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Book Review Essay

Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?

THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT. By H. Richard Uviller[†] and William G. Merkel.^{††} Durham: Duke University Press, 2002. Pp. xii, 340. \$19.95.

Reviewed by Randy E. Barnett^{*}

Those who deny that the original meaning of the Second Amendment protected an individual right to keep and bear arms on a par with the rights of freedom of speech, press, and assembly no longer claim that the amendment refers only to a "collective right" of states to maintain their militias. Instead, they now claim that the right, although belonging to individuals, was conditioned on service in an organized militia. With the demise of organized militias, they contend, the right lost any relevance to constitutional adjudication. In this Essay, I evaluate the case made for this historical claim by Richard Uviller and William Merkel in their book, The Militia and the Right to Arms, or, How the Second Amendment Fell Silent. I also evaluate their denial that the original meaning of the Fourteenth Amendment protected an individual right to arms unconditioned on militia service. I find both claims inconsistent with the available evidence of original meaning and also, perhaps surprisingly, with existing federal law.

Who says that even heated conflicts over constitutional meaning can never progress? Over the past ten years, the intellectual clash between those who claimed that, at the time of the founding, the "right to keep and bear arms" protected by the Second Amendment was a "collective right" of the states to preserve their militia and those who maintain instead that it originally referred to an individual right akin to the others protected in the Bill of Rights has been resolved. That the individual right view prevailed definitively is evidenced by the fact that no Second Amendment scholar, no matter how inimical to gun rights, makes the "collective right" claim any more. All

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now agree that the Second Amendment originally referred to the right of the individual.¹

Indeed, the fact that the collective right theory was once so confidently advanced by gun control enthusiasts² is on its way down the collective memory hole as though it had never been asserted. With its demise, the intellectual debate over the original meaning of the Second Amendment has turned in a different direction. Although now conceding that the right to keep and bear arms indeed belongs to individuals rather than to states, almost without missing a beat, gun control enthusiasts now claim with equal assurance that the individual right to bear arms was somehow "conditioned" in its exercise on participation in an organized militia.

The "militia-conditioned individual right" theory represents an advance for the anti-gun-rights position. It obviates (a) the copious evidence, both direct and circumstantial, that "the right to keep and bear arms" belonged to individuals³ and (b) the lack of any direct evidence that the Second Amendment protected some sort of a never-very-well-specified power of states, while (c) allowing opponents of gun rights to maintain, as they did with the "collective right" theory, that the Second Amendment is irrelevant to the constitutionality of modern gun laws. But is the theory supported by the available evidence?

The latest to make this historical claim are Richard Uviller and William Merkel. In their book, *The Militia and the Right to Arms, or, How the Second Amendment Fell Silent*, Uviller and Merkel reject the collective right theory and characterize the Second Amendment "right to keep and bear arms" as an individual right.⁴ However, they further claim that, because the right to arms may be exercised only while participating as part of an organized militia,⁵ its existence as a constitutional right is conditioned on the continued existence of a well-regulated militia. With the demise of the organized militia, so too has vanished the right to keep and bear arms. In their

1. The viewpoint of Uviller and Merkel is representative: "[W]e cannot join . . . in the contention that the constitutional right to arms belongs to the states rather than to natural persons. . . . This reading is, we think, misguided." H. RICHARD UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT* 179 (2002).

2. E.g., Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309, 408 (1998) (asserting that "to the extent original intent matters, the hidden history of the Second Amendment strongly supports the collective rights position").

3. For a succinct summary of this evidence, which has been developed by scholars over the past ten or more years, see *United States v. Emerson*, 270 F.3d 203, 236–59 (5th Cir. 2001).

4. UVILLER & MERKEL, *supra* note 1, at 23 ("From the text as well as a fair understanding of the contemporary ethic regarding arms and liberty, it seems to us overwhelmingly evident that the principal purpose of the Amendment was to secure a personal, individual entitlement to the possession and use of arms.").

5. *Id.* at 31 ("To return to our central theme, then, the individual right to keep and bear arms that is secured in the Second Amendment in our analysis is a right without application outside the context of service in state or federal militia.").

words, “historical developments have altered a vital condition for the articulated right to keep and bear arms.”⁶

In this Essay, I will comment briefly on the authors’ interpretive methodology before moving on to discuss specific problems with their effort to interpret the Second Amendment. One of the peculiarities of the modern debate over the Second Amendment is its single-minded preoccupation with the issue of original meaning or original intent. This is odd because, to my knowledge, none of the right-limiting theorists are themselves originalists, and consequently they would surely not limit, for example, their interpretation of the First Amendment by its original meaning. But as the modern academic debate over the Second Amendment is entirely a historical one, in this Essay I limit my attention to this issue.

I will confine myself to evidence, some previously unconsidered in this debate, that specifically disproves that the Second Amendment protected a militia-conditioned individual right. I do not reiterate here the other direct and circumstantial evidence that supports an individual, as opposed to a “collective,” right, but the full strength of the individual-right position cannot fully be appreciated without taking that evidence into account.⁷

I. The Authors’ Originalism

Uviller and Merkel (hereinafter “the authors”) are to be commended for explicitly discussing their method of interpretation.⁸ Few law professors and even fewer historians so much as attempt this. Unfortunately, I found their discussion of interpretation rather confused. Increasingly, originalists like myself focus entirely on the original meaning of the text—the meaning that a reasonable speaker of the language would have attached to the words at the time of the text’s enactment.⁹ What did “militia” mean in 1791? Or “well-regulated” or “arms” or “bear” or “right” or “the people”? Of course, speakers then, like speakers today, would be influenced by the context in which a particular word or phrase is used. For example, because of the context of the Second Amendment, we can be quite sure that the term “arms” refers to weapons, not the appendages to which our hands are attached.

Discerning the original public meaning of the text requires an examination of linguistic usage among those who wrote and ratified the text as well as the general public to whom the Constitution was addressed.

6. *Id.* at 35.

7. See *Emerson*, 270 F.3d at 236–59 (surveying that other evidence).

8. UVILLER & MERKEL, *supra* note 1, at 147–67.

9. I explain the version of originalism described in this Part in RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 89–130 (2004) [hereinafter BARNETT, *RESTORING*]. There, I defend original-meaning originalism as entailed by the commitment to a written constitution—a structural feature of the U.S. Constitution (like federalism or separation of powers) that is needed to impose law on those who make, enforce, and interpret legislation that they then impose on the citizenry. For a written constitution to fulfill the function of providing a higher law, its meaning must remain the same until it is properly changed.

Evidence of specialized meaning or intent by framers or ratifiers is only relevant if it is shown that such specialized meaning would have been known and assumed by a member of the general public. Where more than one contemporary meaning is identified, it becomes necessary to establish which meaning was dominant. Any such historical claim is an empirical one that requires actual evidence of usage to substantiate. If possible, one should undertake a quantitative assessment to distinguish normal from abnormal usage.¹⁰

Of course, once discerned, the original public meaning of the text, like the public meaning of laws enacted yesterday, must be applied to the facts of particular cases. Though general language of the sort used in the Constitution may exclude many possible outcomes, often it does not dictate a unique result, thus leaving to those actors that apply original meaning to particular cases and controversies considerable discretion in developing legal doctrines. This activity of applying meaning to cases by means of intermediary doctrines is better described as constitutional *construction*, rather than as interpretation of text.¹¹ The need for construction is the unavoidable cost of using language, especially general abstract language, to guide behavior. On the other hand, the benefit of general language is that, even with no deviation from its original meaning, it can last a very long time without becoming antiquated.

Sometimes it sounds like the authors are endorsing an original-public-meaning approach, but that is not what they practice. In particular, the authors present very little evidence of the public meaning of the words used in the Constitution and, where disagreement exists, little quantitative evidence by which to distinguish dominant from deviant meaning. They seem instead to be searching for what is better described as original intent, rather than original meaning.

Those originalists who favor original intent want to fill the gaps in the original public meaning and cabin the discretion of those engaged in construction of abstract provisions by appealing to the specific intentions of those who either wrote or ratified them. This version of originalism has been

10. I offer elsewhere such a quantitative assessment of the meaning of the words "commerce" and "regulate." Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847 (2003); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001) [hereinafter Barnett, *The Original Meaning of the Commerce Clause*]. Such a quantitative survey is not always possible, however, given the state of the evidence of the particular word at issue. For example, the term "necessary" is too common to establish by quantitative survey a dominant public meaning to which the Necessary and Proper Clause must have referred. One must then fall back on more traditional reliance on statements of various participants in the historical period about the clause in question. See, e.g., Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183 (2003) (analyzing statements made by Madison, Hamilton, Jefferson, Marshall, and others for evidence of the original meaning of the words "necessary" and "proper").

11. On the distinction between interpretation and construction, see BARNETT, *supra* note 9, at 118-30.

roundly criticized for reasons that I shall not repeat here, many of which I think are sound.¹² Given the fact that the Framers did not actually contemplate most instances in which their words would be applied, in practice the search for specific original intentions usually consists of what I call “channeling the framers” to discern what they “would have” thought of a particular case or controversy. This converts originalism from a historical and factual inquiry into a speculative and counterfactual one. There is simply no factual answer to the question of what the founders *would have* thought of a particular matter. For this reason, such claims can neither be empirically established nor refuted.

While in places, the authors appear to reject this approach—for example, when they repeatedly cite the work of H. Jefferson Powell with approval¹³—this rejection is not practiced consistently,¹⁴ as demonstrated by their heavy and uncritical reliance on the works of such original-intent authors as Raoul Berger.¹⁵ The authors also seem to be unaware that the historical evidence cited by Powell actually supports the conclusion that the founding generation, while rejecting original-intent originalism, ended up favoring original-meaning interpretation.¹⁶

Finally, in contrast with both original-meaning and original-intent originalists, there are the new fangled “translation theory” originalists, such as Larry Lessig and William Michael Treanor, who start with original meaning or intent (it is not always clear which) to discern the principles underlying the text, and then purport to “translate” those principles—but not the text itself—into the modern day context.¹⁷ While this does not sound like the method that the authors endorse, nor practice in most cases, they nevertheless cite Larry Lessig’s work with approval without seeming to appreciate the difference between his approach and that of other originalists.¹⁸

As I said, their discussion of methodology is confusing, but perhaps no more so than the well-known historian Jack Rakove, a nonoriginalist, whose discussion of interpretive methodology the authors say they found helpful.¹⁹

12. *See id.* at 89–91, 113–16.

13. UVILLER & MERKEL, *supra* note 1, at 148, 154, 296 n.6, 299 n.36.

14. *See, e.g., id.* at 98 (“By inference, as well as from the record of debate in the House, the process casts light on the Amendment’s intended meaning.”).

15. *See, e.g., id.* at 205–06 (discussing Berger’s criticism of Professor Akhil Reed Amar’s thesis related to the Fourteenth Amendment’s effect on the Second Amendment).

16. *See* BARNETT, *supra* note 9, at 94–100.

17. *See, e.g.,* Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 400 (1995) (arguing that the context in which text was created, along with the context in which text must be applied, should be considered in order to understand the text’s meaning); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 859–80 (1995) (applying “translation theory” to the Takings Clause).

18. *See* UVILLER & MERKEL, *supra* note 1, at 296 n.6.

19. The authors rely on Professor Rakove’s work several times in the book. *Id.* at 80, 177, 246 n.9, 273 n.140, 292 n.54.

Uviller and Merkel seem not to realize that originalism has quite differing and competing strains or, if they do, they do not consistently keep within one method or another. Their erratic methodology renders it hard to respond to their interpretive claims since they might, for example, present evidence of intent that, while valid as far as it goes, is irrelevant to the public meaning of the text or, at a minimum, is not dispositive.

As it turns out, the obvious source of this confusion stems from the fact that the authors are not themselves originalists, although they never disclose this to the reader.²⁰ They therefore fall into the large class of nonoriginalists who make originalist arguments, one assumes, to persuade others who care more about original meaning than they do. This probably describes every opponent of the individual-rights interpretation of the Second Amendment who offers historical evidence that this interpretation is in error.²¹ Even the professional historians who insist on a crabbed originalist interpretation of the right to bear arms, a right of which they disapprove, would never think to apply this method to limit other constitutional rights that they like.²²

If, however, as the authors themselves believe, courts need not and often should not follow original meaning, then courts are perfectly free to adopt a robust individual-rights interpretation of the Second Amendment even if this should contradict its original meaning. Uviller and Merkel do not, of course, consider this implication of rejecting originalism.

So far as I could tell, the authors present no new evidence of the original meaning of the Second Amendment and confine themselves to reliance on

20. I learned for the first time that they are not originalists during their talks at the symposium on their book held at the William & Mary School of Law. Until that moment, I had assumed from the book that they were. I was perhaps misled by their statement near the beginning of the book that: "Our historical approach is simply this: we take seriously the words chosen by the drafters, and seek their meaning to the ratifying generation." *Id.* at 37. Perhaps like other readers, I took this to describe their approach to constitutional interpretation.

21. See, e.g., Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309, 369, 362-69 (1998) (arguing that "Madison's objective in writing the Second Amendment was not to grant an individual right but to set limits on congressional power"); Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5, 24, 18-24 (1989) (concluding that "in the context of the Constitution, the militia was viewed as a state-organized, state-run body" and that "[t]his distinction between the militia as a state-organized body and as the entire citizenry at large is important in understanding the Second Amendment because one of the central claims of those who oppose government efforts to regulate firearms is that the 'militia' referred to in the Constitution simply means an armed citizenry at large").

22. I know of no historian or law professor who, in offering an originalist critique of the individual rights position, has ever used an originalist method to limit the scope of any other right in the Bill of Rights, though someone may have escaped my attention. Historian Jack Rakove, the author of *Original Meanings: Politics and Ideas in the Making of the Constitution* (1997), for example, has never claimed to be an originalist. See, e.g., Jack N. Rakove, *Words, Deeds, and Guns: ARMING AMERICA and the Second Amendment*, 59 WM. & MARY Q. 205, 206 (2002) ("[I]t would be difficult to identify any clause of the Constitution more open to the common sense objection that its modern interpretation should not be rooted in the concept of 'original intent' or 'original understanding,' simply because firearms are now far more devastating than anyone in the eighteenth century could have plausibly imagined.").

secondary sources or evidence already well-known to Second Amendment scholars of all stripes. There is nothing wrong with offering a new interpretation of previously discussed evidence, of course, but readers should not expect to find anything that has not been previously considered by other writers in the field. Nothing new has been uncovered to change the debate. And unfortunately for a book-length work, the authors do not treat comprehensively all the available evidence of original meaning. This is particularly regrettable as the quantity of such historical evidence is manageable enough that all of it could have been evaluated in the space of a monograph.

Let me turn now from generalities to particulars, for it will come as no surprise to those familiar with my writings in this area²³ to learn that I am not persuaded by the authors' originalist arguments and therefore disagree with their conclusions. Because most of the book is taken up by a lengthy, and largely uncontroversial, history of the militia before and after the adoption of the Constitution, along with a discussion of classical republicanism, the book's treatment of the Second Amendment is actually rather brief.²⁴ Their conclusion that the individual right to arms is conditioned on service in an organized militia rests on a few claims that I shall treat separately.

First is the claim that "bear arms" had an exclusively military connotation. Second, that, as a textual matter, the first part of the amendment places a condition on the exercise of the right specified in the second part.²⁵ Third, that the "Privileges or Immunities" of the Fourteenth Amendment do not include the protection of an individual non-militia-based right to keep and bear arms.²⁶ Fourth, that the practical significance of finding the right to bear arms to be an unconditional individual right is to protect an absolute right to be free of any regulation whatsoever, no matter how reasonable. Though this last claim hardly seems relevant to the authors' historical claims, they repeat it in sometimes intemperate tones throughout the work.²⁷ Finally, the authors conclude that the general militia referenced in the Second Amendment no longer exists.²⁸ On all five counts, they err.

II. Was "Bear Arms" Exclusively a Military Term?

The authors claim that: "*Bearing* arms implied making muster, equipped and ready for service; *keeping* entailed steady readiness to serve when called to duty."²⁹ For this proposition they reference with uncritical approval Garry Wills's essay in *The New York Review of Books* in stating that "bearing arms

23. E.g., Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139 (1996).

24. UVILLER & MERKEL, *supra* note 1, at 24–27.

25. *Id.* at 149–50.

26. *Id.* at 204–07.

27. *Id.* at 1, 9, 11, 37, 54, 83, 169, 197.

28. *Id.* at 109–44.

29. *Id.* at 39.

had, from its earliest recorded employment and through the late eighteenth century, an *exclusively* military connotation.”³⁰ From Wills the authors conclude that “the verb ‘to bear’ . . . would not have been used in the eighteenth century—as it would not commonly be today—to connote purely private use of arms.”³¹

It is not enough, however, to present numerous examples of the use of “bear arms” in a military context to demonstrate that this is its exclusive use. Claims of exclusivity are hard to establish empirically because it must be shown that there are no other competing uses of a particular word. Just a few counterexamples call such a claim into question and then force those making it to do a systematic survey to distinguish normal from abnormal or deviant uses. Individual-rights scholars have pointed to several instances of the term “bear arms” being used in a nonmilitary context.³²

A. Early Uses of “Bear Arms” Outside the Military Context

One important example, overlooked by the authors, is *A Bill for the Preservation of Deer* drafted by Thomas Jefferson and presented by James Madison to the Virginia General Assembly in October of 1785.³³ The bill prohibited the taking of deer under certain circumstances and ends with the following stricture:

[A]nd, if, within twelve months after the date of the recognizance he shall *bear a gun* out of his inclosed ground, *unless whilst performing military duty*, it shall be deemed a breach of the recognizance, and be good cause to bind him a new, and every such *bearing of a gun* shall be a breach of the new recognizance and cause to bind him again.³⁴

Here “bear a gun” is clearly being used in a nonmilitary context, as it exempts military bearing of a gun from the prohibition imposed on those who previously violated the act. (Note, however, that even offenders may still “bear a gun” on their own property.)

Garry Wills dismisses this highly inconvenient bill with some too-fancy footwork: “Not only is the context different from the amendment’s, but the ‘bearing of a gun’ is not the canonical formulation with a plural noun.”³⁵ As to the first part of this sentence, Wills fails to note that the statute which he claims uses the term in a different context, exempts military duty from the

30. *Id.* at 194 (citing Garry Wills, *To Keep and Bear Arms*, N.Y. REV. BOOKS, Sept. 21, 1995, at 64 [hereinafter Wills, *To Keep and Bear Arms*] (emphasis added)). For responses to Wills by Sanford Levinson, David C. Williams, Glenn Harlan Reynolds, and John K. Lattimer, and for Wills’s reply, see *To Keep and Bear Arms: An Exchange*, N.Y. REV. BOOKS, Nov. 16, 1995, at 61–64.

31. *Id.* at 149.

32. See *infra* notes 34–43 and accompanying text.

33. Thomas Jefferson, *A Bill for the Preservation of Deer* (Oct. 31, 1785), in 2 *THE PAPERS OF THOMAS JEFFERSON* 443, 444 (Julian P. Boyd ed., 1950).

34. *Id.* (emphasis added).

35. Wills, *To Keep and Bear Arms*, *supra* note 30, at 64–65.

scope of its prohibition, showing that it would otherwise be included in “bearing a gun.” In rejecting the relevance of this statute on the ground that the context differs, he also assumes his conclusion—that the Second Amendment was exclusively military—a conclusion based in part on his contention that “bear arms” is exclusively military. But the statute is offered precisely to show that the term “bear arms” had a nonmilitary usage, in this case that of hunting. So the statute undermines Wills’s claim that the context of the Second Amendment is indeed different, and his reassertion of the “context” point to refute this inference is a non sequitur.

As for the second part, Wills is echoing a point made earlier in his review that “[o]ne does not ‘bear arm.’ Latin *arma* is, etymologically, war ‘equipment,’ and it has no singular forms.”³⁶ Wills has been misled by a species of language known to philosophers as a “mass noun.”³⁷ Mass nouns like “equipment” are useful when you need a term that will describe a class of items without limiting yourself to particular types of the class. Take the word “luggage.” You can say “pieces of luggage” or “suitcase” but there is no singular of “luggage” (i.e., you do not say, hand me that “lugg”). A “right to luggage” would not, grammatically, be a right that could only be exercised collectively or en masse. Though ostensibly plural in form, the term “arms” is functioning here as a mass noun. The Founders would not have wanted to use the plural of “gun,” for example, because the term “arms” also includes edge weapons as well as weapons to be invented in the future. The fact that there is no singular of “arms” tells us exactly nothing about its application. Wills’s argument might be dubbed a grammatical fallacy.³⁸

Even though Jefferson’s bill concerns only one type of arms (guns), it refutes Wills’s claim that “[o]ne does not bear arms against a rabbit.”³⁹ However strange it may sound to his ears, it is undeniable that both Jefferson and Madison did not think it odd to say that one does “bear a gun” to hunt deer.⁴⁰ So do others of their contemporaries, discussed below, whose statements to this effect are dismissed by Wills and by the authors because they do not fit the authors’ and Wills’s opinion about the historical “context.”

36. *Id.* at 64.

37. The New Oxford English Dictionary defines “mass noun” as “a noun denoting something that cannot be counted (e.g., a substance or quality), in English usually a noun that lacks a plural in ordinary usage and is not used with the indefinite article, e.g., luggage, china, happiness. Contrasted with COUNT NOUN.” NEW OXFORD ENGLISH DICTIONARY 1051 (2001).

38. Another such grammatical fallacy is the claim that “commerce” in the Commerce Clause had a narrow meaning excluding manufacturing because you would not speak of manufacturing among the several states. But this awkwardness is caused by the meaning of “among the several states” that limits the type of activities to those that could be conducted across state lines. Though it is true that the original meaning of “commerce” *did* exclude manufacturing, this is established by direct evidence of usage and the grammatical awkwardness of substituting “manufacturing” for “commerce” in the Commerce Clause tells us nothing about its original meaning. Barnett, *The Original Meaning of the Commerce Clause*, *supra* note 10, at 112–13.

39. Wills, *To Keep and Bear Arms*, *supra* note 30, at 64.

40. See *supra* note 34 and accompanying text.

The authors (and Wills) fail to discuss the first learned treatise on the Constitution authored by jurist and law professor St. George Tucker in his annotated edition of Blackstone's Commentaries, published in 1803, and based on lectures that he gave in the 1790s.⁴¹ There, Tucker offers the following example of judicial review under the Necessary and Proper Clause:

If, for example, congress were to pass a law *prohibiting any person from bearing arms*, as a means of preventing insurrections, the judicial courts, under the construction of the words necessary and proper, here contended for, would be able to pronounce decidedly upon the constitutionality of these means. But if congress may use any means, which they choose to adopt, the provision in the constitution which secures to the people the right of bearing arms, is a mere nullity; and *any man imprisoned for bearing arms* under such an act, might be without relief; because in that case, no court could have any power to pronounce on the necessity or propriety of the means adopted by congress to carry any specified power into complete effect.⁴²

Tucker here is clearly discussing an individual right to keep and bear arms outside of any militia context, and he ignores entirely the preface to the Amendment.

Another important counterexample to their thesis that "bear arms" had an exclusively military meaning, one that the authors do discuss, is the recommendation of the minority report of the Pennsylvania ratification convention that the Constitution be amended to include the following:

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 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 governed by the civil power.⁴³

The authors readily concede that this proposal clearly uses "bear arms" to include both nonmilitary ("defense of themselves," "for the purpose of killing game") and military ("and their own State") contexts, thus

41. The omission is curious as Tucker is discussed in articles cited and criticized by Uviller and Merkel. They would have had to have skipped over this source in one article they discuss to reach the quotation from the later treatise by Joseph Story, the treatment of which they chose to discuss at some length. See UVILLER & MERKEL, *supra* note 1, at 30–31 (discussing the scholarly treatment of a Joseph Story passage by Barnett & Kates, *supra* note 23).

42. 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA 289 (Augustus M. Kelley ed., 1969) (1803) (emphasis added).

43. Pennsylvania Ratification Convention Minority Proposal (Dec. 12, 1787) (emphasis added), reprinted in THE COMPLETE BILL OF RIGHTS 182 (Neil H. Cogan ed., 1997).

undercutting the claim that “bear arms” had an exclusively military connotation. But they repeatedly dismiss the minority report as reflecting “marginal voices,”⁴⁴ a “disaffected minority,”⁴⁵ and “some radical, libertarian support for an unrestricted right to weapons.”⁴⁶ They claim that the minority report’s “view of arms-related rights did not represent majority opinion in Pennsylvania,”⁴⁷ adding heatedly that “the assertion of an individual right to arms for purposes beyond service in the lawful state militia may have resonated with some groups of anarchic radicals, but that majority sentiment and enlightened reason failed to embrace constitutional claims for such a right in Pennsylvania.”⁴⁸ They even go so far as to claim that “[t]hese supporters of [a] constitutional right to own weapons for private purposes were atypical even within the anti-federalist movement, and they remained insignificant within the nation as a whole.”⁴⁹ One suspects from their vehement denunciation of these delegates that the authors think this proposal of the Pennsylvania minority hurts their case badly.

But, for all this sound and fury, it is remarkable that the authors offer little, if any, evidence or secondary support for these claims about popular opinion.⁵⁰ Perhaps they base these claims on the fact that this is a recommendation made by a “minority” of delegates to the Pennsylvania convention, but it is well known that several of the earlier constitutional conventions were packed by the comparatively well-organized Federalists. The fact that this particular sentiment was held by a minority of delegates tells us next to nothing about whether it reflects the common view among Pennsylvanians at large. Further, this individualist view of the right to keep and bear arms could easily have reflected the view of the majority of delegates themselves who nevertheless supported ratifying the Constitution without amendments. Indeed, the strategy of ratification conventions proposing amendments to Congress developed later in the ratification process.⁵¹

44. UVILLER & MERKEL, *supra* note 1, at 82.

45. *Id.* at 83.

46. *Id.*

47. *Id.*

48. *Id.* at 85.

49. *Id.* at 81; *see also id.* at 91 (referring to “the radical fringe”); *id.* at 100 (referring to “a few radicals outside Congress”); *id.* at 241 n.71 (“[T]hese endorsements almost invariably issue from the pens of marginal, radical figures who did not represent the mainstream of either federal or antifederal thought.”).

50. The only related footnote references in the book are (1) to a Fifth Circuit decision, *United States v. Emerson*, that does not characterize as radical or minority the listed voices that buttress an individual right to bear arms and (2) to pages of an article by Saul Cornell that contain no claims about majority versus minority sentiments. *Id.* at 241 n.71; *see United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001); Saul Cornell, *Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 CONST. COMMENT. 221, 231–34 (1999) (discussing the constitutional perspectives of the Pennsylvania Antifederalists on the individual right to bear arms).

51. The Pennsylvania convention, the second to ratify the Constitution, did so on December 12, 1787. 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 27

Evidence is required to establish the authors' dismissive claims, but none on this point is offered.

When characterizing the Pennsylvania minority report as reflecting the views of wild anarchic deviants, the authors fail to mention the wording of the right-to-arms provision of the Pennsylvania Constitution of 1776: "That the people have a right to bear arms for *the defence of themselves* and the state"⁵² This right was reaffirmed in the 1790 Constitution in a passage that reads: "That the right of citizens to bear arms, *in defence of themselves* and the state, shall not be questioned."⁵³ In addition to using the same phraseology as the Pennsylvania minority, neither provision in these enacted state constitutions even mentions the militia. So there is good reason to believe that the Pennsylvania dissenters were merely elaborating the individual, nonmilitia-conditioned right to bear arms already included in their state constitution. In fairness then, the Pennsylvania dissenters can hardly be "discount[ed] . . . as the rambling catch-all compendium of one man bent on scuttling ratification"⁵⁴ without some evidence that this was so.

Nor was the Pennsylvania minority alone in attempting to amend the Constitution to protect an individual right to arms not conditioned on militia service. Included in the minority recommendation of the Massachusetts convention was this proposed amendment:

[The] Constitution be never construed . . . to prevent *the people of the United States, who are peaceable citizens, from keeping their own arms*; or to raise standing armies, unless when necessary for the defence of the United States, or of some one or more of them; or to prevent the people from petitioning, in a peaceable and orderly manner, the federal legislature, for a redress of grievances; or to subject the people to unreasonable searches and seizures of their persons, papers or possessions.⁵⁵

(1894). The first state convention to append proposed amendments was Massachusetts—the sixth state to ratify—which voted for ratification on February 6, 1788. *Id.* at 93–96. After Massachusetts, all of the remaining seven states except Maryland proposed amendments to the Constitution along with their vote to ratify. *Id.* at 97. These proposals can also be accessed online from the Avalon Project at Yale Law School, at <http://www.yale.edu/lawweb/avalon/18th.htm> (click on "Ratification of the Constitution" for an individual state) (last visited Oct. 17, 2004).

52. PA. CONST. of 1776, ch. I, art. XIII, reprinted in THE COMPLETE BILL OF RIGHTS, *supra* note 43, at 184. The Vermont Constitution of 1777 contains identical language. VT. CONST. of 1777, ch. I, art. XV, reprinted in THE COMPLETE BILL OF RIGHTS, *supra* note 43, at 184.

53. PA. CONST. of 1790, art. IX, § 21 (emphasis added), reprinted in THE COMPLETE BILL OF RIGHTS, *supra* note 43, at 184.

54. UVILLER & MERKEL, *supra* note 1, at 270 n.90.

55. Massachusetts Ratification Convention Minority Proposal (Feb. 6, 1788) (emphasis added), reprinted in THE COMPLETE BILL OF RIGHTS, *supra* note 43, at 181. This recommendation is in contrast with the Massachusetts state constitution that protected only the right to bear arms "for the common defence." MASS. CONST. of 1780, pt. 1, art. XVII, reprinted in THE COMPLETE BILL OF RIGHTS, *supra* note 43, at 183.

As in Pennsylvania, this proposal does not explicitly mention the militia. The right to keep arms appears among a list of purely individual rights, none of which are in any way conditioned upon service in the militia.

In addition, the New Hampshire ratification convention officially proposed that the Constitution be amended to read that "Congress *shall never disarm any Citizen* unless such as are or have been in Actual Rebellion."⁵⁶ Uviller and Merkel grudgingly concede that this proposal "*might* support the argument that a private right to gun possession is protected."⁵⁷ It should also be noted that none of the other right-to-arms proposals made by New York, North Carolina, Virginia, or Rhode Island were expressly limited to "the common defence" or "the defence of the state,"⁵⁸ though, as the authors note, the Massachusetts Bill of Rights was qualified in this way.⁵⁹

Uviller and Merkel should be estopped from responding that the language in the Pennsylvania and Vermont constitutions does not reflect an individual right exercisable both within and outside of militia service, for their interpretation of these passages is inconsistent with such an argument.⁶⁰ When discussing the later Kentucky case of *Bliss v. Commonwealth*, in which the court interprets the very same language in the Kentucky Constitution as protecting an individual right,⁶¹ the authors readily concede that it does indeed have this broader meaning.⁶² They respond by distinguishing the language on the ground that this wording differs from that of the Second Amendment.⁶³ By striking down a law banning concealed weapons, they note that "the [Kentucky] Court of Appeals acknowledged a

56. New Hampshire Ratification Convention Report (June 21, 1788) (emphasis added), reprinted in *THE COMPLETE BILL OF RIGHTS*, *supra* note 43, at 181. The authors claim, again without evidence, that this proposal "sought to push the republic further than any of the other states desired to go." UVILLER & MERKEL, *supra* note 1, at 82.

57. UVILLER & MERKEL, *supra* note 1, at 82 (emphasis added). Even a single example of a patently individual right to bear arms rebuts a charge commonly made by collective-right proponents, and now by militia-conditioned-individual-right proponents, that the unconditioned-individual-rights formulation is a pure invention of modern gun rights scholars with no basis in history.

58. New York Proposal (July 26, 1788), reprinted in *THE COMPLETE BILL OF RIGHTS*, *supra* note 43, at 181-82; North Carolina Proposal (Aug. 1, 1788), reprinted in *THE COMPLETE BILL OF RIGHTS*, *supra* note 43, at 182; Virginia Proposal (Jun. 27, 1788), reprinted in *THE COMPLETE BILL OF RIGHTS*, *supra* note 43, at 182-83; Rhode Island Proposal (May 20, 1790), reprinted in *THE COMPLETE BILL OF RIGHTS*, *supra* note 43, at 182.

59. UVILLER & MERKEL, *supra* note 1, at 82.

60. Others not so constrained may contend that "the defence of themselves" was still a collective notion referring to "the community," and such defense was to be done entirely within the context of the militia. I address this claim—which is not made by Uviller and Merkel—in subpart II(D). See *infra* notes 115-39139 and accompanying text.

61. 12 Ky. (2 Lit.) 90, 90 (1822).

62. UVILLER & MERKEL, *supra* note 1, at 27-28.

63. *Id.* at 28.

private, state constitutional right for purposes having nothing to do with militia service.”⁶⁴

The authors also dismiss the 1846 Georgia case of *Nunn v. State*, in which the state judge found a law banning certain pistols to be unconstitutional under both the Georgia constitution and the Second Amendment.⁶⁵ Here the authors criticize the judge for not considering himself sufficiently bound by the “revered” John Marshall’s earlier opinion in *Barron v. Baltimore* in which the Court held that the Bill of Rights applied only to the federal government.⁶⁶ “[F]or those who seek a coherent doctrine,” they write, “*Nunn v. Georgia* [sic] is a case of no importance whatever.”⁶⁷ But coherent doctrine is not why we look to *Nunn*. Rather *Nunn* is significant because it is inconsistent with the claim that the right to keep and bear arms existed only in the context of militia service.

Moreover, in their dismissal of *Nunn*, Uviller and Merkel fail to appreciate that many people then viewed the Bill of Rights, at least in part, as declaratory of preexisting rights and therefore as good authority to anyone, including a state court, trying to ascertain what the fundamental rights of persons might be.⁶⁸ Strictly speaking, *Barron* merely deprives the rights specified in the Bill of Rights of federal protection as against state governments. The Court does not hold that these rights are inapplicable to the states, should state courts decide to apply them. However this issue is decided, the opinion in *Nunn* still stands as an example of the right to bear arms being interpreted as an individual right outside the military context.

Surprisingly, nowhere in their book do the authors discuss how the right to keep and bear arms related to the natural right of self defense, though the wording of the Pennsylvania Constitution and other statements invokes a right of “defence.”⁶⁹ Instead, the authors claim that the right to arms “did not readily lend itself to Locke’s rational and enlightened discourse about the nature of man and the entitlements appurtenant thereto.”⁷⁰ Scholarly literature is replete with observation that the right to keep and bear arms was

64. *Id.* The authors then gratuitously observe that subsequent Kentucky constitutions expressly “allowed the legislature to pass gun control laws.” *Id.* This further modification of the text, however, supports the view that the unmodified language protected an individual-right-free-of-militia connotation.

65. 1 Ga. 243 (1846). The authors cite this case as *Nunn v. Georgia*. UVILLER & MERKEL, *supra* note 1, at 30.

66. 32 U.S. 243, 247–51 (1833); UVILLER & MERKEL, *supra* note 1, at 29–30.

67. UVILLER & MERKEL, *supra* note 1, at 30.

68. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 147–56 (1998) (describing “the declaratory theory” of the Bill of Rights).

69. See, e.g., PA. CONST. of 1790, art. IX, § 21, reprinted in *THE COMPLETE BILL OF RIGHTS*, *supra* note 43, at 184.

70. UVILLER & MERKEL, *supra* note 1, at 164.

viewed as an extension of the fundamental right of self defense,⁷¹ but the authors cursorily dismiss this notion in their book.⁷²

The authors attempt to mitigate *Nunn v. State* by discussing the 1840 Tennessee case of *Aymette v. State*.⁷³ In *Aymette*, the court upheld a ban on the wearing of a concealed bowie-knife, reasoning that “[t]hese weapons would be useless in war. They could not be employed advantageously in the common defence of the citizens. The right to keep and bear them is not, therefore, secured by the constitution.”⁷⁴ Uviller and Merkel claim that the state constitutional provision in question was “similar in form and words to the federal Second Amendment.”⁷⁵ But unlike the Second Amendment (and the other proposed amendments and state right-to-arms provisions discussed above), the Tennessee constitutional provision qualified the right to bear arms by the phrase “for their common defence,”⁷⁶ and the court places great stress on this language in the passage quoted by Uviller and Merkel.⁷⁷ As the authors acknowledge elsewhere,⁷⁸ this language suggests a more military or mutual defense meaning.

In contrast to the language of the Tennessee constitution, however, the U.S. Senate rejected a proposal to add the qualifier “for the common defence” to the language of the Second Amendment.⁷⁹ While the authors dismiss the significance of the Senate’s refusal on the ground that this qualifying language was redundant,⁸⁰ their assertion requires independent proof that the unqualified right is *already* limited to uses of arms for the common defense and does not *also* include the use of arms by the people in defense of themselves, as several state constitutions specified. In other words, only if you assume that you have established the meaning of the right to keep and

71. See generally Anthony J. Dennis, *Clearing the Smoke from the Right to Bear Arms and the Second Amendment*, 29 AKRON L. REV. 57 (1995); David B. Kopel, *The Self-Defense Cases*, 27 AM. J. CRIM. L. 293 (2000).

72. UVILLER & MERKEL, *supra* note 1, at 166-67.

73. 21 Tenn. (2 Hum.) 152 (1840).

74. *Id.* at 156. The authors are wrong to claim that individual rights scholars are guilty of “[i]gnoring the case from Tennessee.” UVILLER & MERKEL, *supra* note 1, at 27. It is widely discussed in the Second Amendment literature. E.g., STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* 94 (1984). By contrast, Halbrook notes an earlier 1833 case, overlooked by the authors, in which the Tennessee court offered a broader meaning of the right-to-arms provision in Tennessee’s constitution: “By this clause of the constitution, an express power is given and secured to all the free citizens of the State to keep and bear arms for their defense, *without any qualification whatever as to their kind or nature.*” *Simpson v. State*, 13 Tenn. (5 Yer.) 356, 360 (1833) (emphasis added), quoted in HALBROOK, *supra*, at 94.

75. UVILLER & MERKEL, *supra* note 1, at 27.

76. TENN. CONST. of 1836, art. I, § 26, quoted in *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 158 (1840).

77. UVILLER & MERKEL, *supra* note 1, at 27.

78. *Id.* at 104.

79. *Id.* at 103.

80. *Id.* at 104 (arguing that “invocation of arms bearing in the militia already clearly proclaimed the purpose of common defense to eighteenth-century cars”). But the Second Amendment does not refer to “arms bearing in the militia.”

bear arms can you contend that this additional language was superfluous. Equally if not more plausible is the inference that the qualifying language might well have been rejected because it unduly narrowed the scope of the right. In the absence of any recorded debate, we just do not know.

B. Evidence That the Right "to Keep" Arms is Not Military

To determine original meaning, as opposed to original intent, the cryptic and unreported Senate deliberations are far less important than the existence of state constitutional right-to-arms guarantees that included the broader "defence of themselves" language. A member of the public in 1791 reading the Second Amendment would likely not assume that the unqualified right in the Amendment actually meant something narrower than the broad right to arms for both personal and collective self defense that was already protected by some state constitutions.

Take, for example, the reaction to Madison's proposed amendments by Samuel Nasson, an Antifederalist representative to the Massachusetts ratification convention held the previous year. In a letter to George Thatcher, a Federalist congressman from Massachusetts, Nasson wrote:

I find that Ammendments [sic] are once again on the Carpet. I hope that such may take place as will be for the Best Interest of the whole. A Bill of rights well secured that we the people may know how far we may Proceade in Every Department then their will be no Dispute Between the pöople and rulers in that may be secured the right to keep arms *for Common and Extraordinary Occations such as to secure ourselves against the wild Beast and also to amuse us by fowling and for our Defence against a Conunon Enemy . . .*⁸¹

Nasson then goes on to extol the virtue of popular resistance to a "foreign foe" and condemn standing armies in times of peace.⁸² Notwithstanding his concern for the common defense, Nasson nevertheless reads the right to keep arms in the Second Amendment as also a personal one, unconnected with militia service.⁸³ Note also, that Nasson uses "arms" for hunting, in contrast with Garry Wills's assertions.⁸⁴

This quote goes unmentioned by Uviller and Merkel, though it appears in the Fifth Circuit's opinion in *United States v. Emerson*,⁸⁵ an opinion that they much discuss and disparage.⁸⁶ Instead of letting readers make up their own minds about such contemporary statements, this highly inconvenient

81. Letter from Samuel Nasson to George Thatcher (July 9, 1789), in *CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS* 260-61 (Helen E. Veit et al. eds., 1991) (emphasis added).

82. *Id.*

83. *Id.*

84. Wills, *To Keep and Bear Arms*, *supra* note 30, at 64.

85. 270 F.3d 203, 253 (5th Cir. 2001).

86. UVILLER & MERKEL, *supra* note 1, at 220-24.

direct evidence of original meaning is dismissed by the authors in a single conclusory sentence: "Contrary to many commentators and to our own interpretation, the court finds 'numerous instances' where the words were employed to connote private carrying for private purposes. Accordingly, they conclude that the term refers to carrying or wearing arms generally."⁸⁷

An earlier letter from Massachusetts historian and pastor Jeremy Belknap to Federalist Paine Wingate, written in May 1789, evidences that Nasson was not alone in this individualist reading of the right to arms.⁸⁸ Belknap writes of his pleasure with Samuel Adams's investiture speech as lieutenant governor in which Adams affirmed that:

"[T]he people may enjoy well grounded confidence that their *personal & domestic* rights are *secure*." This is the same Language or nearly the same which he used in the [Massachusetts ratification] Convention when he moved for an addition to the proposed Amendments—by inserting 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*.⁸⁹

As it turned out, none of these "personal and domestic" rights were included among the amendments proposed by the Massachusetts convention.⁹⁰ Would anyone, however, fairly conclude from this omission that the liberty of the press or the right of conscience was supported only by a minority or radical fringe of the population of Massachusetts? More importantly, these two contemporary letters join the ranks of other direct statements about the public meaning of the Second Amendment and the right to keep and bear arms, indicating that the Second Amendment right protected a personal, individual right like the other rights in the Bill of Rights.

These statements by Nasson and Belknap, along with the previously quoted proposal from the Massachusetts minority, highlight a single fact overlooked by the authors and by others who now base their historical argument on the supposedly military meaning of "bear arms": The Second Amendment also protects the right to *keep* arms. No evidence is presented by the authors to show that "keep" was a military term at all, much less exclusively so.⁹¹ These references to a personal, individual right "to keep arms" are significant, therefore, because even if "bear arms" did have an exclusively military connotation, the individual and nonmilitary right to "keep" arms still colors the meaning of the Second Amendment as a whole, giving it a nonmilitary meaning as well.

87. *Id.* at 222.

88. Letter from Jeremy Belknap to Paine Wingate (May 29, 1789), in *CREATING THE BILL OF RIGHTS*, *supra* note 81, at 241, 241.

89. *Id.* (quoting Samuel Adams's investiture speech as lieutenant governor).

90. Amendments Proposed by the Massachusetts Convention (Feb. 6, 1788), in *CREATING THE BILL OF RIGHTS*, *supra* note 81, at 14, 14–15.

91. See UVILLER & MERKEL, *supra* note 1, at 149.

Perhaps because the Second Amendment literature had not previously discussed the Nasson and Belknap statements, Wills fails to consider them in his exposition on the meaning of “to keep.”⁹² The best counterexample that he can produce is a statement in which John Trenchard “advised that ‘a competent number of them [firelocks] be *kept* in every parish for the young men to exercise with on holidays.’”⁹³ That “kept” can be used in a military context, however, does not give the word itself a military connotation. “Truck” can be used in a military context too, but that does not make the word itself military, much less exclusively military. That arms can be “kept” in an armory, as of course they can, does not mean that they cannot also be “kept” at home.⁹⁴

Wills concludes: “To separate one term from this context and treat it as specifying a different right (of home possession) is to impart into the language something foreign to each term in itself, to the conjunction of terms, and to the entire context of Madison’s sentence.”⁹⁵ But given his lack of evidence, Wills’s argument concerning “to keep” must really boil down to his tenuous claim that “bear arms” is exclusively military and therefore “to keep” must be military when conjoined with it. With Nasson, Belknap, and the authors of the Massachusetts minority report, however, we have actual members of the public at the founding referencing the right to keep arms and describing it as a nonmilitary right. Appeals to “context” cannot silence

92. It is typical in this debate for the individual-rights scholars to produce direct evidence of usage, which their opponents then attempt to shoot down, usually by asserting some larger “context,” rather than producing new direct evidence of their own.

93. Wills, *To Keep and Bear Arms*, *supra* note 30, at 67 (quoting JOHN TRENCHARD, AN ARGUMENT, SHEWING, THAT A STANDING ARMY IS INCONSISTENT WITH A FREE GOVERNMENT AND ABSOLUTELY DESTRUCTIVE TO THE CONSTITUTION OF THE ENGLISH MONARCHY 21 (1697)) (alteration in Wills’s article) (emphasis added by Wills). Wills also offers a quote from *Federalist* 25 in which Alexander Hamilton records that “the objection to standing armies was to ‘*keeping them up* in a season of tranquility.’” *Id.* at 67 n.30 (quoting THE FEDERALIST NO. 25, at 160 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)). Wills notes that “[a]s an English noun, ‘keep’ meant the permanently holdable part of a castle . . .” *Id.* at 67 n.34. Fair-minded readers can decide for themselves if Wills is being sensitive here to “context,” and whether these uses of “keep” in any way detract from the significance of the use of “keep arms” by Nasson and Belknap. Or might Wills himself be guilty of the same foible that he accuses individual-rights scholars of manifesting—“seeking out every odd, loose, or idiosyncratic” use of a term “in defiance of the solid body of central reference,” *id.* at 64, or of what he dubs the “throw-in-the-kitchen-sink approach?” *Id.* at 65.

94. It is perhaps useful to remember that, in 1995, Wills was writing before gun rights opponents had made the transition from the “collective right”-of-states interpretation of the Second Amendment to the new militia-conditioned-individual-right theory. Hence, he still is claiming that the original meaning of the Second Amendment in the Bill of Rights was to protect the rights of states to have a militia—the view now rejected by writers such as Uviller and Merkel. UVILLER & MERKEL, *supra* note 1, at 12. Additional evidence is needed to fully refute this claim. For a summary, see *United States v. Emerson*, 270 F.3d 203, 236-60 (5th Cir. 2001). Wills’s work is worth mentioning, however, because writers like Uviller and Merkel still rely heavily on his *New York Review of Books* essay claiming that “bear arms” was an exclusively military term. UVILLER & MERKEL, *supra* note 1, at 27, 104-05, 194, 296-97.

95. Wills, *To Keep and Bear Arms*, *supra* note 30, at 68.

these contemporary statements. If anything, conjoining the right to bear arms with the nonmilitary right to keep arms renders them both nonmilitary in this context, but there is no reason to insist on so narrow a definition.

These statements—like others relied upon by individual-rights scholars that I do not reiterate here⁹⁶—are direct evidence of what the public thought the Second Amendment phrase “the right to keep and bear arms” meant. Unlike the authorities relied upon by Uviller and Merkel (or Wills), they are not statements merely evincing a concern for the militia, from which we are supposed to circumstantially infer what the “right to keep and bear arms” might have meant. These statements evidence what the specific words of the Second Amendment objectively manifested to real people. The dirty little secret of this long-running debate is that only one side has produced any concrete examples of actual statements from the founding era expressing that side’s interpretation of the right to keep and bear arms and the Second Amendment.

C. Evidence That to “Bear Arms” Meant to Carry Arms

Several times the authors assert, once again without evidence, that the term “bear arms” was chosen because it did not connote the mere carrying of guns. “In late-eighteenth-century parlance, *bearing arms* was a term of art with an obvious military and legal connotation. ‘Carrying a gun’ lacks the implication of *bearing arms* and, of course, the Constitution nowhere mentions a ‘right to carry a gun.’”⁹⁷ The 1785 edition of Samuel Johnson’s *A Dictionary of the English Language* repeatedly defines “bear” as “carry.”⁹⁸ After describing “bear” as a “word used with such latitude, that it is not easily explained,” the dictionary lists its first meaning as “To carry as a burden,” followed immediately by “To convey or carry,” “To carry as a mark of authority,” “To carry as a mark of distinction,” “To carry as in show,” “To

96. For a useful compendium of examples, see *Emerson*, 270 F.3d at 236–59. Those who oppose the individual-rights interpretation love to deride the reiteration of the same examples, as though examples of usage wear out from overuse. See, e.g., Wills, *To Keep and Bear Arms*, *supra* note 30, at 65 (noting that “Standard Modelers” refer “again and again” to the Pennsylvania ratifying convention’s minority vote to place killing game among the objects of a right to bear arms). In contrast, they offer no examples of founding-era views regarding the Second Amendment, or the right to keep and bear arms, that correspond to the view that they claim everyone held. E.g., UVILLER & MERKEL, *supra* note 1, at 109 (“To the ratifiers, the right to keep and bear arms was inextricably and exclusively bound to the maintenance of a militia . . .”). Instead, they use “context” to explain away and trump the contrary evidence. When it comes to historical evidence, however, you cannot beat something with nothing.

97. UVILLER & MERKEL, *supra* note 1, at 26–27; see also *id.* at 149 (“The right to arms is declared by the verbs, ‘keep and bear,’ a phrase carefully selected in preference to alternatives such as ‘have,’ ‘own,’ ‘carry,’ or ‘possess.’”). The authors offer no independent evidence as to the “care” that went into this verbal choice. See *id.* The argument that the phrase “keep and bear” must have been carefully chosen instead of these other words that connote a different meaning assumes a fact that must be shown: that these other words would indeed have connoted a different meaning.

98. 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (not paginated) (photo. reprint 1990) (1755).

carry as in trust," and "To carry in the mind, as love, hate."⁹⁹ So "carry" seems to be the most prevalent synonym of "bear." The same is true for the first edition of Webster's dictionary, which defined "bear" as "[t]o carry" and which mentions "to carry" nine times in discussing the term's derivation from other languages.¹⁰⁰ So far as Johnson and Webster are concerned, "to bear" simply means to carry.

This usage is borne out in the context of the Second Amendment by the Supreme Court's earliest known reference to the right to arms. This reference goes unmentioned by the authors (and Wills), though Uviller and Merkel purport to comprehensively discuss the few times that the Supreme Court has discussed the Second Amendment, including even a television interview with Chief Justice Warren Burger.¹⁰¹ In his infamous opinion in *Dred Scott v. Sandford*, Chief Justice Taney denies that blacks could have been considered citizens of the United States for, if that were the case, then blacks would enjoy along with whites "the full liberty of speech . . . and to keep and carry arms wherever they went."¹⁰²

In this passage, Justice Taney uses "carry" as a substitute or synonym for "bear" and implies that the right protected by the Second Amendment is to carry weapons wherever one travels, a right completely unconnected with active militia service.¹⁰³ Taney groups the right to keep and bear arms in the Second Amendment with the equally nonmilitary liberty of speech protected by the First Amendment.¹⁰⁴ And he obviously thinks that his readers would share his interpretation of the Second Amendment, or his *reductio ad absurdum* for black citizenship would fail.

The authors cannot have omitted Taney's opinion because of its late date or racist reasoning and outcome because they rely on the nearly-as-vile ruling in *United States v. Cruikshank*, an even later opinion in which the Supreme Court frees some members of the Ku Klux Klan who were convicted of violating the civil rights of blacks in Louisiana by torturing and murdering them.¹⁰⁵ According to the reasoning of the Court in *Cruikshank*, cited approvingly by the authors,¹⁰⁶ the defendants could not have been guilty of violating the victims' rights under color of state law because the entire Bill

99. *Id.*

100. NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1828) (not paginated) (listing "To carry" as the second definition out of twenty; the first definition—"To support; to sustain"—is less relevant in the context of arms).

101. UVILLER & MERKEL, *supra* note 1, at 13.

102. 60 U.S. 393, 417 (1856).

103. *See id.*

104. *See id.*

105. 92 U.S. 542, 559 (1875).

106. UVILLER & MERKEL, *supra* note 1, at 14.

of Rights, including the rights of assembly and to keep and bear arms, applies only to federal, and not state, exercises of power.¹⁰⁷

Although today we protect such liberties (a historically and incompletely) by “incorporating” them into the Due Process Clause, the protection of the right to arms against infringement by the states, as I discuss below in Part IV, is more properly included within the original meaning of the Privileges or Immunities Clause of the Fourteenth Amendment.¹⁰⁸ Clearly, however, if the later doctrine of incorporation properly applies to the right of assembly, it can just as easily apply to the right to arms, *Cruikshank* notwithstanding.

Some might object to the relevance of all the nineteenth-century cases that I have discussed for establishing original meaning of an amendment enacted in 1791, and I sympathize with the objection. The farther in time that one gets from promulgation, the less germane is the evidence of public meaning. I offer these cases because nineteenth-century cases are discussed at length by the authors in their opening chapter¹⁰⁹ and because they concede that these cases interpreting the language “in defence of themselves and the state” represent the antithesis of their view.¹¹⁰ This in turn is relevant to the meaning of the same language used at the founding in right-to-arms provisions in the state constitutions discussed above.¹¹¹

Also, more recent cases are useful to establish the late development of a collective or states-rights view of the amendment—a view unknown at the founding and correctly rejected by the authors.¹¹² Finally, Taney’s opinion in *Dred Scott* refutes the authors’ suggestion that the Supreme Court has never considered the Second Amendment to protect an individual right unconditioned on militia service.¹¹³ In this, its earliest known mention of the Amendment, the Court clearly did.

D. Was “defence of themselves” Also Exclusively Military?

Before moving on to the next problem with Uviller and Merkel’s originalist argument, let me briefly consider a different militia-conditioned interpretation of “for the defence of themselves and the state” that they do not offer. As we just saw, Uviller and Merkel concede that the wording of the Pennsylvania minority report included a personal right to bear arms

107. *Cruikshank*, 92 U.S. at 552. The authors do not inform the reader that the *Cruikshank* court found that the *right of assembly* also does not apply to the states via the Fourteenth Amendment. UVILLER & MERKEL, *supra* note 1, at 14.

108. See *infra* notes 160–73 and accompanying text.

109. UVILLER & MERKEL, *supra* note 1, at 9–36.

110. *Id.* at 12–13.

111. See *supra* notes 52, 61–64, 76, and accompanying text.

112. UVILLER & MERKEL, *supra* note 1, at 179.

113. *Id.* at 13.

outside the militia context.¹¹⁴ That is why they go to such lengths to marginalize these speakers. Others, however, might claim that the phrase “for the defence of themselves” was the equivalent of “for the defence of the community,” a right that also was to be exercised solely in the context of the militia.

Here is a brief list of the problems with that claim:

(1) First, and most importantly, I am aware of no direct evidence of anyone at the time of the founding asserting that “in defence of themselves” means “for the defence of the community.”

(2) As a textual matter, “in defence of themselves” seems most obviously to be simply the plural of the personal right of self defense, a usage that was appropriate given that the subject of the right is the plural term “the people.” In other words, if the drafters wanted to use the term “the people” as they had in other amendments, and “the people” is the plural of individual person, how else would the right to bear arms for personal self defense be protected besides making the second term “themselves”? A drafter would not write “himselves” or “him or herselfes.”

(3) Indeed, this same grammatical choice is made in the Fourth Amendment, which refers to the “right of the people to be secure in *their* persons, houses, papers, and effects”¹¹⁵ So here “the people” is being used as the plural of individual person, as reflected in the use of the word “their”—just like the use of “themselves” in state constitutions. Similarly, the English Bill of Rights refers to the right of individual protestant “Subjects” to “have Arms for *their* Defence.”¹¹⁶ There is no difference in meaning between “their defence” and “in defence of themselves.”

(4) It is true that the founders used “no person” and “any person” in the Fifth Amendment to refer to individuals,¹¹⁷ but this is a grammatical consequence of shifting from affirming that *everyone* has a particular right to a claim about *particular individuals* not being denied a right. In the absence of direct and compelling historical evidence to the contrary, nothing in the public meaning would turn on this grammatical flip between the Fourth Amendment, on the one hand, and the First, Second, and Fifth Amendments on the other.

(5) Consider this language from the very same 1776 Pennsylvania Declaration of Rights in which the “in defence of themselves” language appears:

114. See discussion *supra* subpart II(A).

115. U.S. CONST. amend. IV (emphasis added). To forestall future debate on this point, “persons” in this passage refers to their bodies as distinct from their possessions.

116. Bill of Rights, 1688, 1 W. & M. ch. 2, § 1 (Eng.) (emphasis added); see JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGIN OF AN ANGLO-AMERICAN RIGHT* 119 (1994) (describing the legislative history of this formulation, which lacked any militia preface or condition).

117. U.S. CONST. amend. V.

[T]he people have a right to hold *themselves*, their houses, papers, and possessions free from search or seizure; and therefore warrants without oaths or affirmations first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize *any person or persons*, his or their property, not particularly described, are *contrary to that right*, and ought not to be granted.¹¹⁸

Did the use of the term “themselves” imply that the reference here is to “the community” rather than to individual rights? Hardly. The last portion of this statute refutes any such suggestion. Nearly identical language appears in the 1777 Vermont Constitution.¹¹⁹ Other state constitutional protections from unreasonable searches refer to “every subject” with no apparent difference in meaning.¹²⁰ Or consider this passage from the 1780 Massachusetts Constitution: “that the judges of the supreme judicial court should hold their offices as long as they behave *themselves* well; and that they should have honorable salaries ascertained and established by standing laws.”¹²¹

(6) As I have already discussed, language expressing “in defence of the community” was readily available and in use in, for example, the Massachusetts Constitution, which referred to “a right to keep and bear arms for the common defense”¹²²—qualifying language that was proposed and rejected in the Senate as an amendment to the Second Amendment.¹²³

(7) Finally, this interpretation of “in defence of themselves” leads to a bizarre interpretation of the Pennsylvania minority report itself that Uviller and Merkel, and others, claim to be a pure (and radical, exceptional, and rejected) statement of individual rights. By this interpretation, even the Pennsylvania dissenters did not seek to protect an individual right of self defense! We would be asked to believe that they sought instead to protect the right to defend the community (“in defence of themselves”), the right to defend the state (“and their own state”—notice the use of the word “their,” by the way, as in the Fourth Amendment), and the right to kill game, but not the right to arms for personal self defense. This interpretation would not

118. PA. CONST. of 1776, ch. 1, art. X (emphasis added), reprinted in *THE COMPLETE BILL OF RIGHTS*, *supra* note 43, at 235.

119. VT. CONST. of 1777, ch. 1, art. 11 (“That the People have a Right to hold *themselves*, their Houses, Papers and Possessions free from Search or Seizure . . .”) (emphasis added), reprinted in *THE COMPLETE BILL OF RIGHTS*, *supra* note 43, at 235.

120. E.g., MASS. CONST. of 1780, pt. 1, art. XIII, reprinted in *THE COMPLETE BILL OF RIGHTS*, *supra* note 43, at 234; N.H. CONST. of 1783, art. XXII, reprinted in *THE COMPLETE BILL OF RIGHTS*, *supra* note 43, at 234.

121. MASS. CONST. of 1780, art. XXIX (emphasis added), reprinted in *THE COMPLETE BILL OF RIGHTS*, *supra* note 43, at 234.

122. See *supra* note 59 and accompanying text.

123. UVILLER & MERKEL, *supra* note 1, at 103; see also *supra* notes 79–80 and accompanying text.

only be bizarre, it would contradict Uviller and Merkel's repeated aspersion that the Pennsylvania dissenters were weird radicals and anarchists because they asserted an individual right to keep and bear arms.¹²⁴

E. Evidence of Congressional Usage

By the end of the book, the authors get a little carried away and assert that "[t]o the ratifiers, bearing arms unequivocally meant rendering military service."¹²⁵ As we have seen, the examples that they discuss and others that they omit include numerous uses of the term "bear" outside the military context. With one exception, no quantitative evidence is presented here to show that these uses were aberrant.¹²⁶ The exception is found in a footnote, quoting an article by David Yassky in which he reports "searching a Library of Congress database containing all official records of debates in the Continental and U.S. Congresses between 1774 and 1821" and finding that "the phrase had an unambiguously military meaning."¹²⁷ Yassky's quantitative survey is highly relevant to the issue of whether the original public meaning of "bear arms" *included* a military connotation. It establishes this uncontroverted claim beyond any doubt. But as proof that the term had an *exclusively* military connotation—a much harder claim to establish—it is far from dispositive. The problem is to establish the relevant baseline in the database that Yassky used.

My own search of this database generally confirms that the discussions in which "bear arms" appears (not including references to the Second Amendment) in the period searched by Professor Yassky do indeed concern only military matters.¹²⁸ But this cannot establish, as Yassky asserts, that during this period "the phrase [had] an unambiguously military meaning."¹²⁹

124. *Id.* at 83.

125. *Id.* at 194.

126. By quantitative, I mean a systematic survey of a database from which conclusions about normal and aberrational usage can be drawn. This is not to diminish the type of evidence on which the authors rely. Often, such statements are all that is available and I have relied upon such evidence myself. See *supra* note 10 (referring to my reliance on statements of various participants in the historical period to determine the meaning of the Necessary and Proper Clause). In the absence of quantitative evidence, however, assertions that a particular view was "insignificant" or "radical" or a "minority" view—much less "the rambling catch-all compendium of one man bent on scuttling ratification"—are difficult to establish. UVILLER & MERKEL, *supra* note 1, at 81–83, 270 n.90. With respect to the right to keep and bear arms, the situation is worse, as many examples of contemporaries who viewed the right as personal and individual have been produced, while we have no example of a single person who stated that the Second Amendment meant what Uviller and Merkel claim that everyone but a few radicals thought it meant.

127. David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 618 (2000), quoted in UVILLER & MERKEL, *supra* note 1, at 296 n.7.

128. I used the same database as did Yassky, although the years covered by the database seem to have expanded since his search. A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774–1875, at <http://memory.loc.gov/ammem/amlaw/lawhome.html> (last visited Nov. 2003).

129. Yassky, *supra* note 127, at 618.

Why not? Because if only military matters were under discussion when arms were mentioned in Congress during this period, then it follows from this fact—and not from any exclusive meaning of the phrase “bear arms”—that all uses of the phrase “bear arms” *during this period in this database* would necessarily be military.

To test this proposition, I searched for phrases that Uviller and Merkel might concede have nonmilitary connotations, like “carry arms,” “possess arms,” and “have arms” and found just one nonmilitary result.¹³⁰ Significantly, I also found no references at all in this database to “keep arms,” other than one (garbled) reference to the Second Amendment.¹³¹ This finding further suggests both (1) that the discussions involving “arms” in this database during this period were exclusively about military matters, such that we would expect “bear arms” to be used only in its military sense, and (2) that “keep arms” did not have a commonly employed military connotation.¹³²

Professor Yassky’s findings should not be surprising. Given the narrowly interpreted powers of Congress during the era that he surveyed, 1774–1821, it is hardly unexpected that congressional debates would be discussing arms only in a military context. Congress had neither the inclination nor the power to propose laws that would have affected the personal right to keep or bear arms outside the militia context. Besides, *it was constitutionally barred from doing so by the Second Amendment*.

Furthermore, since Professor Yassky did his search, the Library of Congress extended its database to the year 1875, covering the tumultuous years before, during, and after the Civil War, when the personal, nonmilitary rights of blacks and others to keep and bear arms were perceived as threatened from a variety of sources. Sure enough, four examples of the word “bear arms” from this era appear to refer to a personal right outside the context of the militia.¹³³ Each of the following examples substantiates the proposition that, when Congress was discussing nonmilitary matters that

130. “Is it possible, he asked, 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?” 2 JONATHAN ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787*, at 97 (2d ed. 1836) (statement of Theodore Sedgwick to the Massachusetts ratification convention, January 24, 1788) (emphasis added). Sedgwick’s comment was made before the Second Amendment was even proposed, of course, but like others of this era and afterwards, he clearly assumes that individuals in a free state would possess or keep arms.

131. A second reference in this debate to “keep arms” purportedly appears in the right to arms provision of the Constitution of the Confederate States of America, but is actually a mistranscription of the original, which is also available for comparison on the relevant page.

132. I do not claim that “keep arms” could never be used in a military context, but that any such uses are rare and there are clear instances—for example, the Nasson and Bellnap statements quoted above—of “keep arms” referring to an individual right wholly apart from any active service in an organized militia. See *supra* notes 81 & 89 and accompanying text.

133. See *infra* text accompanying notes 134–37.

concerned the right to arms, the phrase "bear arms" was deemed perfectly appropriate.

On June 28, 1856, Representative Alexander H. Stephens proposed a comprehensive list of individual rights as part of a lengthy amendment to the pending bill admitting Kansas into the Union, which stated: "And be it further enacted . . . *[t]he people of said Territory shall be entitled to the right to keep and bear arms*, to the liberty of speech and of the press, as defined in the constitution of the United States, and all other rights of person or property thereby declared and as thereby defined."¹³⁴ No mention is made of the militia, and a militia preface like that found in the Second Amendment is absent. "Bear arms" is clearly being used in a nonmilitary context.

In 1861, Representative Clement Vallandigham of Virginia announced his intention to introduce the following legislation, the specific nature of which is not specified:

A bill to regulate and enforce the writ of habeas corpus, and for the better securing the liberty of the citizens;

Also, a bill to enforce the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures;

Also, a bill to secure to the people the right to keep and to bear arms for their defence;

Also, a bill to prescribe the manner of quartering soldiers in private houses in time of war;

Also, a bill to secure the freedom of speech and of the press.¹³⁵

Here too, any militia preface is omitted, and "bear arms" is nonmilitary.

In 1864, Garrett Davis of Kentucky introduced a resolution containing the following in the Senate:

14. . . . That the present executive government of the United States has subverted, for the time, in large portions of the loyal States, the freedom of speech, the freedom of the press, and free suffrage, the constitutions and laws of the States and of the United States, the civil courts and trial by jury; it has ordered . . . arbitrary arrests by military officers, not only without warrant, but without any charge or imputation of crime or offence; and has hurried the persons so arrested from home and vicinage to distant prisons and kept them incarcerated there for an indefinite time; some of whom it discharged without trial, and in utter ignorance of the cause of their arrest and imprisonment; and others it caused to be brought before courts created by itself, *and to be tried and punished without law, in violation of the constitutional guarantee to the citizen of his right to keep and bear arms*, and of his

134. H.R. J., 34th Cong., 1st Sess. 1126 (1856) (emphasis added).

135. H.R. J., 37th Cong., 1st Sess. 102 (1861) (emphasis added).

rights of property . . . ; all of which must be repudiated and swept away by the sovereign people.¹³⁶

The militia is not mentioned in the litany of alleged violations of individual and personal rights contained in this resolution. The context is entirely nonmilitary.

On April 19, 1872, President Grant addressed Congress in a lengthy message regarding the lawless activities in certain portions of South Carolina. The President listed numerous deprivations of individual rights arising “under the sway of [a] powerful combination[], properly known as [the] ‘Ku-Klux-Klan[],’ the objects of which were, by force and terror, . . . *to deprive colored citizens of the right to bear arms . . .*”¹³⁷ Clearly, this reference to a right to bear arms, unaccompanied by a right to keep arms, is outside the militia context. Such abuses of the privileges and immunities of citizens of the United States¹³⁸ is what motivated Congress to propose the Fourteenth Amendment.¹³⁹

True, all these nonmilitary uses of “bear arms” occurred long after the founding, but any assertion that the meaning of “bear arms” had changed at some unspecified interval assumes what must be proved: that the phrase “bear arms” had at the founding an exclusively military meaning—especially when conjoined with a right to keep arms—that was subsequently broadened to include nonmilitary usages as well. Evidence that such a change occurred is nonexistent.

In this regard, it bears repeating that neither the authors nor Garry Wills present a single example of any person from the founding era or immediately thereafter who suggested that the right to “keep and bear arms” was *exclusively* a military right. While there are numerous examples of the right being used more broadly, such as the statements by Nasson and Belknap quoted above,¹⁴⁰ there is no record of anyone at the time asserting that the right in the Second Amendment was as narrow or conditioned as the authors claim. Three types of statements could directly support their empirical claim that the original meaning of the right to keep and bear arms was exclusively a military one:

(a) A statement opining that the right to keep and bear arms in the Second Amendment is conditioned on the continued existence of an organized militia; and

(b) A statement explicitly rejecting the importance of an individual right to keep and bear arms, independent of an organized militia; and

136. SEN. J., 38th Cong., 1st Sess. 53–54 (1864) (emphasis added).

137. President Ulysses S. Grant, Address Before Congress (Apr. 19, 1872) (emphasis added), in H.R. J., 42d Cong., 2d Sess. 716 (1872).

138. See *infra* notes 160–73 and accompanying text.

139. MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 71–72 (1986).

140. See *supra* notes 81 & 89.

(c) A statement decrying the Second Amendment for having rejected the individual right to keep and bear arms for one's own self-defense as well as the common defense, in favor of a purely militia-conditioned right.

No such statements are presented. Had Uviller and Merkel done so, it would have made them the first anti-gun-rights scholars to have produced direct evidence of anyone actually holding the view that they claim everyone (or nearly everyone) held.¹⁴¹ At this point no such direct evidence is known to exist.

III. The Structure of the Text

None of the discussion in Part II is intended to suggest that the term "bear arms" did not also include a military connotation; rather, it is intended only to establish that the term had a broader meaning that the public would reasonably have attributed to the term unless it was expressly qualified, which the Senate declined to do. In addition, Part II illustrates that the right "to keep" arms had no obvious military connotation. If it establishes nothing else, the evidence presented in Part II shows that the unconditioned individual-rights interpretation of the amendment can be found in the historical record and is no invention of the NRA—an organization that Uviller and Merkel mention derisively¹⁴²—or of individual-rights scholars, who the authors repeatedly disparage throughout the book as "advocates"¹⁴³ or worse, rather than historians.¹⁴⁴

At its root, and despite the pages of historical narrative, Uviller and Merkel's argument that the Second Amendment fell silent is not based on any new or direct evidence of original meaning. Apart from ritualistic invocations of "historical context," and various assertions about the meaning of "bear arms," the authors' argument rests almost entirely on their own analysis of its wording. "[A]s a matter of textual analysis," they contend, "we regard it as highly significant that of the several great entitlements enunciated in the first eight Amendments, no other is hedged by a *conditional* or explanatory clause."¹⁴⁵

Elsewhere they claim: "We have . . . a *clear and unequivocal* expression of the linguistic context of the primary right in the introductory phrase that accompanies it."¹⁴⁶ Obviously this is wishful hyperbole. If the right to arms had been made explicitly conditional on participation in the militia, we

141. *E.g.*, UVILLER & MERKEL, *supra* note 1, at 109 ("To the ratifiers, the right to keep and bear arms was inextricably and exclusively bound to the maintenance of a militia . . .").

142. *Id.* at 205.

143. *Id.* at 246 n.9.

144. *See infra* notes 193–98 and accompanying text.

145. *Id.* at 23 (emphasis added); *see also id.* at 35 ("[H]istorical developments have altered a *vital condition* for the articulated right to keep and bear arms.") (emphasis added).

146. *Id.* at 149 (emphasis added).

would not be having this debate. The authors claim that the Second Amendment “guaranteed the right to keep and bear arms *in the militia*,”¹⁴⁷ but the last three qualifying words simply do not appear there or elsewhere.

At one point Uviller and Merkel go so far as to claim: “Had the two statements—regarding the importance of a militia and the right to arms—not been joined in this manner, it might have been possible to argue that even if the first declaration ceases to be true, the second is undiminished.”¹⁴⁸ Yet none of the precursors of the Second Amendment—including Madison’s proposal to Congress—are worded in the grammatical fashion that the authors find so significant.¹⁴⁹ This does not prevent them from insisting, with equal ardor, that these formulations too “expressly linked” the right to arms to militia service.¹⁵⁰

The Founders, however, were quite capable of expressly qualifying an individual right—indeed of qualifying a right by military service. They did just this in the Fifth Amendment when they specified the individual right not to be prosecuted without an indictment by the grand jury “except in cases arising in the land or naval forces, or in the Militia, *when in actual service* in time of War or public danger.”¹⁵¹ In other words, unlike the Second Amendment, the Fifth Amendment right to an indictment *is* expressly conditioned on whether or not a defendant is in actual militia service. And as already noted, the Senate rejected the proposal that would have expressly qualified the exercise of the right to be “for the common defence.”¹⁵²

Eugene Volokh has chronicled how prefacing constitutional rights with affirmations of purposes was quite common in state constitutions of the day.¹⁵³ For example, the New Hampshire Constitution of 1783 read: “The Liberty of the press is essential to the security of freedom in a State; it ought, therefore, to be inviolably preserved.”¹⁵⁴ Lest any weight be placed on the

147. *Id.* at 114 (emphasis added).

148. *Id.* at 150.

149. See *supra* notes 51–59 and accompanying text; 1 ANNALS OF CONG. (Joseph Gales ed., 1789), reprinted in BENNETT B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT 111 (1955) (“The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms shall be compelled to render military service in person.”).

150. UVILLER & MERKEL, *supra* note 1, at 83 (referring to the proposal by North Carolina at the ratification convention).

151. U.S. CONST. amend. V (emphasis added).

152. UVILLER & MERKEL, *supra* note 1, at 103.

153. Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 793–95 (1998) (explaining that these clauses “shed some light” on the Second Amendment in that they (1) show that the Second Amendment is fairly commonplace, rather than strikingly odd; (2) rebut the claim that a right expires once its justification expires; (3) show that operative clauses are often “both broader and narrower than their justification clauses,” not dependent on the right’s furtherance of its justification clause; and (4) “point to how the two clauses might be read together without disregarding either”).

154. N.H. CONST. OF 1783, art. XXII, reprinted in THE COMPLETE BILL OF RIGHTS, *supra* note 43, at 94.

use of a semicolon, the nearly identical passage from the Massachusetts Constitution of 1780 reads: "The Liberty of the Press is essential to the security of freedom in a State, it ought not, therefore, to be restrained in this Commonwealth."¹⁵⁵

The authors note these state constitutions but dismiss this evidence on the sole ground that "the Second Amendment remains unique among the federal Bill of Rights."¹⁵⁶ But this misses the significance of Professor Volokh's justification-clause evidence for the original public meaning of the Second Amendment. These state-constitutional-rights provisions show that "to eighteenth century ears" (using the authors' phrase),¹⁵⁷ such language was not uncommon and, so far as we know, was not elsewhere interpreted to limit or condition the right that followed. The authors' denials notwithstanding, this evidence does indeed bear on the original public meaning of the Second Amendment.

None of this is to suggest that the authors' purely textualist analysis is absurd. To the contrary, it is the most plausible argument that the gun-rights opponents have raised to date because they finally concede that the right was one held by individuals and not by state governments.¹⁵⁸ But neither is their analysis compelling. The fact that the right to bear and keep arms was not expressly conditioned on the Second Amendment's preface strongly suggests that it was not so conditioned. It is precisely when plausible doubts are raised about the proper interpretation of text that evidence of original public meaning becomes important. As we have seen, ample evidence exists to suggest that the right to keep and bear arms existed apart from active service in a militia for the common defense, and reasonable members of the public would have *and did* so read it.¹⁵⁹

Even if Uviller and Merkel are correct that the right to keep and bear arms is conditioned on the continued existence of a general militia-of-the-whole, this raises the question of whether they are also right to claim that such a militia no longer exists, a claim to which I shall return after briefly considering two other problems with their treatment.

IV. Was the Right to Keep and Bear Arms Among the Privileges or Immunities of Citizens?

Whatever its proper scope, the right to keep and bear arms (like the rest of the Bill of Rights) was originally meant solely as a constraint on federal

155. MASS. CONST. of 1780, art. XVI, reprinted in THE COMPLETE BILL OF RIGHTS, *supra* note 43, at 94.

156. UVILLER & MERKEL, *supra* note 1, at 24.

157. *Cf. id.* at 156 ("twenty-first-century ears").

158. See *supra* note 9 and accompanying text.

159. See *supra* Part II.

power; state power was not affected by its adoption. This structural feature of the original Constitution was fundamentally altered by the enactment of the Fourteenth Amendment, which dictates that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States”¹⁶⁰ Was the right to bear arms among these privileges or immunities?

Uviller and Merkel vehemently deny this possibility.¹⁶¹ Textually, they argue that because the Fourteenth Amendment does not specifically refer to the right to keep and bear arms as a protected privilege or immunity, the Amendment does not protect this right.¹⁶² Of course *no* particular right is specified as a privilege or immunity, so this first objection would wipe the clause from the Constitution entirely. Even the Supreme Court in its atrocious five-to-four decision in *The Slaughter-House Cases* did not go so far as to suggest that the clause had no application whatsoever.¹⁶³

Understanding the original meaning of “privileges or immunities” requires evidence of public meaning.¹⁶⁴ Unfortunately, the authors rely for their evidence solely on the work of Raoul Berger.¹⁶⁵ While Berger never made up evidence, as did historian Michael Bellesiles,¹⁶⁶ a researcher should

160. U.S. CONST. amend. XIV, § 1.

161. In addition to the textual and historical arguments discussed here, Uviller and Merkel also stress the fact that courts have uniformly refused to incorporate a personal right to arms into the Fourteenth Amendment. UVILLER & MERKEL, *supra* note 1, at 198–99, 208. The principal purpose of this debate over the meaning of the Second and Fourteenth Amendments, however, is to discern if this judicial stance has been correct.

162. *Id.* at 197–98 (“Regardless of the intentions—even the clearly expressed intentions—of individual Framers, it is the text as ratified that counts, and the text of the Fourteenth Amendment (of course) does not reflect any such purpose.”); *id.* at 198 (“Thus, the Fourteenth Amendment does not proclaim, ‘The Bill of Rights, including a personal right to arms for private purposes such as self-defense, shall apply against the states.’”).

163. See 83 U.S. 36, 79–80 (1872) (citing as privileges of citizens of the United States the rights “to peaceably assemble and petition for redress of grievances, the privilege of the writ of *habeas corpus*” among others). I critically examine the majority opinion in Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 466–68 (2004).

164. BARNETT, *RESTORING*, *supra* note 9, at 89–130.

165. See UVILLER & MERKEL, *supra* note 1, at 200 (“Indeed, Professor Raoul Berger reminds us that the derivation of the phrase ‘privileges and immunities’ strongly suggests that it referred only to rights of trade and commerce.”); *id.* at 205–06 (citing “[t]he eminent legal historian, Professor Raoul Berger[’s]” conclusion that “the first use of the term—in the Articles of Confederation—made it pretty plain that the privileges referred to were privileges of trade and commerce”); *id.* at 313 n.120 (attributing to Raoul Berger “a powerful counterargument, presenting convincing evidence that Howard and Bingham spoke inconsistently, that they frequently contradicted themselves, that most members of Congress expressly rejected these views, and that Howard and Bingham did not command the respect of the mainstream of the Republican party”) (citing RAUL BERGER, *GOVERNMENT BY JUDICIARY* 182–85 (2d ed. 1997)).

166. See James Lindgren, *Fall From Grace: Arming America and the Bellesiles Scandal*, 111 YALE L.J. 2195 (2002) (book review) (pointing out Bellesiles’s fabrication of evidence); James Lindgren & Justin Lee Heather, *Counting Guns in Early America*, 43 WM. & MARY L. REV. 1777, 1839–49 (2002) (demonstrating how Bellesiles misreported the probate records on which he purported to rely and that some of the probate records he claimed to have examined do not exist);

always independently check sources for context. In this case, Uviller and Merkel fail to address Michael Kent Curtis's refutation of Berger's thesis in *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights*, an especially influential book that was also published by Duke.¹⁶⁷ Though not every scholar has been completely persuaded by Curtis's refutation of Berger's thesis, his conclusions have been widely accepted and have reshaped the current debate over the original meaning of the Fourteenth Amendment.¹⁶⁸ Curtis has shown that the primary purpose of the Privileges or Immunities Clause was to reverse *Barron v. Baltimore*¹⁶⁹ and extend federal protection against state violations of the rights contained in the Bill of Rights, especially the right to keep and bear arms.¹⁷⁰ The lack of any reference to Curtis's work—together with the paucity of their own sources—severely undermines the authors' assertions about the Fourteenth Amendment.

Even if Uviller and Merkel were correct about the founding, by 1868 the individual right to arms was certainly not a militia-conditioned one, especially as free blacks and southern Republicans suffered abuses at the hands of white militiamen. As Chief Justice Taney's 1856 opinion in *Dred Scott v. Sandford* reflects, the right to bear arms was the right "to keep and carry arms"

see also Joyce Lee Malcolm, *Review: Arming America*, 79 TEXAS L. REV. 1657 (2001) (lambasting Bellesiles for "present[ing] a skewed and distorted selection of the records, misquot[ing] contemporary statements and statutes, provid[ing] inaccurate information, and report[ing] erroneous counts of the particular probate collections he specifically cites"). Though Uviller and Merkel's book appeared after the disgraced Michael Bellesiles's scholarship began to be discredited, the authors repeatedly cite and discuss his work with favor, even emphasizing at one point Bellesiles's receipt of the now-revoked Bancroft Prize. UVILLER & MERKEL, *supra* note 1, at 58–59, 143, 279 n.24, 286 n.78, 287 n.5, 292 n.54, 294 nn.55–57, 295 n.58, 298 n.20, 313 n.110 (all citing Bellesiles's work); *id.* at 292 n.54 ("In his Bancroft Prize book *Arming America* . . ."); Press Release, Columbia University, Columbia's Board of Trustees Votes to Rescind the 2001 Bancroft Prize (Dec. 16, 2002), at http://www.columbia.edu/cu/news/02/12/bancroft_prize.html (announcing the December 7, 2002 vote to rescind the Bancroft Prize originally awarded to Michael Bellesiles and reporting Bellesiles's violation of "basic norms of acceptable scholarly conduct"). While the authors acknowledge some of Bellesiles's now-vindicated critics in a footnote, in the same footnote they minimize the significance of the critics' contrary findings. UVILLER & MERKEL, *supra* note 1, at 292 n.54 ("Bellesiles's use of the probate data has come under severe scrutiny, and his findings and methods have been sharply criticized However, other commentators . . . have defended Bellesiles In the interest of fairness, it should be added that Bellesiles's conclusions in *Arming America* do not depend entirely, or even chiefly, on his analysis of probate data.").

167. CURTIS, *supra* note 139, at 113–29.

168. See, e.g., Michael Les Benedict, *Constitutional History and Constitutional Theory: Reflections on Ackerman, Reconstruction, and the Transformation of the American Constitution*, 108 YALE L.J. 2011, 2022 (1999) (characterizing Curtis's contribution to the academic debate on the meaning of the Fourteenth Amendment as "something pretty close to" certainty).

169. 32 U.S. 243 (1833).

170. CURTIS, *supra* note 139, at 173–74. In my writings, I have shown how "privileges or immunities" include the natural rights retained by the people as well as additional privileges established by the Bill of Rights. BARNETT, *RESTORING*, *supra* note 9, at 60–68. As the right to keep and bear arms is included in the Bill of Rights, however, it is unnecessary to accept this historical claim to agree that it was included among the privileges or immunities of citizens.

wherever one went.¹⁷¹ Though Michael Curtis is no gun-rights advocate, he repeatedly references statements that include the right to keep and bear arms as among those rights protected by the Constitution.¹⁷² For example, the Freedmen's Bureau Act of 1866, approved by a supermajority of Congress over Andrew Johnson's veto, provided that:

[T]he right . . . to have full and equal benefit of all laws and proceedings *concerning personal liberty, personal security*, and the acquisition, enjoyment, and disposition of estate, real and personal, *including the constitutional right of bearing arms*, shall be secured to and enjoyed by all citizens of such State or district without respect to race or color, or previous condition of slavery.¹⁷³

Uviller and Merkel contend that the militia-conditioned "Second Amendment, as adopted by the Founders cannot be surgically reconstructed as a purely personal right, the 'militia' as referred to therein cannot be redefined as bands of private citizens."¹⁷⁴ The copious historical evidence reported by Curtis and others¹⁷⁵ makes it clear, however, that the "incorporation" of individual amendments from the original Bill of Rights into the Due Process Clause is an anachronism. When it comes to the original meaning of the Fourteenth Amendment, the true issue is whether the personal right of bearing arms was among the privileges or immunities of citizens that no state could constitutionally abridge. The overwhelmingly enacted Freedmen's Bureau Act exemplifies the fact that by 1866 the protection of the individual, non-militia-conditioned right to arms for personal security was understood to be a privilege or immunity of citizenship.

V. Is the Right to Arms Subject to Reasonable Regulation?

Uviller and Merkel repeatedly assert that finding the right to arms to be an individual right unconditioned on the existence of the militia is a radical claim because such a right would not be subject to reasonable regulation. Thus, they refer to the individual-rights position as entailing an "unbridled right,"¹⁷⁶ an "absolute right,"¹⁷⁷ "an individual entitlement immune from

171. 60 U.S. 393, 417 (1856).

172. CURTIS, *supra* note 139, at 52, 53, 56, 72, 88, 104, 111, 112, 138, 140–41, 164, 167, 178–79, 187, 203, 217, & 238 (discussing references to the right to arms in the context of the drafting and ratifying of the Fourteenth Amendment).

173. 14 Stat. 176–77 (1866) (emphasis added). That the Act protected the right to bear arms solely from discriminatory treatment does not detract from the conclusion that the right is clearly among the privileges or immunities protected by the Fourteenth Amendment. As Curtis has explained, the Amendment protects the right *both* from laws that discriminate among the people and from laws that abridge equally the privileges or immunities of all citizens. See CURTIS, *supra* note 139, at 115–20; see also BARNETT, *RESTORING*, *supra* note 9, at 195–96.

174. UVILLER & MERKEL, *supra* note 1, at 201.

175. See, e.g., STEPHEN P. HALBROOK, *FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866–1876* (1998).

176. UVILLER & MERKEL, *supra* note 1, at 9.

government curtailment,"¹⁷⁸ an "unfettered general license to carry weapons,"¹⁷⁹ an "unrestricted right to weapons,"¹⁸⁰ an "individual license"¹⁸¹ that "prohibits any interference"¹⁸² with a right that would be "immune to government restriction and regulation,"¹⁸³ and "free of any government control of arms."¹⁸⁴

Despite these polemics, the authors know better. In a footnote referring to Laurence Tribe, Akhil Amar, and William Van Alstyne, the authors acknowledge that: "Preeminently, three of the most respected members of the orthodox legal academy to embrace an individual rights reading of the Second Amendment emphasize that this right—like the other individual rights protected in the first eight amendments—should be subject to reasonable regulation."¹⁸⁵ Disturbingly, the authors fail to mention¹⁸⁶ that virtually all individual-rights scholars, including the others cited in the same footnote, hold the position that an individual right may be subject to regulation.¹⁸⁷ Indeed, I know of no individual-rights scholar who claims that the Second Amendment is any more absolute than is the First Amendment.

This uniformity is evidenced by a 1993 advertisement taken out in major journals by "Academics for the Second Amendment" and jointly signed by most individual-rights scholars.¹⁸⁸ The text of this advertisement appears in an article cited by Uviller and Merkel earlier in the same footnote that concedes the reasonableness of Tribe, Amar, and Van Alstyne.¹⁸⁹ In this article, which Uviller and Merkel find important enough to criticize elsewhere in their text,¹⁹⁰ the following sentence of the advertisement is italicized: "Of course, *the right to bear arms is no more 'absolute' than is the*

177. *Id.* at 11.

178. *Id.* at 37.

179. *Id.* at 54.

180. *Id.* at 83.

181. *Id.* at 86-87.

182. *Id.* at 169.

183. *Id.* at 1.

184. *Id.* at 197.

185. *Id.* at 245 n.4 (citing Laurence Tribe & Akhil Reed Amar, *Well-Regulated Militias, and More*, N.Y. TIMES, Oct. 28, 1999, at A31, and William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1253-54 (1994)).

186. See UVILLER & MERKEL, *supra* note 1, at 254 n.4; see also *id.* at 37 (describing the individual-rights view as holding that "now and forever, in military pursuits and all others, guns are an individual entitlement immune from government curtailment").

187. See, e.g., Don B. Kates, *The Second Amendment: A Dialogue*, 49 LAW & CONTEMP. PROBS., Winter 1986, at 143, 145-46 ("[R]easonable gun controls are no more foreclosed by the second amendment than is reasonable regulation of speech by the first amendment.").

188. *An Open Letter on the Second Amendment*, NEW REPUBLIC, Mar. 15, 1993, at 15 (advertisement) (endorsing the individual-rights theory of the Second Amendment in a statement signed by, among others, law professors Akhil Amar, Charles Cantrell, Robert Control, Raymond Diamond, Nicholas Johnson, Sanford Levinson, and Nelson Lund).

189. UVILLER & MERKEL, *supra* note 1, at 244 n.4 (citing Barnett & Kates, *supra* note 23).

190. UVILLER & MERKEL, *supra* note 1, at 30.

right to speak, to publish, or to assemble."¹⁹¹ This advertisement merely evidences the fact that most individual-rights scholars of the Second Amendment hold a view that the authors mysteriously attribute only to Tribe, Amar, and Van Alstyne.¹⁹² For this reason, Uviller and Merkel are unable to produce a single example of any individual-rights scholar who contends otherwise.

One suspects that they omit this fact about other individual-rights scholars—whom they never call "scholars," much less "respected"—so they can repeatedly belittle them as "advocates,"¹⁹³ a "dedicated band of individual rights advocates,"¹⁹⁴ an "individual rights brigade"¹⁹⁵ or "a growing entourage of individualist interpreters of the Second Amendment."¹⁹⁶ Indeed, when mentioning historian Professor Joyce Malcolm, whose book *To Keep and Bear Arms: The Origins of an Anglo-American Right*¹⁹⁷ was published by Harvard University Press, they go so far as to mention that Bentley College, where she teaches, is "an undergraduate business school in Massachusetts."¹⁹⁸ Though individual-rights scholars have come to expect such cheap shots from their academic opponents, it still disappoints.

At this point, some readers may be scratching their heads and wondering, if an individual right to keep and bear arms is subject to reasonable regulation, what is all the excitement about? Why do gun control proponents not simply embrace the original meaning of the right and then propose what regulations they wish? The answer is simple. Were they to do so under current doctrine, such regulations would be subjected to the same scrutiny as laws restricting the liberty of speech and the press. Within the modern theory of constitutional rights, as articulated in the famous Footnote Four¹⁹⁹ of *United States v. Carolene Products Co.*:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be *within a specific prohibition of the Constitution, such as those of the first ten*

191. Barnett & Kates, *supra* note 23, at 1189 (quoting *An Open Letter on the Second Amendment*, *supra* note 188) (emphasis added).

192. Uviller & Merkel, *supra* note 1, at 245 n.4.

193. *Id.* at 246 n.9.

194. *Id.* at 38.

195. *Id.* at 11.

196. *Id.* at 53; see also *id.* at 178 ("[W]e think it regrettable that [Levinson's] unpersuasive thesis has lent respectability to the outlaw libertarians who claim to be the legitimate guardians of American freedom.").

197. MALCOLM, *supra* note 116.

198. Uviller & Merkel, *supra* note 1, at 246 n.9.

199. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 306 (Kermit L. Hall et al. eds., 1992) (noting in an entry entitled "Footnote Four" that "[w]hat is probably the most renowned footnote in Supreme Court history appeared in a case that would otherwise be forgotten").

amendments, which are deemed equally specific when held to be embraced within the Fourteenth.²⁰⁰

Despite this injunction, the Second Amendment has never been held by the Supreme Court to be among those specific prohibitions that shift the presumption of constitutionality.²⁰¹ The centrality of the doctrine articulated in Footnote Four to the modern theory of constitutional rights explains why gun-control proponents have expended so much energy to show that the right to keep and bear arms is *not* "a specific prohibition of the Constitution"²⁰²—proponents of gun control wish to avoid the scrutiny that Footnote Four would require.

So here is the position held by individual-rights scholars that Uviller and Merkel fail to acknowledge, much less meet: The fact that the Second Amendment protects an individual right means only that the government must establish the necessity and propriety of its regulations, much as it must do when adopting time, place, and manner restrictions on the freedom of speech.²⁰³ Further, the individual right bars the complete prohibition and confiscation of all private firearms suitable for self defense, a goal so radical that most gun control enthusiasts deny favoring it.²⁰⁴ In other words, properly construed, by permitting reasonable regulation while taking complete prohibition off the table, an individual-rights reading of the Second Amendment prevents rather than proposes a radical policy measure. This is evidenced by the fact that on three occasions Congress has passed a statute expressly recognizing the Second Amendment as protecting an individual right, unconditioned on militia service.²⁰⁵

200. 304 U.S. 144, 152 n.4 (1938) (emphasis added).

201. See *Presser v. Illinois*, 116 U.S. 252, 264–65, 267–68 (1886) (refusing to incorporate the Second Amendment and other rights into the Fourteenth Amendment); William F. Lane, *Public Endangerment or Personal Liberty? North Carolina Enacts a Liberalized Concealed Handgun Statute*, 74 N.C. L. REV. 2214, 2225 n.76 (stating that, although *Presser* has never been overruled, the Supreme Court has incorporated aspects of the First, Fourth, Fifth and Sixth Amendments into the Fourteenth Amendment). Federal appellate courts have repeatedly held that the Second Amendment does not apply to state and local gun control laws. See, e.g., *Love v. Peppersack*, 47 F.3d 120, 123–24 (4th Cir. 1995); *Fresno Rifle & Pistol Club, Inc. v. Van de Kamp*, 965 F.2d 723, 729–31 (9th Cir. 1992); *Quilici v. Vill. of Morton Grove*, 695 F.2d 261, 269–71 (7th Cir. 1982).

202. For a critique of this modern theory, see BARNETT, *RESTORING*, *supra* note 9, at 224–52.

203. See, e.g., *United States v. Grace*, 461 U.S. 171, 177 (1983) (approving time, place, and manner restrictions of speech only if they "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication").

204. Though the denial may be disingenuous. See Barnett & Kates, *supra* note 23, at 1254–59 (describing the prohibitionist agenda of the gun control movement).

205. Firearms Owners' Protection Act § 1(b), Pub. L. No. 99-308, 100 Stat. 449 (1986) ("The Congress finds that the rights of citizens . . . to keep and bear arms under the second amendment to the United States Constitution [and other rights] . . . require additional legislation to correct existing firearms statutes and government policies."); Property Requisition Act of 1941, Pub. L. No. 77-274, 55 Stat. 742 ("Nothing contained in this Act shall be construed . . . to impair or infringe in any manner the right of any individual to keep and bear arms . . ."); Freedmen's Bureau Act of 1866, 14 Stat. 176–77 (1866) (defining "all laws and proceedings concerning personal liberty" to include "the constitutional right of bearing arms"). See generally Stephen P. Halbrook, *Congress Interprets*

VI. Is the Militia Gone?

Notwithstanding all the evidence presented above, suppose Uviller and Merkel are correct in their claim that the right to keep and bear arms in the Second Amendment was somehow conditioned on service in the militia. Even were this true, their case would still depend on whether the “militia,” properly defined, no longer exists. Therefore, Uviller and Merkel’s next most important claim after their assertion that the right to bear arms is conditioned on the continued existence of the militia, is that the militia has been discontinued and thus the Second Amendment has fallen silent:

[W]ith no contemporary descendent to inherit the Framers’ concept of a republican militia, the incidental right of citizens to bear and to keep the arms necessary to the life of such a militia has atrophied; it has simply fallen silent in the midst of the tumultuous debate on the issue in today’s world.²⁰⁶

How then do they define the term “militia”?

As we have recounted—and as all scholars agree—the founding generation of Americans conceived of a militia as a group composed of all free white males between eighteen and forty-five (except for the conscientious objectors and others entitled to an exemption), responding willingly, as needed, for the common defence, at the call of local authority, and above all, as a viable alternative to the feared standing army.²⁰⁷

Now it is possible to quarrel with this definition. At the end, for example, the authors seem to build into the definition of militia that “above all” it must be a “viable alternative” to a standing army, suggesting that if an entity is not a viable alternative then it is not truly a “militia.” If by “viable alternative” the authors have in mind something like an “effective substitute,” they cannot mean this seriously. Such a definition runs afoul of the Constitution itself, which affirms *both* the existence of the militia *and* the power to create a standing army, as necessary for national defense.²⁰⁸ In the

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

206. UVILLER & MERKEL, *supra* note 1, at 228.

207. *Id.* at 157 (footnote omitted).

208. U.S. CONST. art. I, § 8, cl. 15 (giving Congress the power “[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions”); *id.* art. I, § 8, cl. 16 (giving Congress the power “[t]o provide for organizing, arming, and disciplining, the Militia”); *id.* art. I, § 8, cl. 12 (giving Congress the power “[t]o raise and support Armies”); *see id.* amend. V, cl. 1 (mentioning cases “arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger”). Uviller and Merkel acknowledge Congress’s Article I, Section 8 powers in their book, noting that “[u]nder the Constitution, then, Congress was empowered to raise a professional army” and that “assuming Congress made such provision under Article I, Section 8, Clause 15, the President would be empowered to call up the several state militia into the service of the United States to execute the Laws of the Union, suppress Insurrections, and repel Invasions.” UVILLER & MERKEL, *supra* note 1, at 77.

Constitution, a well-regulated militia is clearly viewed as an auxiliary to a standing army—the militia can be called into action either to augment the army or to act in their stead when regular forces are preoccupied with other matters or cannot be on the scene as fast as locals.²⁰⁹

This caveat aside, Uviller and Merkel acknowledge, correctly, that the original militia to which the Second Amendment refers is not the select militia of the National Guard,²¹⁰ but instead is what they repeatedly call the “militia-of-the-whole.”²¹¹ Are they then correct to claim, as they do at considerable length,²¹² that the militia to which the Second Amendment refers no longer exists—“that there is no contemporary, evolved, descendent of the eighteenth-century ‘militia’ on today’s landscape”?²¹³ It turns out that (if one omits the unwarranted word “evolved” from this claim), according to the current laws of the United States as enacted by Congress, the authors are wrong.

Section 311 of the United States Code, Title 10, entitled “Militia: composition and classes,” reads in its entirety as follows:

- (a) The militia of the United States consists of *all able-bodied males at least 17 years of age and, except as provided in section 313 of title 32, under 45 years of age* who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are commissioned officers of the National Guard.
- (b) The classes of the militia are —
 - (1) the organized militia, which consists of the National Guard and the Naval Militia; and
 - (2) the unorganized militia, which consists of the members of the militia who are not members of the National Guard or the Naval Militia.²¹⁴

209. See U.S. CONST. art. I, § 8, cl. 15 (giving Congress the power “To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions”); *id.* art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual Service of the United States; . . .”).

210. See UVILLER & MERKEL, *supra* note 1, at 141 (“As far removed as the Cold War National Guard was from the militia described in the Second Amendment . . .”).

211. *E.g., id.* at 31, 32, 71, 119, 125, 134.

212. *Id.* at 109–44 (detailing the decay of the militia of 1789–1791 and the origin of the organized militia of today).

213. *Id.* at 157.

214. 10 U.S.C. § 311 (2000) (emphasis added). It should be noted how similar this provision is to the proposal by Henry Knox, which, as the authors note, “proposed to retain the militia-of-the-whole in theory, but to divide it up into three corps according to age—an advanced corps aged 18–20, a main corps aged 21–45, and a reserve aged 46–59” with only the advanced corps receiving six weeks of training per year. UVILLER & MERKEL, *supra* note 1, at 71–72. Compare as well the wording of this statute with that of the Militia Act of 1792 which defined “militia” to include (with some narrow exceptions) “each and every free able-bodied white male citizen of the respective

So far as federal law is concerned, then, the militia-of-the-whole continues to exist.

Given its obvious relevance to their central claim, what do the authors say about this statute? Actually, they fail to mention it.²¹⁵ Though they note the distinction adopted by statute in 1903 between the “active militia” and “an unorganized militia (the non-enrolled male population between eighteen and forty-five),”²¹⁶ they twice repeat a claim taken from a 1940s law review article,²¹⁷ that in 1933 “Congress made the National Guard part of the regular army during peace as well as wartime . . . and erased the word ‘militia’ from the War Department charts, changing the name of the supervisory agency to National Guard Bureau.”²¹⁸ So far as I know, this claim is not actually false, but it certainly is misleading when used to suggest that the class of militia defined by statute in 1903 as “unorganized militia” no longer exists as a matter of federal law. To the contrary, we have seen that it continues to be recognized in the United States Code.²¹⁹

The authors might respond that this is not the “republican” militia that they and the Founders had in mind: a “well-regulated” militia that is to be properly trained and drilled.²²⁰ But the federal government retains the power to train and discipline the militia if it so chooses.²²¹ What the federal government cannot do—if we are to take the preface to the Second Amendment seriously—or at least what the federal government has not done, is abolish the militia altogether rather than to leave it unorganized. Nor can Congress abolish the individual right to arms simply by failing to well-regulate the militia-of-the-whole.

states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years.” Uniform Militia Act of 1792, ch. 33, § 1, 1 Stat. 271, 271, *repealed by* Dick Act, ch. 196, 32 Stat. 775 (1903).

215. Without noting its continued existence in federal law, the authors do connect the “common militia” of the Founders with “the unorganized militia”: “In contrast to the National Guard, the unorganized militia—the shadow of the common militia so extolled by the framers of the Second Amendment—has not been funded by Congress since at least 1903.” UVILLER & MERKEL, *supra* note 1, at 143. A lack of funding, however, does not cause the militia to evaporate; rather, the militia is at present “unorganized,” as current federal law accurately describes it.

216. *Id.* at 134.

217. Frederick Bernays Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181, 209 (1940).

218. UVILLER & MERKEL, *supra* note 1, at 33, 137, 243 n.99, 290 n.23 (“[L]awmakers ‘eliminated the word “Militia” from the War Department organization by changing the name of the supervisory agency to National Guard Bureau.”).

219. 10 U.S.C. § 311.

220. Indeed, the authors mentioned “trained” and “organized” in one of their definitions of “militia”: “By *militia* is meant a trained, organized, and armed collection of qualified citizens, save only those of conscientious scruple and others exempted from service by their states, called together from their normal pursuits to respond to occasional and particular threats, internal or external, to community peace.” UVILLER & MERKEL, *supra* note 1, at 228.

221. U.S. CONST. art. I, § 8, cl. 16 (granting Congress the power “[t]o provide for organizing, arming, and disciplining, the Militia”).

The irony is that, although the authors' entire thesis depends upon the presence in the Second Amendment of the militia preface, they fail to realize that the preface, if taken seriously, would constitutionally bar the abolition of the militia-of-the-whole, thus fatally undermining their claim that the Second Amendment has fallen silent. No matter what Congress might do in the future, the militia-of-the-whole would continue to exist in a constitutional sense, despite its being unorganized and not well-regulated.

Much of their book is devoted to discussing the obsolescence of this body-of-the-whole militia.²²² They devote chapters to its early ineffectiveness, for example, in stopping the British invasion of Washington in 1812, colorfully noting that the British soldiers consumed the dinner at the White House that had been prepared for President Madison and his wife.²²³ As for today's militia, they write:

In the years since World War II, the role of a mass reserve in assuring national security has seriously diminished in consideration of the technical complexity of equipment and tasks required of a thoroughly professional modern army, and because nuclear deterrence has made a mass war drawing on all the personnel reserve of the country unlikely. The need for a whole nation in arms has—in all likelihood, permanently—disappeared.²²⁴

“Indeed,” they confidently assert, “it would be difficult to conceive of any institution less necessary to the security of the fifty free states at the beginning of the new millennium than the vanished common militia.”²²⁵

On September 11th of 2001, however, the United States came under aerial attack by planes piloted by foreign nationals. Two planes struck the World Trade Center, destroying it and, with it, thousands of innocent civilians inside.²²⁶ Another struck the Pentagon, killing hundreds of members of the armed forces.²²⁷ A fourth plane, United Flight 93, was heading for the nation's capital with the likely target being the White House²²⁸ or the U.S. Capitol building. It was stopped from reaching its target, but not by the Army, the Navy, or even the Air Force. Nor was it stopped by the National Guard or the armed constabulary of the District of Columbia. After all, these official personnel cannot be everywhere the nation is threatened. No, unlike 1812, this time the White House was saved from possible destruction by the heroics of members of the “unorganized militia”²²⁹ who, after learning on

222. UVILLER & MERKEL, *supra* note 1, at 37–144.

223. *Id.* at 120–21.

224. *Id.* at 142.

225. *Id.* at 143.

226. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 7–8 (2004).

227. *Id.* at 9–10.

228. *Id.* at 14.

229. 10 U.S.C. § 311 (2000).

their cell phones of the attacks by other planes, acted in concert to protect the capital from a second successful attack on the same morning, at the cost of their own lives.²³⁰

VII. Conclusion

Uviller and Merkel's book adds no new historical evidence to the debate over the original meaning of the Second Amendment. Instead, resting their argument almost exclusively on historical "context" and parsing of text, they propose that the right to keep and bear arms was expressly conditioned on its exercise as part of a militia that no longer exists. This interpretation is belied by contemporaneous statements about the nature of the right and the meaning of the Amendment before, during, and after its ratification,²³¹ by evidence of later usage,²³² by the original meaning of the Fourteenth Amendment,²³³ by repeated affirmations by Congress,²³⁴ and by the current statutes of the United States.²³⁵

Notwithstanding the authors' opinion that "it would be difficult to conceive of any institution less necessary to the security of the fifty free states at the beginning of the new millennium"²³⁶ than the now-disorganized common militia, we may just need the militia again one day, as we did on September 11th. When we do, it may well be under circumstances where it would be better if its members have access to their own weapons to arm themselves. Fortunately, as the evidence shows, the Founders had the foresight to enshrine an individual right of the people to keep and bear arms in the Constitution when they added the Second Amendment. Though it has often been ignored by courts,²³⁷ and sometimes squelched by scholars like Richard Uviller, William Merkel, or Garry Wills who wish that it was not there, the Second Amendment has not been repealed and it has never fallen silent.

230. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., *supra* note 226, at 13. Lest I be misunderstood, I do not offer this example to suggest that airplane passengers should be armed or that a proper interpretation of the Second Amendment would make disarming them unconstitutional. I offer it only to show that Uviller and Merkel are wrong to assert that, because the nature of warfare has changed, the militia-of-the-whole is no longer, and will never again be, needed to assist in providing for the common defense of the United States. At the least, reasonable people can disagree with their claim.

231. See *supra* subparts II(A)–(D).

232. See *supra* notes 61–68, 73–78, & 105–13 and accompanying text.

233. See *supra* Part IV.

234. See *supra* subpart II(E).

235. See *supra* Part V.

236. UVILLER & MERKEL, *supra* note 1, at 143.

237. For a recent example of a court asserting the militia-conditioned interpretation of the Second Amendment, see *Silveira v. Lockyer*, 312 F.3d 1052, 1060–61 (9th Cir. 2003) (as amended). The opinion in *Silveira* had to be amended to correct its original reliance on the discredited work of Michael Bellisiles. *Silveira v. Lockyer*, 2003 Cal. Daily Op. Serv. 800 (9th Cir. 2003).

* * *