

## ESSAY/REVIEW

# WAS THE RIGHT TO KEEP AND BEAR ARMS CONDITIONED ON SERVICE IN AN ORGANIZED MILITIA?

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*ABSTRACT: 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 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 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 now agree that the Second Amendment originally referred to the right of the individual.

Indeed, the fact that the collective right theory was once so confidently advanced by gun control enthusiasts 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 now turned in a different direction. Although now conceding that the right to keep and bear arms

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indeed belongs to individuals rather than to states, almost without missing a beat, gun control enthusiasts now with equal assurance claim that the individual right to bear arms was somehow “conditioned” in its exercise by 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, developed by scholars over the past ten or more years that “the right to keep and bear arms” belonged to individuals,<sup>1</sup> 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 it 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. However, they further claim that, because the right to arms may be exercised only while participating as part of an organized militia, 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 words, “historical developments have altered a vital condition for the articulated right to keep and bear arms.”<sup>2</sup>

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 an historical one, in this essay, I limit my attention to this issue.

I will confine myself to evidence, some of which not previously considered in this debate, that specifically negates the claim that the Second Amendment protected a militia-conditioned individual right. I should stress that I do not reiterate here the other direct and circumstantial evidence that supports an

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<sup>1</sup>For a succinct summary of this evidence, see *U.S. v. Emerson*, 270 F.3d 203, 236–59 (5th Cir. 2001).

<sup>2</sup>H. RICHARD UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT* 35 (2002).

individual, as opposed to a “collective” right, but the full strength of the individual right position cannot fully be appreciated without taking this evidence into account along with that presented here.<sup>3</sup>

## I. THE AUTHORS’ ORIGINALISM

Uviller and Merkel (hereinafter “the authors”) are to be commended for explicitly discussing their method of interpretation. Few law professors and even fewer historians even attempt this. Unfortunately, I found their discussion of interpretation rather confused. Increasingly, originalists like myself focus entirely on the original meaning of the text — that is, the meaning that would have been attached to the words used in the text by a reasonable speaker of the language at the time of its enactment.<sup>4</sup> 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. 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, a quantitative assessment to distinguish normal from abnormal usage should be undertaken.<sup>5</sup>

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<sup>3</sup>See *U.S. v. Emerson*, 270 F.3d at 236–59.

<sup>4</sup>I explain the version of originalism described in this section in RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 89–130 (2004). 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 which they then impose on the citizenry. For a written constitution to fulfil the function of providing a higher law, its meaning must remain the same until it is properly changed.

<sup>5</sup>I offer such a quantitative assessment of the meaning of the words “commerce” and “regulate” in Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001), and Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 U. ARK. LITTLE ROCK L. REV. 847 (2003). Such a quantitative survey is not always possible, however, given the state of the evidence of the

Of course, once discerned, the original public meaning of the text, like the public meaning of laws enacted yesterday, must be applied to 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 room for considerable discretion in developing legal doctrines by those applying original meaning to particular cases or controversies. This activity of applying meaning to cases by means of intermediary doctrines is better described as constitutional *construction*, rather than as interpretation of text strictly speaking.<sup>6</sup> 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 roundly criticized for reasons I shall not rehearse here, many of which I think are sound.<sup>7</sup> 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 an historical and factual inquiry to 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.

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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).

<sup>6</sup>On the distinction between interpretation and construction see Barnett, *supra* note 4, at 118-130.

<sup>7</sup>*See id.*, at 89-91, 113-16.

While in places, the authors appear to reject this approach—for example, when they repeatedly cite the work of H. Jefferson Powell with approval—this rejection is not practiced consistently,<sup>8</sup> as demonstrated by their heavy and uncritical reliance on the works of such original-intent authors as Raoul Berger.<sup>9</sup> 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.<sup>10</sup>

Finally, in contrast with both original meaning and original intent originalists, there are the new-fangled “translation theory” originalists, such as Larry Lessig and Michael Treanor, who start with original meaning or intent (its 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.<sup>11</sup> While this does not sound like the method they endorse, nor practice in most cases, they nevertheless also cite Larry Lessig’s work with approval without seeming to appreciate the difference between his approach and that of other originalists.<sup>12</sup>

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 also say they found helpful.<sup>13</sup> 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

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<sup>8</sup>See, e.g., UVILLER & MERKEL, *supra* note 2, 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.”).

<sup>9</sup>See, e.g., *id.* at 205–06 (discussing Berger’s criticism of Professor Akhil Reed Amar’s thesis related to the Fourteenth Amendment’s affect on the Second Amendment).

<sup>10</sup>See, Barnett, *supra* note 4, at 94–100.

<sup>11</sup>See, e.g., Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 902 (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 (1995) (applying “translation theory” to the Takings Clause).

<sup>12</sup>See UVILLER & MERKEL, *supra* note 2, at 296 n.6.

<sup>13</sup>The authors rely on Professor Rakove’s work several times in the book. See *id.* at 80, 177, 246 n.9, 273 n.140, 292 n.54.

the reader.<sup>14</sup> They therefore fall into the large class of non-originalists 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.<sup>15</sup> Even the professional historians among the opponents of the individual-rights interpretation who insist, like the authors, on a crabbed originalist interpretation for the right to bear arms — a right of which they disapprove— would never think to apply this method to limit other constitutional rights they like.<sup>16</sup>

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 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 begin this book expecting 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

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<sup>14</sup>I learned for the first time that they are not originalists during their talks at the symposium on the book held at William and Mary. 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.

<sup>15</sup>*See, e.g.,* Keith A. Erhman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5 (1989); Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309 (1998).

<sup>16</sup>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* (New York: Vintage 1997) — for example, has never claimed to be an originalist. *See, e.g.,* Jack Rakove, *Words, Deeds, and Guns: Arming American and the Second Amendment*, 59 WILLIAM AND MARY QUARTERLY 205 (Jan. 2002) at <http://www.historycooperative.org/journals/wm/59.1/rakove.html> (“[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.”).

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 not so great that all of it could not 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 area<sup>17</sup> to learn that I am not persuaded by their originalist arguments and therefore disagree with their conclusions. Most of the book is taken up with a lengthy and largely uncontroversial description of the history of the militia before and after the adoption of the Constitution, along with a discussion of classical republicanism, so the book's treatment of the Second Amendment is actually rather brief. Their conclusion that the individual right to arms is conditioned on service in an organized militia rests on a few claims I shall treat separately.

First, 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. Third, that the "Privileges or Immunities" of the Fourteenth Amendment does not include a protection of an individual non-militia-based right to keep and bear arms. 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 their historical claims, they repeat it in sometimes intemperate tones throughout the work. Finally, the authors conclude that the general militia referenced in the Second Amendment no longer exists. 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."<sup>18</sup> For this proposition they reference with uncritical approval Garry Wills' essay in *The New York Review of Books* by stating that "bearing arms had, from its earliest recorded employment and through the late eighteenth century, an *exclusively* military connotation."<sup>19</sup> From Wills the authors conclude that "the

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<sup>17</sup>See Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139 (1996).

<sup>18</sup>UVILLER & MERKEL, *supra* note 2, at 39 (emphasis in original)

<sup>19</sup>*Id.* at 194 (citing Garry Wills, *Why We Have No Right To Keep and Bear Arms*, THE NEW YORK REVIEW OF BOOKS, Sept. 21, 1995, at 62, 64)(emphases added). For responses to Wills by Sanford Levinson, David Williams, Glenn Harlan Reynolds, and

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.”<sup>20</sup> 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.

#### 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. The bill prohibited the taking of deer under certain circumstances and ends with the following stricture:

. . . and 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 him to be bound again.<sup>21</sup>

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 statute with some too-fancy footwork: “Not only the context is different from the amendment’s, but the ‘bearing of a gun’ is not the canonical formulation with a plural noun.”<sup>22</sup> 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 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

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John Lattimer, and for Wills reply, see *To Keep and Bear Arms: An Exchange*, THE NEW YORK REVIEW OF BOOKS, Nov. 16, 1995, at 61-64).

<sup>20</sup>UVILLER & MERKEL, *supra* note 2, at 149.

<sup>21</sup>2 THE PAPERS OF THOMAS JEFFERSON 443 (Julian P. Boyd, ed., 1950)(emphases added).

<sup>22</sup>Wills, *supra* note 19, at 64-65.

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’ 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 he makes earlier in his review that “One does not ‘bear arm.’ Latin *arma* is, etymologically, war “equipment” and has no singular forms.”<sup>23</sup> Will has been misled by a species of language known to philosophers as a “mass noun.”<sup>24</sup> Mass nouns, like “equipment,” are useful because you need a term that will describe a class of items without limiting oneself to particular types of the class. Take the word “luggage.” You can say “pieces of luggage” or “suit case” 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 want to have used the plural of gun, for example, since 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 argument might be dubbed a grammatical fallacy.<sup>25</sup>

While concerning only one type of arms—guns—the statute also refutes Wills’ claim that “[o]ne does not bear arms against a rabbit.”<sup>26</sup> 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. So do others of their contemporaries discussed below whose statements to this effect are dismissed by

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<sup>23</sup>*Id.* at 64.

<sup>24</sup>The Oxford English Dictionary defines “mass noun” as “a noun denoting something, such as a substance or a quality, which cannot be counted; esp. (in the English language) a noun which lacks a plural in ordinary usage and is not used with the indefinite article (opposed to *count noun*).”

<sup>25</sup>Another such 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. See Barnett, *The Original Meaning of the Commerce Clause*, *supra* note 5 at 112-13.

<sup>26</sup>Wills, *supra* note 19, at 64.

Wills and by the authors because they do not fit the authors' and Wills' opinion about the historical "context."

The authors (and Wills) fail to discuss the first learned treatise on the Constitution authored by the jurist and law professor St. George Tucker in his annotated edition of Blackstone's Commentaries published in 1803 and based on lectures he gave in the 1790s.<sup>27</sup> 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.<sup>28</sup>

Tucker here is clearly discussing the 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 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

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<sup>27</sup>The omission is curious as Tucker is discussed in articles cited and criticized by Uveller and Merkel. They would have had to have skip over this quote to reach the quotation from the later treatise by Joseph Story, which they choose to discuss at some length. See UVILLER & MERKEL, *supra* note 2, at 30–31 (discussing Barnett & Kates, *supra* note 17, at 1220).

<sup>28</sup>ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAW OF THE FEDERAL GOVERNMENT AND THE COMMONWEALTH OF VIRGINIA 289 (1803) (emphases added).

shall be kept under strict subordination to and governed by the civil power.<sup>29</sup>

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 undercutting the claim that “bear arms” had an exclusively military connotation, but repeatedly dismiss it as reflecting a “marginal voice[],”<sup>30</sup> “disaffected minority,”<sup>31</sup> and “some radical, libertarian support for an unrestricted right to weapons.”<sup>32</sup> They claim that the minority report’s “view of arms-related rights did not represent majority opinion in Pennsylvania,”<sup>33</sup> 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.”<sup>34</sup> 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.”<sup>35</sup> 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.<sup>36</sup> 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 this particular sentiment was held by a minority of delegates tells us next to nothing about whether it reflects

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<sup>29</sup>NEIL H. COGAN, *THE COMPLETE BILL OF RIGHTS* 182 (1997) (emphasis added).

<sup>30</sup>UVILLER & MERKEL, *supra* note 2, at 82.

<sup>31</sup>*Id.* at 83.

<sup>32</sup>*Id.*

<sup>33</sup>*Id.* at 83.

<sup>34</sup>*Id.* at 85.

<sup>35</sup>*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.”).

<sup>36</sup>The only footnote references are to an article by Saul Cornell that does not make any claims about majority versus minority sentiments on the pages cited and to a Fifth Circuit decision, *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), that does not characterize the list of sources for the individual right to bear arms as radical or minority voices.

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.<sup>37</sup> Evidence is required to establish the author's dismissive claims, but none on this point is offered.

When characterizing the Pennsylvania minority report as reflecting the views of wild anarchical deviants, the authors fail to mention the wording of the right-to-arms provision of the Pennsylvania Constitution of 1776 that reads: "That the people have a right to bear arms for *the defense of themselves* and the state. . . ."<sup>38</sup> This right was reaffirmed in the 1790 Constitution in a passage that reads: "That the right of citizens to bear arms, *in defense of themselves* and the state, shall not be questioned."<sup>39</sup> 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, non-militia 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"<sup>40</sup> without some evidence that this was so.

Nor was the Pennsylvania minority alone in attempting to amend the constitution to protect a 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

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<sup>37</sup>The Pennsylvania Convention, the second to ratify the Constitution, did so on December 12, 1787. The first state convention to append proposed amendments was Massachusetts — the sixth state to ratify — which voted for ratification on February 6, 1788. After Massachusetts, all the remaining seven states, except Maryland, proposed amendments to the Constitution along with their vote to ratify. These proposals can be accessed online from the Avalon Project at Yale Law School, *available at* <http://www.yale.edu/lawweb/avalon/18th.htm>.

<sup>38</sup>COGAN, *supra* note 29, at 184 (emphasis added). The Vermont Constitution of 1777 contains identical language. *Id.* VT. CONST. of 1777, ch. I, art. XV.

<sup>39</sup>*Id.* (emphasis added).

<sup>40</sup>UVILLER & MERKEL, *supra* note 2, at 270 n.90.

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.<sup>41</sup>

As in Pennsylvania, this proposal does not explicitly mention the militia. The right to 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.”<sup>42</sup> Uviller and Merkel grudgingly concede that this proposal “*might* support the argument that a private right to gun possession is protected.”<sup>43</sup> 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 defense” or “the defense of the state,”<sup>44</sup> though, as the authors note, the Massachusetts Bill of Rights was qualified in this way.<sup>45</sup>

Uviller and Merkel should be estopped from responding that the language in the Pennsylvania and Vermont constitutions does not reflect an individual right that may be exercised both within and outside of militia service, as their interpretation of these passages is inconsistent with such an argument.<sup>46</sup> When discussing the later Kentucky case of *Bliss v. Commonwealth*,<sup>47</sup> in which the court interprets the very same language in the Kentucky Constitution as protecting an individual right, the authors readily concede it does indeed have this broader meaning. They respond by distinguishing it on the ground that this

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<sup>41</sup>COGAN, *supra* note 29, at 181 (emphasis added). This recommendation is in contrast with the Massachusetts state constitution that protected only the right to bear arms “for the common defense.” *Id.* at 183; MASS. CONST. of 1780, pt. 1, art. XIII.

<sup>42</sup>*Id.* at 181 (emphasis added). 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 2, at 82.

<sup>43</sup>UVILLER & MERKEL, *supra* note 2, at 82 (emphasis added). Even a single example of a patently individual right to bear arms rebuts a charge commonly made by collective rights proponents, and now by militia-conditioned individual rights proponents, that the unconditioned individual rights formulation is a pure invention of modern gun rights scholars with no basis in history.

<sup>44</sup>COGAN, *supra* note 29, at 181–82.

<sup>45</sup>UVILLER & MERKEL, *supra* note 2, at 82.

<sup>46</sup>Others not so constrained may contend that “in defense 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—*infra* in Part II D.

<sup>47</sup>12 Ky. 90, 2 Litt. 90 (1822).

wording differs from that of the Second Amendment.<sup>48</sup> By striking down a law banning concealed weapons, they note that “the [Kentucky] Court of Appeals acknowledged a private, state constitutional right for purposes having nothing to with militia service.”<sup>49</sup>

The authors also dismiss the 1846 Georgia case of *Nunn v. Georgia*, in which the state judge found a law banning certain pistols to be unconstitutional under both the Georgia constitution and the Second Amendment.<sup>50</sup> Here the authors criticize the judge for not considering himself sufficiently bound by the “revered” John Marshall’s earlier opinion in *Barron v. Baltimore*<sup>51</sup> in which he held that the Bill of Rights applied only to the federal government.<sup>52</sup> “[F]or those who seek a coherent doctrine,” they write, “*Nunn v. Georgia* is a case of no importance whatever.”<sup>53</sup> But coherent doctrine is not why we look to *Nunn*. Rather *Nunn* is significant because the claim that the right to keep and bear arms was thought to exist only in the context of militia service is inconsistent with its holding.

Moreover, in their dismissal of *Nunn*, Uviller and Merkel fail to appreciate that many 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.<sup>54</sup> Strictly speaking, *Barron* merely deprives the rights specified in the Bill of Rights of federal protection. The Court does not hold that these rights do not also apply to the states, should state courts so decide. 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 they 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 “defense.”<sup>55</sup> 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.”<sup>56</sup> That the right to keep and bear arms was

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<sup>48</sup>See UVILLER & MERKEL, *supra* note 2, at 28.

<sup>49</sup>*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.

<sup>50</sup>See 1 Ga. 243 (1846).

<sup>51</sup>32 U.S. 243 (1833)

<sup>52</sup>See UVILLER & MERKEL, *supra* note 2, at 28–30.

<sup>53</sup>*Id.* at 30.

<sup>54</sup>See AKHIL AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 147–56 (1998) (describing “the declaratory theory” of the Bill of Rights).

<sup>55</sup>See PA. CONST. art. I, § 21.

<sup>56</sup>UVILLER & MERKEL, *supra* note 2, at 164.

viewed as an extension of the fundamental natural right of self defense is much discussed in the literature but is cursorily dismissed in this book.

The authors attempt to mitigate *Nunn v. Georgia* by discussing the 1840 Tennessee case of *Aymette v. State*.<sup>57</sup> 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.”<sup>58</sup> Uviller and Merkel claim that the state constitutional provision in question was “similar in form and words to the federal Second Amendment.”<sup>59</sup> But unlike the Second Amendment (and the other proposed amendments and state right-to-arms provisions discussed above), the Tennessee provision qualified the right to bear arms by the phrase “for their common defense”<sup>60</sup> and the court places great stress on this language in the passage quoted by Uviller and Merkel.<sup>61</sup> As the authors acknowledge elsewhere,<sup>62</sup> this language suggests a more military or mutual defense meaning.

In contrast to the language of the Tennessee constitution, however, the Senate rejected a proposal to add the qualifier “for the common defense” to the language of the Second Amendment.<sup>63</sup> While the authors dismiss the significance of the Senate’s refusal on the ground that this qualifying language was redundant,<sup>64</sup> 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 bear arms can you contend that

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<sup>57</sup>21 Tenn. 154 (1840)

<sup>58</sup>*Id.* at \_\_. The authors are wrong to claim that individual rights scholars are guilty of “[i]gnoring the case from Tennessee.” UVILLER & MERKEL, *supra* note 2, at 27. It is widely discussed in the Second Amendment literature. See e.g. STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* 94 (1984). By contrast, Halbbrook 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 its 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. . . .*” *Id.* (quoting *Simpson v. State*, 13 Tenn Reports (5 Yerg.) 356, 360 (1833))(emphasis added).

<sup>59</sup>UVILLER & MERKEL, *supra* note 2, at 27.

<sup>60</sup>*Id.*

<sup>61</sup>*See id.*

<sup>62</sup>*See id.* at 104.

<sup>63</sup>*See id.* at 103.

<sup>64</sup>*Id.* (“[I]nvocation of arms bearing in the militia already clearly proclaimed the purpose of common defense to eighteenth century ears.”). But the Second Amendment does not refer to “arms bearing in the militia.”

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 “defense of themselves” language. A member of the public in 1791 reading the Second Amendment would not likely 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 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. 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 people 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 Common Enemy. . . .<sup>65</sup>

Nasson then goes on to extol the virtue of popular resistance to a “foreign foe” and condemn standing armies in time of peace.<sup>66</sup> Notwithstanding his concern for the common defense, Nasson nevertheless reads a right to keep arms in the Second Amendment as also a personal one unconnected with militia service. Note also, *contra* Wills, the use of “arms” for hunting.

This quote goes unmentioned by Uviller and Merkel though it appears in the Fifth Circuit’s opinion in *U.S. v. Emerson*,<sup>67</sup> an opinion they much discuss and

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<sup>65</sup>Letter from Samuel Nasson to George Thatcher (July 9, 1789) *in* CREATING THE BILL OF RIGHTS: DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 260–61 (Helen E. Veit, et al. eds., 1991) (emphasis added).

<sup>66</sup>*See id.*

<sup>67</sup>270 F.3d 203, 253 (5th Cir. 2001).

disparage.<sup>68</sup> Instead of letting readers make up their own minds about such contemporary statements, this highly inconvenient 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 [sic] conclude that the term refers to carrying or wearing arms generally.”<sup>69</sup>

That Nasson was not alone in this individualist reading of the right to arms is evidenced by an earlier letter from Massachusetts historian and pastor Jeremy Belknap to Federalist Paine Wingate in May of 1789. Belknap writes of his pleasure with Samuel Adams’ investiture speech as lieutenant governor in which Adams affirmed that:

“The 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*.<sup>70</sup>

As it turned out, none of these “personal and domestic” rights were included among the amendments proposed by the Massachusetts convention. Would anyone, however, fairly conclude from this omission that the liberty of the press or the right of conscience were 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 public meaning of the Second Amendment or the right to keep and bear arms indicating that it 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 signal 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. These references to a personal, individual right “to keep arms” is significant, therefore, because

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<sup>68</sup>UVILLER & MERKEL, *supra* note 2, at 220–24.

<sup>69</sup>*Id.* at 222.

<sup>70</sup>Letter from Jeremy Belknap to Paine Wingate (May 29, 1789), in *CREATING THE BILL OF RIGHTS: DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS* at 241 (Helen E. Veit, et al. eds., 1991) (emphasis in original).

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.

Perhaps because they had not previously been discussed in the Second Amendment literature, Wills fails to consider any of these examples in his exposition on the meaning of “to keep.”<sup>71</sup> The best counter-example 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.’”<sup>72</sup> 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.<sup>73</sup>

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 consequences of terms, and to the entire context of Madison’s sentence.”<sup>74</sup> But given his lack of evidence, Wills’ argument concerning “to keep” really boils down to his tenuous claim that “bear arms” is exclusively military and therefore so too must “to keep” be military when conjoined with it. With Nasson, Belknap and the authors of the

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<sup>71</sup>It is typical in this debate for the individual rights scholars to produce the 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.

<sup>72</sup>Wills, *supra* note 19, at 67 (emphasis added by Wills). He also offers a quote from Federalist 25 in which Hamilton is describing “the objection to standing armies was to *keeping them up* in a season of tranquility.” *Id.* at 67 n. 10; and he notes that: “As an English noun, ‘keep’ meant the permanently holdable part of a castle. . . .” *Id.* at 67 n. 14. Fair minded reader 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 what he accuses individual rights scholars: “seeking out every odd, loose, or idiosyncratic” use of a term “in defiance of the solid body of central references” (*id.* at 64), or what he dubs the “throw-in-the-kitchen-sink approach” (*id.* at 65)?

<sup>73</sup>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. See UVILLER & MERKEL, *supra* note 2, at 12. Additional evidence is needed to fully refute this claim. For a summary, see *U.S. v. Emerson*, 270 F.3d 203, 236–59 (5th Cir. 2001). Wills work is still worth mentioning, however, because writers like Uviller and Merkel still rely heavily on his *New York Review of Books* essay that “bear arms” was an exclusively military term.

<sup>74</sup>*Id.* at 68.

Massachusetts minority report, however, we have actual members of the public at the founding using the right to keep arms and describing it as a nonmilitary right. Appeals to “context” cannot silence 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 I do not reiterate here<sup>75</sup>—are direct evidence of what the public thought the phrase “the right to keep and bear arms” in the Second Amendment 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 real people thought the specific words of the Second Amendment objectively manifested to them. 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 their 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 connotation. ‘Carrying a gun’ lacks the implication of *bearing arms* and, of course, the Constitution nowhere mentions a ‘right to carry a gun.’”<sup>76</sup> The 1785 edition of Samuel Johnson’s Dictionary of the English Language repeatedly defines “bear” as “carry.” After describing “bear” as a “word used with such latitude that it is not easily explained,” its first meaning is

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<sup>75</sup>For a useful compendium of examples, see *U.S. v. Emerson*, 270 F.3d 203, 236–59 (5th Cir. 2001). Wills, like Uviller and Merkel and others who oppose the individual rights interpretation love to deride the reiteration of the same examples, as though examples of usage wear out from overuse. In contrast, they offer no examples of persons from the founding era who held the view of the Second Amendment or the right to keep and bear arms that they claim everyone held, and instead use “context” to explain away and trump the contrary evidence. When it comes to historical evidence, however, you cannot beat something with nothing.

<sup>76</sup>UVILLER & MERKEL, *supra* note 2, at 26–27. See also *id.* at 149 (The right to arms is declared by the verbs, “keep and bear,” a phrase carefully selected to alternatives such as “have,” “own,” “carry,” or “possess.”) There is no independent evidence offered as to the “care” that went into this verbal choice. That this phrase must have been carefully chosen from these other words that connote a different meaning assumes what must be shown: that these other words would indeed have connoted a different meaning.

“To carry as a burden,” followed immediately by “To convey or carry,” “To carry as a mark of distinction,” “To carry, as in show, and “To carry, as in trust.” 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 “to bear, carry, bring, sustain, produce, bring forth,” and mentions “to carry” five more times in discussing the term’s derivation from other languages.<sup>77</sup> So far as Johnson and Webster are concerned, “to bear” simply means to carry or wear.

This usage is borne out in the context of the Second Amendment by the earliest known reference to the right to arms by the Supreme Court that goes unmentioned by Uviller and Merkel (or Wills), though the authors 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.<sup>78</sup> In his infamous opinion in *Dred Scott v. Sandford*,<sup>79</sup> Chief Justice Taney denies that blacks could have been considered citizens of the United States for, if this were the case, then blacks would enjoy along with whites “the full liberty of speech . . . and to keep and carry arms wherever they went.”<sup>80</sup>

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. Taney equates the right to keep and bear arms in the Second Amendment with the equally nonmilitary liberty of speech protected by the First Amendment. And he obviously thinks 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 since they rely on the nearly-as-vile ruling in *U.S. 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.<sup>81</sup> According to the reasoning of the Court in *Cruikshank* — cited approvingly by the authors — the defendants could not have been guilty of violating the victims’ rights under color of state law because the entire Bill of Rights, including the rights of assembly

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<sup>77</sup>Noah Webster, *An American Dictionary of the English Language* (1<sup>st</sup> ed. 1828)(not paginated).

<sup>78</sup>UVILLER & MERKEL, *supra* note 2, at 13.

<sup>79</sup>60 U.S. 393 (1856)(emphasis added).

<sup>80</sup>*Id.* at 417.

<sup>81</sup>*United States v. Cruikshank*, 92 U.S. 542 (1875).

and to keep and bear arms, applies only to federal and not state exercises of power.<sup>82</sup>

Although today we protect such liberties (ahistorically and incompletely) by “incorporating” them into the Due Process Clause, as I discuss below in Part IV, the protection of the right to arms against infringement by states is more properly included within the original meaning of the Privileges or Immunities Clause of the Fourteenth Amendment. 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 I have discussed for establishing original meaning of an amendment enacted in 1791, and I sympathize with the objection. The farther in time one gets from promulgation, the less germane is evidence of public meaning. I offer this information because nineteenth-century cases are discussed at length by the authors in their opening chapter and because they concede that these cases interpreting the language “in defense of themselves and the state” represent the antithesis of their view. This in turn is relevant to the meaning of the same language used at the founding in right-to-arms provisions in state constitutions discussed above.

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. 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. In this, its earliest known mention of the Amendment, it clearly did.

#### D. Was “*Defense 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 defense 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 outside the militia context. That is why they go to such lengths to marginalize these speakers. Someone else, however, might claim that the phrase “for the defense of themselves” was the

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<sup>82</sup>UVILLER & MERKEL, *supra* note 2, at 14. 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.

equivalent of “for the defense 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 this theory:

- (1) First, and most importantly, I am aware of no direct evidence of anyone at the time of the founding asserting that this is what “in defense of themselves” means.
- (2) As a textual matter, “in defense 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 a drafter 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 that refers to the right of “the people to be secure in *their* persons, houses, papers, and effects. . . .”<sup>83</sup> So here “the people” is being used as the plural of individual person as reflected in the use of the word “their” here — just like “themselves” in state constitutions. Similarly, the English Bill of Rights refers to the right of individual protestant “Subjects” to “have Arms for *their* Defence”<sup>84</sup> There is no difference in meaning between “their defense” and “in defense of themselves.”
- (4) It is true that the founders used “no person” and “any person” in the Fifth Amendment to refer to individuals, 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 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 defense of themselves” language appears: “[T]he people have a right to hold *themselves*, their houses, papers, and possessions free from search and seizure; and therefore warrants without oaths or affirmations first made, affording a sufficient

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<sup>83</sup>U.S. CONST. amend. IV. To forestall future debate on this point, “persons” in this passage refers to their bodies as distinct from their possessions.

<sup>84</sup>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).

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.”<sup>85</sup> 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.<sup>86</sup> Other state constitutional protections from unreasonable searches refer to “every subject” with no apparent difference in meaning.<sup>87</sup> Or consider this 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.”<sup>88</sup>

- (6) As was already discussed, language expressing “in defense of the community” was readily available and in use in, for example, the Massachusetts constitution that refers to “a right to keep and bear arms for the common defense” — qualifying language that was proposed and rejected in the Senate as an amendment to the Second Amendment.<sup>89</sup>
- (7) Finally, this interpretation of “in defense 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 defense 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 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.

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<sup>85</sup>COGAN, *supra* note 29, at 235 (emphasis added).

<sup>86</sup>*Id.* (“That the People have a Right to hold *themselves*, their Houses, Papers and Possessions free from Search or Seizure . . . .”) (emphasis added).

<sup>87</sup>*Id.* at 234 (quoting the Massachusetts Constitution of 1780 and the New Hampshire Constitution of 1783).

<sup>88</sup>MASS. CONST. of 1780, art. XXIX (emphasis added).

<sup>89</sup>UVILLER & MERKEL, *supra* note 2, at 103. *See also supra* notes 63-64 and accompanying text.

### 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.”<sup>90</sup> As we have seen, the examples discussed and others they omit include numerous uses of the term outside the military context. With one exception, no quantitative evidence is presented here to show that these uses were aberrant.<sup>91</sup> The exception is found in a footnote, where the authors quote from 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. Congress between 1774 and 1821” and finding that “the phrase had an unambiguously military meaning.”<sup>92</sup> 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 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.<sup>93</sup> But this cannot establish, as Yassky asserts, that during this period “the phrase had an unambiguously military meaning.” Why not? Because if the

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<sup>90</sup>UVILLER & MERKEL, *supra* note 2, at 194.

<sup>91</sup>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 they rely. Often, such statements are all that is available and I have relied upon such evidence myself. *See supra* note 4. 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” (UVILLER & MERKEL, *supra* note 2, at 270 n.90) — are difficult to establish. 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 know of no single person who stated that the Second Amendment meant what Uviller and Merkel claim everyone but a few radicals thought it meant.

<sup>92</sup>UVILLER & MERKEL, *supra* note 2, at 296 n.7 (quoting David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 618 (2000)).

<sup>93</sup>Although the years in the database seem to have been expanded since Yassky’s search, I used *A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774–1875*, available at <http://memory.loc.gov/ammen/amlaw/lawhome.html> (last visited Nov. 2003).

only discussions in Congress of arms during this period were in a military context, then this database cannot tell us whether the term “bear arms” would be understood as also having a nonmilitary meaning outside a discussion of military matters. In other words, 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 a phrase that Uviller and Merkel might concede to have a nonmilitary connotation, like “carry arms,” “possess arms,” and “have arms” and found just one nonmilitary result.<sup>94</sup> Significantly, I also found no references at all in this database to “keep arms” besides one (garbled) reference to the Second Amendment.<sup>95</sup> This finding further suggests both (1) that the discussions in this database during this period were exclusively about military matters so 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.<sup>96</sup> Professor Yassky’s findings should not be surprising. Given the narrowly interpreted powers of Congress during the era he surveyed — 1774–1821 — it is hardly unexpected that Congressional debates would only be discussing arms 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 database now extends to 1875 and covers the tumultuous years before, during,

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<sup>94</sup>“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 97 (2d ed. 1863) (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.

<sup>95</sup>A second reference to “keep arms” in the right to arms provision of the Constitution of the Confederate States of America is actually a mis-transcription of the original, which is also available for comparison on the relevant page.

<sup>96</sup>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 Belknap statements quoted above — of “keep arms” referring to an individual right wholly apart from any active service in an organized militia.

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” appear in this era to refer to a personal right outside the context of the militia. All of these examples substantiate the proposition that, when Congress was discussing nonmilitary matters that concerned the right to arms, the phrase “bear arms” was deemed perfectly appropriate.

On June 28, 1856, Representative Alexander H. Stephens proposed a section consisting of 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 . . . *the 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.”<sup>97</sup> 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 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.<sup>98</sup>

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. Resolved, That the present executive government of the United States has subverted, for the time, in large portions of the loyal States,

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<sup>97</sup>U.S. HOUSE JOURNAL, 34th CONG., 1st Sess. 1126 (1856) (emphasis added).

<sup>98</sup>U.S. HOUSE JOURNAL, 37th CONG., 1st Sess. 102 (1861) (emphasis added)

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, ad libitum, 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 rights of property . . . ; all of which must be repudiated and swept away by the sovereign people.<sup>99</sup>

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] “Klu-Klux-Klan,” the objects of which were, by force and terror, . . . *to deprive colored citizens of the right to bear arms.*”<sup>100</sup> Clearly, this reference to a right to bear arms, unaccompanied by a right to keep arms, is outside the militia context. Such abuses of privileges and immunities of citizens of the United States is what motivated Congress to propose the Fourteenth Amendment.<sup>101</sup>

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 not 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, there is no

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<sup>99</sup>U.S. SENATE JOURNAL, 38th CONG., 1st Sess. 53–54 (1864) (emphasis added)

<sup>100</sup>U.S. HOUSE JOURNAL, 37th CONG., 2d Sess. 716 (1872) (emphasis added)

<sup>101</sup>See *infra* notes 115–24, and accompanying text.

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 evidence their empirical claim that the original meaning of the right was exclusively a military one:

- (a) A statement asserting the opinion of the speaker that the right to keep and bear arms in the Second Amendment is conditioned on the continued existence of an organized militia;
- (b) A statement explicitly rejecting the assertions of the importance of an individual right to keep and bear arms independent of an organized militia;
- (c) A statement decrying the Second Amendment for having rejected the individual right to keep and bear arms for their own as well as 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 they claim everyone (or nearly everyone) held. 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, but only to establish that it had a broader meaning as well that the public would reasonably have attributed to it unless the right was qualified expressly, which the Senate declined to do. In addition, the right “to keep” arms had no obvious military connotation. If it establishes nothing else, the evidence presented in Part II also 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 derisively—or of individual rights scholars, who the authors repeatedly disparage throughout the book as “advocates”<sup>102</sup> rather than historians — or worse.<sup>103</sup>

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<sup>102</sup>*Id.* at 246 n.9.

<sup>103</sup>*See* discussion *infra* notes 138-41 and accompanying text.

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 explanative clause.”<sup>104</sup>

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.”<sup>105</sup> Obviously this is wishful hyperbole. If the right to arms had been made explicitly conditional on participation in the militia, we would not be having this debate. The authors claim that the Second Amendment “guaranteed the right to keep and bear arms *in the militia*,”<sup>106</sup> 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.”<sup>107</sup> 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. This does not prevent them, with equal ardor, from insisting that these formulations too “expressly linked” the right to arms to militia service.<sup>108</sup>

The Founders, however, were quite capable of expressly qualifying an individual right—indeed to qualify a right by military service. They did just this in the Fifth Amendment when they specified an 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. . . .”<sup>109</sup> 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

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<sup>104</sup>*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).

<sup>105</sup>*Id.* at 149 (emphasis added).

<sup>106</sup>*Id.* at 114 (emphasis added).

<sup>107</sup>*Id.* at 150.

<sup>108</sup>*Id.* at 83 (referring to the proposal by North Carolina at the ratification convention).

<sup>109</sup>U.S. CONST. amend. V (emphasis added).

the proposal that would have expressly qualified the exercise of the right to be “for the common defense.”<sup>110</sup>

Eugene Volokh has chronicled how prefacing constitutional rights with affirmations of purposes was quite common in state constitutions of the day.<sup>111</sup> 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.”<sup>112</sup> Lest any weight be placed on the 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.”<sup>113</sup>

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.”<sup>114</sup> But this misses the significance of Professor Volokh’s 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) such language was not uncommon and, so far as we know, was not elsewhere interpreted to limit or condition the right that followed. Their 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 the anti-gun-rights opponents have raised to date because they finally concede that the right was one held by individuals not by state governments. But neither is it compelling. The fact that the right to arms was not made expressly conditioned on the preface

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<sup>110</sup>UVILLER & MERKEL, *supra* note 2, at 103.

<sup>111</sup>See Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. Rev. 793, 793–95 (1998). In his article, Professor Volokh explains why these clauses “shed some light” on the interpretation of the Second Amendment:

- (1) They show that the Second Amendment should be seen as fairly commonplace, rather than strikingly odd.
- (2) They rebut the claim that a right expires when courts conclude that the justification given for the right is no longer valid or is no longer served by the right.
- (3) They show that operative clauses are often both broader and narrower than their justification clauses, thus casting doubt on the argument that the right exists only when (in the courts’ judgment) it furthers the goals identified in the justification clause.
- (4) They point to how the two clauses might be read together, without disregarding either.

*Id.* at 795.

<sup>112</sup>COGAN, *supra* note 29, at 94.

<sup>113</sup>*Id.*

<sup>114</sup>UVILLER & MERKEL, *supra* note 2, at 24.

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.

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?

The right to keep and bear arms, whatever its proper scope, like the rest of the Bill of Rights, was originally a constraint only on federal power, not that of states. This structural feature of the original Constitution was fundamentally altered by the enactment of the Fourteenth Amendment that dictates that “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . .”<sup>115</sup> The question arises whether the right to bear arms was among these privileges or immunities.

The authors vehemently deny this possibility on two grounds. First, because the right to arms was not specifically mentioned. Of course *no* particular right is specified as a privilege or immunity, so this 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*<sup>116</sup> did not go this far.<sup>117</sup>

Understanding the original meaning of “privileges or immunities” requires evidence of public meaning. Unfortunately, the authors rely for their evidence solely on the work of Raoul Berger. While Berger never made up evidence, as was done by historian Michael Bellesiles,<sup>118</sup> one must always take Berger’s

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<sup>115</sup>U.S. CONST. amend. XIV.

<sup>116</sup>83 U.S. 36 (1872).

<sup>117</sup>*See id.* at 79–80 (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. \*\*\* (2003).

<sup>118</sup>*See* James Lindgren, Book Review, *Fall From Grace: Arming America and the Bellesile Scandal*, 111 YALE L.J. 2195 (2002) (pointing out Bellesile’s fabrication of evidence). Though Uviller and Merkel’s book appeared long after the disgraced Michael Bellesiles’s scholarship began to be discredited, they repeatedly cite and discuss his work

claims with a very large pinch of salt, and carefully check the sources for context. The authors seem unaware of the refutation of Berger's thesis in the pathbreaking work of Michael Kent Curtis, especially his influential book (also published by Duke), *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights*.<sup>119</sup>

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. While I will not summarize his argument or evidence here, Curtis has shown that the primary purpose of the Privileges or Immunities Clause was to reverse *Barron v. Baltimore*<sup>120</sup> and extend federal protection against state violations of the rights contained in the Bill of Rights — especially including the right to keep and bear arms — and other rights as well.<sup>121</sup> The lack of any reference to Curtis' work, and the paucity of their own sources, severely undermines the authors' confident 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 reflects, the right to bear arms was the right "to keep and carry arms" wherever one goes.<sup>122</sup> Though Michael Curtis is no gun rights advocate, he repeatedly references statements that include the right to keep and bear arms among those rights protected by the Constitution.<sup>123</sup> For example, the Freedman's Bureau Act of 1866, approved by a supermajority of Congress over a Presidential veto, provided that:

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with favor, even emphasizing at one point his receipt of the now-revoked Bancroft Prize. See UVILLER & MERKEL, *supra* note 2, at 292 n.54. While acknowledging some of Bellesiles' now-vindicated critics, in the same footnote they discount the significance of their contrary findings.

<sup>119</sup>MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986).

<sup>120</sup>32 U.S. 243 (1833).

<sup>121</sup>In my writings, I have shown how "privileges or immunities" includes the natural rights retained by the people as well as additional privileges established by the Bill of Rights. See Barnett, *supra* note 4, 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 concur that it was included among the privileges or immunities of citizens.

<sup>122</sup>*Dred Scott v. Sandford*, 60 U.S. 393, 417 (1856).

<sup>123</sup>See CURTIS, *supra* note 119, at 52, 53, 56, 72, 88, 104, 111, 112, 138, 140-41, 164, 167, 178-79, 187, 203, 217, and 238 (discussing references to the right to arms in the context of the drafting and ratifying of the Fourteenth Amendment).

[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 to keep and bear arms*, shall be secured to and enjoyed by all citizens of such State or district without regard to race or color or previous condition of slavery.<sup>124</sup>

In 1866 the protection of the individual non-militia-conditioned right to arms for personal security was no secret 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,”<sup>125</sup> an “absolute right,”<sup>126</sup> “an individual entitlement immune from government curtailment,”<sup>127</sup> an “unfettered general license to carry weapons,”<sup>128</sup> an “unrestricted right to weapons,”<sup>129</sup> “individual license” that “prohibit[s] any interference”<sup>130</sup> with a right that would be “immune to government restriction and regulation,”<sup>131</sup> and “free of any government control of arms.”<sup>132</sup>

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

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<sup>124</sup>14 Stat. 176–77 (1866) (emphasis added). That the Act protected the right to keep and 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. And that amendment protects the right *both* from laws that discriminate among the people and laws that abridge equally the privileges or immunities of all citizens.

<sup>125</sup>UVILLER & MERKEL, *supra* note 2, at 9.

<sup>126</sup>*Id.* at 11.

<sup>127</sup>*Id.* at 37.

<sup>128</sup>*Id.* at 54.

<sup>129</sup>*Id.* at 83.

<sup>130</sup>*Id.* at 169.

<sup>131</sup>*Id.* at 1.

<sup>132</sup>*Id.* at 197.

eight amendments—should be subject to reasonable regulation.”<sup>133</sup> Disturbingly, the authors fail to mention 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.<sup>134</sup> Indeed, I know of no individual rights scholar who claims that the Second Amendment is any more absolute than is the First Amendment.

This 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. 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.<sup>135</sup> In this article, which Uviller and Merkel find important enough to criticize elsewhere in their text,<sup>136</sup> the following sentence of the advertisement is italicized: “Of course, *the right to bear arms is no more ‘absolute’ than is the right to speak, to publish, or to assemble.*”<sup>137</sup> This advertisement merely evidences the fact that most individual rights scholars of the Second Amendment have taken the view the authors mysteriously attribute only to Tribe, Amar and Van Alstyne. For this reason, Uviller and Merkel are unable to produce a single example of any individual rights scholar who contends otherwise.

One suspects 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,”<sup>138</sup> or a “dedicated band of individual rights advocates,”<sup>139</sup> or “a growing entourage of individualist interpreters of the Second Amendment.”<sup>140</sup> Indeed, when mentioning historian Professor Joyce Malcolm, whose book *To Keep and Bear Arms: The Origins of an Anglo-American Right* 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

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<sup>133</sup>*Id.* at 245 n.4 (citing Lawrence Tribe and Akhil Amar, *Well-Regulated Militias, and More* N.Y. TIMES, Mar. 27, 2000, at A27; William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1253–54 (1994)).

<sup>134</sup>See e.g., Don B. Kates, *The Second Amendment: A Dialogue*, 49 L. & Contemp. Probs. 143, 145–46 (1986) (“[R]easonable gun controls are no more foreclosed by the second amendment than is reasonable regulation of speech by the first amendment.”).

<sup>135</sup>*Id.* at 244 n.4 (citing Barnett & Kates, *supra* note 17).

<sup>136</sup>UVILLER & MERKEL, *supra* note 2, at 30.

<sup>137</sup>Barnett & Kates, *supra* note 17, at 1189 (quoting *An Open Letter on the Second Amendment*, NEW REPUBLIC, Mar. 15, 1993, at 15) (emphasis added).

<sup>138</sup>UVILLER & MERKEL, *supra* note 2, at 246 n.9.

<sup>139</sup>*Id.* at 38.

<sup>140</sup>*Id.* at 53.

Massachusetts.”<sup>141</sup> 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 not gun control proponents 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 Four of *U.S. v. Carolene Products*:

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 amendments*, which are deemed equally specific when held to be embraced within the Fourteenth.<sup>142</sup>

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. The centrality of the doctrine articulated in Footnote Four to the modern theory of constitutional rights explains why so much energy has been expended to show that the right to keep and bear arms is *not* “a specific prohibition of the of the Constitution.”<sup>143</sup> 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 as it must do when adopting time, place, and manner restrictions on the freedom of speech. And the 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 they favor it.<sup>144</sup> In other words, properly construed, an individual-rights reading of the Second Amendment prevents rather than proposes a radical policy measure—as evidenced by the fact that on three occasions Congress passed

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<sup>141</sup>*Id.* at 246 n.9.

<sup>142</sup>*U.S. v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938).

<sup>143</sup>For a critique of this modern theory, see Barnett, *supra* note 4, at 224-52.

<sup>144</sup>Though the denial may be disingenuous. See Barnett & Kates, *supra* note 17, at 1254–59 (describing the prohibitionist agenda of the gun control movement).

statutes expressly recognizing the Amendment as protecting an individual right unconditioned on militia service.<sup>145</sup>

## 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 how “militia” is defined in the amendment, and whether it no longer exists. Therefore, after their assertion that the right to bear arms is conditioned on the continued existence of the militia, Uviller and Merkel’s next most important claim is that, because the militia has been abolished, the condition for the exercise of the right no longer exists and 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 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.<sup>146</sup>

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 defense, at the call of local authority, and above all, as a viable alternative to the feared standing army.<sup>147</sup>

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<sup>145</sup>In addition to the Freedman’s Bureau Act of 1866, see Requisition Act of 1941, ch. 445, 55 Stat. 742 (1941) (“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.”) and the FIREARMS OWNERS’ PROTECTION ACT, §1(b), 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.”). See also Stephen P. Halbrook, *Congress Interprets the Second Amendment: Declarations by a Co-Equal Branch on the Individual Right to Keep and Bear Arms*, 62 TENN. L. REV. 597 (1995).

<sup>146</sup>UVILLER & MERKEL, *supra* note 2, at 228.

<sup>147</sup>*Id.* at 157 (citation omitted).

Now it is possible to quarrel with this definition. At the end, for example, it seems to build into the definition of militia that “above all” it must be a “viable alternative” to a standing army suggesting that if it is not 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 that was also needed for national defense. In the 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 when regular forces are preoccupied with other matters or cannot be on the scene as fast as locals.<sup>148</sup>

With this caveat to one side, Uviller and Merkel acknowledge, correctly, that the original militia to which the Second Amendment refers is not the select militia of the National Guard, but instead is what they repeatedly call the “militia-of-the-whole.”<sup>149</sup> Are they then correct to claim, as they do at considerable length, 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”?<sup>150</sup> 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, they 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 members 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

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<sup>148</sup>See U.S. CONST., art. 1, § 8 (Congress shall have power “To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.”).

<sup>149</sup>See generally UVILLER & MERKEL, *supra* note 2, at 109–44.

<sup>150</sup>*Id.*

(2) *the unorganized militia, which consists of the members of the militia who are not members of the National Guard or the Naval Militia.*<sup>151</sup>

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.<sup>152</sup> Though they note the distinction adopted by statute in 1903 between the “active militia” and “an unorganized militia (the nonenrolled male population between eighteen and forty-five),”<sup>153</sup> they twice repeat a claim taken from a 1940s law review article 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.”<sup>154</sup> So far as I know, this claim is not actually false, but it certainly is misleading to use it 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.

The authors might respond that this is not the “republican” militia they and the Founders had in mind: a “well regulated” militia that is to be properly trained and drilled. But the federal government retains the power to train and discipline

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<sup>151</sup>10 U.S.C. §311 (2003)(emphasis added). It should be noted how similar this provision is to the proposal by Henry Knox which, the authors note, “proposed to retain the militia-of-the-whole 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 2, at 71. 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 states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years.”

<sup>152</sup>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 2, at 142. A lack of funding, however, does not cause the militia to evaporate, but it is at present “unorganized” as current federal law accurately describes it.

<sup>153</sup>UVILLER & MERKEL, *supra* note 2, at 134.

<sup>154</sup>*Id.* at 33. *See also id.* at 137 (“[L]awmakers ‘eliminated the word “militia” from the War Department organization by changing the name of the supervisory agency to National Guard Bureau.’”).

the militia if it so chooses.<sup>155</sup> What the federal government cannot do — if we are to take the preface to the Second Amendment seriously—or at least it has not done, is abolish the militia altogether rather than to leave it unorganized.

The irony is that, although the author’s 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. 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. 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.<sup>156</sup>

“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.”<sup>157</sup>

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. Another struck the Pentagon killing hundreds of members of the armed forces. A fourth plane, United Flight 93, was heading for the nation’s capital with the likely target being the White House. It was stopped from reaching its target, but not by the Army, 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

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<sup>155</sup>See U.S. CONST. art. I, §8 (granting Congress the power “to provide for organizing, arming, and disciplining the Militia. . . .”)

<sup>156</sup>*Id.* at 142. See also *id.* at 34 (“The need for a whole nation in arms has—in all likelihood permanently—disappeared.”).

<sup>157</sup>*Id.* at 143.

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”<sup>158</sup> who, after learning on their cell phones of the attacks by other planes, acted in concert to protect the capital from a second successful attack in the same morning at the cost of their own lives.<sup>159</sup>

## 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, by evidence of later usage, by the original meaning of the Fourteenth Amendment, by repeated affirmations by Congress, and by the current statutes of the United States.

Notwithstanding their 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”<sup>160</sup> 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<sup>161</sup> and sometimes squelched by scholars like Richard Uviller, William Merkel, or Garry Wills who wish it was not there, the Second Amendment has not been repealed and it has never fallen silent.

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<sup>158</sup>10 U.S.C. § 311 (2003).

<sup>159</sup>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.

<sup>160</sup>UVILLER & MERKEL, *supra* note 2, at 143.

<sup>161</sup>For a recent example, see *Silveira v. Lockyer*, 312 F.3d 1052, *as amended*, 328 F.3d 567, reh.denied, 2003 WL 21004622 (9th Cir. 2003).(asserting the militia-conditioned interpretation of the Second Amendment). The opinion in *Silveira* had to be amended to omit its original reliance on the discredited work of Michael Bellisiles.