Duquesne Law Review

Volume 39 | Number 1 Article 5

2000

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Recommended Citation
Roger I. Roots, *The Approaching Death of the Collective Right Theory of the Second Amendment*, 39 Duq. L. Rev. 71 (2000).
Available at: https://dsc.duq.edu/dlr/vol39/iss1/5

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The Approaching Death of the Collective Right Theory of the Second Amendment

*Roger I. Roots**

INTRODUCTION

The Second Amendment reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[1] To most Americans, this language guarantees an individual right to keep and bear arms,[2] in accordance with what is generally accepted as the plain language of the Amendment.[3] However, a rival interpretation of this language — the "collective right" theory of the Second Amendment,[4] — has gained numerous converts in the federal judiciary[5] and the organized legal profession.[6] The collective right,

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1. U.S. CONST. amend. II.

2. *See, e.g.*, Carl T. Bogus, *The Strong Case for Gun Control*, THE AMERICAN PROSPECT, Summer 1992, at 27 (saying that more than three-quarters of the public believes that the Constitution guarantees an individual right to own weapons); Thomas B. McAffee & Michael J. Quinlan, *Bringing Forward the Right to Keep and Bear Arms: Do Text, History, or Precedent Stand in the Way?*, 75 N.C. L. REV. 781, 784 (1997) (citing polling data suggesting that between 53% and 88% of the population believe that the Second Amendment guarantees an individual right to bear arms).

3. *See* Frank Espohl, *The Right to Carry Concealed Weapons for Self-Defense*, 22 S. ILL. U. L.J. 151, 152-53 (1997) (citing a grammatical study establishing the Second Amendment as an individual right). "The language of the Second Amendment can only reasonably be interpreted as guaranteeing an individual right." *Id.* at 152.

4. This paper uses the term "collective right theory" to designate various general views that the Second Amendment does not guarantee an American citizen a personal right to possess firearms of his own acquisition or purchase. Terms such as "militia-centric," "states' right," and "narrow individual right" have also been employed by commentators to describe variations on the theme that the Amendment's right to bear arms is limited to possession of arms solely in the government's service. For a discussion of the appropriateness of such terms, see Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139, 1204-07 (1996) (stating "we might well have called [the collective right theory] the 'makeweight' view" for its lack of "any specific affirmative function or substantive content.").

5. *See* Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L.

"states' right," or "militia-centric" theory holds (apparently)[7] that the Second Amendment merely grants the states the right to form militias.[8]

Adherents of the collective right theory tend to overlook several glaring problems with the theory, among which are an overwhelming constitutional history refuting the theory and the virtual impossibility of the theory's exact implementation. The theory's adherents tend to utilize the theory as a procedural rather than as a substantive defense against claims of the right to possess or own firearms. They use the collective right theory to justify increasingly stringent gun control legislation enacted by the United States Congress. Since the 1960's such use of the collective right theory to quell assertions of the right of individual arms ownership has been overwhelmingly successful. Hundreds of thousands of Americans have been incarcerated for nonviolent, victimless gun charges and more than 20,000 gun control laws have been enacted nationwide without serious judicial impediment.[9]

All of this is about to change. A torrential backlash of scholarship undermining the collective right theory of the Second Amendment now makes scholarly support for the collective right

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REV. 309, 316 (1997) (opining that the courts have "unanimously adopted what is generally referred to as the 'collective rights' theory.").

6. The number of attorneys who subscribe to the collective theory is difficult to determine. It can safely be said, however, that the collective right theory finds more support among the organized bar than among the general public. This can be divined from the fact that the nation's largest association of attorneys, the American Bar Association (ABA), subscribes to the collective right view. *See* Brannon P. Denning, *Professional Discourse, the Second Amendment and the "Talking Head Constitutionalism" Counterrevolution: A Review Essay*, 21 S. ILL. U. L.J. 227, 239-40 (1997).

7. As this article establishes, the parenthetical is necessary because proponents of the collective right theory either have not produced a fully developed explanation of its application or have provided ambiguous or conflicting arguments so epithelial that it is difficult to tell whether their vision of the Second Amendment grants it any real meaning at all. *See* Brannon P. Denning, *Gun Shy: The Second Amendment as an "Underenforced Constitutional Norm,"* 21 HARV. J.L. & PUB. POL'Y 719, 729 (1998) (suggesting that to cast the collective model as a "theory" at all is misleading because "its main proponents neither take it seriously nor carefully follow its logic to a reasonable conclusion").

8. Because of the inherently vague nature of the collective right theory, this article lumps many arguments together under that designation. For purposes of this article, the collective right theory is defined as any argument that the Second Amendment offers no personal right of firearm ownership or possession without the sanction of the state.

9. A 1995 report by the Justice Department revealed that more than 260,000 arrests were made in 1993 in which a weapons offense was the most serious charge. *See* Lawrence Greenfeld & Marianne W. Zawitz, U.S. Department of Justice, Bureau of Justice Statistics, *Weapons Offenses and Offenders*, Nov. 1995, NCJ-155284. Because weapons offenses amount to a large percentage of all arrests, it can easily be estimated that far more than one million people have been arrested on gun charges in the past twenty years. *Id.*

theory increasingly difficult to justify.[10] Collective right proponents, once confident in their bald-faced and conclusory renunciations of the individual right to bear arms, are now forced to couch their support for the collective right theory in increasingly narrow terms. To make matters even more unsettling for the theory's proponents, recent federal court proceedings suggest the theory will soon be subjected to embarrassing scrutiny in the courts.[11]

This article predicts that the collective right theory of the Second Amendment will not survive. It examines the collective right theory and the brief history of its rise to relative prominence in legal thought and policy. Next, this article delves into claims made by collective right proponents in the academy and exposes them as untenable. Finally, it concludes that the theory is unrealistic, ideologically driven, and too poorly explained by its own adherents to justify its continued existence in American jurisprudence.

I. AN OVERVIEW OF THE COLLECTIVE RIGHT THEORY

The collective right theory of the Second Amendment assumes that the opening phrase of the Amendment, which lays out the express *reason* for the right to bear arms, acts as a *limitation* on the right.[12] Thus, "a well regulated Militia, being necessary to the security of a free State" is presented as the primary focus of the "right" of "the people" — as a collective body only — to keep and bear arms. Collective right theorists attempt to argue that this language simply secures to the "free State" its "necessary" and "well regulated Militia." Conveniently enough for gun control advocates, "the people" of the Second Amendment are an amorphous mass, no member of which may ever invoke the right.[13]

The theory is grounded in a highly questionable construction of the Amendment's sentence structure. It proffers that the *reason* for the right is the right itself, while what a plain reading indicates *is* the right is merely a poorly worded repetition of the prior clause. Contrary to statements made by collective right proponents alleging that such bifurcated clauses are unusual,[14] it was not at all rare for

10. *See infra* notes 59-60 and their accompanying text (discussing the increasingly philosophical, rather than textual or historical, support for the collective right theory among academics).

11. *See infra* notes 40-44 and their accompanying text.

12. *See* Bogus, *supra* note 2, at 27.

13. *See* Denning, *supra* note 7, at 730 (describing the collective right perception of "the people" as an "undifferentiated mass").

14. *See, e.g.*, Louis A. Craco, Jr., *A Right to Bear Arms?*, EXPERIENCE, Summer 1997, at 6, 8-9 (opining that the Second Amendment, in "sharp contrast" to other constitutional

Founding era laws to be prefaced by such clauses, and such justification phrases were considered at the time to have no bearing on the right or operative provision.[15] As an "interpretation," the collective right theory violates virtually every rule of constitutional and statutory construction.[16]

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provisions, contains a "unique" explanatory clause).

15. Some commentators view the Second Amendment's wording as unusual because it has both a justification clause ("a well regulated Militia being necessary to the security of a free State") and an operative clause ("the right of the people to keep and bear Arms shall not be infringed."). However, U.C.L.A. law professor Eugene Volokh has recently pointed out that this linguistic structure was actually quite commonplace in American constitutions of the Framers' era. Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 793-821 (1998). For example, Rhode Island's 1842 Constitution provides that "[t]he liberty of the press being essential to the security of freedom in a state, any person may publish his sentiments on any subject, being responsible for the abuse of that liberty"; the 1784 New Hampshire Constitution says that "[i]n criminal prosecutions, the trial of facts in the vicinity where they happen, is so essential to the security of the life, liberty and estate of the citizen, that no crime or offence ought to be tried in any other county than that in which it is committed . . . ."; the 1780 Massachusetts Constitution, the 1784 New Hampshire Constitution, and the 1786 Vermont Constitution, with only minor differences in word choice, all provide that "[t]he freedom of deliberation, speech, and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever." *Id.* at 794-95 (citations omitted). Volokh lists dozens more such examples in the appendix of his article. *Id.* at 814-21.

Professor Volokh calls the opening clause of the Second Amendment its "justification clause" rather than a "purpose clause," *id.* at 795 n.8, because the only thing indicated by it is its drafters' justification for the right to bear arms, and not any notion that the right is contingent on the purpose of ensuring a well-regulated militia, as some authorities have postulated, *see id.* at 793-94 n.1. In the linguistic styling of the times, the Second Amendment's use of dual clauses was nothing unusual, and was, in fact, "commonplace," according to Professor Volokh. "My modest discovery is that the Second Amendment belongs to a large family of similarly structured constitutional provisions: They command a certain thing while at the same time explaining their reasons." *Id.* at 813.

16. Constitutional scholars disagree over whether constitutional interpretation is a science or merely an art. The basic principles of constitutional interpretation, however, are for the most part settled. In 1833, Justice Story in his famous *Commentaries* attempted to ascertain the "true rules of interpretation applicable to the constitution" and found that "[t]he first and fundamental rule" is to construe constitutional wording according to "the sense of the terms, and the intention of the parties." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 134, 135 (1833). Only if the words are dubious, must their meaning be established by context (i.e., "by comparing them with other words and sentences in the same instrument") or the causes which led to the provision. *Id.* at 135. Precedent or case law may be consulted only if the prior standards yield no definitive answer. These principles of construction have enjoyed such longevity in the life of the Supreme Court that a century and a half later they were again enunciated by the Court in *Printz v. United States*, 521 U.S. 898, 905 (1997), in which the Court concluded that only where there is "no constitutional text" to guide an interpreter should a court resort to "[1] historical understanding and practice, [2] in the structure of the Constitution, and [3] in the jurisprudence of this Court . . . in that order."

That the plain text of the Second Amendment is for the most part unambiguous can be divined from the fact that public opinion polls establish an overwhelming view among the

The collective rights theory is a relative newcomer to constitutional jurisprudence. It arose solely during the twentieth century and grew popular among jurists, social commentators, and some members of the organized American bar only during the second half of the twentieth century.[17] That the theory ever breathed life at all is owed primarily to an irresolute 1939 United States Supreme Court opinion notable only for its lack of clarity.

In *United States v. Miller*,[18] the Supreme Court held that an indictment for transporting a sawed-off shotgun in interstate commerce without the payment of transfer taxes should not have been dismissed by the trial court on Second Amendment grounds. This holding came in 1939, in the wake of President Roosevelt's unsuccessful "court-packing" plan.[19] With this backdrop, *Miller* can be seen as part of the "switch in time that saved nine," a capitulation by the Supreme Court to the Roosevelt Administration. Only two years earlier, Roosevelt had angrily proposed to put an end to the court's conservative tendencies by packing it with his allies after the Court invalidated a string of President Roosevelt's New Deal acts.[20] In this atmosphere, the Supreme Court was extremely reluctant to strike down F.D.R.'s 1934 National Firearms Act; instead, the Court upheld the Act, but only on "the narrowest

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public that the Amendment secures an individual right. *See supra* note 2 and its accompanying text. Thus, the analysis of any court should stop there. Even if the Second Amendment were legitimately ambiguous, the collective theory would no doubt be defeated by applying the three default rules of interpretation enunciated in *Printz*. Historical understanding and practice demonstrate clearly that an individual interpretation reigned supreme and unchallenged in comment and practice until at least the mid-twentieth century. *See* STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 89-153 (1984). The "structure of the Constitution" yields a similar advantage to the individual argument because of the Amendment's placement along with other private rights in the Bill of Rights. *See also* JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 159 (1996). Even "the jurisprudence of this Court" standard would provide no solace to collective arguments because the Supreme Court's case law on the Second Amendment is overwhelmingly favorable to an individual interpretation, in dicta if not in holdings. *See* McAffee & Quinlan, *supra* note 2, at 878-84 (reviewing several cases); Stephen P. Halbrook & David B. Kopel, *Tench Coxe and the Right to Keep and Bear Arms, 1787-1823*, 7 WM. & MARY BILL OF RIGHTS J. 347, 352 (1999) (discussing that the Supreme Court has consistently treated the Amendment as guaranteeing an individual right, and never anything else).

17. *See* David B. Kopel, et al., *A Tale of Three Cities: The Right to Bear Arms in State Supreme Courts*, 68 TEMPLE L. REV. 1177, 1240 (1995).

18. 307 U.S. 174 (1934).

19. *See* CLAYTON E. CRAMER, FOR THE DEFENSE OF THEMSELVES AND THE STATE: THE ORIGINAL INTENT AND JUDICIAL INTERPRETATION OF THE RIGHT TO KEEP AND BEAR ARMS 188 (1994).

20. *See id.* For an overview of the climate surrounding the Supreme Court's New Deal jurisprudence, see Roger Roots, Note, *Government by Permanent Emergency*, ___ Suffolk U. L. Rev. ______ (2000).

of grounds."[21]

Because the Western District of Arkansas had dismissed the indictment of Jack Miller and Frank Layton upon a taking of judicial notice that a short-barreled shotgun was a military weapon, the Supreme Court reversed on the ground that judicial notice was in error:

> In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" *at this time* has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. *Certainly, it is not within judicial notice* that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.[22]

While the *Miller* opinion provided a very broad depiction of the right to bear arms under the Second Amendment,[23] its *holding* provided an opening for gun control *proponents* to proclaim a victory over what had almost universally been seen as a plenary constitutional impediment. *Miller* did, after all, find the Second Amendment to be no *per se* impediment to a gun control statute.[24]

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21. Cramer, *supra* note 19, at 189.

22. *Miller*, 307 U.S. at 178 (emphasis added).

23. Justice McReynolds's opinion discussed the meaning of "well regulated militia" at length. McReynolds wrote that the historical background of the Second Amendment showed "plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense." *Id.* at 179. Upon being summoned for militia duty, such men "were expected to appear bearing arms supplied by themselves and of the kind in common use at the time." *Id.* (emphasis added).

24. It has unfortunately escaped the analysis of many scholars on every side of the Second Amendment debate that *Miller* is a poor standard by which to interpret an article in the Bill of Rights. At its essence, *Miller* is a procedural case that dealt with the substance of the Second Amendment only in dicta. The very reason that no evidence of the militia-value of shortened shotguns was introduced in *Miller* is that the case had been dismissed upon demurrer (i.e., motion to dismiss for failure to state a claim). *See* McAffee & Quinlan, *supra* note 2, at 882. After the indictment against Miller and Layton was dismissed by the district court, Miller and Layton did not even make an appearance nor file a brief before the Supreme Court. The issue was decided against them solely on the arguments made by the prosecution. *See* Cramer, *supra* note 19, at 188 (stating that the Second Amendment citations given by the Miller Court were apparently only those provided by the prosecution). Note that the Court did not say that a short-barreled shotgun was unprotected by the Second Amendment, only that no evidence had been presented to demonstrate that such a weapon was protected. *See* Michael I. Garcia, Comment, *The Assault Weapons Gun, the Second Amendment, and the Security of a Free State*, 6 REG. U. L. REV. 261, 286 (1995). For that matter, Miller's membership in any state militia was never even considered by the Supreme

While the *Miller* court voiced no indication whatsoever that the Second Amendment was unavailable as a defense to a prosecution of an individual defendant (or even to Jack Miller), gun control advocates have found *Miller* to represent the idea that the militia clause is *the* controlling element of the Second Amendment. It has remained only for gun regulation advocates to paint the militia-nexus requirement of the Amendment (under the apparent *Miller* rule)[25] as eternally unreachable. The collective right interpretation — i.e., the theory that the Second Amendment is no obstacle at all to gun control legislation — was only one step away. Thus, the collective right theory was born — illegitimately, it would seem — in 1939.

During the sixty years since *Miller*, lower federal courts have taken the limited rule of the *Miller* case (that the Second Amendment applies where some relationship to "a well regulated militia" exists) and ran with it. The Fourth, Sixth, and Ninth Circuits have openly embraced the collective right interpretation,[26] while the First, Second, Third, Fifth, Seventh, Tenth, and Eleventh Circuits have all affirmed criminal convictions for possessing or transacting in various firearms based upon interpretations of the *Miller* holding that can best be described as injudicious.[27] The Ninth Circuit went so far in adopting the collective right theory as to say that "[f]ollowing *Miller*, '[i]t is clear that the Second Amendment guarantees a collective rather than an individual

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Court as an issue.

25. *See Garcia, supra* note 24. That the Second Amendment right to keep arms requires any nexus whatsoever with militias is almost certainly false in light of the recent evidence produced by Professor Volokh. *See supra* note 15.

26. *See* Love v. Peppersack, 47 F.3d 120 (4th Cir. 1995); United States v. Warin, 530 F.2d 103 (6th Cir. 1976); Hickman v. Block, 81 F.3d 98 (9th Cir. 1996).

27. Professor Nelson Lund refers to interpretations of the Second Amendment made by such circuits as "the 'government always wins' interpretation" of the Second Amendment. Nelson Lund, *The Ends of Second Amendment Jurisprudence: Firearms Disabilities and Domestic Violence Restraining Orders*, 4 TEX. REV. L. & POLITICS, 157, 184 (1999):

> [This] line of cases avoids embracing the states' rights theory, but comes essentially to the same result. The opinions in these cases typically begin with some version of Miller's statement that the possession or use of a particular firearm must have "a reasonable relationship to the preservation or efficiency of a well-regulated militia." Whatever analysis follows, and there is usually not much, always puts a burden on the claimant of Second Amendment rights to demonstrate such a relationship. And the court always concludes that the claimant failed to make the required demonstration.

Id. at 184-85. *See* Cases v. United States, 131 F.2d 916 (1st Cir. 1942); United States v. Toner, 728 F.2d 115 (2nd Cir. 1984); United States v. Rybar, 103 F.3d 273 (3rd Cir. 1997); United States v. Johnson, 441 F.2d 1134 (5th Cir. 1971); Quilici v. Village of Morton Grove, 695 F.2d 261 (7th Cir. 1983); United States v. Hale, 978 F.2d 1016 (8th Cir. 1993); United States v. Oakes, 564 F.2d 384 (10th Cir. 1978); United States v. Wright, 117 F.3d 1265 (11th Cir. 1997).

right.' "[28]

In the sixty years following *Miller*, the Supreme Court has repeatedly declined to clarify its interpretation of the Second Amendment.[29] Tens of thousands of Americans have been prosecuted, convicted, and imprisoned for violating federal gun control statutes.[30] Until 1999, federal district and circuit courts had never found any scenario for which the collective right or militia-centric right to bear arms applied.[31] For example, in *Gillespie v. City of Indianapolis*,[32] the Seventh Circuit held that even an active-duty police officer on roll for Indiana militia service could not invoke the Second Amendment to require his reinstatement to armed police service after he was dismissed pursuant to federal gun regulations:

> The link that the amendment draws between the ability 'to keep and bear Arms' and '[a] well regulated Militia' suggests that the right protected is limited, one that inures not to the individual but to the people collectively, its reach extending so far as is necessary to protect their common interest in protection by a militia.[33]

In another recent case, the Fraternal Order of Police, an organization of police officers, challenged a federal law that effectively disarmed some of their officers for committing certain domestic violence misdemeanors.[34] The D.C. Circuit disposed of the

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28. Hickman, 81 F.3d at 102 (quoting United States v. Warin, 530 F.2d 103, 106 (6th Cir. 1976), *cert. denied*, 426 U.S. 948 (1976)).

29. *See, e.g.*, United States v. Rybar, 103 F.3d 273 (3rd Cir. 1997), *cert. denied*, 118 S.Ct. 46 (1997); Hickman v. Block, 81 F.3d 98 (9th Cir. 1996), *cert. denied*, 519 U.S. 912 (1996); Love v. Peppersack, 47 F.3d 120 (4th Cir. 1995), *cert. denied*, 516 U.S. 813 (1995); United States v. Hale, 978 F.2d 1016 (8th Cir. 1993), *cert. denied*, 507 U.S. 997 (1993); Quilici v. Village of Morton Grove, 695 F.2d 261 (7th Cir. 1983), *cert. denied*, 464 U.S. 863 (1983); United States v. Oakes, 564 F.2d 384 (10th Cir. 1978), *cert. denied*, 435 U.S. 926 (1978); United States v. Warin, 530 F.2d 103 (6th Cir. 1976), *cert. denied*, 426 U.S. 948 (1976).

30. A study conducted by the Justice Department in 1993 revealed that 3177 people — approximately 6% of all those convicted in federal court — were convicted of a federal weapons offense in 1992. Lawrence A. Greenfeld & Marianne W. Zawitz, U.S. Department of Justice, *Weapons Offenses and Offenders* 3 (1995). About 10% of felony convictions for weapons violations occur in federal court. *See id.* at 5. Moreover, the increasingly lengthy sentences handed out for firearms violations at the federal level have made weapons offenders about three times more prevalent in federal prisons than in state prisons. *See id.* at 6.

31. *But see* notes 40-44, and their accompanying text.

32. 185 F.3d 693 (7th Cir. 1999).

33. *Gillespie*, 185 F.3d at 710.

34. Fraternal Order of Police v. United States, 173 F.3d 898 (D.C. Cir. 1999).

challenge, after rehearing,[35] by proclaiming that the Fraternal Order of Police had "presented no evidence on the matter at all" and therefore never indicated "how restrictions on [the militia service of domestic violence misdemeanants] would have a material impact on the militia."[36] Thus, even a collective body of state officers was denied standing as "the People" of the Second Amendment.

Gillespie and *Fraternal Order of Police* show that what passes for modern Second Amendment jurisprudence allows courts to move the goal post perpetually, lest anyone or anything claim a right to bear arms under the Amendment. The Second Amendment is, thus, more than just, as Brannon P. Denning asserts, a constitutional "dead letter."[37] Under the ever-metamorphasizing collective right or "government-always-wins" interpretation, it is an intangible, a whiff of smoke that never solidifies into a palpable mass, a shimmering mirage that dissipates whenever approached.

Meanwhile, Congress has legislated as if the Second Amendment offers no barrier to its actions at all. In fact, it has enacted increasingly stringent regulations governing the sale, shipment, and possession of firearms.[38] Until 1999, none of these intrusions upon the right to keep and bear arms had ever been struck down by a federal court on Second Amendment grounds.[39]

In 1999, a lone federal judge changed this. The decision of United States District Judge Sam R. Cummings in *United States v. Emerson*,[40] now being reviewed by the United States Fifth Circuit

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35. A three-judge panel of the District of Columbia Circuit Court of Appeals initially vacated a lower court order granting summary judgment to the government in the case. *Fraternal Order of Police*, 173 F.3d at 898. This initial decision was predicated on a finding that the statute in question lacked a rational basis for its harsher treatment of domestic violence misdemeanants as compared to domestic violence felons. The panel found that the apparent illogic doomed the statute under the federal equal protection doctrine. *Id.* The same panel, composed of Judges Williams, Ginsburg, and Randolph, granted a rehearing upon the petition of the government based on the argument that the Fraternal Order of Police had not properly raised the argument involving § 922(g)(9)'s irrationality and that the panel's finding was incorrect. *See* Fraternal Order of Police v. United States, 159 F.3d 1362 (1998).

36. *Fraternal Order of Police*, 173 F.3d at 906 (D.C. Cir. 1999).

37. Brannon P. Denning, *Gun Shy: The Second Amendment as an "Underenforced Constitutional Norm"*, 21 HARVARD J.L. & PUB. POL'Y, 719, 723 n.24 (1998).

38. In 1996, for example, Congress enacted a law prohibiting persons convicted of domestic violence misdemeanors — whether or not such persons were ever even arrested or jailed or had a trial — from possessing firearms for life. Those who violate face up to ten years in federal prison. 18 U.S.C. § 922(g)(8) (1994 & Supp. II 1996).

39. To this must be added the caveat that the lower court ruling reviewed in Miller did, in fact, dismiss an indictment on grounds that the statute in question violated the Second Amendment. Only upon review by the Supreme Court was the statute upheld.

40. 46 F.Supp.2d 598 (N.D. Tex. 1999).

Court of Appeals,[41] represents the first time in sixty years that a federal court has applied the Second Amendment to strike down a federal firearm statute.[42] Cummings, a federal judge sitting in the Northern District of Texas, found that the Second Amendment barred the government from prosecuting a person for possessing a firearm while under a domestic violence restraining order.[43] The decision, though based on straightforward reasoning, "shocked the legal world."[44]

While the ultimate outcome of the *Emerson* case remains unclear pending appeal, the case has already brought substantial repercussions to America's gun control debate. If affirmed, the case is likely to be considered by the Supreme Court because it will set the Fifth Circuit Court of Appeals at odds with virtually every other federal circuit.[45] "[P]erhaps hundreds of laws will be in danger of being struck down."[46]

The briefs filed in the Fifth Circuit by the government in *Emerson* stop short of proclaiming that the Second Amendment preserves a collective right. Instead, they assert the "government-always-wins" interpretation of the Second Amendment coined by Professor Nelson Lund.[47] They argue that the Supreme Court in *Miller* laid down a test — the "reasonable relationship" test — and that Judge Cummings failed to apply this test.[48] According to this interpretation of *Miller*, any possession of a firearm must be reasonably related to the preservation or efficiency of the militia before such possession will be constitutionally protected.[49]

But the evidentiary burden required by *Miller* appears to be a nominal one, consisting of "any evidence" of a relationship between a person's firearm possession and the militia.[50] Only "in the absence

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41. United States v. Emerson, 46 F.Supp.2d 598 (N.D. Tex. 1999), appeal docketed, No. 99-10331 (5th Cir. 1999).

42. *See* Nelson Lund, *The Ends of Second Amendment Jurisprudence: Firearms Disabilities and Domestic Violence Restraining Orders*, 4 TEXAS REV. L. & POLITICS 157 (1999).

43. *Emerson*, 46 F.Supp.2d 598 (N.D. Tex. 1999).

44. Lund, *supra* note 42, at 163.

45. *See id.* at 171-73.

46. Richard Willing, *Texas Case Could Shape the Future of Gun Control*, USA TODAY, Aug. 27-29, 1999.

47. *See supra* note 27.

48. *See* Brief for the United States at 28, United States v. Emerson, ____ F.3d.____(5th Cir. 2000).

49. *See id.* at 10.

50. *Miller*, 307 U.S. at 178.

of *any evidence*" of such a relationship may a court conclude that firearm possession is not constitutionally protected.[51] As Judge Cummings himself wrote, "It is difficult to interpret *Miller* as rendering the Second Amendment meaningless as a control on Congress."[52] While the post-Miller case law has been overwhelmingly disrespectful of the right to bear arms, it cannot be said that it followed *Miller* with precision.[53] Indeed, "there is some confusion among the courts . . . as to whether the Supreme Court in [*Miller*] was in fact laying down a general rule at all"[54] rather

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51. *Id.* The various tests of constitutional scrutiny that are now relatively well settled (rational basis, undue burden, strict scrutiny) arose primarily with the jurisprudence of the second half of the twentieth century and were not known by the Supreme Court in 1939. Therefore, the level of scrutiny for analyzing the Amendment under *Miller* can still be said to be in controversy. On this point opponents of the individual right interpretation seem thus far to be in relatively good stead. *Miller* did, after all, place the burden on the claimant rather than the government, suggesting a rational basis level of scrutiny under current jurisprudence. *See, e.g.*, Keith A. Ehrman and Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. Dayton L. Rev. 5, 52 (1989) (citing *Lewis v. United States*, 445 U.S. 55 (1980), for the proposition that the right to bear arms is not a fundamental right for Equal Protection purposes). While such placement of the burden suggests an inappropriate devaluation of the Amendment in the federal courts, it by no means conflicts with the view that the Second Amendment protects an individual and not a collective right.

Moreover, this devaluation of the importance of firearm ownership is almost certainly improper in light of the history and purpose of the Amendment. Indeed, a rational basis type of review seems antithetical to any right protected under the Bill of Rights. As Nelson Lund has concluded, the "scheme of ordered liberty" test for determining whether an interest is a fundamental right is "nothing but a slightly reworded version of the Second Amendment's reference to what is 'necessary to the security of a free State.' " Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 GA. L. REV. 1, 53 (1996). Indeed, the personal right to bear arms stands on surprisingly better footing as a historically recognized fundamental right than either the religion clauses of the First Amendment, the First Amendment's right of free speech and press, the Fifth Amendment prohibition against uncompensated takings, and several Fifth and Sixth Amendment rights of criminal defendants, all of which lack the support of any fundamental documents of the (unwritten) English Constitution, or are substantially newer in their recognition at English common law than the right of arms ownership. *See id.* at 55.

52. *Emerson*, 46 F.Supp.2d at 608 (N.D.Tex. 1999).

53. Ironically, even this is contrary to statements of collective theorists, who tend to present post-Miller jurisprudence as uniform. See, e.g., Craco, *supra* note 14, at 38, 39 (stating that "[t]he federal courts have spoken with extraordinary clarity on the scope of the Second Amendment" and that "lower federal courts have faithfully followed the Supreme Court's teaching for decades and have upheld numerous provisions of the federal firearms laws").

54. *Miller* can be seen as merely a procedure case, and its substantive ruminations nothing more than dicta. *See* Cramer, *supra* note 19, at 189-91; *see also* Daniel E. Field, Annotation, *Federal Constitutional Right to Bear Arms*, 37 A.L.R. Fed. 696, at 701 (1978). At least three different interpretations of the *Miller* rule exist in the federal courts. *See id.* at 709-10 (explaining that courts disagree on whether *Miller* means 1) that the Second Amendment is not applicable without some relationship between the person bearing an arm

than reviewing the record as to the sufficiency of evidence required for the taking of judicial notice.[55]

The *Emerson* case portends the death of the collective right theory. It hits the collective right theory where it hurts the theory most — case law. For decades, gun control advocates have shrugged off the Second Amendment by claiming the case law does not support an individual right to bear arms.[56] That such statements are exaggerations of the case law has not deadened the force of such assertions.[57] *Emerson* poses the threat of crashing through the

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and preservation or efficiency of a well regulated militia, 2) that the Amendment protects only individuals bearing weapons with a reasonable relationship to the preservation or efficiency of a well regulated militia, or 3) that the manner of the weapon's use is the primary determinant of applicability of the Second Amendment).

55. Judicial notice is a procedural mechanism designed to expedite cases involving facts not in controversy. See JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 297 (2d ed. 1993). In taking judicial notice, a trial court recognizes the truth of certain facts without the production of evidence. *See id.* The lower court in *Miller* took judicial notice that the prosecution of Jack Miller violated the Second Amendment. As a matter of procedure, the Supreme Court acted properly in reversing such judicial notice, where one party (the government) maintained that whether a sawed-off shotgun was suitable for militia service was in controversy.

56. *See, e.g.*, PETE SHIELDS, GUNS DON'T DIE—PEOPLE DO 55 (1981) (quoting the American Bar Association for the proposition that "every federal court decision involving the [Second] amendment has given the amendment a collective, militia interpretation and/or held that firearms-control laws enacted under a state's police power are constitutional.").

57. Perhaps too typical is the list of citations provided by collective right proponent Louis A. Craco, Jr., in his article *A Right to Bear Arms?*. *See* Craco, *supra* note 14, at 39. Craco provides an impressive list of a dozen case citations, all of which supposedly bolster the collective right position. An examination of the authorities cited, however, shows that only one of the twelve cases actually appears to stand for the proposition that the Second Amendment provides only a collective and not an individual right. *United States v. Hale*, 978 F.2d 1016, 1020 (8th Cir. 1992), on which Craco relies heavily, actually states that "[w]hether the 'right to bear arms' for militia purposes is 'individual' or 'collective' in nature is irrelevant"; the case was decided on the (questionable) reasoning that a machine gun is not reasonably related to the right. *United States v. Friel*, 1 F.3d 1231 (1st Cir. 1993), is a mere affirmation of a lower court decision and does not contain any published opinion. *United States v. Toner*, 728 F.2d 115, 128 (2d Cir. 1984), merely states that aliens can be prosecuted for gun violations because the right to bear arms is not a "fundamental right" of aliens. *Quilici v. Village of Morton Grove*, 695 F.2d 261, 270 (7th Cir. 1982), simply refused to incorporate the Second Amendment onto the states, and expressly stated "we need not consider the scope of its guarantee of the right to bear arms." *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977), did not say the right was a collective right but simply upheld a firearm conviction summarily pursuant to the rule of *Miller*. *United States v. Turcotte*, 558 F.2d 893, 893 (8th Cir. 1977), dismissed a Second Amendment challenge without analysis, merely concluding that a particular felon's firearm possession conviction "does not obstruct the maintenance of a well regulated militia, and therefore is not violative of the Second Amendment."

The Third Circuit opinion in *United States v. Graves*, 554 F.2d 65, 66 n.2 (3d Cir. 1977), actually seems to enshrine an individual interpretation, rather than a collective one, noting that "[a]rguably, any regulation of firearms may be violative of this constitutional provision,"

logjam of case law and compelling the Supreme Court to address the meaning of the Second Amendment for the first time in three generations.

II. ACADEMICS CAST ASPERSIONS ON THE COLLECTIVE THEORY

The predilection of federal courts to "look the other way" when Second Amendment issues are raised[58] has had a stunning result — overwhelming objections by those legal scholars who have examined the subject. In response to court cases that have recognized the collective right doctrine as the law, dozens of academics have become sufficiently disgruntled to compose law review articles that, with varying degrees of outrage, have exposed the fledgling collective right doctrine as essentially a fraud on the human intellect.[59]

While the academic debate is lively, it is anything but even-sided. Legal scholarship concerning the original intent and purpose of the Second Amendment is so overwhelmingly in favor of the individual right interpretation that the individual interpretation is now generally considered the "Standard Model" of the Amendment's

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and that the defendant in question did not even raise the Second Amendment as a defense; the case's dicta merely said that the courts have narrowly construed the Amendment. *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976), began its analysis by "[a]greeing . . . that the Supreme Court did not lay down a general rule in *Miller*," and then concluded that "[i]t is clear that the Second Amendment guarantees a collective rather than an individual right"; only case citations, none of which announced such a finding, were provided as support. *United States v. Swinton*, 521 F.2d 1255, 1259 (10th Cir. 1975), says simply that "there is no *absolute* constitutional right of an individual to possess a firearm." *United States v. Tomlin*, 454 F.2d 176 (9th Cir. 1972), did not analyze the issue at all but simply cited *Miller* to affirm summarily a firearm conviction. *United States v. Johnson*, 441 F.2d 1134, 1136 (5th Cir. 1971), likewise provided no discussion and only cited *Miller* in affirming a firearm conviction. *United States v. Synnes*, 438 F.2d 764, 772 (8th Cir. 1971), found merely that "there is no showing that prohibiting possession of firearms by felons obstructs the maintenance of a 'well regulated militia.' "

58. A review of the relevant district and circuit court opinions reveals that most handle the issue summarily — with little more than a conclusory recital, often expressed in only a single sentence or two. See Barnett & Kates, *supra* note 4, at 1162 (saying that many such opinions "discuss the Second Amendment so summarily that it is impossible to say that they are adopting any position beyond their bare holding that the Amendment does not give felons a right to own firearms."). As Barnett and Kates point out, academic claims that a "broad," "clear," and "striking judicial consensus" supporting the collective view exists are made largely by "misstating opinions, misconstruing dicta as holdings, and failing to disclose contrary opinions." *Id.* at 1152.

59. The sheer number of law review articles that have concluded that the Second Amendment secures an individual right to bear arms and that present lower federal case law is in error is now so large that a listing of them would merely waste paper and ink. See David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1362 n.1 (1998). To this list can now be added a number of other articles (including this one).

meaning.[60] The academics who defend the thrashing of the Second Amendment in the courts do so on public policy grounds, citing modern homicide rates, changing times, and the increasingly frightening nature of individual resistance to perceived tyranny.[61] Such defenders, when alluding to the Framers' intent, do so in a way that is vague and improvisational rather than clear.[62] Collective right theorists who have delved deeply into the history of the Amendment (and there have not been many) either have been dissuaded from publicly proclaiming the theory as their own or have used the historical record as a canvas upon which to paint an elaborate caricature of the Founders' cultural and legalistic worldview.

Collective right proponents point to statements made by Framers who expressed the now-clichéd "fear of standing armies" — of which there are many statements on record.[63] This "fear of standing armies" is said to be the justification for the Amendment's empowerment of state militias, which would presumably act as an armed deterrent to the standing army's tyrannical propensities (even though such state militias — like the professional military — are simultaneously regulated (in part) by the same entity, Congress and the President).[64] To the extent that the Second Amendment empowers citizens collectively to deter the potential danger posed by standing armies, Standard Model proponents do not quibble in any way with this collective right supposition.

But there were many other statements made concerning arms and militias during the 1780s.[65] In order to operate to the *exclusion* of an individual right, the collective right doctrine seemingly requires the utter absence of documentary evidence that the Founders considered the Amendment as a protection of the right of individuals. Yet rarely is a collective right scholar brazen enough to

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60. *See* Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 463 (1995).

61. *See, e.g.*, GARRY WILLS, A NECESSARY EVIL: A HISTORY OF AMERICAN DISTRUST OF GOVERNMENT *passim* (1999); Bogus, *supra* note 2, at 25-27; Herz, *supra* note 58, *passim*.

62. It is a gifted academic, indeed, who can pass the theory off as legitimate in the face of the overwhelming evidence weighing against it. *But see* Bogus, *supra* note 5, at 309; Ehrman, *supra* note 51, at 5.

63. *See, e.g.*, SHIELDS, *supra* note 56, at 127.

64. *See* the discussion accompanying notes 176-81.

65. For an exhaustive collection of ratification era documents concerning the Second Amendment, see THE ORIGIN OF THE SECOND AMENDMENT: A DOCUMENTARY HISTORY OF THE BILL OF RIGHTS 1787-1792 (David E. Young ed., 2d ed. 1995) (hereinafter ORIGIN) (reprinting hundreds of pages of such documents).

assert that such evidence is nonexistent.[66] The collective right argument instead depends upon the suppression, or at least the *avoidance*, of ratification era statements that described the right to keep and bear arms as a fundamental individual right.[67] Increasingly dogged research has shown that the historical record is relatively rich with statements by both the primary Founders[68] (those who served as delegates to the ratifying conventions) and the secondary Founders[69] (those who contributed ideas, editorials, or writings about the Constitution in public forums) expressing the viewpoint that keeping arms was a fundamental individual right and that the Second Amendment was designed to protect that right.[70]

Such statements were made by both Federalists[71] (those who supported a stronger national government) and Anti-Federalists[72]

66. But see Ehrman, *supra* note 51, at 7 (saying "[t]here is no evidence that the Framers discussed, much less intended, that the amendment provide a guarantee to individuals of a right to be armed for purposes unrelated to militia service"). Ehrman and Henigan's article was published in 1989 and a decade of scholarship has served to refute their statements. This did not stop Garry Wills (another strong proponent of the collective right theory) from claiming in 1999 that "only one clear reference to private ownership from the ratification debates" expresses the individual right view. Wills, *supra* note 61, at 253 (referring to the 1787 Dissent of the Minority); *see also* notes 166-67, and their accompanying text. The notes that follow indicate the error of Wills's claim.

67. *See A Pennsylvanian* [Tench Coxe], Newspaper article, PHILADELPHIA FEDERAL GAZETTE, June 18, 1789, *reprinted in* ORIGIN, *supra* note 65, at 670, 671 (stating that under the Bill of Rights, if the government "may attempt to tyrannize . . .[and] pervert their [military] power to the injury of their fellow-citizens, the people are confirmed by the next article in their right to keep and bear their private arms.").

68. *See* MALCOLM, *supra* note 16, at 97 (quoting Noah Webster as saying Americans need not fear standing armies "because the whole body of the people are armed").

69. For example, the Anti-Federalist "M.T. Cicero" wrote to the *Charleston State Gazette* in September, 1788, that a well-regulated militia "composed of the freeholders, citizen and husbandman, who take up arms to preserve their property, *as individuals*, and their rights as freemen" was the best defense against tyranny. *See* HALBROOK, *supra* note 16, at 72 (emphasis added).

70. The most contemporary known statement about the Second Amendment — a newspaper article written by Federalist leader Tench Coxe just days after the Bill of Rights was introduced in Congress — described the Second Amendment as an individual right. *See* Kopel, *supra* note 16, at 351.

71. *See, e.g.*, *The Federal Farmer*, May, 1788, *reprinted in* ORIGIN, *supra* note 65, at 354 (opining that the militia should "always be kept well organized, armed, and disciplined, and include, according to the past and general usage of the states, all men capable of bearing arms; and that all regulations tending to render this general militia useless and defense less, by establishing select corps of militia, or distinct bodies of military men, . . . [should] be avoided"); *see also id.* at 355 (stating that "to preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them.").

72. The great Virginia Anti-Federalist George Mason asked during the Virginia debates, "Who are the militia?" and answered, "They consist now of the whole people, except a few public officers." 3 JONATHON ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE

(those who sought a weaker and more limited national government and who generally opposed the Constitution unless it included a bill of rights), both before[73] and after[74] the ratification of the Bill of Rights. As the scholarship on the Second Amendment has probed more and more deeply into the Framers' intent, the collective right position has been progressively undermined.[75] The Founders wrote eloquently that the militia was the whole people,[76] including farmers,[77] mechanics,[78] laborers,[79] and woodsmen,[80] and that it was every man's duty to arm himself for militia duty if the government failed to provide him with arms.[81] That disarmament of citizens by

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ADOPTION OF THE FEDERAL CONSTITUTION 425-26 (2d ed. 1863).

73. *See* Letter from Samuel Nasson to U.S. Rep. George Thatcher, (July 9, 1789), *reprinted in* ORIGIN, *supra* note 65, at 796-97 (expressing support for a bill of rights that would secure "the right to keep arms for Common and Extraordinary Occasions such as to secure ourselves against the wild Beast and also to amuse us by fowling and for our Defense against a Common Enemy").

74. Years after the constitutional debates, James Madison wrote that "a government resting on a minority is an aristocracy, not a Republic, and could not be safe with a numerical and physical force against it, without a standing army, and enslaved press, and a disarmed populace." RALPH L. KETCHAM, JAMES MADISON: A BIOGRAPHY 64, 640 (1971).

75. *See* Kopel, *supra* note 16, at 351 (expressing that as the Standard Model has become the consensus choice among legal scholars, the collective right view has "nearly vanished from the legal literature").

76. *See, e.g.*, James Madison's depiction in *The Federalist Papers* of "a militia amounting to near half a million of citizens with arms in their hands." ORIGIN, *supra* note 65, at 234. See also Mr. Corbin's remarks at the Virginia Convention (stating "Who are the militia? Are we not militia?"). *A Federalist*, June 7, 1788, *reprinted in* ORIGIN, *supra* note 65, at 375. A large number of similar remarks also testify to this same proposition. *See* ORIGIN, *supra* note 65, at 190 (stating that "Tyrants never feel secure until they have disarmed the people . . . . But the people of this country have arms in their hands; . . . every citizen is required by law to be a soldier"); *see also A Pennsylvanian III*, PHILADELPHIA PENNSYLVANIA GAZETTE, Feb. 20, 1788, *reprinted in* ORIGIN, *supra* note 65, at 276 (stating "Who are these militia? are they not our selves.").

77. *See An American* [Tench Coxe], *reprinted in* ORIGIN, *supra* note 65, at 185 (saying that "the number of people employed in agriculture, is at least nine parts in ten of the inhabitants of America, that therefore the planters and farmers form the body of the militia, the bulwark of the nation.").

78. *See* Saul Cornell, *Commonplace or Anachronism: The Standard Model, The Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 CONSTITUTIONAL COMMENTARY 221, 239 (1999) (citing William Petrikin as accusing authorities of trying to disarm farmers, mechanics, and "labourers"). Cornell cites Petrikin's remarks for the proposition that the arms of such persons were subject to confiscation by the state. The same remarks, however, stand for the proposition that people saw potential disarmament as an ever-present danger that was abhorrent to republican values.

79. *See id.*

80. *See Letter from Franklin County*, PHILADELPHIA INDEPENDENT GAZETTEER, April 30, 1788, *reprinted in* ORIGIN, *supra* note 65, at 339 (saying that with "ten days warning, TWENTY THOUSAND expert woodsmen, completely armed" could be called upon in the wooded counties of Pennsylvania).

81. *See An Old Militia Officer of 1776*, PHILADELPHIA INDEPENDENT GAZETTEER, Jan. 18,

the government was contemplated[82] and that the absence in the pre-amendment constitution of an express protection of the right to keep arms was troubling to members of the public cannot be denied.[83] It is noteworthy that Federalist defenders of the pre-amendment constitution offered the *natural* right to bear arms as the reason that no bill of rights was needed.[84] Others wrote that the right to bear arms was a protection for other freedoms such as those of speech and religion.[85]

If the Framers had intended the Second Amendment to secure

1788, *reprinted in* ORIGIN, *supra* note 65, at 221-22 (writing that if orders to turn in state-owned arms for cleaning and repair are suspicious, "will it not be their indispensable duty, as men, as citizens, and as guardians of their own rights, immediately to arm themselves at their own expense?").

82. *See* the Anti-Federalist satire entitled and signed *James De Caledonia IV*, PHILADELPHIA FREEMAN'S JOURNAL, March 12, 1788, *reprinted in* ORIGIN, *supra* note 65, at 298 (depicting a satirical claim by a fictitious well-born noble (who was probably meant to suggest the Federalist ratification promoter James Wilson) "I wish all the arms were collected."); see also the satirical pamphlet THE GOVERNMENT OF NATURE DELINEATED OR AN EXACT PICTURE OF THE NEW FEDERAL CONSTITUTION, April 15, 1788, *reprinted in* ORIGIN, *supra* note 65, at 334 (saying that "[t]he militia must be disarmed; for this purpose all the public arms must be called in, upon pretence of having them cleaned").

83. *See Common Sense*, NEW YORK JOURNAL AND DAILY ADVERTISER, April 21, 1788, *reprinted in* ORIGIN, *supra* note 65, at 790 (complaining that the pre-amendment constitution may deprive "a citizen" of "the privilege of keeping arms for his own defense").

84. *See* Federal Farmer, Nov. 8, 1787, *reprinted in* ORIGIN, *supra* note 65, at 298 (noting that the yeomanry of the country possess arms "and are too strong a body of men to be openly offended — and, therefore, it is urged, they will take care of themselves, that men who shall govern will not dare pay any disrespect to their opinions."). For a variety of similar sentiments, see documents collected in ORIGIN, *supra* note 65. *See also The Republican*, Jan. 7, 1788, *reprinted in* ORIGIN, *supra* note 65, at 190 (stating that "Tyrants never feel secure until they have disarmed the people. . . . But the people of this country have arms in their hands; . . . every citizen is required by law to be a soldier"); *A Pennsylvanian III*, Feb. 20, 1788, *reprinted in* ORIGIN, *supra* note 65, at 276 (stating that "Congress have [sic] no power to disarm the militia. Their swords, and every other terrible implement of the soldier, are the birthright of an American."); *Alexander White*, WINCHESTER VIRGINIA GAZETTE, Feb. 22, 1788, *reprinted in* ORIGIN, *supra* note 65, at 281 (stating that "There are other things so clearly out of the power of Congress, that the bare recital of them is sufficient, I mean the rights of conscience, or religious liberty — the rights of bearing arms for defense, or for killing game — the liberty of fowling, hunting and fishing . . ."); *Alexander White*, WINCHESTER VIRGINIA GAZETTE, Feb. 29, 1788, *reprinted in* ORIGIN, *supra* note 65, at 288 (stating that "In America it is the governors not the governed that must produce their Bills of Rights: unless they can shew the charters under which they act, the people will not yield obedience.").

85. *See Argus*, PROVIDENCE UNITED STATES CHRONICLE, Nov. 8, 1787, *reprinted in* ORIGIN, *supra* note 65, at 84 (saying that freedom of the press is a privilege "for which (among others) we have fought and bled, and for which I would again shoulder my Musket."). Toward the same reasoning, Zachariah Johnson told the Virginia convention that their liberties would be safe because "the people are not to be disarmed of their weapons" and should anyone attempt to infringe upon the people's religious liberty, he would "be universally detested and opposed, and easily frustrated." Malcolm, *supra* note 16, at 157.

only a collective right and not an individual right, they picked a poor set of words to convey their intent. For that matter, if they had designed the Amendment to secure to the states their right to form militias, they should have used different phraseology. They could have easily substituted "the states" or "the militia" for the phrase "the people," for example.[86] The first United States Senate, upon returning to Philadelphia in the summer of 1789 to draft a Bill of Rights, rejected one proposal to add the words "for the common defense" after "keep and bear Arms," and thus passed the Amendment with no such limitation.[87]

As the collective right position has retreated from reliance on the Framers' intent, its proponents have switched to more crafty historical arguments. They see government control in every Founder's reference to the individual right to bear arms and take pains to place every such expression into the "context" of government supervision.[88] In one recent article, published along with a triumvirate of articles praising its "fresh insights into the intellectual and social context of the Second Amendment,"[89] historian Saul Cornell claims to offer evidence that the Founders understood the right to bear arms to be conditioned upon permission from the state.[90] Specifically, Cornell cites the Pennsylvania "Test Acts" of the 1770s for the proposition that many Framers "believed that one could exclude large numbers of individuals from the right of gun ownership."[91]

The Test Acts were passed in the heat of wartime in 1777 and 1778 as British General Howe threatened to invade and take Pennsylvania.[92] They required loyalty oaths for voting, holding

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86. *See* Anthony J. Dennis, *Clearing the Smoke From the Right to Bear Arms and the Second Amendment*, 29 AKRON L. REV. 57, 70 (1995).

87. *Id.*

88. In *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, Dennis Henigan and coauthor Keith Ehrman claim that "[i]n no sense can it be confidently stated that [state declarations of a right to bear arms prior to the ratification of the federal bill of rights] were concerned with an individual right to bear arms for anything other than milita-related purposes." Ehrman, *supra* note 65, at 18. Elsewhere in the same article, the authors claim that "while the term 'militia' may have referred in some contexts to the citizenry as a whole, *in the context* of the Bill of Rights debate, it referred to organized, trained, and government-supplied militias." *Id.* at 29 (emphasis added).

89. Robert E. Shalhope, *To Keep and Bear Arms in the Early Republic*, 16 CONSTITUTIONAL COMMENTARY 269, 270-71 (1999).

90. Saul Cornell, *Commonplace or Anachronism: The Standard Model, The Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 CONSTITUTIONAL COMMENTARY 221 (1999).

91. *Id.* at 237.

92. *See* ALAN AXELROD, THE COMPLETE IDIOT'S GUIDE TO THE AMERICAN REVOLUTION 209-18

public office, and serving on juries, to weed out "persons disaffected to the *liberty and independence of this state*," (loyalists to the British Crown).[93] These Test Acts, according to Cornell, prove that only citizens who were willing to swear an oath to the state could claim the right to bear arms.[94] "Gun ownership in Pennsylvania was thus predicated on a rejection of the very right of armed resistance posited by the Standard Model."[95] Cornell states that "perhaps as much as forty percent of the citizenry" were stripped of "many essential rights"[96] by the Acts (a reviewer extrapolated from this misleading statement that the Acts "had the ultimate effect of disarming as much as 40 percent of the citizenry").[97] Although Cornell criticizes Standard Modelers for omitting discussion of the Test Acts, and for failing to consult two specific historical works (one of them a 1942 book on local history, the other a published dissertation),[98] nothing in the works Cornell cites mentions a single case where the right to bear arms was legally trumped by the Test Acts in any court of law.[99]

III. THE TEST ACTS — INFRINGEMENT ON THE RIGHT TO BEAR ARMS?

Cornell downplays the wartime context of the Test Acts as an explanation for their intrusion upon civil liberties[100] even though such intrusions are hardly unique for governments in wartime.[101] The Acts, however, can hardly be understood outside their wartime context.[102] Nor does Cornell reconcile the impact of the Acts on

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(2000) (summarizing the invasion of Philadelphia).

93. Cornell, *supra* note 90, at 228 n.30 (citing 9 Statutes at Large of Pennsylvania 110-14) (emphasis added).

94. *Id.* at 229.

95. *Id.*

96. *Id.* at 228.

97. Chris Mooney, *Showdown: Liberal Legal Scholars Are Supporting the Right to Bear Arms*, LINGUA FRANCA, Feb. 2000, at 29.

98. Cornell, *supra* note 90, at 229 n.33.

99. In pursuit of authority for Cornell's claim, I consulted Cornell's own book *The Other Founders: Anti-Federalism & the Dissenting Tradition in America, 1788-1828*. SAUL CORNELL, THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION (1999). While illuminating, the book does not provide any evidence that anyone was actually denied the right to bear arms under the Test Acts. It seems that, although the Acts allowed for the disarming of loyalists, the historical record is virtually devoid of recorded complaints over such disarming — suggesting that instances of it were rare.

100. *Id.* at 228. Cornell states that "[b]oth the timing and language of the Acts suggests that they were not simply [wartime measures], but a reflection of a particular republican ethos that was antithetical to modern liberal ideas about rights." *Id.*

101. *See* Roots, *supra* note 20.

102. After cessation of hostilities in 1786, the Acts were amended to permit full citizenship to all men except those who had aided the British in the Revolution. ROBERT L.

holding public office, voting, or transferring real estate with the protections for such rights that are found in the Bill of Rights. Reconciliation, however, is exceedingly simple when considering the setting for the Test Acts.

The Test Acts were enacted by the ultra-patriotic Pennsylvania Assembly while the Commonwealth's independence was just days old and being contested by military force. The Acts declared that all voters in the fall elections would be required to take an oath to uphold the new government.[103] Large numbers of Pennsylvanians refused the oath because either they remained loyal to Britain or objected to the structure of the new Pennsylvania Constitution.[104] The British invaded and occupied Philadelphia (both the state capital and the fledgling nation's capital) on September 23, 1777. Congress fled in haste to Baltimore[105] as many locals deserted the Patriots' cause and fled to the side of Britain.[106]

With a pressing need for both men and arms to fight in the Revolution, the Patriots enacted further legislation ordering all men aged sixteen to fifty under arms (except conscientious objectors who paid fines).[107] The Assembly dropped the oath requirement for those who would take positions in the militia, but enacted further Test Acts requiring voters to swear an oath renouncing fidelity to King George III, pledging allegiance to Pennsylvania, and promising to bring traitorous conspiracies against the United States to the attention of local justices of the peace.[108] "*When arms were needed for the militia to repel invasion*, they were seized from those who had not taken the oath."[109]

Cornell's thesis (that the Test Acts show the Founders' willingness to violate the right to bear arms — and thus the normalcy of such violations in the ratification era) is undermined by a reading of the sources Cornell cites for his proposition. Although the Pennsylvania Assembly suspended habeas corpus and

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BRUNHOUSE, THE COUNTER-REVOLUTION IN PENNSYLVANIA 1776-1790 180-81 (1942). This amendment contained a preamble with a passage explaining the original restrictions as a war necessity. *Id.* The Acts were abolished by the Pennsylvania Legislature in 1789, allowing even persons who refused to denounce the British Crown to be citizens if they swore allegiance to Pennsylvania. *Id.* at 197.

103. *Id.* at 16.

104. *See id.* at 16-30.

105. *See id.* at 23.

106. *See id.* at 24.

107. *See* BRUNHOUSE, *supra* note 102, at 23.

108. *Id.* at 39-41.

109. *Id.* at 41.

granted sweeping powers to Patriot officials to confiscate property and arrest suspected spies and traitors, such officials were far more respectful of the right of individuals to possess private arms than was the invading British army, which disarmed the population of Philadelphia during its occupation.[110] Even the right to put on theatrical entertainment was curtailed in the atmosphere of Pennsylvania's war for survival — yet Cornell draws no correlation to the meaning of the First Amendment.[111]

Nor is the record clear that disarmament of the disloyal was in any way general. When a patriotic mob descended upon the home of a Tory-friendly author, the author "armed himself and defied the assailants" until they dispersed.[112] In October 1779, when patriotic fervor ran so hot that radical Patriots laid plans to seize the wives and children of Pennsylvania Tories who had gone over to the enemy and to ship them to New York, a patriotic mob formed at the home of wealthy conservative James Wilson to accost Wilson and others who were perceived as sympathetic to the Tories.[113] The mob came accompanied by a militia and two cannons, but were met by Wilson and others who "awaited with arms."[114] Several persons were killed or wounded when the militia-mob broke into Wilson's home; order was not restored until Commonwealth President Reed and a horse troop galloped to the scene and arrested the militiamen.[115] The incident shows that the Pennsylvania Test Laws — contrary to the Cornell thesis — were not broad-scale gun control acts and that many guns were kept by opponents of the Pennsylvania government.

IV. THE SCHOLARSHIP OF COLLECTIVE RIGHT THEORISTS

The collective right theory will die because even its foremost proponents do not claim the theory as their own.[116] Instead, they

110. *See* Kopel, *supra* note 16, at 355.

111. *See* BRUNHOUSE, *supra* note 102, at 147, 169 (mentioning Revolution era ban on Philadelphia theater company).

112. *Id.* at 75.

113. *Id.*

114. *Id.*

115. *Id.*

116. Andrew Herz, author of the controversial 1995 article that vociferously attacked Standard Model proponents, distanced himself from openly supporting the collective right theory and instead claimed to support the "narrow individual right" view of the Second Amendment. See Andrew Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57, 61 (1995). As Randy Barnett and Don Kates point out, however, Herz's "narrow individual right" is the collective right in disguise because Herz fails to acknowledge that individuals may possess arms outside the

write only that "the courts" believe in the theory.[117] In turn, those courts that have provided their rationales for adopting the collective right theory have cited either (erroneously) to the *Miller* case,[118] or to scholars who do not themselves faithfully subscribe to the theory. For example, the Court of Appeals for the Ninth Circuit recently denied a Second Amendment challenge by citing Keith Ehrman and Dennis Henigan as authorities for the collective right theory while simultaneously ignoring a much larger number of Standard Model scholars.[119] But Ehrman and Henigan — though strong opponents of a broad individual right to bear arms — stop short of adopting the collective right theory as their own;[120] instead, they state that "[t]he courts repeatedly [have held] that the right guaranteed by the second amendment [sic] is not an individual right, but rather a 'collective' right."[121]

Collective right proponents take pains to paint the Constitution in "living" terms — emphasizing the changing nature of the document or the outdated nature of private arms ownership.[122] Ehrman and Henigan join other anti-Standard Modelers in painting the history of the Second Amendment in vague terms that suggest that the Amendment was designed to operate only as prescribed by sanction of government. Law professor Carl T. Bogus, arguably the most prominent Second Amendment scholar who opposes the Standard Model, has offered a variety of arguments to reconcile the collective right theory with the historical record refuting it. Bogus suggests that much of the public dialogue surrounding the Constitution's ratification, including the statements of both Federalists and Anti-Federalists, and even the *Federalist Papers*,

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express permission of the state. *See* Barnett, *supra* note 4, at 1204-05.

117. *See* Bogus, *supra* note 2, at 27 (stating that "[t]he courts have consistently held that this guarantees only a collective right, that is, it gives states the right to have armed militias, not individuals the right to own guns.").

118. *See, e.g.*, Stevens v. United States, 440 F.2d 144, 149 (6th Cir. 1971) (citing *Miller* for the proposition that the Second Amendment "applies only to the right of the State to maintain a militia and not to the individual's right to bear arms"). That this case misstates the rule of *Miller* is explained in the text accompanying notes 50-55.

119. Hickman v. Block, 81 F.3d 98 (9th Cir. 1996).

120. *See* Ehrman, *supra* note 51, at 47 (saying "[i]t may well be that the right to keep and bear arms is individual in the sense that it may be asserted by an individual").

121. *Id.* at 46. Ehrman and Henigan concede that "it may well be that the right to keep and bear arms is individual in the sense that it may be asserted by an individual" but maintain that the Amendment is "distinguishable from other parts of the Bill of Rights because it protects a public interest, not a private interest." *Id.* at 47.

122. *See, e.g.*, Herz, *supra* note 116, at 66 (stating that "we need not read the Second Amendment exclusively through the eyes of a small group of white property-owning males who lived in a world utterly different than our own.").

was disingenuous.[123] Thus, the Founders' statements regarding the Second Amendment were an elaborate code. They masked hidden political maneuvering, compromises supportive of slavery, and an elaborate conspiracy of silence.[124]

Bogus suggests that the Framers plotted in secret to lay the Second Amendment into the Bill of Rights in encrypted form as a slavery provision, and posits that the Amendment's meaning can be discerned, not from recorded history, but from what went *unrecorded* during ratification of the Amendment. "The story of the Second Amendment . . . is a tale of political struggle, strategy, and intrigue . . . [which] has been hidden because neither [Madison] nor those he was attempting to outmaneuver politically, laid their motives on the table."[125] Bogus alleges that the Second Amendment's "hidden history" reveals it to have been part of the slavery compromise.[126] In addition, Bogus argues that the Richmond Convention in June 1788 was punctuated by unexpressed fears that the proposed federal government would attempt to destroy the slave system.[127] As a result, according to Bogus, the later-enacted Second Amendment was an avenue for Southerners and Anti-Federalists, who had lost out in the overall design of the Constitution, to assert a buffer provision against the military power of the federal government.[128]

Unfortunately for this line of reasoning, a secret or "hidden" history is neither binding nor helpful in interpreting a constitutional provision. Nor is it nearly as clear, as Bogus suggests, that slavery supporters cowed at stating their support openly during the ratification debates.[129] The Constitution does, after all, contain slavery provisions that were expressed (and thus "unhidden") in the

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123. *See* Bogus, *supra* note 5, at 401 (suggesting Hamilton, Madison, and Jay departed from their private views and wrote *The Federalist Papers* solely as a work of advocacy).

124. *Id.*

125. *Id.* at 315.

126. *Id.* at 371. According to Bogus, the Second Amendment deserves a place alongside (1) the fugitive slave provision, U.S. CONST. art. IV, § 2, cl. 3, (2) the provision prohibiting Congress from abolishing the African slave trade until 1808 or imposing an import tax of more than ten dollers per slave, U.S. CONST. art. I, § 9, cl. 1, and (3) the provisions counting slaves as three-fifths of free persons for apportionment purposes, U.S. CONST. art. I, § 2, cl. 3. Id. at 371.

127. *Id.* at 344-47.

128. *See* Bogus, *supra* note 5, at 344-47.

129. Bogus points out that the words "slaves" and "slavery" do not appear anywhere in the Constitution. *Id.* at 373. This omission was intended to "make the Constitution more palatable to the North." *Id.* (quoting Paul Finkleman). But the Founders themselves admitted to this deception in their private correspondence and occasionally in their public statements. *See id.*

text — albeit in stifled wording.[130] While these slavery provisions may contain "inscrutable language that the people could not readily understand,"[131] they nonetheless were understood by people of the Founders' era as slavery provisions. Bogus's own writings yield scant primary evidence (which would be needed to take his argument on its face) of either any similar understanding regarding the Second Amendment or any secret correspondence among slavery supporters evidencing the notion that the Second Amendment was intended to enable slave states to obstruct the federal government should abolitionists ever gain control of it.

Equally controversial is the approach taken by Michael Bellesiles, a history professor at Emory University who has contributed much to the collective right argument.[132] Bellesiles has mined the historical record for evidence that the Founders were *gun controllers* and found what seems at first impression to be hard evidence in favor of such a proposition.[133] After scrutinizing Bellesiles's examples, however, one must conclude that they consist largely of colonial measures enacted during community conflicts or emergencies (such as when arms and powder shortages required strict limits on firing of guns required for communal defense),[134] regulations pertaining to arms purchased and provided (and thus owned) by authorities for use in community activities,[135] or statutes applicable only to slaves, freed slaves, indentured servants or Indians[136] — hardly surprising in light of the historical

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130. *See* U.S. CONST. art. I, § 2, cl. 3 (stating that "[r]epresentative and direct Taxes shall be apportioned [according to the number of free Persons plus] three fifths of all other Persons."); U.S. CONST. art. I, § 9, cl. 1 (stating that "[t]he Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight . . . ."); U.S. CONST. art. IV, § 2, cl. 3 (stating that "[n]o Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.").

131. Bogus, *supra* note 5, at 373 (quoting Paul Finkleman).

132. *See* Michael A. Bellesiles, *Suicide Pact: New Readings of the Second Amendment*, 16 CONST. COMMENTARY 247 (1999) [hereinafter *Suicide Pact*]; *The Origins of American Gun Culture in the United States, 1760-1865*, 83 J. OF AM. HIST. 425 (1996) [hereinafter *Gun Culture*]; *Gun Laws in Early America: The Regulation of Firearm Ownership, 1607-1794*, 16 L. & HIST. REV. 567 (1998) [hereinafter *Gun Laws*].

133. *See Gun Laws*, *supra* note 132.

134. *See, e.g.*, *id.* at 583 (describing Connecticut's prohibition of firing guns, except for defense, in 1675 during King Philip's War).

135. *See id.* at 585 (describing a 1763 Connecticut assembly order requiring deputies to impound and then sell guns belonging to Connecticut).

136. *See id.* at 584 (describing Virginia's 1642 decrees that no one sell guns to Indians). It is noteworthy, also, that none of Bellesiles's examples would have been subject to the

non-universality of constitutional protections in the eighteenth and nineteenth centuries (religious, speech, electoral, property, and other rights were likewise denied to such groups). Bellesiles has also studied eighteenth century probate records and concluded that rates of firearm ownership were much lower than popular perceptions would suggest — perhaps as low as fourteen percent.[137] Bellesiles's study, however, did not count firearms transferred outside probate, which may have been substantial in number.[138]

The research and insights of Bogus, Bellesiles, Cornell, and others may provide assistance, but do not establish that the Founders viewed arms possession by the common citizen as subject to the graces of the state. *At most*, these historical insights establish that the Second Amendment protects a collective right to join in armed association on behalf of the state *as well as* protecting an individual right to possess private arms. While these scholars' writings are thought provoking, they do very little to refute or explain the writings of ratification contemporaries evidencing the view that the Second Amendment preserved an individual right to keep and bear arms without leave from any government.

The published article written by the leading Pennsylvania Federalist, Tench Coxe, just days after Madison's introduction of the Bill of Rights — and during the consideration of and debate on the Bill of Rights — is probably the best single piece of evidence of the Second Amendment's meaning to the Founders and the Founding Generation.[139] The article described and praised each of the proposed rights. Regarding Madison's provision that later became the Second Amendment, Coxe wrote that:

> As civil rulers, not having their duty to the people, duly before

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Second Amendment anyway because the Second Amendment has not been applied to the states through the Fourteenth Amendment. *See* Miller v. Texas, 153 U.S. 535 (1894); Presser v. Illinois, 116 U.S. 252 (1886); United States v. Cruikshank, 92 U.S. 542 (1875).

137. *See Gun Culture, supra* note 132.

138. *See id.* at 427-28 (admitting probate records are not a "perfect source" for such information).

139. Stephen P. Halbrook and David B. Kopel, two of the foremost authorities on the Second Amendment, describe Tench Coxe's contribution to the Second Amendment debate as being so irrefutable that it essentially resolves the debate in favor of an individual right construction. See Kopel, *supra* note 16, at 348. Tench Coxe wrote more than anyone else about the right to bear arms during the ratification era. *See id.* Coxe wrote numerous widely circulated articles about the right to bear arms and the Constitution over the course of his lifetime, all of which expressed the opinion that the Second Amendment protects an individual right. *See id.*

> them, may attempt to tyrannize, and as the military forces which shall be occasionally raised to defend our country, might pervert their power to the injury of their fellow-citizens, the people are confirmed by the next article *in their right to keep and bear their private arms.*[140]

His article appeared in one of the most prominent newspapers in Philadelphia — the very city where the First Congress met to ratify the Bill of Rights. In fact, it appeared during the same period when Madison's proposed Bill of Rights was under consideration. Further bolstering the authoritative credibility of this single piece of evidence, Coxe actually sent a copy of the article to Madison himself, who congratulated and thanked Coxe for "the co-operation of your pen."[141]

Bogus, Bellesiles and their comrades are now among a rather isolated group of scholars — and even they have, for the most part, retreated from solidly backing the collective theory as an exclusive proposition.[142] The vast majority of recent scholarship has pointed out that for all of its allure among today's bar and bench, the collective right theory is, for the most part, an outlaw notion, baseless in terms of known history.[143] The statements, letters, and publications of the Founders and the Founding Generation are so replete with evidence that the right to have arms was considered an individual right secured to each citizen, that no single law review article could possibly restate such a record.[144]

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140. *A Pennsylvanian*, PHILADELPHIA FEDERAL GAZETTE, June 18, 1789, *reprinted in* ORIGIN, *supra* note 65, at 670, 671 (emphasis added). One should note that Coxe's use of the term "bear" in context with an individual's Second Amendment rights also represents a direct refutation of an argument made by some collective right theorists that the phrase "bear arms" means only the use of arms in the military context. *See, e.g.*, WILLS, *supra* note 61, at 256-60.

141. Madison to Coxe, June 24, 1789, reprinted in ORIGIN, *supra* note 65, at 673, 674.

142. *See supra* notes 88-90 and accompanying text. The third and most celebrated of Bogus's widely-circulated Second Amendment writings concludes, "I do not in this Article take any position with respect to 'original intent.' " Bogus, *supra* note 5, at 408. Bellesiles's most recent work on the Second Amendment begins with "There are many ways of reading the past" and then descends into a lengthy diatribe about how historical evidence should never be read to grant a "monopoly on truth." *See Suicide Pact, supra* note 132, at 247-50.

143. *See* Kopel, *supra* note 16, at 352 (saying there is no writing from 1787 to 1793 that states the collective right thesis).

144. *See, e.g.*, Dennis, *supra* note 86, at 70-72 (pointing to letters from Madison's associates and contemporaries, statements made by John Adams in defense of the new Constitution, writings of early congressmen about the right to bear arms, and newspaper accounts of the amendments).

V. THE STRUGGLE FOR RATIFICATION

The Constitution was hammered out at the Constitutional Convention in Philadelphia between May and September 1787. Its drafters met on the second floor of the Philadelphia Statehouse (now known as Independence Hall) with windows shut, sentries posted below, and delegates sworn to strict silence.[145] The States had chosen seventy-four delegates, nineteen of whom refused to attend, leaving only fifty-five.[146] Most were cosmopolitan and personally anxious for a stronger national government; the American countryside was grossly underrepresented.[147] Before the end of the Convention, fourteen delegates left, leaving forty-one, three of whom refused to sign.[148] Thus, nearly half refused to attend, left, or did not sign.[149] The document that was circulated for ratification in the winter of 1787-1788 came largely with the onus that it was a Federalist statement (i.e., that it was being promoted by the advocates of a more centralized government).

Opponents of this constitution cited to a number of objectionable aspects of it. In particular, the document provided no express limitations on the powers of the national government and did not enumerate a list of natural rights that the government could not infringe, such as freedom of the press, freedom from unreasonable search and seizure, and freedom of religion. The right to bear arms was occasionally, if not always, listed among these rights.[150]

The document also contained provisions for federal military power that greatly concerned much of the reading public. It empowered Congress to employ a professional, or standing, army and allowed for the organizing, arming, and disciplining by Congress of civilian militia units when such units were called up to serve the national government. Those suspicious of centralized

145. *See* KENNETH W. ROYCE, HOLOGRAM OF LIBERTY: THE CONSTITUTION'S SHOCKING ALLIANCE WITH BIG GOVERNMENT 2/11 (1997).

146. *Id.* at 2/16.

147. *Id.* at 2/12. The Philadelphia delegates were a much different body from that which had previously led the nascent republic. Only eight had signed the Declaration of Independence, and six the Articles of Confederation. *Id.* The most famous revolutionaries, including Thomas Jefferson, Samuel Adams, John Adams, Patrick Henry, Thomas Paine, and Christopher Gadsen, were not delegates. *Id.*

148. *Id.* at 2/16.

149. *Id.*

150. *See* Letter from Jeremy Belknap to Rep. Paine Wingate (May 29, 1789) *reprinted in* ORIGIN, *supra* note 65, at 795 (speaking of the insertion of a clause "to provide for the Liberty of the press — the right to keep arms — Protection from seizure of person & property & the Rights of Conscience").

authority were relentless in their criticism of these provisions.[151] They argued that the provisions would allow the national legislature to order local militias into theaters of war far from home, to virtually enslave militiamen by keeping them in service for extended periods and under total control, and to discipline militiamen arbitrarily or inhumanely.[152] There were also fears that the provision granting Congress the power to arm the militias would allow Congress to let the militias atrophy by arming them inadequately, or by not arming them at all.[153]

In each state where ratification was at issue, Federalists and Anti-Federalists battled over these military provisions. It is from these debates over the propriety of a standing army that collective right proponents draw each and every one of the quips, quotes, and anecdotes that they use as evidence that the Second Amendment right to bear arms was intended to be reserved solely to the states — a proposition that was stated nowhere in the debates in question.[154] While collective right proponents admit to their readers that there was no recorded debate over the right to bear arms during the ratification controversy,[155] they insist that these debates over *the structure of the United States military* are authoritative as to the meaning of the Second Amendment.

Even the occasional concession that there was no debate over the personal right to bear arms during ratification is somewhat deceptive.[156] A more realistic statement would be that no "debate"

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151. *See id.* (reprinting numerous documents expounding upon criticisms of the Constitution's militia provisions).

152. *See, e.g.*, *Centinel III*, newspaper excerpt from PHILADELPHIA INDEPENDENT GAZETTEER, Nov. 8, 1787, *reprinted in* ORIGIN, *supra* note 65, at 85 (arguing that under the militia provisions, militiamen "may be made as mere machines as Prussian soldiers"); John Smilie, Pennsylvania Convention Debates, Dec. 6, 1787, *reprinted in* ORIGIN, *supra* note 65, at 145-46 (saying the militia clauses will allow Congress to form a select militia "which will, in fact, be a standing army" or even "may say there shall be no militia at all" and that "[w]hen a select militia is formed; the people in general may be disarmed.").

153. *Id.*

154. *See* HALBROOK, *supra* note 16 (citing a collection of historical records at the University of Wisconsin, "probably the most complete in the world on the subject," that contains "not one iota of evidence that the Second Amendment was intended to guarantee solely and exclusively a collective right and not an individual right.").

155. *See, e.g.*, Ehrman, *supra* note 51, at 20 (saying "[n]owhere in the Constitutional debates was there a discussion of a right to keep or bear arms.").

156. Both Standard Model and collective theorists are in error when they allege that the personal right to bear arms was never discussed during the ratification struggle. Although it was at issue only rarely, it did figure in the concerns of the Pennsylvania minority who submitted their proposed bill of rights in December, 1787. The minority's proposed amendment number seven stated that "the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing

over the issue *was joined* because all parties *agreed*. There were, in fact, a variety of *unchallenged* statements made in the public forum advancing the proposition that bearing arms was a fundamental, natural, and individual right of American citizens. There was no debate over the mutual understanding that the militia was the whole people,[157] that the people enjoyed a right to keep and bear arms, and that no special sanction was needed for the keeping of personal arms. No militia-centric view of the right to bear arms was contemplated by either those who supported or those who opposed ratification.

As the proposed constitution made its way around the circuit of states, its attackers gained momentum.[158] A sizeable percentage of delegates indicated they would support ratification only if a declaration or bill of rights were amended into it.[159] It soon became evident that the Constitution would not be ratified unless assurances were given that a bill of rights with agreeable terms would soon be attached upon the document's successful return to

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game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to and be governed by the civil power." See ORIGIN, *supra* note 65, at 160. This proposed amendment was separate and distinct from proposed amendment eleven, which stated that "the power of organizing, arming, and disciplining the militia . . . remain[s] with the individual states . . ." *Id.* The persistent Pennsylvanians published a letter in the Philadelphia *Packet* newspaper saying they submitted proposed amendment number seven because of the fear that "the personal liberty of every man probably from sixteen to sixty years of age may be destroyed by the power Congress [has] in [the] organizing and governing of the militia." *Id.* at 174.

157. Madison's original version of the amendment, like many of the declarations submitted by the states, described the militia as comprised of the body of the people. *See* Malcolm, *supra* note 16, at 162-63.

158. *See, e.g.*, *Agrippa III*, Article in BOSTON MASSACHUSETTS GAZETTE, Nov. 30, 1787, *reprinted in* ORIGIN, *supra* note 65, at 123 (reporting that ratification of the Constitution in New York, Virginia, and Pennsylvania seems problematic without major alterations in the text, and asking "is it not . . . better to recommit it to a new convention . . . than the endeavour to force it through in its present form . . . ?").

159. George Turner, in a letter to Winthrop Sargent on Nov. 6, 1787, stated that:

> There are two parties here upon the momentous Business now agitating independent America. One party sees nothing but Danger and Mischief in the proposed Constitution; while the other extols it as a Chef d'oeuvre in Politics. In this Case, as in almost every other, there is a middle walk to be trodden, as the directest Road to Truth. For my part, I like the Outlines of the Plan, and, being a Friend to Energy of Government, I approve of most of the Powers proposed to be given. But, as a Friend to the natural Rights of Man, I must hold up my Hand against others. There are certain great and unalienable Rights (which I need not enumerate to you) that should have been secured by a Declaration or Bill of Rights. . . . [I]n my Opinion, such a Declaration [is] an indispensable Condition . . . .

ORIGIN, *supra* note 65, at 83-84.

Philadelphia.[160]

The final result of the ratification conventions was an utter failure for those who had sought to remove the national standing army provisions from the text of the Constitution.[161] The document we now know as the Constitution was formally ratified by a recalcitrant Rhode Island on May 29, 1790. After this final ratification, the work of drafting a bill of rights began in earnest.

It was not necessary to prepare a bill of rights from scratch, however. More than a dozen lists of rights were offered by various writers throughout the debates on the Constitution.[162] Indeed, many existing state constitutions already contained bills of rights.[163] Many such bills of rights either contained a right to keep arms that would be difficult to construe as anything but individual and/or defined

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160. The combined number of votes from all of the conventions indicates that 34% of convention delegates approved of the Constitution just as it was and an additional 30% favored ratification with proposed amendments. *Id.* at app. C. Only by combining were these two groups (totaling 64%) able to gain ratification. *Id.* The largest voting bloc (36%) was that of delegates who were against the Constitution unless it was amended prior to ratification. *Id.* According to these figures, a significant majority (66%) required amendments. *See id.* (providing statistics from the twelve state conventions which met in 1787 and 1788).

161. It is noteworthy that those who debated the value of including a bill of rights, and who addressed themselves upon matters pertaining to both military and personal arms possession issues, seemed to reconcile the two issues very well. Philadelphia Federalist Tench Coxe, for example, strongly supported a national professional military yet spoke and wrote eloquently of the importance of individual gun ownership. *See* Kopel, *supra* note 16, at 348 (saying Coxe wrote more than anyone else about the right to bear arms).

162. It cannot be said that the notion of the individual right to keep arms was not at issue during the ratification of the Bill of Rights. By early January 1788, five states — Delaware, Pennsylvania, New Jersey, Georgia, and Connecticut — had ratified the Constitution, although only after contentious debates over its lack of a bill of rights. Pennsylvania had been a close call; a vocal minority had almost disrupted passage by demanding a list of rights — including both a personal right to arms clause and a limitation on standing armies clause. Massachusetts ratified, but only after attaching a list of recommended amendments, including a broad reservation to the states of all powers not delegated to the federal government. Shortly thereafter, the New Hampshire convention adopted the nine Massachusetts amendments and added three of its own: one to limit standing armies, one to ensure the individual's right to have arms, and one to protect freedom of conscience. *See* Malcolm, *supra* note 16, at 158. Virginia, New York and North Carolina all drew up lists of amendments, many patterned after the Virginia Declaration of Rights. The Virginia arms amendment provided that "the People have a right to keep and bear Arms" and that a militia composed of the body of the people "capable of bearing arms" is the proper and safe defense "of a free state." *Id.* at 159.

163. *See* ORIGIN, *supra* note 65, at 747-80 (showing text of pre-ratification bills of rights in the states). *See also* McAffee, *supra* note 2, at 818 (stating that "[w]e are unaware . . . of any evidence suggesting that the Second Amendment was intended to have a different meaning than the amendment proposed by the Virginia state ratifying convention, from which James Madison drafted the Second Amendment."). The Virginia ratifying convention's proposal "included both clauses of what became the Second Amendment, but neither its language nor structure suggest that the two clauses lack independent force." *Id.*

the militia as essentially all adult males.[164] The Pennsylvania Statehouse was already well suited for the consideration of such proposals, having been the site of ratification of a state constitution in 1776 that recognized the arms right for both personal and state defense,[165] as well as having been the scene of introduction for one of the first proposed *national* bills of rights at the original ratification convention in 1787.[166] *That* proposed bill of rights, known as the Pennsylvania Minority Bill of Rights, included two separate clauses that are relevant to this discussion. The first clause was intended to eliminate or limit the standing army provisions of the Constitution; the other clause was intended to secure eternal acknowledgment of the right to keep and bear arms "for defense of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals . . ."[167]

The final version of the Second Amendment was a composite of several such arms-right provisions.[168] It is noteworthy that the ratifiers (actually U.S. Senators by that time) conformed to the gist of the latter of the two Pennsylvania Minority provisions but jettisoned the gist of the former (although recognizing the "necessity of a well-regulated militia" to "the security of a free state"). The ten amendments ratified in 1789 were said to secure private rights, and not to alter in any manner the structure of government that had been laid out in the 1787 Constitution.[169]

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164. *Id.*

165. *See* Pennsylvania Constitution, Sept. 28, 1776, *reprinted in* ORIGIN, *supra* note 65, at 752, 754 (providing Pennsylvanians with the right to "bear arms for the defence of themselves and the state").

166. *See Pennsylvania Minority*, Dec. 18, 1787, *reprinted in* ORIGIN, *supra* note 65, at 154, 160.

167. *Id.*

168. Miller's holding that the right to bear arms is necessarily related to the militia clause of the Second Amendment appears to violate the known intent of the Founders. Like the First, Fourth, Fifth and Sixth Amendments, the Second Amendment was a composite of two or more constitutional principles. The notion that the "right of the people to keep and bear arms" was contingent on some relationship to a "well regulated militia" is as erroneous as the notion that the First Amendment's protection of freedom of speech is contingent on such speech having some relationship to the free exercise of religion. *See* ORIGIN, *supra* note 65, at 3-4 (recounting that the militia clause and the right to bear arms clause of the Second Amendment originated in two separate proposals and were combined only for the purpose of brevity and not so that the two statements would rely upon each other for operability).

169. *See* Letter from Rep. William L. Smith to Edward Rutledge (August 9, 1789), *reprinted in* ORIGIN, *supra* note 65, at 798 (saying "[t]here appears to be a disposition in our house to agree to some [amendments] which will more effectually secure private rights,

James Madison, the so-called Father of the Constitution, wrote in his personal notes that the amendments he had drafted "relate 1st to private rights"[170] and would hopefully "quiet the fears of many by supplying those further guards for private rights."[171] Madison's statement is important because it establishes that the ratifiers did not intend for the Second Amendment to alter in any manner the standing army provisions or the national militia powers of Congress.

VI. THE COLLECTIVE RIGHT THEORY'S UNWORKABILITY

Whether the collective right theory dies peacefully due to its continuing abatement in the halls of academia, or by quick judicial stroke in the halls of the judiciary (either in the *Emerson* case or some other controversy), will be determined by how far the theory's adherents are willing to follow their own logic. Collective theory adherents never offer even a hypothetical enactment, either state or federal, that would qualify for invalidation under the Second Amendment, nor even a single hypothetical action that might constitute an "infringement." Indeed, for all of their repetition of the "right of the states to form militias," collective proponents have never conceded that any federal gun control measure, either now in existence or conceivably enacted in the near future, might place that objective in danger.

Yet the modern, combined burden of federal gun control legislation exacts a mighty toll on any State's ability to "regulate" its "militia." At present, if a State governor were to call up his State's militia for immediate action, he would contend with immense federal interdiction obstructing his decision. His pool of militiamen could be limited to federally approved personnel, precluding all who have felony or domestic violence convictions, dishonorable discharges from the United States military, drug addiction or mental illness problems, or questionable citizenship.[172] The arms of his units could be limited to federally approved firearms designed solely for non-assaultive purposes (or at least non-assaultive appearances).[173] Those militiamen who must acquire

without affecting the structure of the Govt.").

170. *See* Dennis, *supra* note 86, at 70 (quoting Madison).

171. *Id.*

172. *See* 18 U.S.C. § 922(g) (1994) (making unlawful the possession of "any firearm or ammunition" that "has been . . . transported in interstate . . . commerce" by anyone who has been convicted of a crime that warrants imprisonment for more than one year, who is a drug addict, who suffers from officially recognized mental deficiencies, or who is an illegal alien).

173. *See* 18 U.S.C. §§ 922(o), (v) (1994) (making unlawful the possession of machine

or upgrade their personal arms would also find themselves denied immediate purchases at gun stores, pending federally mandated background checks and waiting periods.[174] To be sure, collective right advocates would hardly appreciate the obvious result of a challenge by a state attorney general on grounds that federal law is infringing on that state's ability to "regulate" its militias. Under the collective right theory, however, such a challenge would, by necessary implication, require the invalidation of all infringing federal gun statutes.[175]

Perhaps the primary reason why the collective right theory cannot survive lies in the theory's glaring inconsistencies with the Constitution itself. At least three provisions of Article I appear inconsistent with the collective right interpretation of the Second Amendment.[176] Article I grants Congress the power to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions,"[177] and to "provide for organizing, arming, and disciplining, the Militia,"[178] and requires that no state

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guns and semiautomatic assault weapons). Note that such statutes contain numerous exemptions and conditions that might impact such firearm use in the context of law enforcement or militia duty. To the extent that such exemptions and conditions are unclear, however, the ability of militia members to obtain proper militia arms seems highly controlled by federal law. *See* §922(o) (allowing the possession of a machine gun by one who possesses it "under the authority of the United States . . . a State, . . . or political subdivision thereof. . . .").

174. *See* 18 U.S.C. § 922(t) (1994) (requiring licensed dealers to wait for the result of background checks of potential buyers before selling firearms).

175. *See* Roger Roots, *The NRA v. The Right to Bear Arms*, FREE AMERICAN, Sept. 1998, at 51, 53 (stating that most federal gun control is doomed). In 1990 when Governor Perpich of Minnesota challenged the validity of a federal defense statute that authorized the Defense Department to order Minnesota's National Guard units out of the country for military training, the United States Supreme Court essentially held the "collective rights theory" invalid although not squarely addressing the Second Amendment. *See* Perpich v. Dep't of Defense, 496 U.S. 334 (1990). The Court held that because National Guard enlistees are simultaneously enrolled in the national military, the federal government maintains control over their movements, military training and actions, and no state governor can withhold consent. *Id. Perpich* was based upon the militia clauses of the Constitution and did not address any Second Amendment issue. Indeed, the Court did not even include the Second Amendment as a "militia clause" — suggesting that the Court either negligently overlooked the potential impact of the Second Amendment or concluded that the Amendment addresses rights of individuals rather than military or militia concerns. *Id.*

176. *See* Glenn Harlan Reynolds & Don B. Kates, *The Second Amendment and States' Rights: A Thought Experiment*, 36 WM. & MARY L. REV. 1737, 1744 (1995) (highlighting the inconsistencies between the Constitution and the States' right theory).

177. U.S. CONST. art. I, § 8, cl. 15.

178. U.S. CONST. art. I, § 8, cl. 16. The clause goes on to grant Congress the power to govern "such Part of [the militia] as may be employed in the Service of the United States" with the condition that the respective states themselves must retain power to appoint the militia officers and hold authority for training the Militia, but "according to the discipline

shall, "without the Consent of Congress, keep Troops, or Ships of War in time of Peace."[179]

Under a states' right or collective right interpretation of the Second Amendment, each of these three constitutional provisions would seem to "infringe" on a state's right to regulate its militias.[180] For that matter, the National Guard system that exists today would be unconstitutional.[181] Because "consent of Congress" is required for a state to keep troops or warships in peacetime, as Article I requires, the militias' alleged check on federal tyranny seems grossly intruded upon, if not null and void, from the beginning.

Collective right theorists occasionally argue that the modern National Guard — composed of paid full-time and part-time troops drawn from the respective states and answerable in part to the state governors — constitute the militia (and therefore, "the people") of the Second Amendment.[182] Following this assertion even further, collective right theorists claim that any law that does not infringe on the power of state governments to equip National Guard units will withstand scrutiny under the Second Amendment.[183] Yet the notion that "the people" of the Second Amendment are the modern National Guard seems fantastically ill-fitting in the context of the debates of the late eighteenth century.[184]

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prescribed by Congress."

179. U.S. CONST. art. I, § 10, cl. 3.

180. One can assume that because the Bill of Rights was a later addendum to the "preamendment Constitution," "it must thus be viewed as an implicit repeal or modification" of those prior constitutional provisions. Kates, *supra* note 176, at 1744. Indeed, under a true application of a collective right scheme, Congress would be forbidden to organize, arm or discipline the Militia if such action "infringed" on the right of state governments to regulate their militias. *See id.* (stating that "if the Second Amendment was designed to create an independent state counterweight to federal military power, then it must at the very least protect those aspects of state military forces that are independent and that serve as counterweights to federal power.").

181. *See id.* at 1743.

182. *See, e.g.*, Shields, *supra* note 56, at 126 (claiming that the Supreme Court holds that the arms right is "a *collective* one that allows a state to raise a militia (today, the national guard)").

183. *See* Marguerite A. Driessen, *Private Organizations and the Militia Status: They Don't Make Militias Like They Used To*, 1998 BYU L. REV. 1, 32(1998) (saying that the only action likely to be found violative of the Second Amendment is, "perhaps, federal confiscation of weapons in state militia armories — disarming the state police or the state National Guard units."). "It is not the individual's right to keep and bear arms that the Second Amendment protects; it is the militia's right. And it is not any militia that can claim that right; it is the official militia." *Id.*

184. Professional, or regular, troops, such as National Guard units, were regarded as the antithesis of the militia concept in the ratification era. Noah Webster, for example,

The National Guard is, by law, a component of the national military under the command of the commander-in-chief and subject to the budgetary constraints provided by Congress. Today's National Guard units do not even meet the basic constitutional requirements for a "militia." For example, the National Guard is hired, paid, trained, and organized by the leaders of the United States military. It is irrefragable that the Founders would view today's National Guard — a force consisting entirely of professional, full-time or part-time troops — as standing army units.[185]

The collective right theory also flies in the face of fundamental principles of the United States Constitution, the founding of the United States, and the Bill of Rights. Unlike the Articles of Confederation, that recognized the States as its fundamental organizational unit, the United States Constitution does not build upon state legislatures and does not rely upon state governments. The Constitution was ratified by conventions of citizens rather than by state legislatures, in large part because of the Founders' fears that if put before state legislatures, it would have been killed.[186] Nevertheless, collective right theorists portray the Second Amendment as little more than a specific-issue version of the Tenth Amendment. Why then do not the same arguments which *disempower* the Tenth Amendment into a mere "truism" apply to *empower* the Second Amendment to preclude the federal government from enacting gun control legislation?[187]

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argued that the Constitution was to embody the principle that unjust laws could not be enforced by the sword "because the whole body of the people are armed, and constitute a force superior to any band of regular troops that can be, on any pretence, raised in the United States." See Malcolm, *supra* note 16, at 157 (citing NOAH WEBSTER, AN EXAMINATION INTO THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION (1787)).

185. *See, e.g.*, Zachariah Johnson's words during the Virginia Convention, June 25, 1788, *reprinted in* ORIGIN, *supra* note 65 (defending the proposed militia provisions of the Constitution by saying "Congress has only the power of arming and disciplining them.").

186. Chief Justice John Marshall, in his famous *McCulloch v. Maryland* opinion, pointed out that the Constitution was not written for the states but for the people. 17 U.S. (4 Wheat.) 316, 403 (1819). It was dedicated, presented, voted on, and ratified completely without the input of the states as parties. "It required not the affirmance, and could not be negatived, by the state governments." *Id.* at 404.

187. The jurisprudence of the Tenth Amendment is odd when juxtaposed with that of the Second Amendment. The very gun laws that collective theory adherents support result from an extension of the commerce power that would not have been possible without a weakening of states' rights during the course of the twentieth century. See Carlo D'Angelo, Note, *The Impact of United States v. Lopez Upon Selected Firearms Provisions*, 8 ST. THOMAS L. REV. 571 (1996) (stating that many federal gun control measures violate the Commerce Clause).

If "people" means government, the Second Amendment would protect no one from governmental power. It would mean that the Founding Generation fought a bloody eight-year war, gaining through violence their independence from the most heavily armed government in the world, only to grant their *governments* the right to bear arms. It must be remembered that the placement of a Bill of Rights into the Constitution was a herculean feat that seems difficult to reconcile with the notion that it secured a meaningless nullity.[188] Yet the collective right theory would essentially enshrine a nullity, for the right of state militias to exist was implicitly recognized even in the pre-amendment text of the Constitution.[189] As Joyce Lee Malcolm has pointed out, it seems redundant to specify that members of a militia had a right to be armed.[190] "A militia could scarcely function otherwise."[191]

Yet another immense problem with the logic of the collective theory is that it would have been laughably redundant at the time of the country's Founding. The states at the time of the Founding could have easily crushed the minuscule federal government.[192] The very notion that any state government could ever be stripped of its power to arm its own officers is, to this day, outrageous.[193]

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188. *See* Exxon Corp. v. Hunt, 475 U.S. 355, 375 (1986); Regan v. Time, Inc., 468 U.S. 641, 649 (1984); Bd. of Regents v. Roth, 408 U.S. 564, 572 (1972); Rosado v. Wyman, 397 U.S. 397, 415 (1970); Wolf v. Colorado, 338 U.S. 25, 41 (1949) (all standing for the general proposition that courts should construe all constitutional and legislative enactments to have some meaning).

189. This has been admitted even by collective theory proponents. *See* Ehrman, *supra* note 51, at 23 (stating that "the 'right to exist' of the state militias was recognized by the creation of a separate national army."). The Constitution's text clearly reflects that the states had certain authority over even the militias that were to be used in federal service in war. *See* U.S. CONST. art I, § 8, cl. 16.

190. Malcolm, *supra* note 16, at 163.

191. *Id.*

192. James Madison, who drafted the standing army provisions of the Constitution, dismissed the Anti-Federalists' fears of a federal standing army by explaining that no federal army could impose its will on the states when the federal army was small compared to the vast state militia. *See*, Donald W. Dowd, *The Relevance of the Second Amendment to Gun Control Legislation*, 58 MONTANA L. REV. 79, 88 (1997). Madison went on to say that even if the federal army became something of a tyrant, the American people would easily defeat it because they were permitted to have arms. *See id.* (stating "that the federal army was not like the army of a European tyrant . . . because [the American people] were permitted to have arms.") (footnote omitted).

193. The 1996 Supreme Court decision in *Printz v. United States*, 521 U.S. 898 (1997), shows that the federal government's power to regulate the affairs of state officers is constitutionally limited regardless of any Second Amendment considerations. The Court in *Printz* invalidated a congressional mandate compelling state sheriffs and police officers to conduct background checks upon gun purchasers pursuant to a federal gun regulation. *Id.* at 935. Printz was decided on general federalism grounds rather than Second Amendment

VII. INSURRECTION THEORY

Some of the most twisted rhetoric surrounding the right to bear arms concerns the notion that the arms right is a check on one's own government. Collective right proponents derisively refer to this notion as "insurrectionist theory" and suggest that there is something irrational or repulsive about it.[194] They attack the Standard Model by claiming that the right to bear arms without government sanction constitutes "rival sovereignty" and "denies the consent to be governed."[195] The belief of the Framers that an armed citizenry was needed to prevent governmental tyranny seems incomprehensible to modern "elite decision-makers"[196] who see unregulated gun ownership as an anachronism and a "blot upon civilization."[197]

Collective proponents assert that democratic institutions alone are sufficient protection against tyranny.[198] Such "bulwarks against oppression" as free speech, a free press, the right to elect leaders, and an independent judiciary are said to provide all the protection required, with no need ever to resort to the right to bear arms in revolt.[199] Indeed, the private right of arms possession, according to at least one collective right proponent, threatens the "rational policymaking in a representative democracy" such as the United States.[200]

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grounds. *See Id.* (stating that the federal government may not commandeer state officials because "such commands are fundamentally incompatible with our constitutional system of dual sovereignty"). Justice Scalia, writing for the majority, said the Framers "rejected the concept of a central government . . . and instead designed a system in which the State and Federal Governments would exercise concurrent authority over the people . . . ." *Id.* at 919-20.

194. *See, e.g.*, Craco, *supra* note 14, at 7 (saying that "since the Constitution's objective was to create a government, it would have been irrational to provide, in the same document, a legal means for that government's armed destruction.").

195. *See* Potomac Institute, Amicus Curiae Brief at 6, 7, United States v. Emerson, _____ F.3d ____ (5th Cir. ____) (No. 99-10331). The Potomac Institute, a gun control organization in Bethesda, Maryland, has filed amicus briefs opposing the individual right to bear arms in a number of major gun cases. *See* Potomac Institute (visited May 17, 2000) <http://www.potomac-inc.org/emerarg.html.>

196. McAffee, *supra* note 2, at 799 (stating that such elites believe the right to arms is an anachronism).

197. B. Bruce Briggs, *The Great American Gun War*, 45 PUB. INTEREST 61 (1976).

198. *See* Bogus, *supra* note 5, at 319 (mocking Steven Halbrook's disbelief that constitutional mechanisms, such as the division of power between the federal and state governments and among the three branches of the national government, a bicameral legislature, an independent judiciary, freedom of speech and press, and a civilian commander-in-chief, are adequate to ensure that government power will not be misused).

199. Dowd, *supra* note 192, at 94.

200. Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction*

This faith in the benevolence and supremacy of government was by no means shared by the Founding Generation.[201] A cursory review of the dialogue that occurred regarding the Constitution in the late eighteenth century reveals that the modern claim that no right of insurrection against tyranny was contemplated by the Framers when they adopted the Bill of Rights is a farce.[202] The Founders were themselves insurrectionists[203] who hardly viewed the government they had created as beyond criticism or attack.[204] Indeed, had it not been for the Founders' use of independent, totally unsanctioned, and legally forbidden militias,[205] bearing forbidden private arms and engaged in actual insurrection, the United States of America would not exist today.[206]

The ratification debates show that as Anti-Federalist detractors of the Constitution called for a bill of rights, Federalist supporters of the Constitution argued that no bill of rights was needed

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of Dialogic Responsibility, 75 B.U. L. REV. 57, 61 (1995).

201. *See, e.g.*, Mr. Tredwell, statements before the New York Convention, July 2, 1788, *reprinted in* ORIGIN, *supra* note 65, at 464, 467 (arguing that Federalist pleas to have faith that political leaders will not violate the rights of citizens were alarming and that "it is proved by all experience [that suspicious jealousy of those in power] is essentially necessary for the preservation of freedom.").

202. Indeed, the prospective bill of rights proposed by a sizeable body at the Virginia Convention included, in its third declaration, a statement that "the doctrine of nonresistance against arbitrary power and oppression is absurd, slavish, and destructive to the good and happiness of mankind." Virginia Convention, June 27, 1788, Proposed Declaration of Rights, *reprinted in* ORIGIN, *supra* note 65, at 457.

203. *See* ORIGIN, *supra* note 65, at xxvii (saying that the "well regulated militia [as described in the Bill of Rights] was clearly the very same armed populace in existence in 1776 which was in the process of resisting the encroachments of the government backed by a standing army.").

204. It is, of course, historically inaccurate to suggest that the Founding Generation viewed the government created by the Constitution as immune from the potential need for popular insurrection. History, in fact, demonstrates that Americans at the time of the Founding viewed the new government as far less legitimate than is now believed. Indeed, a sizeable percentage of the American population was opposed to the Constitution originally. *See* Patrick Henry, Debates before the Virginia Convention, June 24, 1788, *reprinted in* ORIGIN, *supra* note 65, at 452 (stating "I believe it to be a fact that the great body of yeomanry are in decided opposition to it.").

205. *See* Dowd, *supra* note 192, at 100 (stating that "[p]rivate individuals, privately armed, were frequently pressed into service."); *see also* HALBROOK, *supra* note 16, at 60 (noting that groups, such as the Fairfax County Militia Association, organized by George Mason and George Washington in 1774, were not subject to the control of the royal governor, and arose, "in part, as a defense force against the regular militia"). "The cry for independent militias, composed of citizens who would keep their own arms, spread through the colonies . . . ." *Id.* at 61.

206. *See* ORIGIN, *supra* note 65, at xxv (saying that "the people took the militia into their own hands" and "organized, embodied, and trained themselves as a well regulated militia without the sanction of government" prior to hostilities in the American Revolution).

because the public would always possess the means to overthrow the government if it became despotic.[207] In response to such reassurances, critics of the unamended Constitution objected that they had had enough fighting in the war and would rather have explicit guarantees in writing.[208] Others threatened that armed revolt would be on the horizon immediately after ratification so long as no concrete guarantee of the people's individual rights existed.[209] That the Second Amendment and the other nine amendments were intended to placate those who possessed such sentiments — and therefore recognize the supremacy of the citizen *over* government — cannot be reasonably denied.

Although critics may cite evidence that widespread arms ownership among the citizenry may lead to instances of annoyance for rulers, such arms ownership has done much to restrain governments from tyrannical conduct over the course of world

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207. See, for example, the words of Mr. Parsons on January 23, 1788, during the Massachusetts Convention:

> It has been objected that we have no bill of rights. If gentlemen who make this objection would consider what are the supposed inconveniences resulting from the want of a declaration of rights, I think they would soon satisfy themselves that the objection has no weight . . . .
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> . . . .
>
> . . . But, sir, the people themselves have it in their power effectively to resist usurpation . . . any man may be justified in his resistance. Let him be considered as a criminal by the general government, yet only his own fellow-citizens can convict him; they are his jury, and if they pronounce him innocent, not all the powers of Congress can hurt him; and innocent they certainly will pronounce him, if the supposed law he resisted was an act of usurpation.

ORIGIN, *supra* note 65, at 229-30. *See also* the paraphrased words of Mr. Sedgwick on the following day, *reprinted in* ORIGIN, *supra* note 65, at 230-31 (asking "[i]s it possible, ... that an army could be raised for the purpose of enslaving themselves and their brethren? Or, if raised, whether they could subdue a nation of freemen, who know how to prize liberty, and who have arms in their hands?").

208. *The Yeomanry of Massachusetts* newspaper article, BOSTON MASSACHUSETTS GAZETTE, Jan. 25, 1788, *reprinted in* ORIGIN, *supra* note 65, at 232. This article contained the following passage:

> It is argued [by the Federalists] that there is no danger that the proposed rulers will be disposed to . . . deprive the people of their liberties. But in case, say they, they should make such attempts, the people may, and will rise to arms and prevent it; in answer to which, we have only to say, we have had enough of fighting in the late war, and think it more eligible, to keep our liberties in our own hands, whilst it is in our power thus to do . . . [rather than] recovering them back by the point of the sword.

Id.

209. *See Letter from Franklin County*, PHILADELPHIA INDEPENDENT GAZETTEER, April 30, 1788, *reprinted in* ORIGIN, *supra* note 65, at 339 (stating that "[t]he lawyers . . . when they precipitated with such fraud and deception the new system upon us . . . did not recollect, that the militia had arms; however, it will be an awful lesson to tyrants . . . . A civil war is dreadful, but a little blood spilt now, will perhaps prevent much more hereafter.").

history.[210] Yet disorder is not the only potential result of wide-scale arms ownership; millions of firearms have been used throughout American history for hunting, sports, and personal defense.[211] By contrast, the idea of arms rights vesting solely in the state governments presupposes that their sole purpose is to act against the federal power — in the manner of the Confederate States of America in 1861.[212]

CONCLUSION

The collective right theory of the Second Amendment — which contends that the Framers set forth the Second Amendment right to bear arms as a states-rights provision and not as protection for an individual right — has been all but orphaned by the legal academy. Scholarly defenders of the theory now express their support in philosophical, conditional, and provisional — rather than purely historical — terms. Only within the halls of the federal courts — where the theory was born in the mid-twentieth century — has the theory managed to survive and thrive. As the twenty-first century begins, the theory has become increasingly difficult to justify in court opinions. It seems virtually certain that the theory's days as a legitimate jurisprudential doctrine are numbered.

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210. *See* David T. Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J.L. & POL. 1, 8 (1987) (stating that the results of citizen armament during the reign of Queen Elizabeth included her subjects drawing pistols in church or firing them in the churchyards, and other annoyances, but "did much to restrain excessive royal power. An English king had to remember that his [officers and guards] . . . were but a handful, and bills or bows were in every farm and cottage.").

211. *See* JOHN R. LOTT, JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS (1998) (providing figures suggesting millions of individuals have used guns for defense of lives and property). For a collection of selected descriptions of defensive uses of private guns, see ROBERT A. WATERS, THE BEST DEFENSE, TRUE STORIES OF INTENDED VICTIMS WHO DEFENDED THEMSELVES WITH A FIREARM (1998).

212. *See* Don B. Kates & Glenn Harlan Reynolds, *The Second Amendment and States' Rights: A Thought Experiment*, 36 WM. & MARY L. REV. 1737, 1764 (1995) (saying that the states' right, or collective, approach seems likely — and even intended — to create state-federal confrontations).