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INTRODUCTION

"In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights."—James Madison[1]

A quest to realize notions of freedom and liberty clearly served as the impetus for the American Revolution. Although scholars such as John Locke cultivated ideas of freedom and the natural rights of man,[2] liberty would not become a tangible construct until after the United States emerged victorious from the Revolution. Impassioned cries made by great orators demonstrated the founding fathers' idealistic commitment to liberty and freedom.[3] Yet, although the constructs of liberty and the natural rights

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[1] James Madison, *Property*, 1 NAT'L GAZETTE, Mar. 27, 1792, at 174, *reprinted in* 4 THE JAMES MADISON LETTERS 478 (1884).

[2] JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

[3] Clearly the most infamous cry for liberty belongs to Patrick Henry, who stated, "I know not what course others may take; but as for me, give me liberty or give me death!" Speech by Patrick Henry before the Virginia House of Delegates,

of man are fixed realities for the contemporary American populace, they formerly were intangibles that were sculpted into their present state by the founding fathers.

In order to appreciate the framework of the Constitution and its Bill of Rights, it is essential to understand what our nation's founding fathers suffered and what they sought to gain through revolution. The founding fathers lived in an era when Great Britain increasingly taxed imports and exports.[4] Following the Seven Years' War, Great Britain needed a revenue source to provide for the standing army that it chose to maintain in the American colonies.[5] Notwithstanding their status as British citizens, men in the colonies lacked representation in Parliament.[6] Although increased

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Richmond, Virginia (Mar. 23, 1775), *quoted in* JOHN BARTLETT, FAMILIAR QUOTATIONS 270 (16th ed. 1992).

[4] *See, e.g.*, The Sugar Act, 1764, 9 Geo. 3; The Stamp Act, 1765, 10 Geo. 3; The Townshend Act, 1767, 8 Geo. 3; The Tea Act, 1773, 12 Geo. 3.

[5] During the eighteenth century, the entire continent of Europe, including Great Britain, seemed to be at war. *See* John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 215-16 (1996). The Seven Years' War was fought between Great Britain and France both in Europe and North America. The war is more readily known as the French and Indian War in the United States. For additional information regarding taxation following the Seven Years' War, see David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551, 573 (1991).

[6] Several of the grievances highlighted in the Declaration of Independence discuss the injustices of the King in denying the colonists fair representation. Specifically, the Declaration of Independence notes that:

> [The king] has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only.
>
> . . . He has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people.
>
> . . . For suspending our own Legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.

THE DECLARATION OF INDEPENDENCE para. 5, 7, 24 (U.S. 1776).

In a letter written before the Declaration of Independence, a group of colonial figures, highlighted by John Hancock, complain that "[t]axes equally detrimental to the Commercial interests of the Parent country and the colonies, are imposed upon the People, without their Consent." Letter from John Hancock et al., as "Selectmen of Boston," to "Selectmen of Petersham" (Sept. 14, 1768), *at* The Gilder Lehrman Institute of American History, http://www.gliah.uh.edu/documents/documents_p2.cfm?doc=281 (last modified Oct. 25, 2002).

taxes and limited representation often were adequate grounds of protest, other British atrocities served, to a much greater extent, to inflame and invigorate the passions of the American revolutionaries.

As discord rose due to the visible presence of the British, the Crown continually increased the size of its forces in the colonies and permitted British soldiers to seize American homes so that soldiers might quarter themselves at their leisure.[7] British soldiers frequently raided community armories, taking public stores of firearms and gunpowder.[8] Moreover, the British limited the rights of individuals to carry their own weapons.[9] The colonists were left without a means to protect themselves; the British had taken their arms and invaded the sanctity of their homes. Americans were treated as second-class British citizens; they were subject to the whims of British commanders, seemingly prisoners upon their own land. After suffering under the rule of the British, the founders would never permit their new government to commit like offenses. To protect the populace, the founding fathers drafted the Constitution and the Bill of Rights, which guarantee rights and privileges for all Americans.

The Second Amendment of the United States Constitution reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[10] In recent years, academics have struggled to parse the words of the amend-

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[7] *See, e.g.*, The Quartering Act, 1765, 10 Geo. 3; The Quartering Act, 1774, 12 Geo. 3.

[8] For example, on April 21, 1775, one week following the battles of Lexington and Concord, British soldiers from the H.M.S. Magdalen secretly removed most of the gunpowder from the armory in Williamsburg, Virginia, which was the capital of the Commonwealth of Virginia. The Royal Governor, Lord Dunmore, hoped that his action would prevent open rebellion in Virginia. Instead, his actions inflamed Virginia revolutionaries, culminating twelve days later with Patrick Henry leading over 150 men to demand the return of the gunpowder. Rhys Isaac, *Dramatizing the Ideology of Revolution: Popular Mobilization in Virginia, 1774 to 1776*, 33 WM. & MARY Q. 357, 379-81 (1976). For a more thorough description of the events in Williamsburg, see *Williamsburg—The Old Colonial Capital*, 16 WM. & MARY Q. 1, 43-47 (1907). Additionally, the British army made several attempts, both successful and unsuccessful, to raid arsenals storing weapons and gunpowder in the Boston area. In fact, the battles at Lexington and Concord were sparked by an intended raid on the storehouse at Concord. *See* David T. Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J.L. & POL. 1, 25 (1987).

[9] 1 THE PAPERS OF THOMAS JEFFERSON 213, 216 (Julian P. Boyd ed., Princeton University Press 1950).

[10] U.S. CONST. amend. II.

ment in their quest to discern its meaning.[11] In so doing, academics have divided into two predominant schools of thought: (1) adherents to the collective rights theory,[12] and (2) adherents to the "individual rights" theory.[13]

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[11] Numerous articles regarding the Second Amendment and the right to bear arms have been written during the twentieth century. *See, e.g.*, Lucilius A. Emery, *The Constitutional Right to Keep and Bear Arms*, 28 HARV. L. REV. 473 (1915); Daniel J. McKenna, *The Right to Keep and Bear Arms*, 12 MARQ. L. REV. 138 (1928). However, the recent heightening of awareness of the right to bear arms began with historians during the 1970s. *See, e.g.*, Lawrence Delbert Cress, *Radical Whiggery on the Role of the Military: Ideological Roots of the American Revolutionary Militia*, 40 J. HIST. IDEAS 43 (1979); Lawrence Delbert Cress, *Republican Liberty and National Security: American Military Policy as an Ideological Problem, 1783 to 1789*, 38 WM. & MARY Q. 73 (1981); Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599 (1982); Robert E. Shalhope & Lawrence Delbert Cress, *The Second Amendment and the Right to Bear Arms: An Exchange*, 71 J. AM. HIST. 587 (1984). Following this analysis by historians, legal scholars followed suit in their analysis of that right. *See, e.g.*, Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991) [hereinafter Cottrol & Diamond, *The Second Amendment*]; Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 DAYTON L. REV. 5 (1989); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236 (1994).

[12] Collective Rights scholars have nicknamed the individual rights approach the "revisionist theory." In doing so, these scholars attempt to cement their approach as the more acceptable theory. *See, e.g.*, David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588 (2000). However, for the vast majority of American history, the popular belief was that the Second Amendment conveyed an individual right to keep and bear arms. Scholars Stephen Halbrook and David Kopel go as far to say that "*[a]ll legal scholarship* dating from the creation of the Second Amendment and extending through the first decades of the twentieth century considered the Second Amendment to guarantee an individual right." Stephen P. Halbrook & David B. Kopel, *Tench Coxe and the Right to Keep and Bear Arms, 1787-1823*, 7 WM. & MARY BILL RTS. J. 347, 352 (1999) (emphasis added). Only recently have academics questioned this long-standing belief. Thus, it is the collective rights theory that in fact holds the position as a "revisionist approach."

[13] The Individual Rights approach is also known as the "Standard Model" of the Second Amendment in that it guarantees the right of individual Americans to own and carry firearms. Halbrook & Kopel, *supra* note 12, at 351.

The collective rights or "states' rights" theory surmises that the amendment creates only a "collective right" to bear arms and hence does not grant individuals the right to keep and bear arms.[14] Collective rights theorists contend that people only have the right to bear arms when protecting the nation in their capacity as militiamen.[15] Thus they place the weight of their analysis upon the importance of the amendment's initial clause, its militia clause.[16]

Unlike collective rights theorists, adherents to the individual rights theory argue that the Second Amendment grants each individual the right to keep and bear arms without governmental interference.[17] Although there

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[14] Glenn Harlan Reynolds & Don B. Kates, *The Second Amendment and States' Rights: A Thought Experiment*, 36 WM. & MARY L. REV. 1737, 1742-43 (1995).

[15] *Id.*

[16] A wide variety of scholars adhere to the collective rights theory. *See, e.g.*, DENNIS A. HENIGAN ET AL., GUNS AND THE CONSTITUTION: THE MYTH OF SECOND AMENDMENT PROTECTION FOR FIREARMS IN AMERICA (1995); Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309 (1998); Wendy Brown, *Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism: On Sanford Levinson's The Embarrassing Second Amendment*, 99 YALE L.J. 661 (1989); Ehrman & Henigan, *supra* note 11, at 5; Paul Finkelman, *"A Well Regulated Militia": The Second Amendment in Historical Perspective*, 76 CHI.-KENT L. REV. 195 (2000); H. Ober Hess, *Second Amendment—The Right to Bear Arms*, 71 PA. B.A. Q. 82 (2000); Gary Wills, *To Keep and Bear Arms*, N.Y. REV. OF BOOKS, Sept. 21, 1995, at 62-73; Yassky, *supra* note 12, at 588.

Another scholar, David C. Williams, seems to take more of a hybrid approach to the collective rights and individual rights movements. In one article, he argues that the "well regulated Militia" protects the security of the free State only so long as the vast majority of the population is armed. Since this is no longer true, Williams feels that the right is outdated and thus, without meaning. *See, e.g.*, Williams, *supra* note 5, at 554-55. In another article, he proposes that judges interpreting the amendment should consider both of its clauses together, as a unitary whole. In doing so, judges would not give primacy to any particular clause. David C. Williams, *The Unitary Second Amendment*, 73 N.Y.U. L. REV. 822, 829 (1998).

[17] Recently, increasing numbers of scholars advocate an individual rights theory of the Second Amendment. *See, e.g.*, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 46-63, 257-68 (1998); STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT (1984); LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 133-49 (1999); Robert J. Cottrol & Raymond T. Diamond, *"Never Intended to be Applied to the White Population": Firearms Regulation and Racial Disparity—The Redeemed South's Legacy to a National Jurisprudence?*, 70 CHI.-KENT L. REV. 1307 (1995) [hereinafter Cottrol & Diamond, *Never Intended to be Applied*]; Cottrol &

are several approaches that attempt to justify the individualist theory, many scholars argue that the amendment conveys a right of armed resistance against the government when the government supersedes the bounds of its authority.[18] In contrast to collective rights theorists, individual rights scholars place emphasis upon the latter portion of the amendment.

As with many constitutional issues, contemporary political beliefs greatly influence these dominant schools of thought. While members of gun advocacy groups promote the individualist theory and gun control groups promote the collective rights theory, academics have increasingly joined the political fray. In focusing upon their respective *political agendas*,[19]

Diamond, *The Second Amendment*, *supra* note 11; Stephen P. Halbrook, *Encroachments of the Crown on the Liberty of the Subject: Pre-Revolutionary Origins of the Second Amendment*, 15 U. DAYTON L. REV. 91 (1989); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983); David B. Kopel & Richard E. Gardner, *The Sullivan Principles: Protecting the Second Amendment from Civil Abuse*, 19 SETON HALL LEGIS. J. 737 (1995); Levinson, *supra* note 11; Roger I. Roots, *The Approaching Death of the Collective Right Theory of the Second Amendment*, 39 DUQ. L. REV. 71 (2000); Van Alstyne, *supra* note 11; Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998).

Moreover, it should be noted that in the latest version of his constitutional law treatise, Professor Laurence H. Tribe has an extensive discussion of the Second Amendment in which he suggests that the Second Amendment may convey an individual right to bear arms. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (3d ed. 2000).

[18] This variation of the revisionist approach is frequently termed the "Insurrectionist Rights" theory. For examples of insurrectionist theory argument, see, e.g., JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (1994).

[19] For example, Dennis A. Henigan, a collective rights scholar wrote his article, Ehrman & Henigan, *supra* note 11, at 58 n.aa, while acting as the Director of the Legal Action Project at the Center to Prevent Handgun Violence in Washington, D.C. The Center to Prevent Handgun Violence is an organization devoted to lobbying for gun control legislation. *See* Brady Campaign and the Brady Center to Prevent Gun Violence, *at* http://www.bradycampaign.org/about/index.asp (last visited Oct. 29, 2002). Thomas M. Moncure, Jr., an individual rights scholar, wrote his article, *The Second Amendment Ain't About Hunting*, while acting as an Assistant General Counsel for the National Rifle Association of America. *See* Thomas M. Moncure, Jr., *The Second Amendment Ain't About Hunting*, 34 HOW. L.J. 589, 597 n.a1 (1991). The National Rifle Association is a civil rights organization that lobbies to limit gun control legislation and to protect the right to keep and bear arms. *See* NRA Institute for Legislative Action, *at* http://www.nraila.org/about.asp (last visited Oct. 29, 2002). I do not intend to suggest that all

members of both the collective rights and individual rights groups have *misconstrued* and *inaccurately portrayed* the original intent and actual meaning of the Second Amendment.

This Article sets forth a new, apolitical Second Amendment analysis. In many instances, it relies on traditional literature that has been cited as support by each school of thought. However, this Article takes an innovative approach to Second Amendment analysis, treading a different path than previous scholarship. Instead of focusing entirely upon traditional sources, this Article also highlights the views of dissenting members of the American populace. History has demonstrated that dissenters are frequently most capable in their ability to convey the true intent of the majority, along with the concerns of the minority. By considering both traditional and non-traditional sources, this Article sets forth a new Second Amendment analysis that arrives at the original intent of the framers. Part I evaluates the original intent of the framers by examining traditional sources.[20] Part II sets forth the views of William Manning, a common man who crafted an extraordinary manuscript following the drafting of the Constitution, are set forth.[21] Part III attacks the notion that the framers exclusively intended the Second Amendment to be a measure serving states and citizen militias.[22] Part IV examines the amendment in the context of slavery and the South.[23] Lastly, Part V analyzes the Fourteenth Amendment, the incorporation debate, and its bearing on the Second Amendment.[24]

I. THE ORIGINAL INTENT OF THE FRAMERS: AMENDMENT DRAFTS AND THE ROLE OF THE MILITIA

A. Drafts of the Second Amendment

The drafting of the Bill of Rights was a measure in direct response to the abuses suffered by the colonists while under British rule. Adhering to the views of philosopher John Locke, Americans believed that men inherited natural rights that could not be altered or usurped by the

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Second Amendment scholarship suffers from inherent political bias. However, I do wish to highlight that some scholarship in this area does have the appearance of bias.

[20] *See infra* notes 25-38 and accompanying text.

[21] *See infra* notes 39-83 and accompanying text.

[22] *See infra* notes 84-142 and accompanying text.

[23] *See infra* notes 143-85 and accompanying text.

[24] *See infra* notes 186-205 and accompanying text.

monarchy. For example, in his commentary on the workings of government, *Dissertations on the First Principles of Government*, Thomas Paine noted:

> A declaration of rights is not a creation of them, nor a donation of them. It is a manifest of the principle by which they exist, followed by a detail of what the rights are; for every civil right has a natural right for its foundation . . . [a]s, therefore, it is impossible to discover any origin of rights otherwise than in the origin of man, it consequently follows, that rights appertain to man in right of his existence only, and must therefore be equal to every man.[25]

The Bill of Rights was not drafted to create new rights; instead, the founding fathers explicitly set forth natural rights that were previously understood as inalienable.[26] These natural rights were unassailable because it was understood that they were a birthright of all men. Phrased differently, *all men* possessed the *same, and equal*, natural rights.

Following the adoption of the Constitution, James Madison proposed the Bill of Rights as a set of amendments to the Constitution to appease those who were unhappy with the document. Specifically drafted to protect the personal freedoms of the populace, Madison proposed that, "[t]he right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms shall be compelled to render military service in person."[27] This initial draft reflects Madison's true intent; its initial clause conveys the message that "the people" should have the right to keep and bear arms and that right shall not be infringed. The proposed amendment's initial clause conveys a broad statement of purpose to the reader. Rather than limiting the freedom to keep and bear arms to the militia, the focus of the amendment lies in the ability of "the people" to keep and bear arms.

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[25] THOMAS PAINE, *Dissertation on the First Principles of Government*, *in* LIFE AND WRITINGS OF THOMAS PAINE 267 (Daniel Edwin Wheeler ed., 1908).

[26] *Id.* Professor Roger Roots notes that "[f]ederalist defenders of the pre-amendment constitution offered the natural right to bear arms as the reason that no bill of rights was needed." Roots, *supra* note 17, at 87. Blackstone believed governmental authorizations of the right to have arms were "public allowance[s] under due restrictions, of the natural right of resistance and self preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression." 1 WILLIAM BLACKSTONE, COMMENTARIES 107 (Morrison ed., 2001).

[27] 1 ANNALS OF CONG. 451 (Thomas Lloyd ed., 1789).

The phrase, "the people," is a curious phrase used in a limited fashion throughout the Constitution.[28] When used, it refers to those members of the American populace who "'ordain[ed] and establish[ed]' the Constitution;"[29] the phrase "the people" alludes to citizens who possessed all the rights and liberties guaranteed by the Constitution.[30] In using this phraseology in the Second Amendment, Madison intended to convey this right to "the people," which seems to include all men who had the right to vote.[31] However, considerable disagreement exists over whether Madison intended the phrase to convey a selective right to keep and bear arms.[32] Thus, it

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[28] Akhil Reed Amar notes that the phrase is set forth in the Preamble of the Constitution as the body that, "in conventions had 'ordain[ed] and establish[ed]' the Constitution." AMAR, *supra* note 17, at 49. Amar notes that "the words 'the People' appear[ ] only once in the original Constitution," discussing the voting populace that would select members of the House of Representatives. *Id.*

[29] *Id.*

[30] *Id.* at 48-49, 258.

[31] In drafting the Constitution, the founding fathers sought to ensure that an educated elite would govern the nation in the best interests of the common man. Historian Gordon Wood notes that "[t]he revolutionaries' stress on the circulation of talent and on the ability of common people to elect those who had *integrity and merit* presumed a certain moral capacity in the populace as a whole." GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 234 (1992) (emphasis added). In many instances, only white men who owned property enjoyed the privilege of suffrage. It should be noted that by 1825, three states, Rhode Island, Virginia, and Louisiana, still lacked universal white manhood suffrage. *Id.* at 294. Consequently, although Madison drafted the amendment with the intent of conveying its rights to common men, he, like other founders, hoped that the common men would elect educated elites who would, in turn, safeguard the rights of the common man. *Id.* at 234. Madison even admitted that common men needed sufficient "virtue and intelligence to select men of virtue and wisdom." *Id.* Without doing so, Madison believed "no form of government, can render us secure." *Id.* at 235. Other evidence that the founding fathers hoped the educated would govern society is manifest in the leadership of Pennsylvania attempting to create a system in which representatives would be elected in "at-large" fashion, rather than in specific districts. Federalists from Philadelphia simply concluded that there were too few men who had the abilities to govern outside of that city. *Id.* at 260.

[32] For example, the First Amendment mandates that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. In drafting this amendment, did Madison and the framers intend to convey the freedom of speech and to protect all individuals from Congressional interaction with religion, while only selectively allowing "the

should be understood that in conveying the right to keep and bear arms to "the people," Madison and the framers, at a bare minimum, conveyed this right to those white men who were able to vote.

In Madison's initial draft of the Second Amendment, he set forth three specific concepts: (1) the amendment ensured that the populace had a civil right to keep and bear arms and that right could not be infringed by the government; (2) he hoped to ease the fears of Anti-Federalists[33] by promoting the militia's role as the primary unit of protection for the United States; and (3) he sought to exempt "religiously scrupulous" citizens from militia service if their religious views interfered with such participation.[34]

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people," those individuals who could vote, to peaceably assemble? If this were the case, presumably, white men would be entitled to peaceably assemble, while white women would not be entitled to that right. However, the phrase "the people" does not exclusively apply only to those white men who could vote. Instead, that phrase has two essential functions: first, it outlines a "core" set of individuals, generally composed of white men who could vote, and second, it generally applies to "the people" as a unitary whole. AMAR, *supra* note 17, at 48-49. Thus, it is possible to interpret the phrase "the people" as applying to "First-Class Citizens," such as white males, or all individuals, including white males that did not own property, white women, and freedmen. Consequently, the right to peaceably assemble applies to the population as a unitary whole. AMAR, *supra* note 17, at 26-27, 48-49.

[33] The Anti-Federalists were passionate advocates against a strong federal government during the Constitutional Convention. They attempted to raise any avenue of argument to eliminate the possibility of ratification. Bogus, *supra* note 16, at 327. Anti-Federalists such as Patrick Henry initially hoped to foster sentiment against ratification by citing an absence of a bill of rights in the proposed American Constitution. After defeats in state legislatures, however, they turned their attention to proposing amendments to the document, hoping that their efforts would fundamentally alter the dynamic between federal and state power in the new structure of government. Finkelman, *supra* note 16, at 197-98.

Historian Gordon Wood believes that there were two types of Anti-Federalists; each type of Anti-Federalist had a strong fear of centralized power in government. However, Anti-Federalists such as George Mason or Richard Henry Lee had no desire to "undermine the traditional order of society." WOOD, *supra* note 31, at 258. Such Anti-Federalists tended to be from the southern states. Wood identifies another breed of Anti-Federalist, however, who had a "desire to challenge both aristocratic leadership and the social order." *Id.*

[34] There is evidence that the members who drew up the Second Amendment understood that each of the three clauses within the initial proposal stood on their own with independent strength. Specifically, in debate, Mr. Stone "[i]nquired what the words 'religiously scrupulous' had reference to: was it of bearing arms? If it was, it ought so to be expressed." 1 ANNALS OF CONG. 779 (Thomas Lloyd

In subsequent drafts, however, the religious exemption from militia service was abandoned because drafters considered it unnecessary and feared that the religious exemption might cripple the functionality of the militia.[35] Without the latter clause providing a religious exemption, the drafters were left with two clauses that were *similar in concern but unrelated in fact.* The Second Amendment as originally drafted by Madison would no longer convey an accurate meaning if written in its initial form.[36] Curiously, however, when those phrases were reversed,[37] they formed a dichotomy in which neither clause predominates. In this way, the intent of the founders remained clear and the construction of the text did not need alteration. By simply reversing the clauses, the drafters preserved the textual construction of the amendment.[38] In doing so, they appeased outspoken critics and limited the development of different avenues of complaint regarding the Bill of Rights and its guarantees.

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ed., 1789). Without such a clarification, it was possible that the independent right to have a weapon would not be conveyed to those who were religiously scrupulous. Further discussion was not necessary upon the dissolution of the tertiary clause.

[35] Mr. Benson, 1 ANNALS OF CONG. 779-80 (Thomas Lloyd ed., 1789); Mr. Scott, 1 ANNALS OF CONG. 796 (Thomas Lloyd ed., 1789). Additionally, Mr. Scott believed this religious clause would lead to an inability to depend on the militia. He noted "[t]his will lead to the violation of another article in the constitution, which secures to the people the right of keeping arms, as in this case you must have recourse to a standing army." THE COMPLETE BILL OF RIGHTS 190 (Neil H. Cogan ed., 1997) (quoting Mr. Scott, Gazette of the United States, at 250 (Aug. 22, 1789)).

[36] If the proposed Amendment remained unchanged, it would have read: "The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country."

[37] By reversing the phrases, the Amendment reads: "A well armed, and well regulated militia being the best security of a free country; the right of the people to keep and bear arms shall not be infringed."

[38] Congressional debate regarding the proposed Second Amendment is extremely limited. In proposing the Bill of Rights, Madison sought to assuage the fears of the Anti-Federalists, who generally considered the Constitution as a document that created an undesirably strong federal government. If the amendment underwent dramatic alteration of its text, debate between the Federalists and Anti-Federalists might easily have intensified. Consequently, the drafters tended to reject major alterations to the text and structure of Madison's proposed amendment. For a compilation and analysis of Congressional debate surrounding the Bill of Rights, along with discussion of State Conventions, please see THE COMPLETE BILL OF RIGHTS, *supra* note 35.

II. THE CONSTITUTIONAL APPROACH OF A COMMON MAN[39]

During and immediately following the drafting of the United States Constitution, American patriots felt compelled to espouse their opinions regarding democracy, liberty, and federalism. One such patriot, William Manning, was a New England farmer and laborer.[40] He was a "self-educated citizen-soldier[ ]" who joined the Continental Army in 1775 and "fought at the . . . battle of Concord."[41] As a Democrat, Manning hoped to extend the influence and duties of government to all free men, rather than rely on the abilities of the landed and educated elite to guard the rights and liberties of the working classes.[42] Thus, Manning frequently criticized Federalist policies that repressed and restricted laborers.[43] In advocating a new role for the working classes, Manning took a somewhat Jeffersonian tone in his writings.[44]

William Manning's chief manuscript, *The Key of Liberty*, relied on his notion that there were two broad groups in society, "the Few and the Many," that fueled the mechanism of government.[45] "The Few," including merchants, landed gentry, and professionals, were those individuals who

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[39] In the context of this law review Article, the reader may inquire regarding the relevance of William Manning. William Manning's manuscript, *The Key of Liberty*, provides insight into American society immediately following the adoption of the Constitution, and affords a unique glimpse into "the inarticulate classes." *See generally* WILLIAM MANNING, THE KEY OF LIBERTY (Michael Merrill & Sean Wilentz eds., 1993). Manning's writings, with due attention to *The Key of Liberty*, hold a critical position in American history and historiography. Manuscripts rarely discuss the sentiments of the common man during the early formation of the United States. Yet, Manning's writings hold a critical place in that not only does he discuss these beliefs, but he was an actual representative of the laboring class. *Id.* The writings of William Manning and their value are respected to such a degree that historian Nathan O. Hatch noted that the manuscripts are "the rarest kind of historical evidence, a window on the mind of a man who would generally be considered among 'the inarticulate.'" NATHAN O. HATCH, THE DEMOCRATIZATION OF AMERICAN CHRISTIANITY 26 (1989).

[40] MANNING, *supra* note 39, at 3.

[41] *Id.*

[42] *Id.* at 58-59. Manning clearly saw the vital role that knowledge played in protecting liberty. In the opening paragraphs of his manuscript, he notes, "[l]earning and knowledge is essential to the preservation of liberty; and unless we have more of it among us, we cannot support our liberties long." *Id.* at 125.

[43] *Id.* at 59.

[44] *Id.*

[45] *Id.* at 4.

maintained professions that relied on the labor of others.[46] "The Many," including artisans, farmers, and laborers, were those individuals who labored so that the populace might subsist.[47] Manning sought a more egalitarian nation in which all laboring men were equal and "the Few" would no longer be able to thrive off "the Many."[48] Further, "Manning totally rejected the notion that the Few were uniquely fit to govern."[49] He sought a truly democratic society in which all free men acted in a self-governing capacity.[50] To achieve this goal, he proposed the establishment of the "Laboring Society," a nationwide political group that would permit "all the free male persons" above the age of twenty-one who "labor for a living in the United States" to join.[51]

In his manuscript, Manning emphatically declared that standing armies, and their inherent ability to contribute to needless wars, are a specific means for "the Few" to override the interests of "the Many."[52] Manning stated that defense is absolutely necessary to maintain a free nation; however, he concluded, "the best and only safe defense of a free government is by a well-regulated and disciplined militia."[53] Manning feared "the Few" would entrench the standing army within the fabric of society by "making [the militia] as costly as possible," rather than establishing a militia system "in the cheapest and easiest manner possible."[54] Further, Manning noted that the standing army was a device used by "the Few [to] destroy free governments . . . ."[55] and maintain social control.[56] A standing army was a constant presence, similar to a police force, that would ensure that the populace would not revolt against the elite.[57]

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[46] *Id.* at 135-38.

[47] *Id.*

[48] *See id.* at 70.

[49] *Id.* at 5.

[50] *Id.*

[51] *Id.* at 67-68. In doing so, Manning opened the Labouring Society up to all free men, including "free blacks" and "propertyless whites." *Id.* at 68.

[52] *Id.* at 142.

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *See id.*

[57] The Declaration of Independence takes care to document the tyranny of standing armies. In citing their grievances against the king, the founding fathers note "[the King] is, at this Time, transporting large Armies of foreign Mercenaries to compleat the works of Death, Desolation, and Tyranny, already begun with circumstances of Cruelty and Perfidy, scarcely paralleled in the most barbarous

Manning believed that standing armies should not be forcibly instituted upon the middling classes. He believed that the elite instigated "needless wars," or "raise[d] . . . insurrection[s] or foreign war[s] only [as a] pretext to raise and keep a standing army."[58] Thus, Manning concluded that outside action was required to shift society from its reliance upon militia as its primary means of defense against the ubiquitous standing army.[59] This outside event would harness the loyalty of the middling classes and blindly focus their civic pride on the establishment of a standing army to thwart any danger. Yet, these classes would then inherit the advantages and disadvantages of the standing army, which could be used by the elite to counteract any opposition, whether internal or external.[60] Moreover, once the conflict subsided, the elite would be reluctant to relinquish their newfound social control device.[61]

Manning lamented the role that the laboring classes played in this "dance," noting that "[s]o apt is mankind to be wrought up into a passion by false reports and slight offenses that it is an easy matter for artful and cunning men to set peaceable neighbors and families at variance with each other where there are no grounds for it on either side."[62] Manning clearly felt the laboring classes were the victims of the elite's desire to maintain their status in society.[63] Once the elite established a standing army, the middling classes would rely on that army, rather than the militia, for safety. He believed that the laboring classes were so determined to protect their

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Ages, and totally unworthy the Head of a civilized Nation." THE DECLARATION OF INDEPENDENCE para. 27 (U.S. 1776). In this case, the "foreign Mercenaries" refer to German Hessians imported to assist the British army. To clarify their abhorrence for this practice, the founding fathers explicitly note that these forces are "large Armies," conveying the notion of an intolerable force, rather than a virtuous militia. *See* Carlton F.W. Larson, *The Declaration of Independence: A 225th Anniversary Re-Interpretation*, 76 WASH. L. REV. 701, 776 (2001).

[58] MANNING, *supra* note 39, at 142.

[59] *See id.*

[60] *See id.*

[61] *See id.*

[62] *Id.* at 142. Manning noted "[i]t is the universal custom and practice of monarchical and arbitrary governments to train up their subjects as much in ignorance as they can as to matters of government and policy, and to teach them to reverence and worship great men in office and to take for truth whatever they say without examining or trying to see for themselves." *Id.* at 138-39. Clearly, Manning believed the educated elite who ran the establishment of nations, particularly monarchies such as Great Britain, used the middling classes for the benefit of the elite.

[63] *Id.* at 139.

nation and their homes that they ignored the likelihood that their willingness to fight insurrection would lead to the evisceration of their liberties.[64] Consequently, "the Few," in establishing a standing army, would gain a tool to restrain the middling classes and to prevent any attempts at insurrection.

The standing army and the ever-present state of war were common realities for those living in both the American colonies and in Europe during the seventeenth and eighteenth centuries. For example, during the 1640s, civil war erupted in England and by 1645, "Oliver Cromwell had formed a massive army. . . ."[65] In doing so, he "seize[d] power" from Parliament and the King, and "assumed the role of a military dictator. . . ."[66] To further enunciate the tumult that Manning, other colonists, and the founding fathers felt between the years 1660-1801, Great Britain was in a constant state of war.[67] This constant state of war, which encompassed the entire European landscape, was further complicated by inter-familial alliances that often resulted in branches of the same royal family ruling different nations, or even in distant relatives being at war with each other.[68] Like William Manning, many individuals viewed this state of war as a manufactured social state designed to entrench the standing army and to protect against any and all attempts at social reform.[69]

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[64] *See id.*

[65] Ehrman & Henigan, *supra* note 11, at 11.

[66] *Id.*

[67] During that time frame, Great Britain was involved in the following "laundry list" of actions: the Second Anglo-Dutch War (1665-67), the Third Anglo-Dutch War (1672-74), the War of the Grand Alliance (1689-97), the War of the Spanish Succession (1702-1713), the War of the Quadruple Alliance (1718-20), the War of the Austrian Succession (1739-48), the Seven Years' War (also known as the French-Indian War, 1754-63), the American Revolution (1775-83), and the War with revolutionary France (1793-1801). John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 212 (1996).

[68] *See, e.g.*, CHARLES W. INGRAO, THE HABSBURG MONARCHY, 1618-1815 (1994). The Habsburg Empire had its origins in the thirteenth century. In 1521, Charles V divided the Habsburg Empire into two halves, one in Spain, the other in Austria. Different Habsburgs continued ruling both branches until the Spanish Habsburg dynasty came to an end in 1700 with the death of Charles II. *Id.*

[69] It is no tall order for Manning to have concluded that these conflicts were manufactured when these wars often pitted family against family. For example, Great Britain fought two wars against the Dutch in the latter-half of the seventeenth century. *See* Yoo, *supra* note 5, at 212. Yet, when, upon the birth of a son to James II, the English were faced with the prospect of a line of Catholic kings, seven prominent Englishmen implored William of Orange to invade England, promising

Manning was also clearly cognizant of the recent abuses committed by the British against the Americans.[70] Like many American colonists, he viewed the British army as a feared and loathsome object that preyed upon American weaknesses.[71] For example, prior to and during the American Revolution, British soldiers quartered themselves in American homes without compensating the inconvenienced Americans.[72] Additionally, during times of war, the British navy would force Americans into service against their will aboard British naval vessels.[73] This practice, known as impressment, was explicitly condemned by the Declaration of Independence and, in part, fueled the rise of the American Revolution.[74]

Living in Massachusetts, and participating in the battle of Concord, Manning could recall firsthand the British attempts to disarm the colonists.[75] In 1775, General Gage disarmed the population of Boston in the name of the Crown.[76] Had the British succeeded in taking the right to bear arms from the colonists in its entirety, the Americans would have been subject to the whims of the standing army that remained in the colonies.[77] In light of the threat of disarmament, Manning, when writing his manuscript, believed in the individual right to bear arms.[78] He advocated a militia

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him support if he did. William of Orange, a Dutch nobleman, was married to Mary, the sister of James II. In 1688, the future monarchs set sail for England with the Dutch fleet and they took control in a bloodless coup d'etat known as the Glorious Revolution. *See* Bogus, *supra* note 16, at 379-82.

[70] *See* MANNING, *supra* note 39, at 15.

[71] *See id.*

[72] *See* The Quartering Act, 1765, 5 Geo. 3; The Quartering Act, 1774, 15 Geo. 3.

[73] Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1168 n.175 (1991).

[74] *Id.* Akhil Reed Amar notes, "[i]n the later impressment debate leading to the War of 1812, Secretary of State Monroe declared that impressment 'is not an American practice, but is utterly repugnant to our Constitution . . . .'" *Id.* (citing 28 ANNALS OF CONG. 81 (1814) (remarks of Senator Jeremiah Mason)).

[75] *See* Hardy, *supra* note 8, at 25.

[76] *See* Halbrook & Kopel, *supra* note 12, at 356. When occupying Philadelphia in 1776, General Howe also disarmed the population in the name of the Crown. *Id.* at 355.

[77] David C. Williams notes that, in part, the increases in taxation of the colonists following the Seven Years' War went towards providing for a standing army. Williams writes, "[t]he colonists were experiencing a republican nightmare: an unrepresentative government was using a standing army against them to enforce an unjust policy." Williams, *supra* note 5, at 573.

[78] MANNING, *supra* note 39, at 142-43. Manning's preferred method of national defense was a citizen-militia, which necessarily required every man, whether wealthy or poor, to own firearms. *Id.*

system of defense, which could not function without individuals responsibly defending themselves and their nation. Moreover, Manning focused on the abuses of the standing army and its position as a tool for the elite classes. Like other Democrats, Manning believed that the individual right to bear arms is one that is necessary for liberty.[79] In fact, he might have considered it to be the paramount liberty in that it provided the ability to respond to abuses by the elite. Without the right to bear arms, the governing elite would be free to restrain the liberties and rights of the laboring classes.

In writing about the standing army in his manuscript, William Manning was shaped by Great Britain and its activities in the American colonies. First, Manning clearly was a Democrat in that he wholeheartedly believed that all men were equal and that all men should participate in governing.[80] Second, Manning recognized the historical tradition of the British and the ever-present sense of war that pervaded its eighteenth century society.[81] Third, Manning clearly found the offenses of the British army distasteful and unforgivable.[82] Finally, and of significant note, Manning saw the attempts at disarmament by the British prior to and during the American Revolution as an intolerable example of the elite classes using the standing army to subjugate the middling classes.[83] Although a member of "the inarticulate class," William Manning recognized and valued his liberties; he sought to ensure that they would never be suppressed.

III. HISTORICAL EVIDENCE OF THE INEFFECTUAL MILITIA CLAUSE AND THE FAILURE OF MILITIA AS A MEANS OF NATIONAL DEFENSE

In drafting the Constitution and the Second Amendment, the founding fathers navigated between their Scylla and Charybdis; in one respect, they feared establishing a standing army; in the other, relying on the militia to protect the nation would never prove effective. The founding fathers

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[79] *Id.* It should be noted that Manning rejected uprisings such as the Shays Rebellion in which rebels had alternate means to resolve their dispute through the democratic process. *Id.* at 6.

[80] *See id.* at 5.

[81] *Id.* at 14 (expressions regarding the traditions of the British, including conduct viewed as tyrannical, had "deep roots in the political vernacular of the Massachusetts countryside, dating back to the seventeenth century.").

[82] *Id.* at 15. In response to the Coercive Acts, Billericans, residents of the town where Manning resided, believed "the Crown and Parliament were attempting to 'dragoon us into slavery because we disdain patiently to take the yoke upon our neck.'" *Id.*

[83] *See* Hardy, *supra* note 8, at 13-16.

believed that a standing army might trample upon the liberties of the populace.[84] Although they understood the military advantages of such an army, they were reluctant to pursue that option because of the injustices they suffered at the hands of the British army.[85]

During the Revolution, however, the militia proved that it was not capable of succeeding against a better-equipped standing army.[86] Early in the war, statesmen believed militia would be an adequate foil to the British standing army because while the standing army was an institution of oppression, the militia represented a virtuous armed citizenry.[87] Yet frequent defeats, poor training, and inadequate leadership demonstrated that the militia would not serve as an adequate means to repel the British.[88]

Notwithstanding the failures of the militia during the Revolutionary War, the founding fathers clearly maintained hope that the militia would play an important role in the security of the nation.[89] Despite this hope, they provided the federal government with the authority to establish a standing army.[90] These provisions of the Constitution, however, caused a great uproar with many statesmen, who feared such power could lead to tyrannical oppression by an overbearing government. Specifically, many statesmen of the early republic had a firm and cemented fear of standing armies due to their observations of established standing armies in the Old

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[84] For example, in the Federalist Papers, James Madison noted, "[suppose that we] [l]et a regular army, fully equal to the resources of the country, be formed; and let it be entirely at the devotion of the federal government: still it would not be going too far to say that the State governments with the people on their side would be able to repel the danger . . . [having] half a million citizens with arms in their hands. . . ." THE FEDERALIST NO. 46, at 267 (James Madison) (Clinton Rossiter ed., 1999). Saint George Tucker noted, "[w]herever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction." 1 BLACKSTONE, *supra* note 26, at *300.

[85] CHARLES ROYSTER, A REVOLUTIONARY PEOPLE AT WAR: THE CONTINENTAL ARMY AND AMERICAN CHARACTER, 1775-76, at 17 (1979).

[86] *See* Bogus, *supra* note 16, at 340-42.

[87] ROYSTER, *supra* note 85, at 37-40.

[88] *See, e.g.*, Bogus, *supra* note 16, at 340-42.

[89] *See* Cottrol & Diamond, *The Second Amendment*, *supra* note 11, at 329-30. Alexander Hamilton, although believing the militia had "fought bravely" in the Revolution, concluded they were no match for battle-proven regulars. Hamilton hoped the militia would be uniformly organized and controlled under national authority. *Id.* at 329. Madison's views on the militia were more extensive, believing the militia should consist of nearly the entire white male population. *Id.* at 330.

[90] U.S. CONST. art. I, § 8, cl. 12.

World.[91] For example, George Mason felt the protection of the militia must be established so that the use of standing armies would be restricted.[92] Thus, in order to limit the criticism that the new document suffered, the drafters promised a bill of rights that would firmly entrench the people with liberties not expressly included in the Constitution, so as to protect the populace against intrusions upon fundamental liberties by the government.

A. National Defense in the Context of the Militia and the Native American Campaign of the Ohio River Valley

The United States, when acting against "hostile" Indian groups, relied upon a militia system as a means of national defense. The system obligated white male citizens of proper age who owned property to protect the needs of the state.[93] It required men to assemble on a schedule devised by the local government, between once a week and once a season, for inspection

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[91] In discussing the proposed amendments to the Constitution, Representative Elbridge Gerry stated, "[w]hat, sir, is the use of a militia? It is to prevent the establishment of a standing army, the bane of liberty .... Whenever Governments mean to invade the rights and liberties of the people, they always attempt to destroy the militia, in order to raise an army upon their ruins. This was actually done by Great Britain at the commencement of the late revolution." 1 ANNALS OF CONG. 778 (Joseph Gales ed., 1789).

George Mason noted that "unless there be some restrictions on the power of calling forth the militia . . . we may very easily see that it will produce dreadful oppressions .... This would harass the people so much that they would agree to abolish the use of the militia, and establish a standing army." In response to the potential for standing armies, Mason exclaimed, "I abominate and detest the idea of a government, where there is a standing army." 3 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS 378-79 (1836) (statements of George Mason, June 14, 1788)). These comments were made in response to the notion that the Federal government would have authority over state militias. Mason clearly felt that the federal government should have no such authority, demanding, "the consent of the state legislatures ought to be had." *Id.* at 378. In response, James Madison noted, "I most cordially agree, with the honorable member last up, that *a standing army is one of the greatest mischiefs that can possibly happen.* It is a great recommendation for this system, that it provides against this evil more than any system known to us, and, particularly, more than the old system of confederation." *Id.* at 381 (emphasis added).

[92] *See* Hardy, *supra* note 8, at 50.

[93] Allan R. Millett, *The Constitution and the Citizen-Soldier, in* THE UNITED STATES MILITARY UNDER THE CONSTITUTION OF THE UNITED STATES, 1789-1989, 98 (Richard H. Kohn ed., 1991).

of arms.[94] These citizens were responsible for furnishing weapons with ammunition and, upon verification of proper training, completing their scheduled service.[95] However, reliance upon a militia as a system of national defense was inherently flawed. For example, wealthy individuals were permitted to pay poor individuals to cover their military obligation.[96] Those who were paid for their service frequently squandered their money and failed to provide the defensive capabilities necessary of a common soldier. Unlike regulars, the men who composed the militias were generally deficient in military training and lacked respect for their officers.[97] The flaws of the militia system left the United States and its territories with a dearth of properly trained soldiers.

As evidenced by the militia's failures during the American Revolution, "by the 1790's, the old colonial militia had become an obsolete institution."[98] Washington himself believed that "[t]o place any dependance upon Militia is, assuredly, resting upon a broken staff."[99] The militiamen justified his contention when, during the Revolutionary campaigns of 1776 and 1777, the militia consistently failed to fight, much less defeat, the regulars of the British army.[100] Yet, following the victorious Revolution, the weak central government established under the Articles of Confederation continued to rely on a militia system as a means of national defense.[101]

Following the adoption of the Constitution, the United States embarked on a campaign to free the Northwest Territory from the hostile Indian tribes. Yet, two dramatic defeats served to illustrate the inadequacies of the American militia system. First, General Josiah Harmar led a group of militia against Native Americans in the Ohio frontier, only to be soundly

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[94] *Id.*

[95] *Id.*

[96] *Id.* at 102.

[97] RICHARD KOHN, EAGLE AND SWORD 137 (1975). Historian Richard Kohn notes that the militias were "[d]esigned as local defense forces to protect against Indian raids, foreign invasion, and domestic disorder." *Id.* He further notes that as the frontier moved westward and as the British increasingly used their army in America, the militias "beg[a]n to lose their relevance." *Id.*

[98] *Id.* Kohn notes that upon gaining its independence, the United States "needed a military capable of opposing European armies and moving offensively to break Indian power in the West." *Id.* Kohn clearly believed that the militias could not function as a means to counter such threats.

[99] Letter from George Washington to the President of Congress, Sept. 24, 1776, http://lcweb2.loc.gov/cgi-bin/query/r?ammem/mgw:@field(DOCID+@lit (gw060089).

[100] Bogus, *supra* note 16, at 340-44.

[101] *See* ARTS. OF CONFEDERATION art. VI, cl. 4 (repealed 1787).

defeated. Second, in late 1791, Arthur St. Clair led a large army of ill-trained militia against a stronger contingent of Native Americans, only to be smarted in one of the worst losses in American history. These losses, along with those suffered by the militia in the American Revolution, indicated that the militia would never be a capable means of national defense.

In 1790, General Josiah Harmar and his army of militia were soundly defeated by a loose confederation of Native American tribes. Following the drubbing of his forces at the hands of the Indians, General Harmar blamed his defeat on "the shameful conduct of the militia who threw away their arms and would not fight."[102] In defending his leadership, Harmar argued that holding the militiamen under any degree of control was an "arduous task."[103] He further claimed that once the militia felt secure in their status, they became "ungovernable" by military authorities.[104] Not only did the inadequacies of the militiamen prevent American victory, but the failures of the militia adversely affected the performance of other soldiers in the army.[105]

The stinging American defeat at the hands of the Native Americans, along with the danger to Kentucky,[106] the nation's newest state, catalyzed congressional action providing for the creation of a regiment of nearly one thousand men on March 3, 1791.[107] Following the aforementioned congressional action, President Washington nominated Arthur St. Clair as the leader of the newly commissioned army. St. Clair's task was to assemble a capable army and initiate a fresh campaign against the hostile

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[102] HARVEY LEWIS CARTER, THE LIFE AND TIMES OF LITTLE TURTLE 95 (1987).

[103] BEVERLEY W. BOND, JR., HISTORY OF THE STATE OF OHIO, VOL. I: FOUNDATIONS OF OHIO 320 (Carl Wittke ed., 1941).

[104] *Id.*

[105] WILBUR EDEL, KEKIONGA! THE WORST DEFEAT IN THE HISTORY OF THE U.S. ARMY 81 (1997) (One officer noted, "the regulars being left unsupported fell nearly the whole."); *see, e.g.*, CARTER, *supra* note 102, at 93, 95.

[106] On February 3, 1791, Kentucky was admitted as the fifteenth state in the union. As Native Americans increased their attacks along the Ohio River, these confrontations suddenly had increased prominence because the attacks were now a threat to national security, rather than attacks in a remote territory. *See* EDEL, *supra* note 105, at 85.

[107] 1 Stat. 222 (1791) (repealed 1795). This act also allowed the President to raise "a corps not exceeding two thousand non-commissioned officers, privates and musicians" for use to protect the nation's borders, including Kentucky. *Id.* at 223. While Congress approved an enlarged army, it did not act to reform the inadequacies that were apparent in the nation's reliance on militia as a means of national security. *Id.* at 222-23.

Indians of the Ohio River Valley. However, St. Clair's recruitment of soldiers "'was not a careful selection of picked men but rather a hurried and futile attempt to gather together whatever willing specimens the recruiting officers could find.'"[108] Like other armies relying on militia, soldiers in St. Clair's army frequently had arms and equipment that were "'unfit for use.'"[109]

In the early morning of November 4, 1791, a loose confederation of Native Americans under the leadership of Little Turtle attacked and annihilated the American army led by St. Clair.[110] The Native Americans "concentrated their shots on the active officers," leaving the militia without effective leadership.[111] The militia's response was lethargic; St. Clair's adjutant noted that "[t]he resistance of the militia deserves not the name of defense, but should be branded as the most ignominious flight."[112] After roughly three hours of intense fighting, the American army fled, leaving 630 men dead and 184 wounded.[113]

The utter defeat of the American army at the hands of the Native Americans caused great alarm.[114] In order to avoid repeating the previous debacles that occurred in the Northwest Territory, President Washington and his cabinet took careful measures to ensure full development of the army. Congress passed "[a]n Act for making farther and more effectual Provision for the Protection of the Frontiers of the United States."[115] That Act "raised for a term not exceeding three years, three additional regiments, each of which, exclusively of the commissioned officers, shall consist of nine hundred and sixty non-commissioned officers, privates and musicians."[116] The Act was specifically passed to counter the Native American threat, noting "[t]hat the said three regiments shall be discharged as soon

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[108] EDEL, *supra* note 105, at 87 (quoting WILLIAM H. GUTHMAN, MARCH TO MASSACRE: A HISTORY OF THE FIRST SEVEN YEARS OF THE UNITED STATES ARMY, 1784-1791, 210 (1975)).

[109] *Id.* (quoting 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS 37 (1792)).

[110] *Id.* at 88.

[111] CARTER, *supra* note 102, at 102.

[112] EDEL, *supra* note 105, at 89.

[113] *Id.* St. Clair's defeat stands as one of the worst catastrophes in American military history. At no time before, nor since, did the United States ever suffer a more disastrous defeat at the hands of the Native Americans. *See, e.g., id.* (noting 630 died and 184 were injured in the battle).

[114] Despite limited circulation of written publications, word of mouth brought the American populace to an uproar over St. Clair's defeat. DAVE R. PALMER, 1794: AMERICA, ITS ARMY, AND THE BIRTH OF THE NATION 203 (1994).

[115] 1 Stat. 241 (1792).

[116] *Id.*

as the United States shall be at peace with the Indian tribes."[117] Not only did this congressional action create the army Washington desired, it also increased the pay of the soldiers and instituted an enlistment bonus.[118] In doing so, the newly minted standing army instantly had advantages that previous forces lacked.[119]

After months of preparation and training, General "Mad" Anthony Wayne led the American army, composed of federal volunteers and regulars, against a loosely organized Native American confederation estimated at greater than 1000 braves on the morning of August 20, 1794.[120] Using superior military tactics, General Wayne led his forces to an invaluable victory. Wayne chased his combatants to a local British fort, which refused admittance to the Native Americans.[121] Not only had the Indians been defeated by the Americans, but they had been betrayed by their former allies, the British. The Native Americans would never again have a strong presence in the Ohio River Valley; moreover, westward expansion immediately increased with dramatic results.[122] In a single day,

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[117] *Id.*

[118] *Id.* at 242.

[119] It should be noted that in 1792, Congress passed the Uniform Militia Act of 1792, which attempted to reform the American militia system. KOHN, *supra* note 97, at 135. With the exception of one historian, military historians and analysts have nearly universally emphasized the weaknesses of the bill. *Id.* at 352 n.28. The act made very limited reforms to the militia which proved insufficient. Richard Kohn notes that "[n]othing in the law, however, guaranteed training or even uniformity of structure and equipment." *Id.* at 135. The act "imposed no fines for malfeasance, against the states or individual militia, nor did the law establish any special officers to report on militia affairs to the President or Congress." *Id.*

[120] *See* EDEL, *supra* note 105 (although estimates vary considerably, some believe as many as 2000 Indians were gathered prior to the Battle of Fallen Timbers); PAUL DAVID NELSON & ANTHONY WAYNE, SOLDIER OF THE EARLY REPUBLIC 265 (1985) (noting Anthony Wayne estimated that he faced 1000 braves and about 60 Canadian militiamen).

[121] *See* Richard Baltin, *"Mad Anthony" Wayne at Fallen Timbers*, *in* 1 EARLY AM. REV. (Fall 1996), *available at* http://www.earlyamerica.com/review/fall96/anthony.html (last visited Nov. 4, 2002).

[122] N.E. JONES, THE SQUIRREL HUNTERS OF OHIO OR, GLIMPSES OF PIONEER LIFE 1 (1897). Jones argued that "[f]rom the time the Mayflower landed at Fort Harmar (Marietta) in 1788 until 1795, emigration had not materially increased the population of the North-west, owing to the unstable and dissatisfied condition of the Indians." *Id.* at 2.

The appearance of peace, however, changed the dynamic of the American Northwest by facilitating the widespread immigration of settlers into the territory. The defeat of the confederation at Fallen Timbers along with the peace established

the inadequacies of the militia system were exemplified, while the United States, with its standing army, secured its borders from possible incursions by Native Americans and European forces.

The successful outcome at Fallen Timbers crippled the use of the militia system as a means of national defense for the United States.[123] Throughout the American Revolution and the campaigns against the Indians of the Ohio River Valley, the militia proved unreliable and ineffective.[124] The failures of the militia in the Harmar and St. Clair campaigns were dramatically contrasted by the dramatic victory by General Anthony Wayne and his army composed of federal volunteers and regulars. Where doubt had once lingered, the decisive victory in the Northwest revealed the advantages of a standing army to the public. Although those skeptical of a standing army remained highly suspicious, Federalists increasingly promoted it as a necessity that represented the only military institution capable of repelling foreign threats and protecting the frontier.[125]

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with the Treaty of Greenville, negotiated in 1795, suddenly transformed the Northwest Territory from a sleepy frontier area to a booming sector of migration and economic growth. Historian Gary Walton notes that in 1790 the population of American settlers in Ohio was negligible. Yet, within a decade, the Ohio population had grown to over forty-five thousand. This dramatic increase continued throughout the following decade when, in 1810, the Ohio population grew to over two hundred thirty thousand Americans. Gary M. Walton, *River Transportation and the Old Northwest Territory*, *in* ESSAYS IN NINETEENTH CENTURY ECONOMIC HISTORY: THE OLD NORTHWEST 228 (David C. Klingaman & Richard K. Vedder eds., Ohio Univ. Press 1987). The influx of immigration to the territory qualified Ohio for statehood shortly after it gained territorial status. *See id.* at 225-28. The dramatic population advances that occurred in the Ohio Territory occurred only after Anthony Wayne and the army brought peace to the American northwest.

[123] The militia system would remain a potential means of national defense for years to come. "During the War of 1812, neither the standing army nor the militia" performed exceptionally well during battle. However, it should be noted that in the Battle of New Orleans, following the end of the War of 1812, "[m]ilitia . . . under Andrew Jackson, at that point a regular army officer, handily defeated the regular British army." However, at other times during the war, "militias of several states refused to leave the United States to invade Canada." James Biser Whisker, *The Citizen-Soldier Under Federal and State Law*, 94 W. VA. L. REV. 947, 965 (1992).

[124] *See* KOHN, *supra* note 97, at 137. Kohn concludes that "[t]he calls for reform which began in 1783 and culminated in the act of 1792 revealed that many Americans sensed the inability of state institutions, poorly coordinated, badly disciplined, and casually armed, to meet the needs of the new republic." *Id.*

[125] *Id.* at 280.

Thus, the victory in the Northwest revealed that the militia system was ineffectual as a means of national defense and catalyzed the adoption of the standing army as the military institution that would protect the nation.[126]

B. *National Defense in the Context of the Militia and the Whiskey Rebellion*

In 1792, Congress enacted the Uniform Militia Act, which President George Washington and Secretary of War Henry Knox had hoped would reform the militia system to make it a more adequate means of national defense.[127] However, Congress hollowed out the vast majority of the bill, eliminating nearly every part that Washington and Knox viewed as vital.[128] Also in 1792, Congress enacted an act that "define[d] procedures for federalizing state militias."[129] The act provided that in instances of state insurrection, the President was permitted to call forth the state militias, so long as the legislative or executive branch of each state had expressly permitted presidential action.[130] However, before the President would be permitted to act, he had to send out a "cease-and-desist proclamation," as well as have a federal judge certify that the insurrection was beyond repair by civil authorities.[131]

The most important test of this new emergency use of the federalized militia occurred just two years later, in 1794. In response to what they viewed as intolerable taxes on spirits, citizens in western Pennsylvania, near Pittsburgh, violently rebelled against excise collectors.[132] In July 1794, Washington and his administration learned of the recent attack and sought

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[126] For a more thorough analysis regarding the Battle of Fallen Timbers, its legacy, and its economic effects upon American expansion into the Northwest Territory, see Haydn J. Richards, Jr., The Battle of Fallen Timbers: Its Effects Upon American Westward Expansion and the Legitimacy of the United States. (1999) (unpublished Honors Thesis, College of William and Mary) (on file with author).

[127] 1 Stat. 271 (1792).

[128] Don Higginbotham, *The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship*, 55 WM. & MARY Q. 39, 53 (Jan. 1998). The Congressional action taken in the Uniform Militia Act of 1792 is generally viewed as insufficient. Most contemporaries of that era viewed the act as a failure. KOHN, *supra* note 97, at 136.

[129] Higginbotham, *supra* note 128, at 53.

[130] *See* 1 Stat. 264 (1792).

[131] Higginbotham, *supra* note 128, at 53.

[132] *Id.* at 4.

to ensure a quick response.[133] In early August, Washington issued a proclamation demanding the rebels disperse and then notified the governors of several states of his intention to call up the militia to quell the disturbance.[134] In response to the violence in Pennsylvania, President Washington called forth 15,000 men in the militias of four neighboring states.[135] Militias from New Jersey, Maryland, and Virginia were dispatched, and Washington, along with Alexander Hamilton, joined the federalized militia to provide leadership.[136] Within two months, the rebellion had ended and the vast majority of the militia had withdrawn and returned home.[137]

The Whiskey Rebellion and the federalized militia proved an important event to the early republic. However, in most circles, the rebellion is viewed "as a milestone in the creation of federal authority," rather than as a significant accomplishment of the militia system.[138] The Whiskey Rebellion, as an internal, societal uprising, was an ideal candidate for use of militia. Although use of militia was generally restricted to interstate activity, the insurrection in Pennsylvania posed a direct threat to the security of its neighboring states. By federalizing the militias of those states, Washington assembled a force that could put down the rebellion simply by sheer numbers.

Despite the successful efforts by the militia in quelling internal strife, the actions of the militia during the Whiskey Rebellion demonstrated little in terms of national defense. First, Congress would never engage in meaningful militia reform, despite its frequent attempts to re-tool the existing system.[139] Second, the campaign in Pennsylvania was quite short and the militias were sent back to their home states relatively quickly.[140] Due to the brief nature of the campaign, many of the problems that traditionally plagued the militia did not occur.[141] Third, since the rebellion

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[133] *See* Richard Kohn, *The Washington Administration's Decision to Crush the Whiskey Rebellion*, 59 J. AM. HIST. 567, 568 (1972).

[134] *Id.* at 575-76.

[135] KOHN, *supra* note 97, at 135.

[136] *Id.* at 169.

[137] *Id.* at 170.

[138] *Id.*

[139] *Id.* at 136. Richard Kohn notes that "[a]ttempts were made to change the law in virtually every session for the next three decades, but Congress never acted." *Id.* He further notes that any revisions to the system "would have forced changes many states did not want, worked hardships on special groups, and certainly increased the burden on voters." *Id.*

[140] *See id.* at 170.

[141] *See id.* at 75.

took place within the borders of Pennsylvania, the militias did not need to leave the United States. As such, Washington did not need to worry about state militias refusing to travel outside the borders of the country (a problem that would arise during the War of 1812).[142] Fourth, since the insurrection in western Pennsylvania threatened neighboring states, the legislatures and governors of those states were readily convinced to provide for the mobilization of their state militias. However, if the conflict had not posed a threat to individual surrounding states, legislatures and governors might have been reluctant to mobilize their militias. Thus, they could effectively cripple any federal governmental response to a national threat. Finally, the leadership of George Washington, who led the nation to independence as the Commander-in-Chief of the American forces during the Revolutionary War, should not be discounted.

IV. THE SECOND AMENDMENT, SLAVERY, AND THE SOUTH

A. Gun Control and Social Control in the Antebellum South

The Second Amendment must, at least in part, convey an individual right to keep and bear firearms. In their seminal work, Robert Cottrol and Raymond Diamond analyze the careful blend of racial politics that played a role in the origin and importance of the Second Amendment.[143] They contend that the right to keep and bear arms in Colonial America served as a distinct means of racially subjugating Africans and Native Americans.[144] Specifically, Cottrol and Diamond argue that "an armed and universally deputized white population was necessary" to protect whites from European powers and Native Americans and to maintain effective control over slaves.[145] According to the scholars, it was necessary for the white population to own and operate firearms to protect their populations from a plethora of potentially hostile groups.[146]

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[142] *See* Whisker, *supra* note 123, at 965.

[143] Cottrol & Diamond, *The Second Amendment*, *supra* note 11. Several efforts have since evaluated the role of Africans, slavery, and the effects of gun control initiatives. *See, e.g.*, Cottrol & Diamond, *Never Intended to be Applied*, *supra* note 17; Clayton E. Cramer, *The Racist Roots of Gun Control*, 4 KAN. J.L. & PUB. POL'Y 17 (1995); Stefan B. Tahmassebi, *Gun Control and Racism*, 2 GEO. MASON U. CIV. RTS. L.J. 67 (1991).

[144] Cottrol & Diamond, *The Second Amendment*, *supra* note 11, at 324.

[145] *Id.*

[146] *Id.*

Cottrol and Diamond posit that the legislation emerging from the Second Amendment cultivated racial subjugation so that the southern states would possess an effective means of control over their expansive slave populations.[147] Specifically, the Uniform Militia Act of 1792 delineated the enrollment of state militias and implicitly forbade all non-whites from participating in the militia.[148] Cottrol and Diamond recognize the possibility that the Second Amendment, along with the Uniform Militia Act, served as a means of controlling large African populations in southern states by encouraging firearm ownership and white participation in citizen militias.[149] Moreover, according to the scholars, while the slave codes provided the legal mechanism to suppress slaves,[150] the militia served as an active means to intimidate Africans and thwart any mob opposition.[151] Thus, an armed citizenry protected southern states from slave rebellion and mobilized militia groups served to suppress the slaves and prevent any uprising.[152]

The heightened awareness of slave rebellion in the South polarized southern planters, making them apprehensive of any opposition to slavery. During the eighteenth century, the militia increasingly took the responsibility of maintaining and regulating slave patrols.[153] The concern over slave rebellion was great enough that southern states "often refused to commit their militia to the [American] Revolution, reserving them instead for slave control."[154] Moreover, following the American Revolution, southern states feared any possibility of slave uprising and consequently, used any means necessary to entrench the system of slavery.[155] Akhil Reed Amar notes that

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[147] *Id.* at 325. For example, over 290,000 African slaves lived in Virginia in the era immediately following the adoption of the United States Constitution. *See* GARY B. NASH, RACE AND REVOLUTION 43 (1990).

[148] 1 Stat. 271 (1792).

[149] *See* Cottrol & Diamond, *The Second Amendment*, *supra* note 11, at 331.

[150] *See id.* at 336-37.

[151] *Id.* at 331.

[152] One scholar noted that " '[s]lavery was not only an economic and industrial system,' . . . 'but more than that, it was a gigantic police system.' " Bogus, *supra* note 16, at 335 (quoting H.M. HENRY, THE POLICE CONTROL OF THE SLAVE IN SOUTH CAROLINA 154-55 (1968)).

[153] *Id.*

[154] *Id.* at 336.

[155] Fearing the potential for free blacks to assist their enslaved brothers, southern states "limited the number of free blacks who might congregate at one time; they curtailed the ability of free blacks to choose their own employment, and to trade and socialize with slaves." Cottrol & Diamond, *The Second Amendment*, *supra* note 11, at 336 (footnotes omitted). In the antebellum South, free blacks were a persecuted minority; they clearly did not enjoy rights comparable to even

"[t]he structural imperatives of the peculiar institution led slave states to violate virtually every 'right' and 'freedom' declared in the Bill [of Rights]."[156] Since the South increasingly viewed itself as "under siege,"[157] it enacted gun control measures aimed at restricting firearms access to all minority groups, including free blacks and Native Americans.

The history of gun control in southern states is one of racism. The governments of southern states sought to maintain a repugnant social structure based on slavery; in doing so, the southerners needed to maintain a disarmed slave population.[158] Without the ability to forcibly resist, the slave population would continue to subsist in a system of forced bondage. In the South, the state militias were truly a defensive force; they were poised to counteract any slave uprising. Thus, in the South, with the ever-present threat of rebellion, the right to firearm ownership was a necessary fact of life for white planters, and a non-existent right for blacks. In application, the Second Amendment proved to be a *selective right* in the South. It clearly conveyed an individual right to bear arms; however, this right was limited to white southerners, who needed firearms as protection in the event of rebellion.

B. The Constitution of the Confederate States of America

Existing between 1861 and 1865, the Confederate States of America represents the failed attempt at revolution by eleven southern states.[159] In

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the poorest of whites.

[156] Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1216 (1992).

[157] *Id.* Amar notes that following Nat Turner's rebellion, southern states strictly limited access to firearms, particularly access by free blacks. *Id.* When news of a slave revolt on St. Domingue reached Virginia, even Thomas Jefferson noted that, without adequate reform to the institution of slavery, " 'the revolutionary storm, now sweeping the globe, will be upon us.' " NASH, *supra* note 147, at 46. Saint George Tucker, another statesman of Virginia, believed that the heightened rebelliousness of African slaves " 'afford a solemn warning to us of the dangerous predicament in which we stand.' " *Id.* at 44.

[158] *See generally* Cottrol & Diamond, *The Second Amendment*, *supra* note 11, at 335-38 (noting that the government's historical failure to protect the liberties of black Americans makes gun control claims dubious).

[159] *See generally* E. Merton Coulter, *The Confederate States of America 1861-1865*, *in* 7 A HISTORY OF THE SOUTH (Wendell Holmes Stephenson & E. Merton Coulter eds., 1950) (discussing all aspects of Confederate history during the Civil War); CLEMENT EATON, A HISTORY OF THE SOUTHERN CONFEDERACY (1961) (discussing the political, social, and military history of the Confederacy). It should

their desire to promote states' rights and continue their legacy of slavery, the states seceded and established a government in Richmond, Virginia, that was "highly similar" to the federal government in Washington.[160] They modeled their constitution after the United States Constitution, and, consequently, both documents are quite similar.[161] In fact, Southerners viewed succession and their new constitutional system as a restoration rather than a revolution.[162] By modeling their constitution upon the United States Constitution, southerners aimed to keep all the institutions of government that proved successful following the American Revolution, while reverting to a government based upon the states' rights model.[163]

Southerners were not against the structure and effect of the United States Constitution; instead, they took issue with the "implementation and interpretation [of the Constitution] by the Supreme Court."[164] For the most part, the Confederates left much of what was the United States Constitution unchanged.[165] In shaping their document, "[t]he drafters of the Confederate Constitution may well have thought of themselves as largely improving, rather than replacing, the federal constitution."[166] Although the Confederate Constitution that emerged was virtually identical to that of the United States, its subtle differences reveal key areas of disagreement between the southerners and the Union.[167]

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be noted that thousands of works have been published on the United States Civil War.

[160] *See* Ralph Michael Stein, *The South Won't Rise Again But It's Time to Study the Defunct Confederacy's Constitution*, 21 PACE L. REV. 395, 395 (2001).

[161] For further information regarding the American Constitutional tradition and the intentions of the framers of the Confederate Constitution, see Donald Nieman, *Republicanism, the Confederate Constitution, and the American Constitutional Tradition, in* AN UNCERTAIN TRADITION: CONSTITUTIONALISM AND THE HISTORY OF THE SOUTH 201 (Kermit L. Hall & James W. Ely, Jr. eds., 1989).

[162] *See* Stein, *supra* note 160, at 398.

[163] *See id.* at 401 ("The impetus for secession, and what was perceived by Northerners as the restoration of a dishonored constitution and federal system that insured primacy of the individual subscribing states, surged after the Dred Scott decision and its accompanying debates.").

[164] *Id.* at 402.

[165] James A. Gardner, *Southern Character, Confederate Nationalism, and the Interpretation of State Constitutions: A Case Study in Constitutional Argument*, 76 TEX. L. REV. 1219, 1261 (1998) (arguing the Confederate Constitution is "virtually word-for-word identical" with the United States Constitution).

[166] Stein, *supra* note 160, at 402.

[167] Carl Degler noted, " 'what is striking about the Confederacy is how congruent its institutions and political values were with those of the United States.' " Gardner, *supra* note 165, at 1260. Since the two governments were so

The most significant and noteworthy aspect of the Confederate Constitution is the pervasive inclusion of the states' rights model of government.[168] As early as its preamble, the document articulates the dominance of this concept, noting that "*each State acting in its sovereign and independent character*" commiserated and formed the Confederacy.[169] Unlike the United States Constitution, which was established by "the people," the Confederate Constitution was formed by the eleven states of the Confederacy.[170] Thus the textual language of the Constitution indicates that southerners viewed the Confederacy as severable. Since institutions, rather than the populace, formed the government, individual states, led by "the people," could withdraw from the Confederacy.

The dominance of the states' rights model of government is not limited to the Confederate Constitution's preamble. For example, the last two clauses of Article VI of the Confederate Constitution correspond directly to the Ninth and Tenth Amendments to the United States Constitution. The Confederate Constitution notes, "[t]he enumeration, in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people *of the several* States."[171] The document then notes, "[t]he powers not delegated to the *Confederate* States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people *thereof*."[172] In clause 5, the Confederate Constitution explicitly notes that

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highly similar, the subtle differences between the two prove of even greater importance.

[168] The Confederate Constitution drops all subtlety when discussing the institution of slavery. The document retained the three-fifths compromise and made the importation of slaves illegal. CONFEDERATE CONST. art. I, § 2, cl. 3; *id.* art. I, § 9, cl. 1-2. It should be noted that the document's treatment of the institution of slavery is noteworthy in itself; however, it will not be discussed because it is beyond the scope of this article. For an illustrative discussion of the South's determination to increase the legal protection of slavery, please see Robert J. Cottrol, *The Long Lingering Shadow: Law, Liberalism, and Cultures of a Racial Hierarchy and Identity in the Americas*, 76 TUL. L. REV. 11 (2001).

[169] CONFEDERATE CONST. pmbl. (emphasis added), *available at* http://www.yale.edu/lawweb/avalon/csa/csa.htm (last modified Nov. 7. 2002).

[170] *Id.* (Although the preamble to the Confederate Constitution begins with "We, the people," it then recognizes the role of "each State acting in its sovereign and independent character.").

[171] *Id.* art. VI, cl. 5 (emphasis added). The corresponding section in the United States Constitution, Amendment IX, reads: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others *retained by the people*." U.S. CONST. amend. IX (emphasis added).

[172] CONFEDERATE CONST. art. VI, cl. 6 (emphasis added). The corresponding section in the United States Constitution, Amendment X, reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the

the rights are reserved to the people of the individual states. In clause 6, the Confederate Constitution uses the term "thereof" to modify "the people," making it clear that unenumerated powers are left to the people of the individual states. The Confederate Constitution focused on the rights of the states, so that the people of any state could oppose the federal government should that government burden the state. Both modifications noted above confer rights to the people as citizens of individual states, rather than in their capacity as a national citizenry. Moreover, the explicit alteration of the original language of the United States Constitution serves as evidence that the Confederate government was not constitutionally superior to the governments of the individual states.[173]

The Confederate States of America also included the provisions of the United States Bill of Rights within its Constitution.[174] Since the Confederate Constitution was not meant to curb the overall autonomy of the states, the rights provided within the document were viewed as essential, natural rights, which no state could deny its citizens.[175] Among the many rights-conveying provisions included in the Confederate Constitution is the unaltered text of the Second Amendment to the United States Constitution.[176] The inclusion of this provision in the Confederate Constitution offers great insight into the Confederates' view of that amendment and the antebellum status of the right to keep and bear arms.

Collective rights scholars argue that the Second Amendment only conveys an institutional right to bear arms for the benefit of citizen militias. Let us assume, *arguendo*, that these scholars are correct in their belief that the framers only conveyed a collective right to bear arms. This position results in an academic quagmire. If the right were so limited, the drafters

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States, are reserved to the States respectively, or to the people." U.S. CONST. amend X.

[173] *See* MARSHALL L. DEROSA, THE CONFEDERATE CONSTITUTION OF 1861, 40 (1991). These alterations are a representative sample of some of the adjustments made in the Confederate Constitution. For additional information regarding the differences in both constitutions, see *id.* at 38-56.

[174] The first eight amendments to the United States Constitution were transcribed into Article I, § 9 of the Confederate Constitution. *See id.* at 64. The latter two amendments of the Bill of Rights were placed in Article VI of the Confederate Constitution. *See id.* at 39.

[175] Under the system outlined in the Confederate Constitution, the states had dominion over all rights that were not explicitly enumerated in the Confederate Constitution. *See id.* at 64.

[176] CONFEDERATE CONST. art. I, § 9, cl. 13. Clause 13 reads: "A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed."

of the Confederate Constitution would have had little motivation for including it in their Constitution.

First, if one interprets the Second Amendment to convey only a collective right to arms, one must inherently set aside the states' rights model of government that was so dear to the Confederacy. As argued by collective rights' scholars, the Second Amendment to the United States Constitution served to arm the militia as a means of national defense.[177] Yet, when applied to the Confederate Constitution, such a result flies in the face of the act of secession by the Confederate States. In drafting their Constitution, the ultimate desire of the Confederate States of America was to ensure that the states, rather than the federal government, had ultimate authority in nearly all matters.[178] However, when applying the collective rights interpretation to Article I, § 9, clause 13 of the Confederate Constitution, we arrive at a provision that inexplicably removes a degree of autonomy from the several States. This directly contradicts the intent of the drafters of the Confederate Constitution.[179] Under the states' rights model, rather than limiting state autonomy over their individual militias, the Confederacy would have instead preferred each state to set forth provisions regarding the state militias in their respective constitutions.

Second, only the most fundamental rights were provided for in the Confederate Constitution.[180] Thus the Confederate Constitution, which was based on a states' rights model of government, must be seen as explicitly reproducing the United States Constitution's Second Amendment as a means of conveying an individual right to keep and bear arms for southern whites.[181] The Confederates would not have provided this right unless it was essential—it had to be of paramount importance to the southern antebellum experience. In southern society, the individual right to bear arms was a daily necessity in that it provided them with a means of protection against the reality of slave insurrection.[182] Southerners lived in

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[177] *See, e.g.*, Ehrman & Henigan, *supra* note 11, at 57.

[178] *See* DEROSA, *supra* note 173, at 5.

[179] CONFEDERATE CONST. pmbl. Intent to preserve state autonomy is inferred from the southerners' insertion of the clause "each State acting in its sovereign and independent character."

[180] *See* DEROSA, *supra* note 173, at 64.

[181] CONFEDERATE CONST. art. I, § 9, cl. 13.

[182] The "wave of slave insurrection panics and reprisals that swept the South after the Harper's Ferry raid" served to heighten the paranoia of the South regarding the potential of slave unrest. David W. Blight, *They Knew What Time It Was: African-Americans and the Coming of the Civil War*, *in* WHY THE CIVIL WAR CAME 71 (Gabor S. Boritt ed., 1996). John Brown, by raiding Harper's Ferry, in his attempt to arm enslaved Africans, "laid bare the deepest racial fears and social

constant fear of their enslaved population; in many areas, the number of enslaved Africans was greater than that of free whites.[183] In order to counteract the threat posed by these large populations of enslaved Africans, southern governments purposely disarmed free blacks and slaves.[184] Moreover, they used slave patrols and state militias as de facto police forces, aimed at restraining any form of social discord.[185] Southern society was one reliant on social control; southerners clung to their firearms while ruling over a disarmed, enslaved population. Without the ability to use firearms to control the disarmed population that provided its immediate threat, southerners, and their repugnant institution, could not survive. Consequently, the Confederate Constitution reproduces the Second Amendment as a clause that conveys an individual right to keep and bear arms, a provision that was essential to the southern way of life.

V. THE FOURTEENTH AMENDMENT, THE INCORPORATION DEBATE, AND THE SECOND AMENDMENT

Historical and legal sources reveal that in the antebellum United States the Second Amendment was viewed as an individual right that provided

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insecurities of white Southerners." *Id.* During 1860, Georgians succumbed to a "general 'mob psychosis,'" which took over both their "political and social lives." Moreover, hysteria mounted over fears spawned "by the Texas insurrection panic of the summer of [1860], in which approximately fifty blacks and whites died in vigilante violence." *Id.*

[183] Michael P. Mills, *Slave Law in Mississippi from 1817-1861: Constitutions, Codes and Cases*, 71 MISS. L.J. 153, 160-61 (2001) (noting in 1860, the population of Mississippi consisted of 353,899 whites and 436,631 slaves. The article further notes that in some countries, slaves outnumbered whites by more than ten to one.); Thomas D. Russell, *South Carolina's Largest Slave Auctioneering Firm*, 68 CHI.-KENT L. REV. 1241, 1249, 1251 (1993) (discussing slave population in South Carolina and noting that by 1860, the state's Edgefield district's slave population had risen to 60.3% slave (from 48.6% slave in 1820), the state's Fairfield district's population had risen to 70.3% slave (from 45.1% slave in 1820), and the state's Malboro and Union districts were 52% slave in 1850).

[184] *See* Cottrol & Diamond, *The Second Amendment*, *supra* note 11, at 335-36. According to Professors Cottrol and Diamond, free blacks posed a twofold threat to the southern institution of slavery. First, free blacks were a bad example to slaves, in that they had a great degree of freedom. The scholars note that the example of free blacks served to expand the horizons of slaves, potentially fostering rebellious visions of freedom. Second, free blacks threatened the South by potentially "instigat[ing] or particpat[ing] in a rebellion by their slave brethren." *Id.* at 335.

[185] *See id.* at 336.

people with the ability to own and utilize firearms. The enactment of the Fourteenth Amendment, however, altered the constitutional framework in which we view the rights provided by the Bill of Rights. Specifically, the Due Process clause of the Fourteenth Amendment acts as the tool whereby the fundamental guarantees provided by the Bill of Rights extend and apply to the states. There are three predominant approaches regarding the incorporation of the Bill of Rights: (1) Justice Frankfurter's view that the amendment carries "independent potency;" (2) Justice Black's view that it totally incorporates the first eight amendments of the Bill of Rights against the States; and (3) Justice Brennan's view that the rights provided by the Bill of Rights may be selectively incorporated by the Supreme Court.

A. Adamson v. California

In *Adamson v. California*,[186] two major methodologies were introduced regarding the potency of the Fourteenth Amendment. First, Justice Frankfurter, in his concurrence, argued that the Due Process clause has an "independent potency," which is not defined by the Bill of Rights.[187] Frankfurter believed that judicial interpretation should be dynamic in that it should be capable of adjusting to a maturing sense of society. Frankfurter concluded that a rigid construction of the Due Process clause would simply "turn[ ] it into a summary of the specific provisions of the Bill of Rights" and "would assume that no other abuses would reveal themselves in the course of time [other] than those which had become manifest in 1791."[188] Thus, under his case-by-case approach, Frankfurter would have the court, when evaluating claims under the Fourteenth Amendment, determine if the proceedings offended "those canons of decency and fairness which express

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[186] Adamson v. California, 332 U.S. 46 (1947).

[187] *Id.* at 66 (Frankfurter, J., concurring). Justice Frankfurter, in explaining his conclusion that the Fourteenth Amendment has independent potency, notes:

> [t]he short answer to the suggestion that the provision of the Fourteenth Amendment, which ordains "nor shall any State deprive any person of life, liberty, or property, without due process of law," was a way of saying that every State must thereafter initiate prosecutions through indictment by a grand jury, must have a trial by a jury of twelve in criminal cases, and must have trial by such a jury in common law suits where the amount in controversy exceeds twenty dollars, is that it is a strange way of saying it. It would be extraordinarily strange for a Constitution to convey such specific commands in such a roundabout and inexplicit way.

Id. at 63.

[188] *Id.* at 67.

the notions of justice of English-speaking peoples."[189] Without such a violation, Frankfurter would be satisfied that the accords of due process were offered.

The second proposal put forth in *Adamson* was that of Justice Black, who advocated an approach based on total incorporation of the first eight amendments against State governments. Black argued that the Fourteenth Amendment and its history are "sufficiently explicit to guarantee that thereafter no state could deprive its citizens of the privileges and protections of the Bill of Rights."[190] Black believed that in accepting an approach based on the total incorporation of the protections of the Bill of Rights against the States, the Court could provide a guarantee of objectivity.[191] Furthermore, he concluded that in doing so, the Court would absolutely conform to the intent of the framers.[192]

B. Selective Incorporation

The third approach, selective incorporation, merges portions of each of the first two approaches and has been accepted by the Court. Under selective incorporation, judges may conclude that rights guaranteed by the Bill of Rights are applicable to the states; however, the approach they take in doing so offers them a great degree of flexibility.[193] This approach, which was put forth by Justice Brennan, has been accepted by the Court but has been severely criticized by its opponents. For example, long-time Columbia law professor Louis Henkin argued that "[s]elective incorporation finds no support in the language of the amendment, or in the history of its adoption."[194] Despite such criticism, at least one scholar argues that, to an extent, Brennan's approach is a means of "achieving total incorporation

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[189] *Id.*

[190] *Id.* at 74-75 (Black, J., dissenting).

[191] *See id.* at 89 (Black, J., dissenting). Specifically, Justice Black stated:

> I would follow what I believe was the original purpose of the Fourteenth Amendment—to extend to all the people of the nation the complete protection of the Bill of Rights. To hold that this Court can determine what, if any, provisions of the Bill of Rights will be enforced, and if so to what degree, is to frustrate the great design of a written Constitution.

Id.

[192] *See id.*

[193] Louis Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74, 76 (1963); Amar, *supra* note 156, at 1263.

[194] Henkin, *supra* note 193, at 77.

by indirection, clause by clause, without having to overrule pre-Warren Court precedent repudiating Black."[195]

Since the Court adopted selective incorporation, nearly every amendment has been fully incorporated. However, four rights within the first eight amendments remain unincorporated: the right to keep and bear arms, the right against quartering soldiers, and the rights to grand and civil juries.[196] The Supreme Court has not considered whether the right to keep and bear arms should be incorporated against the states.

C. *The Second Amendment and Incorporation*

The Second Amendment remains one of the few fundamental rights provided in the Bill of Rights that has not been incorporated by the Supreme Court. The theories of incorporation clearly lend themselves toward assisting specific sides of the debate surrounding the Second Amendment. For example, Justice Black's theory of total incorporation clearly appeals to the individual rights scholars, in that it applies the Second Amendment as a restraint against the several States.[197] Under this approach, the Second Amendment, following the ratification of the Fourteenth Amendment, acts as the guarantor of the individual right to keep and bear arms against both federal and state governments. Alternately, adherents to the collective rights approach take a more selective view, believing that since the Second Amendment has not explicitly been incorporated by the Supreme Court, the States are not restrained by its constraints.[198] However, without action by the Supreme Court, we are left without a clear answer as to whether the amendment limits state action.

The Supreme Court has not yet evaluated the Second Amendment and its potency with respect to incorporation under the Fourteenth Amendment.

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[195] AMAR, *supra* note 17, at 220.

[196] *See id.*

[197] *See* Levinson, *supra* note 11, at 652. William Van Alstyne, in arguing for incorporation, notes that as a result of the Fourteenth Amendment, "[w]hat was previously forbidden only to Congress to do was . . . equally forbidden to any state." Van Alstyne, *supra* note 11, at 1253.

[198] *See* Levinson, *supra* note 11, at 652. This approach has generally been attacked by individual rights scholars. For example, in his groundbreaking work, *The Embarrassing Second Amendment*, Sanford Levinson is highly critical of jurisprudence concluding that the Second Amendment is not a limitation against the states. He questions, "[w]hy . . . should *Cruickshank* [sic] and *Presser* be regarded as binding precedent any more than any of the other 'pre-incorporation' decisions refusing to apply given aspects of the Bill of Rights against the states?" Levinson, *supra* note 11, at 653.

It should be noted that two of the most important Supreme Court cases concerning the Second Amendment, *United States v. Cruikshank*[199] and *Presser v. Illinois*,[200] were both decided prior to the Supreme Court's decisions regarding the status of the Fourteenth Amendment. The Court's most recent treatment of the Second Amendment occurred in *United States v. Miller*,[201] in which the Court upheld a provision of the National Firearms Act of 1934 that prohibited the transportation of unregistered firearms through interstate commerce.[202] *United States v. Miller*, however, was decided prior to *Adamson v. California*, where Justices Frankfurter and Black brought the debate over incorporation to the forefront of active jurisprudence. Furthermore, the *Miller* Court did not attempt to define the substantive right protected by the Second Amendment.[203] Thus, in *Miller* the Supreme Court neither considered the possibility that the Second Amendment was incorporated against the States by the Fourteenth

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[199] United States v. Cruikshank, 92 U.S. 542 (1875), *overruled by* Silveira v. Lockyer, 312 F.3d 1052 (9th Cir. 2002). In *Cruikshank*, the Supreme Court noted that the Second Amendment "means no more than that [bearing arms] shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government." *Id.* at 553.

[200] Presser v. Illinois, 116 U.S. 252 (1886), *overruled by* Silveira v. Lockyer, 312 F.3d 1052 (9th Cir. 2002). In *Presser*, the Court cites *Cruikshank* in concluding that "the amendment is a limitation only upon the power of Congress and the National government, and not upon that of the States." *Id.* at 265.

[201] United States v. Miller, 307 U.S. 174 (1939). In *Miller*, the Court described the purpose of the Second Amendment as "assur[ing] the continuation and render[ing] possible the effectiveness of [the militia]." *Id.* at 178. Further, the Court concluded that the possession of a sawed-off shotgun lacked a "reasonable relationship to the preservation or efficiency of a well regulated militia." *Id.* Moreover, writing for the Court, Justice McReynolds, concluded the shotgun was not a "part of the ordinary military equipment" and that "its use could [not] contribute to the common defense." *Id.* (citation omitted).

[202] *See* Printz v. United States, 521 U.S. 898, 938 n.1 (1997) (Thomas, J., concurring). In *Printz*, Justice Scalia struck down provisions of the Brady Handgun Violence Protection Act for violating the Tenth Amendment and its protection of State sovereignty. *Id.* at 935. Concurring, Justice Thomas noted "[i]f, however, the Second Amendment is read to confer a *personal* right to 'keep and bear arms,' a colorable argument exists that the Federal Government's regulatory scheme, at least as it pertains to the purely intrastate sale or possession of firearms, runs afoul of that Amendment's protections." *Id.* at 938 (Thomas, J., concurring). Justice Thomas seemed to advocate a re-examination of the Second Amendment so that the Court could define the protections which it affords. *See id.* at 938-39.

[203] *See id.* at 938.

Amendment, nor did it evaluate the substantive right provided by the amendment.

D. The Second Amendment and Bill of Rights Jurisprudence

In the last half-century, the Supreme Court established a clear policy of inaction regarding the Second Amendment. This course has aroused considerable ire among the community of Second Amendment scholars who follow the Court's jurisprudence. For example, Sanford Levinson has written, "[t]he Supreme Court has almost shamelessly refused to discuss the issue."[204] One likely reason for this anger is that without a definitive pronouncement by the Supreme Court, the populace cannot be sure of the rights provided by the Second Amendment.

As noted earlier, the tradition of the Second Amendment is one of dual aims: the Amendment conveys an individual right to keep and bear arms, while promoting the ability of the several States to each maintain an armed militia. Unlike many of the rights set forth in the Bill of Rights, the Second Amendment and its militia clause form a causal nexus with the governments of the several States. The amendment is uniquely affiliated with the states in that it denies the federal government sufficient authority to regulate state militias. As a consequence of the unique interplay that the Second Amendment facilitates between the populace and the States, it may be appropriate for federal courts to defer to state legislatures and judicial bodies when confronted with questions regarding the Second Amendment and the right to keep and bear arms.

It remains unclear to what degree the right to keep and bear arms may be regulated. When viewed in the context of the wide array of historical evidence, it is nearly undeniable that the Amendment conveys an individual right to keep and bear arms. Yet the Supreme Court, in establishing jurisprudence on a variety of the fundamental rights within the Bill of Rights, has defined and at times limited those rights.[205] Furthermore, the

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[204] Levinson, *supra* note 11, at 653-54.

[205] For example, the Supreme Court continually refines its approach to First Amendment jurisprudence. The Supreme Court has consistently found that the First Amendment's conveyance of a right to free speech is not absolute. *See, e.g.*, Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557 (1980) (holding that the regulation of commercial speech does not violate the First Amendment's right to free speech if the regulation satisfies a four-part test); FCC v. Pacifica Found., 438 U.S. 726 (1978) (holding that indecent speech, although protected by the First Amendment's right to free speech, was subject to reasonable

court has established an active policy of inaction regarding Second Amendment jurisprudence. Perhaps the Court has refused to enter the debate over the Second Amendment in order to avoid introducing a new quagmire into its Bill of Rights jurisprudence. By practicing judicial restraint, the Court has promoted the values of federalism by allowing state legislatures and state judicial bodies to define the right to keep and bear arms, further confirming the causal nexus between the several States and the Second Amendment.

CONCLUSION

It is truly curious that the United States Supreme Court has taken such a hands-off approach to the Constitution's Second Amendment. While other amendments to the Bill of Rights are routinely examined, the Second Amendment was last evaluated before World War II. As originally enacted, the amendment unmistakably conveys an individual right to bear arms. The founding fathers, in drafting the amendment, sought to protect citizens from the potential abuses of an overbearing government. Moreover, they aspired to foster reform for their militia system in the hope that they might be able to save it as a means of national defense. Not only did the founding fathers convey an individual right, but, as evidenced by the manuscript of William Manning, the populace viewed the Second Amendment as a device that confirmed the natural right to keep and bear arms and offered protections against oppressive government.

Based on its consistently inconsistent performance in the American Revolution, the founding fathers realized that without sufficient reform the militia would never successfully resist outside threats. Despite the hopes of the founding fathers, the militia proved ineffectual and Congress never enacted meaningful militia reform. The western campaign against the Native Americans provided a stark contrast between the advantages of a restricted standing army and the loosely disciplined militia system. Although Washington's response to the Whiskey Rebellion demonstrated that the militia clearly had a use in resisting internal dissent, its position as a means of national defense was still viewed as tenuous at best.

Evidence marshaled regarding the right to keep and bear arms in the South further demonstrates that it was widely viewed that, in the antebel-

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regulation); Miller v. California, 413 U.S. 15 (1973) (holding that obscenity is outside the protections of the First Amendment's right to free speech); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (holding the government may regulate the content of speech when such speech constitutes "fighting words").

lum United States, "the people" had a right to keep and bear arms. In their desire to maintain the deplorable institution of slavery, southern states used gun control laws to restrict the ability of free blacks and Native Americans to keep and bear arms. By disarming their enslaved populations, southern whites maintained social control throughout their society. Moreover, following secession, the Confederate States of America, which favored states' rights, adopted the exact text of the Second Amendment. Since the right to keep and bear arms was so fundamental to southern society, the reproduction of the Second Amendment in the Confederate Constitution serves as evidence that the right to keep and bear arms was seen as a natural right of fundamental importance that provided an *individual* right to keep and bear arms.

The enactment of the Fourteenth Amendment altered the framework of the Constitution. Thereafter, the several States were bound by rights that previously restricted only the federal government. However, unlike many of the rights provided in the Bill of Rights, the Second Amendment forms a uniquely causal nexus with the several States. Its dual aims provide an individual right to keep and bear arms and confirm the importance of the militia system to the framers. Unlike its approach to many of the rights conveyed by the Bill of Rights, the Supreme Court has taken a hands-off approach to the Second Amendment. By actively choosing to avoid Second Amendment cases, the Court implicitly promotes the values of federalism. Judicial restraint in this area has allowed the Court to avoid the constant definition and shaping of rights that have come to symbolize its recent Bill of Rights jurisprudence. Furthermore, state legislatures and judicial bodies remain in the position to engage in deliberative debate over this fundamental right. Thus, perhaps the approach of the Supreme Court in choosing to exercise judicial restraint is not one of inaction, but rather one of action.