to the sorts of privileges taken away regularly from convicted felons today.

140. *See infra* note 141.

141. Loyalty oaths, disarmament, and the constitutional definition of the crime of treason raise serious questions about the effort to treat the Second Amendment as part of a constitutional right of revolution. *See generally* Levinson, *supra* note 5, at 656-57; Reynolds, *supra* note 7, at 467; David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 *Yale L.J.* 551, 583 (1991). It also calls into question the argument that an individual right of self-defense was somehow absolute and might trump the needs of collective self-defense. The Shaysite reading of the Second Amendment would therefore be consistent with the Bizarro Theory of the Second Amendment. *See supra* notes 111-15 and accompanying text.

142. *E.g.*, Act of May 8, 1792, 1792 Conn. Pub. Acts 440 (forming the state militia); Act of July 19, 1776, ch. I, 1775-1776 Mass. Acts 15 (regulating the militia of Massachusetts); Act of Apr. 3, 1778, ch. 33, 1778 N.Y. Laws 62 (regulating the militia of New York State); Act of Mar. 20, 1780, ch. CLXVII, 1780 Pa. Laws 347 (regulating the militia of Pennsylvania); Act of Mar. 26, 1784, 1784 S.C. Acts 68 (regulating militia).



who was part of the militia, who was excused from duty, and what weaponry the citizens were required to procure to meet this obligation.<sup>143</sup>

In 1778 New York, the militia consisted of “every able bodied male person Indians and slaves excepted residing within [the] State from sixteen years of age to fifty.”<sup>144</sup> Massachusetts divided its militia into different groups (e.g., a training band and an alarm list), but generally any “able-bodied Male Person[] . . . from sixteen Years old to fifty” was required to be a member of one group.<sup>145</sup> South Carolina’s militia, with certain exceptions, included all men between eighteen and fifty.<sup>146</sup> Those exceptions to militia membership tended to be racially based<sup>147</sup> or contingent upon membership in a certain profession (teachers, politicians, and clergy predominate).<sup>148</sup> Thus, the number of people coming under the militia statutes was considerable.

The state militia statutes had several fairly universal requirements. Members of the militia were required to turn out for regular musters.<sup>149</sup> Militiamen were also required to be armed with certain equipment. In New York, every militia member had to “furnish and provide himself at his own expence with a good musket or fire-lock fit for service[,] a sufficient bayonet with a good belt, a pouch or cartouch box containing not less than sixteen cartridges . . . of powder and ball . . . and two spare flints[,] a blanket and a knapsack.”<sup>150</sup> Not only were the militia members required to furnish and provide their arms and ammunition, they were subject to inspections by their leaders. In New York, the colonel or commanding officer called a regimental parade in April and November of each year.<sup>151</sup> Militiamen were required to attend with their equipment—“the arms, ammunition and accoutrements of each man [were] examined, and the

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143. *See supra* note 142.

144. ch. 33, 1778 N.Y. Laws at 62.

145. § 1, 1775-1776 Mass. Acts at 15.

146. 1784 S.C. Acts at 69.

147. *See, e.g.*, 1778 N.Y. Laws at 62 (providing exclusions for Indians and slaves).

148. *See, e.g.*, § 1, 1775-1776 Mass. Acts at 15.

149. *See, e.g.*, 1784 S.C. Acts at 68. In South Carolina, for example, the governor could order regimental musters every six months in Charleston and once a year in the rest of the state. Ordinary musters of individual companies could be ordered every two months. *Id.*

150. 1778 N.Y. Laws at 62. As further evidence of how poorly our modern constitutional law can translate to eighteenth-century realities, consider the fact that militia members were required to provide their weapons and ammunition *at their own expense*. Such a notion hardly seems consistent with our current ideas about what constitutes a taking under the Takings Clause. *See, e.g.*, *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 160 (1998) (finding that interest earned on a lawyer’s trust account belonged to the client as private property for purposes of the Takings Clause).

151. 1778 N.Y. Laws at 65.

defaulters . . . noted.”<sup>152</sup> Those who failed to attend were fined, and those who attended without the required equipment were also fined.<sup>153</sup> In New York, the names of those absent from the regimental parade were noted and sent to the governor or brigadier-general.<sup>154</sup> In Massachusetts, every six months, the clerk of each company made “an exact List of [each man in the] Company, and of each Man’s Equipments.”<sup>155</sup> The list was sent on to the commanding officer of the company and the commanding officer of the regiment.<sup>156</sup>

The eighteenth-century militia laws are another example of the lengths to which states could go in order to ensure that their communities were well regulated and safe. Indeed, the excerpts from the above militia laws in force at the end of the eighteenth century shed light on the Second Amendment’s language about a “well regulated militia.”<sup>157</sup> Militias were certainly well regulated. The state could require a majority of the adult population to muster and offer up their privately held firearms for inspection. In Massachusetts, an “exact” account of each militiaman’s firearm and equipment was made, which was then sent on to other officers of the state.<sup>158</sup> The militia laws also underscore how different the eighteenth century was from our own century with regard to civic obligations. Average citizens were required to take part in the defense of their community, using their own property and sacrificing their own time. Finally, militia laws can be seen as another attempt by the state to guarantee the safety of the community. In an era that relied on everyday citizens to provide for community and national defense, the idea of a right to keep and bear arms was a given. To provide the best defense, however, the state also had to ensure that the men were trained and that their equipment was in working order. The eighteenth-century militia laws accomplished these twin goals with regular musters, arms inspections, and penalties for noncompliance.

### 3. The Safe Storage of Gunpowder

By the close of the eighteenth century, there was already a tradition of statutes regulating the storage and transport of gunpowder.<sup>159</sup>

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152. *Id.*

153. *Id.* at 66. Those too poor to afford to equip themselves properly were usually provided with the weapon and necessary equipment by the state. *See, e.g., id.* at 63; *see also* § 7, 1775-1776 Mass. Acts at 18.

154. 1778 N.Y. Laws at 65.

155. § 9, 1775-1776 Mass. Acts at 18.

156. *Id.*

157. U.S. Const. amend. II.

158. § 9, 1775-1776 Mass. Acts at 18.

159. *E.g.*, Act of June 26, 1792, ch. X, 1792 Mass. Acts 208 (addressing the carting and transporting of gunpowder in Boston); Act of Apr. 13, 1784, ch. 28, 1784 N.Y. Laws 627 (concerning the storage of gunpowder); Act of Dec. 6, 1783, ch. MLIX, 11 Pa. Stat. 209, available at

These laws were oftentimes enacted to protect the growing population centers, such as Boston,<sup>160</sup> Philadelphia,<sup>161</sup> and New York City.<sup>162</sup> Safe storage laws, however, were not limited to the largest cities. In Pennsylvania, regulations for the storage of gunpowder appeared within the statutes that provided for the initial incorporation of new towns alongside the provisions that created commons and streets and regulated public nuisances.<sup>163</sup>

The statutes provide for the safe storage and transport of gunpowder in a variety of ways. Limits on the amount of gunpowder a person could possess were common and typically in the range of twenty to thirty pounds.<sup>164</sup> Moreover, the amount of powder a person could legally keep was subject to regulation. Many of the statutes specify how the powder a person could legally keep had to be stored. For example, the Pennsylvania statute that established the Town of Carlisle specified that anyone keeping gunpowder “in any house, shop, cellar, store or other place within the said borough” must keep it “in the highest story of the house . . . unless it be at least fifty yards from any dwelling house.”<sup>165</sup> In New York, the law required one to separate powder “into four stone jugs or tin cannisters, which shall not contain more than seven pounds each.”<sup>166</sup>

Early Americans were permitted to *own* more gunpowder than they could physically *possess*. The powder in excess of the legal limit had to be kept, at the owner’s expense, in a public magazine.<sup>167</sup> Removal or transport of the powder from the powder house was also subject to safety regulations. In Boston, when gunpowder in excess of the legal limit was transported to the public magazine, it had to be transported “in a waggon or carriage, closely covered with leather or canvas, and without iron on any part thereof, to be first approbated by the Firewards of said town, and marked in capitals, with the words *approved powder carriage*.”<sup>168</sup> Some port cities also had specific

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<http://www.palrb.us/statutesatlarge/17001799/1783/0/act/1059.pdf>. Laws for the safekeeping of gunpowder, however, continued well into the nineteenth century. *E.g.*, Act of Feb. 24, 1852, ch. CLXIX, 1851-1852 Tenn. Pub. Acts 246.

160. Act of June 19, 1801, ch. XX, 1801 Mass. Acts 507 (relating to storage of gunpowder in Boston); ch. X, 1792 Mass. Acts at 208 (same); Act of Mar. 1, 1783, ch. XIII, 1783 Mass. Acts 218 (same); Act of Oct. 4, 1780, ch. V, 1780 Mass. Acts 326 (relating to a powder house in Boston).

161. Act of Dec. 6, 1783, ch. MLIX, 11 Pa. Stat. 209.

162. Act of Apr. 13, 1784, ch. 28, 1784 N.Y. Laws 627.

163. *See, e.g.*, Act of Sept. 12, 1783, ch. LXXVI, § XLII, 1782-1783 Pa. Laws 124, 140 (concerning storage of gunpowder in the Town of Reading); Act of Apr. 13, 1782, ch. XIV, § XLII, 1781-1782 Pa. Laws 25, 41 (concerning storage of gunpowder in the Town of Carlisle).

164. *See supra* note 159.

165. § XLII, 1781-1782 Pa. Laws at 41.

166. ch. 28, 1784 N.Y. Laws at 627.

167. *E.g.*, Act of June 19, 1801, ch. XX, 1801 Mass. Acts 507; Act of Oct. 4, 1780, ch. V, 1780 Mass. Acts 326.

168. Act of June 26, 1792, ch. X, 1792 Mass. Acts 208.

regulations for what to do with ships arriving with powder on board. New York City required ships to unload gunpowder at a magazine within twenty-four hours of arrival in the harbor and before the ship “hawl[ed] along side of any wharf, pier or key within the city.”<sup>169</sup> Boston subjected any “Gun Powder . . . kept on board any ship or other vessel laying to, or grounded at any wharf within the port of Boston” to confiscation.<sup>170</sup>

The point of these statutes was, as they themselves proclaimed, to protect communities from fire and explosion. As Massachusetts’s 1780 gunpowder statute put it, its goal was to “deter[] the Inhabitants thereof from keeping certain Quantities of Powder in Houses and Ware-Houses, &c. to the great Inconvenience, Discouragement and Danger of Persons assisting in Time of Fire.”<sup>171</sup> As this characteristic language demonstrates, the statutes were quite explicit in their application not just to shops and stores, but also to private individuals’ homes.

The state acting under the authority of its robust police powers retained the right to pass safe storage laws prohibiting citizens from keeping loaded firearms in their homes. A 1783 Massachusetts statute declared that “the depositing of loaded Arms in the Houses of the Town of Boston, is dangerous” and provided for fine and forfeiture for anyone keeping a loaded firearm in “any Dwelling-House, Stable, Barn, Out-house, Ware-house, Store, Shop, or other Building.”<sup>172</sup>

Colonial and state legislators clearly thought that it was well within their powers to regulate the storage and transport of gunpowder. In addition, the amount of gunpowder an individual or business could keep in a building was also limited.<sup>173</sup> The laws were clearly crafted to meet the needs of public safety, but they also provided a check on the creation of a private arsenal. Indeed, gunpowder in excess of the legal limit typically had to be stored in the public magazine, under the authority of the state. The gunpowder storage laws of the eighteenth century thus constituted a significant limit on the right to bear arms.

### B. Nineteenth-Century Gun Laws

In the nineteenth century, laws directly regulating firearms became far more prevalent. In order to combat the dangers stemming from guns and maintain the goal of fostering a well regulated society, states

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169. ch. 28, 1784 N.Y. Laws at 628.

170. ch. XX, 1801 Mass. Acts at 507.

171. ch. V, 1780 Mass. Acts at 326.

172. Act of Mar. 1, 1783, ch. XIII, 1783 Mass. Acts 218 (concerning the storage of gunpowder in Boston).

173. Twenty to thirty pounds of gunpowder is certainly not an inconsiderable amount. *See supra* note 164 and accompanying text. The point is, however, that the state could limit the amount of gunpowder a person could store in his home or shop to an amount that the *state* deemed safe.

became increasingly ambitious in the range and scope of the laws they enacted regarding firearms. The laws fall into three categories: laws prohibiting the carrying of concealed weapons, laws prohibiting the sale of such weapons, and laws prohibiting the firing of a gun under certain circumstances.<sup>174</sup>

### 1. The Danger of Concealed Weapons

In the antebellum period, several states had laws banning the carrying of concealed weapons.<sup>175</sup> Ohio's language is fairly typical: "[W]hoever shall carry a weapon or weapons, concealed on or about his person, such as a pistol, bowie knife, dirk, or any other dangerous weapon, shall be deemed guilty."<sup>176</sup> If convicted, one faced the possibility for a first offense of a fine up to two hundred dollars or imprisonment up to a month.<sup>177</sup>

Some of the states with concealed weapons laws did consider self-defense concerns. However, exceptions from the concealed weapons law for self-defense were limited. In Tennessee, the law explicitly exempted any person who was "on a journey to any place out of his county or state."<sup>178</sup> In Ohio, there was an exception:

If it shall be proved to the jury, from the testimony on the trial of any case presented under the [section of this act banning the carrying of concealed weapons], that the accused was, at the time of

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174. Statutes limiting when and where guns could be fired are not a nineteenth-century invention. Pennsylvania in 1774 and New York in 1785 both passed laws that restricted the firing of guns on New Year's Eve and New Year's Day. Act of Apr. 22, 1785, ch. 81, 1785 N.Y. Laws 152; Act of Dec. 24, 1774, ch. DCCV, 1774 Pa. Stat. 410, available at <http://www.palrb.us/statutesatlarge/17001799/1774/0/act/0705.pdf>. The laws of the nineteenth century go far beyond these restrictions and appear to become more expansive in scope.

175. *E.g.*, Act of Mar. 18, 1859, 1859 Ohio Laws 56 (prohibiting the carrying of concealed weapons); Act of Oct. 19, 1821, ch. XIII, 1821 Tenn. Pub. Acts 15; Act of Feb. 2, 1838, 1838 Va. Acts ch. 101, at 76 (preventing the carrying of concealed weapons).

176. § 1, 1859 Ohio Laws at 56. The language of the Tennessee statute made clear the moral depravity of those who carried concealed weapons. ch. XIII, 1821 Tenn. Pub. Acts at 15. The law states that "each and every person so *degrading himself*, by carrying a dirk, sword cane, French knife, Spanish stiletto, belt or pocket pistols . . . shall pay a fine." *Id.* (emphasis added). Clearly, carrying any of these weapons concealed was not something an upstanding and virtuous citizen would do. There might be a right to bear arms, but such a right was tempered by the demands of the well regulated society, and well regulated societies held those carrying concealed weapons in low regard.

177. § 1, 1859 Ohio Laws at 56 (prohibiting the carrying or wearing of concealed weapons).

178. ch. XIII, 1821 Tenn. Pub. Acts at 16. This language is somewhat unclear, however. Presumably, the application to those on a journey outside of their state would protect out-of-staters traveling in Tennessee who were unaware of Tennessee's ban on concealed weapons. The language also seems to carve out a protection for those who were traveling outside of their communities, where they presumably felt less safe.

carrying any of the weapon or weapons aforesaid, engaged in the pursuit of any lawful business, calling, or employment, and that the circumstances in which he was placed at the time aforesaid were such as to justify a prudent man in carrying the weapon or weapons aforesaid for the defense of his person, property or family, the jury shall acquit the accused.<sup>179</sup>

This exception is obviously narrow. First, it applied only to those who were carrying a concealed weapon in connection with their employment. Second, the *defendant* had to prove to the jury that a “prudent man” in the defendant’s position would have been justified in carrying a concealed weapon. Thus, while state legislatures could be mindful of self-defense concerns, those concerns did not outweigh the general application of a ban on concealed weapons. The state decided that the dangers arising from concealed weapons were simply greater than the benefits to the populace.

Indeed, Virginia’s legislature was so concerned with concealed weapons that the application of the state’s ban on the weapons was rather broad. In Virginia, it was against the law for a person to “habitually or generally keep or carry about his person any pistol, dirk, bowie knife, or any other weapon of the like kind . . . hidden or concealed from common observation.”<sup>180</sup> Under the Virginia law, if a person was tried for “murder or felony” and used a concealed weapon to commit the murder or felony, he could still be charged under the concealed weapon law, even if the jury acquitted him of the murder or felony because of self-defense.<sup>181</sup> A second wave of more restrictive regulations went even further, prohibiting the sale of concealed weapons. An 1837 Georgia law criminalized the sale of concealed weapons, effectively moving toward the complete prohibition of this class of weapon.<sup>182</sup> A similar statute was enacted by Tennessee in 1838.<sup>183</sup> The Supreme Court of Tennessee upheld the law, declaring that “the Legislature intended to abolish these most dangerous weapons entirely from use.”<sup>184</sup>

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179. § 1, 1859 Ohio Laws at 56-57.

180. 1838 Va. Acts ch. 101 at 76.

181. *Id.* at 77. Indeed, the law is broader still because it applied to any such weapon [mentioned in the act], and that the same was hidden or concealed from or kept out of the view of the person against whom it was used, until within the space of one half hour next preceding the commission of the act, or the infliction of the wound, which shall be charged to have caused the death, or constituted the felony . . . .

*Id.* Thus, the weapon need not have been concealed immediately before it was used for the law to apply under these circumstances.

182. Act of Dec. 25, 1837, 1837 Ga. Laws 90 (protecting citizens of Georgia against the use of deadly weapons).

183. Act of Jan. 27, 1838, ch. CXXXVII, 1837-1838 Tenn. Pub. Acts 200 (banning the sale of Bowie knives and Arkansas tooth picks).

184. *Day v. State*, 37 Tenn. (5 Sneed) 496, 500 (1857).

Neither the constitutional right to bear arms nor the common law right of self-defense trumped the right of the state to regulate firearms, including prohibitions on certain types of weapons. In this sense, firearms were subject to a level of prior restraint that would have been unthinkable for the free exercise of religion or freedom of the press.

## 2. Other Regulations on the Use of Firearms in the Antebellum Period

Apart from laws banning the use or sale of concealed weapons, a variety of other laws in the pre-Civil War Era enacted time, place, and manner restraints on firearms use.<sup>185</sup> Laws restricted where a person could shoot a gun.<sup>186</sup> In 1820, Cleveland prohibited the discharge of firearms by local ordinance.<sup>187</sup> An Ohio statute made it a crime to “shoot or fire a gun at a target within the limits of any recorded town plat in [the] state.”<sup>188</sup> This provision is found within the same section of the statute that outlaws playing “bullets along or across any street in any town or village” or “running horses within the limits of any such town or village.”<sup>189</sup> In a law amending a statute incorporating the towns of Winchester and Reynoldsburgh, the Tennessee legislature gave the mayor and aldermen of those towns the

power and authority to make any rules and laws regulating the police . . . and the inhabitants . . . to restrain and punish drinking, gaming, fighting, breaking the sabbath, [and] shooting and carrying guns, and enact penalties and enforce the same, so that they do not conflict or violate the constitution of this State, and are consistent with the laws of this State.<sup>190</sup>

An 1821 Tennessee statute prohibited the “shoot[ing] at a mark within the bounds of any town, or within two hundred yards of any

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185. *E.g.*, Act of Feb. 17, 1831, § 6, 1831 Ohio Laws 161, 162 (preventing certain immoral practices); Act of Dec. 3, 1825, ch. CCXCII, § 4, 1825 Tenn. Priv. Acts 306 (regulating shooting and carrying guns in Reynoldsburgh); Act of Nov. 16, 1821, ch. LXLIII, 1821 Tenn. Pub. Acts 78-79; Act of Jan. 30, 1847, 1846-1847 Va. Acts ch. 79, at 67; Act of Feb. 4, 1806, 1805-1806 Va. Acts ch. XCIV, at 51 (restricting Negroes from carrying guns).

186. *E.g.*, § 6, 1831 Ohio Laws at 162.

187. *Laws, for the Regulation and Government of the Village of Cleaveland*, § 9, in *Cleaveland Herald*, Aug. 15, 1820, at 1.

188. § 6, 1831 Ohio Laws at 162.

189. *Id.*

190. ch. CCXCII, 1825 Tenn. Priv. Acts at 307. The language of the statute also tells us that the legislature did not believe that all laws restraining and punishing the shooting and carrying of guns were unconstitutional. The statute’s allowance for punishing those who broke the sabbath is also demonstrative of the sort of power the state had in the antebellum period. The well regulated society meant that, while people had the freedom to worship, they also had an obligation to honor the sabbath. *Cf.* Novak, *supra* note 39, at 112.

public road of the first or second class within [the] state.”<sup>191</sup> In contrast to modern law where many states have pre-empted the right of localities to restrict firearms, local regulation was quite common in pre-Civil War America.<sup>192</sup>

The use of permits or licenses were less common than time, place, and manner restrictions or bans on selected categories of weapons. Such laws were usually used to target groups such as free blacks. Thus, Virginia passed a law in 1806 that required every “free negro or mulatto” to first obtain a license before carrying or keeping “any firelock of any kind, any military weapon, or any powder or lead.”<sup>193</sup>

These statutes all demonstrate the ample power of the state to regulate and restrict firearm usage and ownership to achieve the goal of creating a well regulated society. A wide range of gun regulations, including safe storage laws; time, place, and manner restrictions; and even prohibitions on certain classes of weapons have deep roots in American history stretching back before the American Revolution and extending forward in time long after the Second Amendment was adopted.

#### IV. JUDGING THE RIGHT TO BEAR ARMS: THE PATTERN OF ANTEBELLUM JURISPRUDENCE

The change from regulation to prohibition prompted a wide ranging discussion and re-evaluation of the meaning of the right to bear arms and its connection to the right of self-defense. The first important case of the Jacksonian era, *Bliss v. Commonwealth*, articulated an expansive individual rights conception of arms bearing, effectively prohibiting any regulation of weapons.<sup>194</sup> The decision was not widely emulated, and proved to be controversial within Kentucky. Indeed, a committee of the Kentucky House excoriated the state’s highest court for misconstruing historical origins of the right to bear arms.<sup>195</sup> Outside of Kentucky, the rejection of the *Bliss* model of arms bearing was equally forceful. In *Aymette v. State*, a Tennessee court accepted the notion that bearing arms was a military activity, but introduced a distinction between keeping arms and bearing arms.<sup>196</sup> In the view of the *Aymette* court, bearing arms was subject to more stringent

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191. Act of Nov. 16, 1821, ch. LXLIII, 1821 Tenn. Pub. Acts 78-79.

192. Scholars have discussed the trend toward greater centralization and preemption in recent firearms jurisprudence. See, e.g., Jon S. Vernick & Lisa M. Hepburn, *State and Federal Gun Laws: Trends for 1970-99*, in *Evaluating Gun Policy: Effects on Crime and Violence*, *supra* note 1, at 345-67. On the robust tradition of local regulation in earlier periods of American history, see Novak, *supra* note 39.

193. Act of Feb. 4, 1806, 1805-1806 Va. Acts ch. XCIV, at 51.

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

195. For a discussion of Kentucky’s political reaction to the *Bliss* ruling, see Robert M. Ireland, *The Problem of Concealed Weapons in Nineteenth-Century Kentucky*, 91 Reg. Ky. Hist. Soc’y 370, 372-74 (1993).

196. *Aymette v. State*, 21 Tenn. (2 Hum.) 154 (1840).



regulation than keeping arms.<sup>197</sup> The only types of weapons that the *Aymette* court believed were entitled to full constitutional protection were those that were suitable for the purposes of supporting a well regulated militia.<sup>198</sup> A more narrowly defined militia-based right was framed in *State v. Buzzard*.<sup>199</sup> In *Buzzard*, the right to bear arms was narrowly construed to protect only militia-related activity.<sup>200</sup> Invoking a concept central to Anglo-American jurisprudence since Blackstone, the court wrote that the goal of the Constitution was to protect those rights “essential to the enjoyment of well regulated liberty.”<sup>201</sup> To conclude, as had the court in *Bliss*, that the right to bear arms was not subject to reasonable regulation was to encourage anarchy, not liberty.<sup>202</sup>

The more robust level of regulation associated with the second wave of bans on concealed weapons, including prohibitions on the sale of particular classes of weapons, produced another division among state courts. In a somewhat rambling discussion that took note of these divisions, the Georgia Supreme Court found that time, place, and manner restrictions were constitutional, but general prohibitions were not.<sup>203</sup> The Supreme Court of Tennessee rejected this view and upheld a broad ban on certain classes of weapons.<sup>204</sup> The Tennessee court went on to note that “[t]he Legislature thought the evil great, and, to effectually remove it, made the remedy strong.”<sup>205</sup> The more robust Tennessee model of regulation proved to be the more influential one.<sup>206</sup>

#### V. DID THE FOURTEENTH AMENDMENT CHANGE THINGS? THE INCORPORATION CONUNDRUM REVISITED

The legacy of the founding is only one of the nodes of historical debate over the meaning of the Second Amendment.<sup>207</sup> A small, but

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197. *Id.* at 160.

198. *Id.* at 158-59.

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

200. *Id.* at 24-25.

201. *Id.* at 21; see *supra* notes 33-35 and accompanying text.

202. *Buzzard*, 4 Ark. at 21.

203. *Nunn v. State*, 1 Ga. 243, 249, 251 (1846).

204. *Day v. State*, 37 Tenn. (5 Sneed) 496, 500 (1857).

205. *Id.* at 501.

206. See Act of Dec. 25, 1837, 1837 Ga. Laws 90 (protecting citizens of Georgia against the use of deadly weapons); Act of Jan. 27, 1838, ch. CXXXVII, 1837-1838 Tenn. Pub. Acts 200 (banning the sale of Bowie knives and Arkansas tooth picks); *Day*, 37 Tenn. (5 Sneed) at 496. In *Nunn v. State*, the Georgia Supreme Court construed the scope of the state’s police power more narrowly to apply to the regulation of weapons. *Nunn*, 1 Ga. at 249. In his important treatise, Joel Prentiss Bishop concluded that the more expansive individual rights view of the *Bliss* court was the minority view regarding the scope of the state’s police powers. Joel Prentiss Bishop, *Commentaries on the Law of Statutory Crimes* § 793 (2d ed. 1883).

207. Amar, *supra* note 102; Stephen P. Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866-1876* (1998); Levinson, *supra* note 5.

growing body of scholarly literature has also developed around the connection between the Fourteenth and Second Amendments. One of the most intellectually provocative claims in the Second Amendment debate is Akhil Amar's suggestion that, as a result of the Fourteenth Amendment, the idea of bearing arms was transformed from a collective right into an individual one.

"[B]etween 1775 and 1866," Amar contends, "the poster boy of arms morphed from the Concord minuteman to the Carolina freedmen."<sup>208</sup> There are a number of problems with this argument. In summarizing Amar's argument, Sanford Levinson correctly notes that Amar identifies close to a dozen Reconstruction Era Republicans in Congress who delivered "odes to arms in speeches in the Thirty-ninth Congress."<sup>209</sup> While it is certainly true that Amar finds some important evidence that such a view was present in Congress, he provides no evidence that this view was widely shared by either the ratifiers of the Fourteenth Amendment or a significant portion of the general public. To document Amar's contention would require a very ambitious examination of the surviving documentary record.<sup>210</sup>

Amar certainly deserves credit for being the first serious constitutional scholar to try to chart the profound changes that transformed the meaning of the right to bear arms in the period after the adoption of the Bill of Rights. There can be little doubt about the emergence of a more individualistic conception of arms bearing over the course of the nineteenth century. While the notion of arms bearing had been closely tied to the well regulated militia in the Founding Era, a considerable amount of slippage had occurred in this concept during this time period.<sup>211</sup> Perhaps the best evidence of this paradigm shift is the remarkable change in the language adopted by a number of state constitutions in the Jacksonian era. While Founding Era constitutions affirmed "the right of the people to bear arms in defense of themselves and the state," a number of states in the Jacksonian era affirmed a right of "each citizen to bear arms in

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The most comprehensive account of the Fourteenth Amendment remains William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (1988). For a critique of Second Amendment scholarship on the Founding Era as a form of consensus history, see Cornell, *Beyond the Myth of Consensus*, *supra* note 51.

208. Amar, *supra* note 102, at 266.

209. Levinson, *supra* note 104, at 108 (quoting Amar, *supra* note 102, at 258).

210. Michael Curtis argues that incorporation enjoyed broad popular support. Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (1986). Other studies of ratification do not support this claim or Amar's morphing Second Amendment. See James E. Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania*, 18 *Akron L. Rev.* 435 (1985) [hereinafter Bond, *Original Understanding*]; James E. Bond, *Ratification of the Fourteenth Amendment in North Carolina*, 20 *Wake Forest L. Rev.* 89 (1984); Lambert Gingras, *Congressional Misunderstandings and the Ratifiers' Understanding: The Case of the Fourteenth Amendment*, 40 *Am. J. Legal Hist.* 41 (1996).

211. Amar, *supra* note 102, at 266.

defense of himself and the state.”<sup>212</sup> If every state had abandoned the older language in favor of the new, Amar would have strong support for his notion that a single monolithic collective understanding of arms bearing in the Founding Era was replaced by an equally hegemonic individualistic ideology during Reconstruction. Although Amar’s model does suggest an important change, he approaches the constitutional thought of the Founding Era and Reconstruction from a model of consensus history that simply does not reflect the complexity of the historical record.

On at least one occasion, Amar has argued that history and constitutional law are distinct and that the legal meaning of arms bearing could well be different than the historical meaning carried by the term.<sup>213</sup> Amar is surely correct in making this important distinction. While the historical question of how far popular and elite attitudes toward arms bearing had shifted in the century between the Revolution and Reconstruction is fascinating, it is not the question with the most probative value. To answer that question, one must grapple with the myriad theories and critiques of constitutional originalism.<sup>214</sup>

Although he eschews the label, Amar’s theory of refined incorporation is ultimately an idiosyncratic version of originalism in which the usual emphasis on Madison and the founding has been

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212. See Kopel, *supra* note 60, at 1410 n.190 (listing state constitutions’ right to bear arms provisions); *supra* note 72 and accompanying text. For a discussion of this transformation, see Cornell, *Beyond the Myth of Consensus*, *supra* note 51; Cornell, “Don’t Know Much About History,” *supra* note 18.

213. See Chris Mooney, *Showdown*, *Lingua Franca*, Feb. 2000, at 28.

214. The literature challenging originalism is enormous. For a particularly forceful statement, see Mark Tushnet, *Interdisciplinary Legal Scholarship: The Case of History-in-Law*, 71 *Chi.-Kent L. Rev.* 909, 914 (1996). A detailed philosophical discussion of originalism may be found in Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (1999). Whittington’s erudite defense of originalism addresses the theoretical and methodological challenges to this interpretive methodology, but provides little historical guidance on how one should weigh different intents or evaluate the meaning or significance of particular texts. Whittington concedes that discerning intent may be difficult, but he insists it is not impossible. *Id.* A less satisfactory and more historically naïve defense of originalism may be found in Barnett, *The Original Meaning*, *supra* note 10; Barnett, *An Originalism for Nonoriginalists*, *supra* note 10. For Barnett’s view of the Second Amendment, see Barnett, *The Relevance of the Framers’ Intent*, *supra* note 10. Historical hostility to the methodology of originalism has had little to do with epistemological problems, and has generally focused on the use of evidence, not the epistemological possibility of reconstructing the past. See also *Interpreting the Constitution: The Debate over Original Intent* (Jack N. Rakove ed., 1990); Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (1996). On the notion of standards for originalists, see H. Jefferson Powell, *Rules for Originalists*, 73 *Va. L. Rev.* 659 (1987). For a critique of law office history, see Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 *Sup. Ct. Rev.* 119. On originalism as a form of forensic history, see John Phillip Reid, *Law and History*, 27 *Loy. L.A. L. Rev.* 193 (1993). On the need for legal scholarship to remain current with historical scholarship, see Flaherty, *supra* note 113.

replaced by an equally narrow focus on John Bingham, one of the Framers of the Fourteenth Amendment.<sup>215</sup> To paraphrase Larry Kramer's critique of originalism, we might describe Amar's account as Reconstruction-obsessed, as opposed to founding-obsessed.<sup>216</sup> Yet, even when judged by the standards of originalist theory, Amar's account is not without problems. If any intent or meaning ought to guide constitutional interpretation in an originalist paradigm, it ought to be the ratifiers, not the framers of the Fourteenth Amendment. Even if one adopts the more inexact and historically naïve approach to original meaning favored by scholars such as Randy Barnett, which requires focusing on widely shared public meanings, one is still left with the complicated historical task of weighing the myriad, and in many cases, discordant voices who participated in the framing and ratification of the Fourteenth Amendment. For anyone who has taken the time to read extensively in the sources for this period, the claims that the Fourteenth Amendment or arms bearing had a single monolithic meaning in this era are simply untenable.<sup>217</sup> Even more problematic from the point of view of any originalist theory is the evidence that the leading framers of the Amendment, such as Bingham, sold the Amendment to the American people in radically different terms: as a legal principle that did nothing more than require Americans to follow the golden rule of doing unto others as you would have them do unto you. Fourteenth Amendment originalists who rest incorporation on the historical intent of the framers of the Amendment are effectively engaged in an elaborate legal game of bait-and-switch where the framers' intent is substituted for the meaning associated with the Amendment during ratification. While one can certainly defend incorporation theory on philosophical grounds or in terms of precedent, the historical foundations for this argument are shaky at best.

The different tone and rhetorical strategies employed in Congress and on the stump are evident if one looks at the way John Bingham tried to sell the Fourteenth Amendment to the citizens of Ohio.<sup>218</sup> In his public speeches to his constituents, he adopted a different rhetorical strategy than the one he used in Washington. Rather than play up a constitutional theory steeped in abolitionist rhetoric, he stressed the notion of equality before the law, a much less threatening concept.<sup>219</sup> In one speech, Bingham summarized the meaning of Section 1 as doing no more than "embodying in the Constitution the

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215. See, e.g., Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 Wake Forest L. Rev. 909 (1998).

216. Larry Kramer, *Fidelity to History—And Through It*, 65 Fordham L. Rev. 1627, 1628, 1638 (1997).

217. See *supra* note 207.

218. Bingham's speech was published in the local newspaper. John A. Bingham, *Politics in Ohio* (Aug. 8, 1866), in *Cincinnati Commercial*, Aug. 10, 1866, at 1.

219. *Id.*

golden rule, learned at the mother's knee, 'to do as we would be done by.'"<sup>220</sup> In a more detailed speech focused exclusively on the meaning of the Fourteenth Amendment, Bingham summarized the meaning of Section 1 in the following manner: "It is a simple, strong, plain declaration that equal laws and equal and exact justice shall hereafter be secured within every State of this Union."<sup>221</sup> He dismissed the charge that the Amendment would destroy the federal system, effectively reducing the individual states and their laws to mere ciphers in a powerful centralized system of government: "It takes from no State any right which hitherto pertained to the several States of the United States."<sup>222</sup> It is impossible to know for certain if Bingham consciously attempted to recast his rhetoric in response to the vicious black baiting tactics used by Democrats to discredit Republicans as supporters of full equality for blacks. While in his own mind, Bingham could in good faith believe that the subtle shifts in emphasis and tone changed nothing in terms of substance, for his listeners, many of whom were not schooled in the same abolitionist ideas and not steeped in the detailed reports of southern atrocities that outraged Republicans in Congress, it is likely that they took a very different message away from his standard stump speech. For the average man on the street listening to one of Bingham's speeches, the argument would have seemed far closer in spirit to the arguments made by those Congressional Republicans who saw the Fourteenth Amendment as doing little more than requiring the states to treat their citizens equally.<sup>223</sup>

What is most striking about the debates over the framing and ratification of the Amendment is how radically different the rhetoric and arguments used by Republicans in Congress were from the way they presented their argument outside the halls of Congress. In Congress, Republicans highlighted the worst excesses of the black codes, which meant playing up the disarmament of freedmen.<sup>224</sup> In the public debate over ratification, Republicans adopted a more conservative strategy, stressing a more abstract and less potentially radical principle of equality.<sup>225</sup> This decision made perfect political sense. Faced with Democratic opponents who played up such emotionally charged issues as Negro suffrage and interracial marriage, it was only natural that Republicans would not dwell excessively on the need to arm blacks.

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220. *Id.*

221. John A. Bingham, *The Constitutional Amendment* (Aug. 24, 1866), in *Cincinnati Commercial*, Aug. 27, 1866, at 1.

222. *Id.*

223. See generally Bond, *Original Understanding*, *supra* note 210, at 445.

224. For a good sampling of such rhetoric, see Kopel, *supra* note 60, at 1447-59.

225. See Bond, *Original Understanding*, *supra* note 210, at 442-43.

Rather than view the impact of the Fourteenth Amendment as transforming the meaning of the Second Amendment in the manner suggested by Amar, a more plausible reading of the evidence would be to argue that the codes selectively disarming blacks were rendered unconstitutional as a result of the Fourteenth Amendment. Borrowing from Amar's vivid imagery, one might describe the impact of the Fourteenth Amendment as facilitating the transformation of the Revolutionary Era's all-white southern militias into the Negro militias of the Reconstruction Era.<sup>226</sup> Amar and other supporters of the individual rights thesis regarding the Fourteenth Amendment have simply ignored the rise of the Negro militias and their importance to the implementation of Reconstruction. Amar's claim that "[r]econstructors obviously had good functional and ideological reasons for downplaying militias"<sup>227</sup> is simply wrong. Congress recognized this fact when it disbanded the rebel-dominated southern militias and then authorized the creation of new militias loyal to the Union.<sup>228</sup> For southern Republicans, the destruction of the old militia, dominated by Confederate sympathizers, and the creation of a new militia loyal to the Union, was a high priority.<sup>229</sup> Even if Amar and others were correct about how Bingham viewed arms bearing, this was not how Republicans in the South viewed the matter. Southern Republicanism not only invested considerable political capital in reconstructing the militia, but they committed enormous financial resources to arming blacks with government-issued weapons.<sup>230</sup> In many places, the inclusion of freedmen into these new militias drove many southern whites to create their own alternative, all-white paramilitary organizations, effectively turning the new state militias into de facto Negro militias.<sup>231</sup> The story of the Negro militias is therefore key to understanding the contest to define the right to bear arms in the Reconstruction South. Indeed, a remarkable test case for the individual rights thesis may be found in the South Carolina Ku Klux Klan trials.<sup>232</sup> Republicans within the newly created Department of Justice, including U.S. Attorney General Amos Akerman, developed a strategy to apply Second Amendment protections through the Fourteenth Amendment.<sup>233</sup> Although Amar and others cite the South

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226. Sally E. Hadden, *Slave Patrols: Law and Violence in Virginia and the Carolinas* 204-05 (2001); see also Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. Davis L. Rev. 309, 335-37 (1998) (describing the slave patrols made by an all white militia to control the slave population).

227. Amar, *supra* note 102, at 259.

228. See Lou Falkner Williams, *The Great South Carolina Ku Klux Klan Trials, 1871-1872*, at 22-29 (1996).

229. *Id.*

230. *Id.*

231. Otis Singletary, *Negro Militia and Reconstruction* (1957).

232. Williams, *supra* note 228, at 75-76.

233. *Id.* at 61-64; Kermit L. Hall, *Political Power and Constitutional Legitimacy: The South Carolina Ku Klux Klan Trials, 1871-1872*, 33 Emory L.J. 921, 941-42 (1984).

Carolina Ku Klux Klan trials as proof for their individual rights thesis,<sup>234</sup> the evidence of the trials reveals a radically different story.

Among the many outrages perpetrated by the Klan in South Carolina, the disarmament of members of the Negro militia was particularly galling to Republicans.<sup>235</sup> U.S. Attorney General Amos Akerman and U.S. Attorney Daniel Corbin, the two men responsible for prosecuting these cases, worked closely together and consulted with one another on the best legal strategy to pursue against the Klan.<sup>236</sup> The strategy they formulated was the most systematic effort to theorize the constitutional impact of the Fourteenth Amendment on the Bill of Rights.<sup>237</sup> With Akerman's blessing and guidance, Corbin adopted a strategy to use the Fourteenth Amendment as a vehicle to seek indictments against the Klansmen for violating the Second Amendment rights of blacks in South Carolina.<sup>238</sup> While Congress and the various ratification conventions may have been divided over the issue of incorporation, Akerman and Corbin were not. The two men framed their case around the incorporation issue.<sup>239</sup> While Amar, Levinson, and others have interpreted this choice as evidence that Republicans viewed the right to bear arms as an individual right,<sup>240</sup> the transcript of the trial supports a rather different reading of the evidence. In his opening address, Corbin announced to the court that, "if there is any right that is dear to the citizen, it is the right to keep and bear arms," a protection "secured to the citizen of the United States on the adoption of the amendments to the Constitution."<sup>241</sup> Corbin then noted that some had argued that *Barron v. Baltimore*<sup>242</sup> had established the precedent that the Bill of Rights was not a restraint on the states. "The fourteenth amendment," Corbin reminded the court, "changes all that theory, and lays the same restriction upon the States that before lay upon the Congress of the United States."<sup>243</sup> Having made a strong argument for using the Fourteenth Amendment to apply the Second Amendment to the states, Corbin then went on to explain the nature of the crime

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234. Amar, *supra* note 102, at 210.

235. See Williams, *supra* note 228, at 27-28.

236. *Id.* at 61-64. See generally The Case of Robert Hayes Mitchell, Sylvanus Shearer and Others, in Proceedings in the Ku Klux Trials at Columbia, S.C. in the United States Circuit Court 147-48 (Negro Univ. Press 1969) (1872) (transcript of the Ku Klux Trials) [hereinafter Proceedings in the Ku Klux Trials].

237. Williams, *supra* note 228, at 62-64.

238. Robert J. Kaczorowski, The Nationalization of Civil Rights: Constitutional Theory and Practice in a Racist Society, 1866-1883, at 153 (1987) (noting that Akerman was committed to enforcing the rights of citizens through the Fourteenth Amendment); Robert J. Kaczorowski, The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights, 1866-1876, at 122-29 (1985).

239. Proceedings in the Ku Klux Trials, *supra* note 236.

240. See *supra* note 209.

241. Proceedings in the Ku Klux Trials, *supra* note 236, at 147.

242. 32 U.S. (7 Pet.) 243 (1833).

243. Proceedings in the Ku Klux Trials, *supra* note 236, at 147.

committed by the Klan—the disarmament of members of the Negro militia.

Imagine, if you like—but we have not to draw upon the imagination for the facts—a militia company, organized in York County, and a combination and conspiracy to rob the people of their arms, and to prevent them from keeping and bearing arms furnished to them by the State Government. Is not that a conspiracy to defeat the rights of the citizen, secured by the Constitution of the United States, and guaranteed by the fourteenth amendment?<sup>244</sup>

The argument employed by the government in these trials demonstrates that modern supporters of the individual rights view of the Second Amendment have seriously misconstrued the connection between bearing arms and incorporation in the South Carolina Ku Klux Klan trials.<sup>245</sup> While the action of the federal government in that case supports the incorporation thesis, it does not support the individual rights view. Members of the South Carolina Ku Klux Klan did disarm blacks and the government did try to use the Fourteenth Amendment to prosecute them for violations of the Second Amendment right to bear arms. The guns confiscated, however, were not privately owned, but were issued to South Carolina blacks because they were members of the militia. It is true that the guns were held privately, and not stored in arsenals, but they were unquestionably held as part of citizens' militia obligations. The government did try to incorporate the Second Amendment through the Fourteenth, but as a militia right, not an individual right.

The notion of citizens keeping and bearing arms as part of their obligation to participate in a well regulated militia has had a long history, stretching back to the eighteenth century. Nothing about the Fourteenth Amendment changed that reality. Rather, as William Nelson has argued, the primary impact of the Fourteenth Amendment was to force states to treat all citizens equally.<sup>246</sup> Modern incorporation theory has tended to approach the Fourteenth Amendment somewhat anachronistically, framing the issue in terms relevant to modern law, rather than in those appropriate to the historical debate over incorporation in the Reconstruction era. Modern supporters of incorporation have argued that Republicans sought to overrule *Barron v. Baltimore* and incorporate the Bill of Rights.<sup>247</sup> Their opponents have argued that Republicans did not wish to undermine traditional notions of federalism and hence could not have intended to effectively nationalize the Bill of Rights.<sup>248</sup> The

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244. *Id.* at 148.

245. See Amar, *supra* note 102; Halbrook, *supra* note 207; Levinson, *supra* note 5.

246. See generally Nelson, *supra* note 207, at 11.

247. See Pamela Brandwein, *Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth* 56-58 (1999).

248. See *id.*



problem with this formulation, as Pamela Brandwein has argued, is that both claims may be true.<sup>249</sup> Republicans may have desired to overrule *Barron* without fundamentally altering the structure of federalism.<sup>250</sup> If one analyzes the issue at stake in the South Carolina Ku Klux Klan trials, it is possible to see how this was possible. When modern incorporation theory is set aside and the issues are understood in context, a different understanding of the connection of the Fourteenth Amendment to the right to bear arms emerges. Akerman and Corbin's theory of the impact of the Fourteenth Amendment on the right to bear arms advanced two interrelated legal doctrines.<sup>251</sup> It barred states from enacting discriminatory legislation that selectively disarmed blacks. It did not establish a single uniform national definition of what kinds of gun laws individual states might enact. States would be free to enact laws regulating or in some cases prohibiting certain types of weapons as long as those laws were not discriminatory and were grounded in some rational basis. States were also prohibited from enacting laws that prevented blacks from bearing arms in the militia. Overruling *Barron v. Baltimore* and preserving the existing structure of federalism were not mutually incompatible goals in the minds of Republicans even if these two ideas now seem inconsistent in light of subsequent jurisprudence.

#### VI. TRANSLATING THE FOUNDERS' VISION: TOWARD A WORKABLE JURISPRUDENCE FOR FIREARMS

Contrary to the claim of some modern gun rights advocates, robust regulation of firearms is not only compatible with the Second Amendment, it is an essential part of the founders' vision of how guns fit within the framework of well regulated liberty.<sup>252</sup> Nothing in the subsequent history, including the ratification of the Fourteenth Amendment, changed the underlying centrality of the concept of well regulated liberty to American law.

Modern Second Amendment scholarship and recent jurisprudence have devoted considerable energy to debating the individual or collective nature of this right. Hardly any attention has been devoted to elaborating a functional Second Amendment jurisprudence. All of the existing theories of the Second Amendment, including those that

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249. *See id.*

250. *Id.*

251. *See* Proceedings in the Ku Klux Trials, *supra* note 236.

252. For problematic efforts to associate guns with modern First Amendment theory's prohibition on prior restraints, see Powe, *supra* note 7. Another dubious modern claim is that the founders would have not cared about the social cost of the exercise of a right, a dubious claim given the regulatory framework they created to deal with firearms and gun powder. On this anachronistic claim, see Reynolds, *supra* note 7. In this sense the right to bear arms was certainly not a trump. *See supra* note 32. When the right is placed in its historical context and viewed as a civic right, this becomes clear.

treat it as an individual right, a collective right, or a civic right, leave open the issue of how courts ought to weigh and evaluate firearms regulation.<sup>253</sup> In this sense, recent Second Amendment jurisprudence has been much less pragmatic than earlier efforts by the courts to sort out the meaning of bearing arms. The struggles of antebellum state judges to make sense of the scope of the right to bear arms and the common law right of self-defense might provide some useful guidelines for modern jurists.

Although mechanistically applying the frameworks developed by these jurists makes little sense, there are a few useful principles to be gleaned from this body of case law. Most jurists recognized a fundamental distinction between guns kept in conjunction with a civic obligation to participate in a well regulated militia, and those kept for purely private purposes. Antebellum jurisprudence also accepted that laws regulating the keeping of militia weapons ought to be subject to a different level of scrutiny than laws regulating the bearing of those weapons. There can be little doubt that if Americans were willing to undertake the burdens of recreating the Founding Era's well regulated militia that the scope of Second Amendment protection for some types of firearms would be considerable.<sup>254</sup> It took a concerted effort on the part of Americans to effectively transform the founders' militia into the modern National Guard; it would take an equally concerted effort to recreate the original militia.<sup>255</sup>

Of course, it is a matter of public policy, not constitutional law, to determine if the time has arrived to restore the founders' militia to its former role in American society. It is also a matter of public policy, not constitutional law, to decide how that militia would be armed and how its arms would be stored. Although gun rights advocates have become somewhat obsessed with proving that the right to bear arms includes private arms for private purposes, there is little in the history, the text, or the structure of the Constitution to support such a view. Only by constructing an alternate history fantasy in which the Second Amendment was authored by Daniel Shays, Samuel Adams, or the dissenting Anti-Federalist minority of Pennsylvania, can such a view be sustained.<sup>256</sup> The absence of any compelling historical evidence to support the individual rights view of the Second Amendment does not mean that government is free to enact any laws it wishes regarding firearms. The concept of well regulated liberty and the common law protections for firearms owners would certainly preclude the nightmare scenario of gun confiscation so often conjured up by gun rights advocates.

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253. See *supra* Introduction.

254. Cornell, *Beyond the Myth of Consensus*, *supra* note 51.

255. See Uviller & Merkel, *supra* note 20, at 143.

256. See *supra* notes 83, 112-16 and accompanying text.

Ironically, rather than conjure up a Bizarro history of the Second Amendment, gun rights advocates would have a much stronger legal theory if they abandoned history entirely and developed a more coherent philosophical defense of their support for an expansive individual right to have firearms for private purposes. While such an exercise would certainly improve the quality of individual rights scholarship on the Second Amendment, there is really no need to invent new legal justifications for protecting the rights of firearms owners. Simply applying a rigorous rational basis review of gun laws would achieve this goal admirably. The notion that we ought to give guns the same protection that the Constitution gives words not only makes little practical sense, it creates yet another false constitutional dichotomy: either we treat guns like words or we give guns no legal protection. Even if one accepted that the Second Amendment protected an individual right, there is no reason to assume that such a right merits strict scrutiny by the courts.<sup>257</sup>

Gun rights advocates have often invoked the specter of domestic disarmament as the inevitable outcome of failing to recognize that the Second Amendment protects an individual right.<sup>258</sup> Although intellectually it is not hard to deconstruct such slippery slope arguments, their emotional resonance in American culture is indisputable.<sup>259</sup> The problem with such slippery slope arguments was first recognized by Federalists, who easily disarmed their Anti-Federalist opponents' hysterical rhetoric by noting that, with such high levels of domestic armament, such a fear was illusory.<sup>260</sup> In a nation with so many guns and such widespread popular support for gun ownership, there is little need to fear domestic disarmament.<sup>261</sup> Quite apart from the problems of enforcement, which would be monumental, it is hard to imagine courts accepting any policy or

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257. For more on this point, see Erwin Chemerinsky, *Putting the Gun Control Debate in Social Perspective*, 73 *Fordham L. Rev.* 477, 484 (2004).

258. See Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 *Geo. L.J.* 309 (1991); Kates, *The Second Amendment*, *supra* note 78, at 98.

259. Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 *Harv. L. Rev.* 1026 (2003).

260. Saul Cornell, *Introduction to Whose Right to Bear Arms*, *supra* note 3, at 14 (quoting Noah Webster).

261. James Fleming's arguments about the deeply rooted nature of property rights in American society apply with even greater force to gun rights. The deep cultural roots of guns in American history and society render aggressive judicial enforcement of an individual right superfluous. Entrenched social practice and organized political action are the most reliable and effective means for protecting the rights of gun owners and have proven remarkably resilient over time. Given the power of gun rights groups, the limited funding of gun control groups, and their quite modest agenda of moderate regulation, the idea of a slippery slope on this issue is ludicrous. For an elaboration of this argument with regard to property rights, see James E. Fleming, *Fidelity, Basic Liberties, and the Specter of Lochner*, 41 *Wm. & Mary L. Rev.* 147 (1999).

regulatory scheme that effectively prohibited all firearms under all circumstances even with the most lax rational basis review.<sup>262</sup> The time has arrived to cast aside both the libertarian and gun prohibitionist rhetoric that drives so much of this debate, and focus our attention on creating a regulatory scheme that promotes public safety and recognizes the many legitimate uses of guns in our society.

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262. James B. Jacobs, *Can Gun Control Work?* (2002).