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United States v. Emerson: The Second Amendment as an Individual Right–Time to Settle the Issue

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I. INTRODUCTION

“A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”

The political debate over the purpose of the Second Amendment has raged on and off for many years. With the recent church shooting in Texas and the rash of school shootings over the past few years, the debate has once again resumed in

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1 U.S. CONST. amend. II.
Washington and across the country. The question remains, does the Second Amendment guarantee an individual right or is it a collective right of the States to maintain a militia? Unfortunately, the Supreme Court has shied away from settling the issue.  

On April 7, 1999, United States District Court Judge for the Northern District of Texas, Sam R. Cummings, dismissed an indictment against Timothy Emerson declaring that 18 U.S.C. § 922(g)(8) is unconstitutional because it violates Emerson’s rights under the Second Amendment of the Constitution of the United States. Under this act, an individual may be deprived of his Second Amendment rights not because of a past criminal act, or because of a credible risk of future violence, but “merely because he is in a divorce proceeding.” According to Judge Cummings, an individual’s “Second Amendment rights should not be so easily abridged.” This strong reading of the Second Amendment is quite controversial. Scholars have long overlooked the amendment and many courts have ignored it as well. This comment will review the current discussion in the legal arena, the major issue involved, the legal history, and the viability of Emerson as an opportunity for the Supreme Court to settle the issue.

Turning first to Emerson, the court focuses on whether the Second Amendment is an individual or collective right. The court then proceeds to perform a textual, historical, and structural analysis and, in each case, determines that the amendment guarantees an individual right. After reviewing various

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3 This statute states that:
   (g) It shall be unlawful for any person –
   (8) who is subject to a court order that –
   (A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;
   (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
   (C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
   (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury . . .
   to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.


5 Id. at 611.

6 Id.

7 See id.

8 See id. at 600-07.
judicial interpretations and prudential concerns, the court states that "[t]he rights of
the Second Amendment should be as zealously guarded as the other individual
liberties enshrined in the Bill of Rights." In light of the above findings, the court
determines that the statute in question violates Mr. Emerson's constitutional right
to keep and bear arms.\(^9\)

This holding, if upheld on appeal to the Fifth Circuit, will be unique
among modern case law in America. In recent years, many lower courts have held
that the amendment guarantees a collective rather than an individual right.\(^11\)
Unfortunately, the facts of many of these cases have not been sufficiently attractive
to the Supreme Court for a grant of certiorari and subsequent settlement of the
issue. This brings us to the second area of discussion, the viability of this case as a
candidate for review by the United States Supreme Court.

This case should be attractive to the Supreme Court for many reasons. First, it does not involve an individual arguing to keep a machine gun or some other
weapon that the public would abhor. Second, it addresses the removal of an
individual's right to possess any firearm. The Court will not have to address the
issue of limiting an individual's right and where the line should be drawn. Finally,
if this case wins on appeal, there will be a split among the circuits and the Court
may be forced to settle the issue once and for all.

This comment will discuss Emerson's chances for review and look at how
the current United States Supreme Court would decide the case. In short, this case
upholds the right of the individual to keep and bear arms and will provide an
excellent opportunity for the Supreme Court to settle the individual right issue once
and for all.

II. \textit{United States v. Emerson} (Facts of the Case)

In August of 1998, Sacha Emerson filed for divorce in the 119th District
Court of Tom Green County, Texas.\(^12\) Concurrent with the divorce petition, an
application for a temporary restraining order was filed against her husband,
Timothy Joe Emerson. The application, essentially a form, contained only the basic
recitals required under the Texas Family Code and stated no other factual basis for
relief.\(^13\) This order sought to prevent Emerson from completing various financial
transactions, and to prevent threatening communications or physical attacks on his

\(^9\) \textit{Emerson}, 46 F. Supp.2d at 610.

\(^10\) \textit{See id. at 611}.

discussion of holdings in the lower courts).

\(^12\) \textit{See Emerson}, 46 F. Supp.2d at 598-99.

\(^13\) \textit{See id. at 599}.
wife during the course of the divorce.  

In September, a hearing was held on the application for the temporary order. Emerson appeared at the hearing without benefit of counsel. During the hearing, Mrs. Emerson testified about her financial situation and her desire for temporary custody of their minor child. Also, Mrs. Emerson alleged that, during a phone conversation, her husband had threatened to kill the man with whom she had been having an affair. However, no evidence was presented that Emerson had committed, or threatened to commit, any acts of violence towards his wife or child. In its order, the court made no findings that Emerson was a threat to his family, nor did the court warn him that he “would be subject to federal prosecution merely for possessing a firearm while being subject to that order.”

Mr. Emerson unknowingly violated federal law by not disposing of his firearms as required by law. Unfortunately, Emerson eventually brandished a gun in front of his wife and daughter and was subsequently arrested and prosecuted not for his actions, but for possession of a gun.

Emerson’s behavior is reprehensible and he should be held accountable for his actions. Instead of prosecution in a state court for his behavior, Emerson finds himself facing a felony conviction in federal court solely because of a boilerplate restraining order. Should he be punished for violating an order that without clear notice exposed him to such risk? At the time the order was entered, Emerson was not guilty of any crime, nor was there any finding of a current or future threat to his family. When Emerson was barred from possessing firearms, “he was a citizen with a clean record, just like you and me.” His prosecution should be for misuse of his weapon, not his otherwise lawful possession of it.

Emerson claims that the statute barring his possession of a firearm violates his Second Amendment and Fifth Amendment rights guaranteed by the Constitution. This brings us to the principle issue at hand: What right is

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14 See id.
15 See id.
16 See id.
17 See Emerson, 46 F. Supp.2d at 610.
18 See id.
19 Id.
21 See id.
22 Id.
23 Emerson also argued that the Congress, when enacting the statute in question, exceeded its power granted under the Commerce Clause, as well as the Tenth Amendment. See Emerson, 46 F. Supp.2d at 599. However, the Fifth Circuit had previously refused a Commerce Clause challenge finding the Act to be a constitutional exercise of power. See id. at 600. Thus, the court found that a motion to dismiss under the
guaranteed by the Second Amendment? For Emerson to be successful, the Second Amendment must establish an individual right. We now turn to the legal and historical evidence that impacts on this issue.

III. TO KEEP AND BEAR ARMS – AN INDIVIDUAL RIGHT

The Second Amendment has been given little attention in twentieth century jurisprudence. To understand what right is embodied in the amendment, this section will review the history surrounding its proposal and ratification, study the text chosen by the founders, and examine the purpose of the Bill of Rights and the meaning of the bill’s construction. In addition, to determine the original meaning, we will turn to those who interpreted it first, the founders themselves and early legal scholars. This section will then review the Second Amendment’s treatment by the courts and attempt to explain why the legal elite have looked upon the Second Amendment with such disdain.

The text of the Second Amendment to the Constitution of the United States is unique among the amendments in the Bill of Rights because it contains an opening clause which indicates a purpose.24 The debate regarding the opening clause centers between two schools of thought.25 Under the first school, the opening clause and subsequent interpretive case law establishes only a state right to maintain militias and does not protect the individual.26 Under the second school, the amendment protects an individual right inherent to the concept of liberty.27 In recent years, a growing body of scholars have joined the latter school, arming themselves with an increasing amount of historical data.28

The first school of thought has become known as the “states’ rights” or “collective rights” interpretation.29 According to this model, the Second Amendment was created in response to fear of Congressional authority to call out, organize, and train the militia, granted by the newly ratified Constitution.30 Simply

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25 See Emerson, 46 F. Supp.2d at 600.
26 See id.
27 See id.
28 See id. at 609 n.3.
29 See Andrew D. Hertz, Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility, 75 B.U. L. REV. 57, 64 (1995). Hertz also lists other scholarly works espousing the collective right view. See id. at 61 n.11.
stated, the states feared that their "organized militias [might be] disarmed, thereby leaving the states powerless against federal tyranny."31 This interpretation states that the purpose of the amendment is to put the state militias beyond the reach of any attempt of the federal government to disarm, and thus ensures a state's ability to "nullify" infringements on its rights by force, if necessary.32 Proponents of this interpretation also argue that the amendment is tied to the "traditional Whig fear of standing armies."33 Thus, large state militias could always overpower a small federal army if revolt became necessary, and in case of invasion, all could band together to resist a foreign power.34 Those who support this interpretation state that the amendment guarantees no individual right to keep and bear arms, nor was one ever intended by the founders. Rather, the right provided for is purely a states' right which in today's society is satisfied by our National Guard system.35 This interpretation is quite attractive to gun control advocates. However, if taken to its logical conclusion it may have some serious consequences. What would happen if a state's militia regulations clash with federal firearms regulations? Would the state's right to maintain its militia trump the federal regulations under a Second Amendment challenge? A full exploration of this issue could make gun control advocates very uncomfortable.36

The second school of thought, the individual rights interpretation, has become what is known as the "standard model" by many scholars.37 Advocates of this model rely on the plain meaning of the phrase "right of the people" used in the amendment and argue it embodies an individual right of the people.38 In addition, the individual rights model accepts that a purpose of the amendment is to ensure arms for the militia.39 However, it is argued, there is an intended additional purpose

31 Id. at 212.
32 Id.
33 Id.
34 See id.
35 See Kates, supra note 30, at 213.
36 Two authors explore the states' rights view at length and conclude that if taken seriously it would produce some radical consequences that would displease advocates on both sides of the issue. See Glenn Harlan Reynolds & Don B. Kates, The Second Amendment and States' Rights: A Thought Experiment, 36 Wm. & Mary L. Rev. 1737 (1995).
38 Kates, supra note 30, at 213.
39 See id.
to guarantee the right of the individual to keep and bear arms.\textsuperscript{40} In fact, by guaranteeing the individual right, the framers assured that the militia would always be armed.\textsuperscript{41} This places a burden on the collective rights proponents. To prove that their position is correct, they must demonstrate that the amendment was intended to protect the states and that no individual protection was intended, despite the plain reading of text chosen by the framers.\textsuperscript{42} As the following sections will demonstrate, this burden is a heavy one. The historical evidence surrounding the origins of the amendment clearly demonstrates that the framers intended to protect an individual right to keep and bear arms.

\textbf{A. Historical Origins}

History demonstrates a tradition of the individual’s right to keep and bear arms in both colonial North America and in England.\textsuperscript{43} An examination of this right, from early English history through the proposal and ratification of the Second Amendment, bears “proof that the right to bear arms has consistently been, and should still be, construed as an individual right.”\textsuperscript{44}

1. English History

The traditional requirement of Englishmen keeping arms and serving in the military was recorded as long ago as 690 AD.\textsuperscript{45} King Henry II codified the sense of a free man’s right to possess arms in the 12th century.\textsuperscript{46} His Assize of Arms of 1181 not only provided that the nobility and their men have arms, but also “every free layman.”\textsuperscript{47} Every man had to swear that he would possess arms and bear them in service of the King and the realm.\textsuperscript{48} In addition, a freeman could not alienate his

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\textsuperscript{40} See id.

\textsuperscript{41} See id. at 217-18.

\textsuperscript{42} See id. at 213.

\textsuperscript{43} This comment focuses on our English roots for support of the right to keep and bear arms. The author wishes to note that others have turned to the founding fathers’ references to classic philosophers and Greek and Roman history for additional support of an individual’s right to arms. See, e.g., STEVEN P. HALBROOK, THAT EVERY MAN BE ARMED 7-35 (2d ed. 1994).

\textsuperscript{44} United States v. Emerson, 46 F. Supp.2d 598, 602 (1999).

\textsuperscript{45} See id.

\textsuperscript{46} See HALBROOK, supra note 43, at 38.

\textsuperscript{47} Id.

\textsuperscript{48} See id.
arms and, upon death, they were to be given to his heir.\textsuperscript{49} The Assize not only allowed for the arming of the lower classes, but even the lords could not deprive freemen of arms.\textsuperscript{60} Following the death of Henry II, King John came into power oppressing and disarming nobles and commoners alike.\textsuperscript{51} This oppression led to the revolt of 1215, which in turn led to the signing of the Magna Carta.\textsuperscript{52} Through this charter, King John was forced to accept the right of barons to resist the King's power by force.\textsuperscript{53} The baron's ability to resist was guaranteed by a reaffirmation of the militia system set forth in the Assize of Henry II.\textsuperscript{54} Thus, the purpose of armed freemen expanded from the public defense to include resistance of the oppression of the crown.\textsuperscript{55} This sense of purpose was subsequently reinforced by both Henry III and Edward I. In edicts issued in 1230 and 1252, Henry III supported the Assize of Arms.\textsuperscript{56} Later, in the 1285 Statute of Winchester, Edward I required that all men between the ages of fifteen and sixty shall keep arms to keep the peace in the tradition of the Assize.\textsuperscript{57} Both kings were forced to concede that without a standing army, the armed populace not only had the ability to resist foreign aggression but the tyranny of a despot as well.\textsuperscript{58}

With the advent of the firearm, many commoners began to purchase and use them for hunting game.\textsuperscript{59} Fearing the independence of the lower classes, the crown passed legislation limiting possession and use of the new technology to the wealthy landowners.\textsuperscript{60} As time passed and the laws were ignored more and more, Henry VIII lowered the property qualifications to keep arms, and by 1541 all persons could possess firearms subject to length requirements.\textsuperscript{61} After thirty years

\textsuperscript{49} See id.
\textsuperscript{50} See id.
\textsuperscript{51} See HALBROOK, supra note 43, at 39.
\textsuperscript{52} See id.
\textsuperscript{53} See id.
\textsuperscript{54} See id.
\textsuperscript{55} See id.
\textsuperscript{56} See HALBROOK, supra note 43, at 39.
\textsuperscript{57} See id.
\textsuperscript{58} See id. at 40.
\textsuperscript{59} See id.
\textsuperscript{60} See id.
\textsuperscript{61} See HALBROOK, supra note 43, at 41-42. Possession of a handgun less than one yard in length was prohibited and punishable by a fine. See id. at 42.
of failure, there was little left of the crown’s gun control legislation.  

By the mid 17th century, the crown began to disarm its subjects. After the outbreak of civil war in 1642, Charles II desired a strong standing army and sought to disarm the population by allowing officials to seize arms of commoners they judged to be a threat to the peace. In addition, through a series of game laws, Charles II sought to keep the lower classes dependent on the nobility for sustenance, as well as to limit their ability to make war. Blackstone, in his Commentaries on the laws of England, confirmed that the covert purpose of the game laws was to prevent insurrection and government resistance “by disarming the bulk of the people.” After the demise of Charles II, James II continued the practice of selectively disarming the commoners through the game laws. In addition, he would disarm anyone who spoke out in opposition to his policies. These policies and practices led to what is known as the Glorious Revolution. As a result of this revolution, Parliament cast off the rule of James II and passed the English Bill of Rights.

The aim of the Bill was to abolish the standing army of James II and restore the right of the Protestants to keep and bear arms. This Bill destroyed the absolute monarchy in England and the new rulers, William and Mary, accepted it as a condition to rule. Among the complaints set forth in the Bill was a charge that James II had subverted the “[l]aws and Liberties of this Kingdom” by raising a standing army in a time of peace and by disarming the Protestants while the “Papists” were “armed ... contrary to law.” In response to these complaints, the

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62 See id. at 42. Halbrook describes the weakening enforcement of the King’s laws to the point that all could keep firearms and use them for protection. Only the prohibitions on taking game remained in force. See id.


64 See HALBROOK, supra note 43, at 42-3.

65 See id. at 42-43; see also JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 13-93 (1994) (reviewing in great detail the history of Charles II and his policies regarding game laws and disarmament of the commoner).

66 Kates, supra note 30, at 235 (quoting Blackstone). See also HALBROOK, supra note 43, at 43 (also quoting Blackstone).

67 See HALBROOK, supra note 43, at 43; see also MALCOLM, supra note 65, at 94-112 (reviewing in detail the history of James II and his control of firearms).

68 Kates, supra note 30, at 236.

69 See id.; HALBROOK, supra note 43, at 43-44.

70 See HALBROOK, supra note 43, at 43-44.

71 See id. at 43.

72 See Kates, supra note 30, at 236.

73 HALBROOK, supra note 43, at 45 (quoting the English Bill of Rights); see also MALCOLM, supra
Bill set forth thirteen rights guaranteed to the subjects.\textsuperscript{74} Included in these rights were that raising a standing army in peacetime was unlawful; and, "[t]hat the Subjects which are Protestants, may have Arms for their Defence suitable to their Condition, and as are allowed by Law."\textsuperscript{75} In his commentaries, Blackstone reviews the rights of Englishmen under the common law. He includes the right to have arms in the list of five auxiliary rights that serve to protect "the three great and primary rights, of personal security, personal liberty, and private property."\textsuperscript{76} Blackstone stated that:

The fifth and last auxiliary right of the subjects, is that of having arms for their defence suitable to their condition and degree, and such as are allowed by law. Which is also declared by the same statute 1 W.&M. st.2c.2 [the Bill of Rights], and it is indeed, a public allowance under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression. In these several articles consist the rights, or as they are frequently termed the liberties of Englishmen . . . . So long as these remain inviolate, the subject is perfectly free; for every species of compulsive tyranny and oppression must in opposition to one or other of these rights, having no other object upon which it can possibly be employed . . . . And, lastly, to vindicate these rights, when actually violated or attacked, the subjects of England are entitled, in the first place, to the regular administration and free course of justice in the courts of law; next, to the right of petitioning the king and parliament for redress of grievances; and lastly, to the right of having and using arms for self-preservation and defense.\textsuperscript{77}

Clearly, Blackstone's interpretation of the English Bill of Rights and the common law was one of an individual right to arms that would preserve the natural right of resistance and self-preservation.

The greatest significance of the English Bill of Rights is that it provides great support for an individual rights perspective of the founders. Since England has no states, Parliament could only have been concerned with the disarming of the individual and through this act sought to restore a common law right that the

\textsuperscript{74} See HALBROOK, supra note 43, at 45 (quoting the English Bill of Rights).

\textsuperscript{75} Id.

\textsuperscript{76} Id. at 54 (quoting 1 BLACKSTONE, COMMENTARIES *140-41 (St. Geo. Tucker ed. 1803)).

\textsuperscript{77} Id. (quoting 1 BLACKSTONE, COMMENTARIES *143-44 (St. Geo. Tucker ed. 1803)).
monarchy had sought to destroy.78 Thus, from the English common law perspective, the right to arms is an individual one.79

2. Colonial America

The English right to bear arms carried over to the American colonies.80 The English government promised that the colonists and their children would have the same rights as natural-born subjects.81 In fact, many of these rights and principles of English law were incorporated into the charters of the colonies.82 The English view of the right to arms was broadened by the necessities of frontier life in America.83 For protection, every colony passed laws to establish an armed militia.84 Like the traditional English militia, the colonial militia was primarily a defensive force consisting of all men between the ages of sixteen and sixty, with some exceptions.85 Faced with dangers of an untamed wilderness, the colonies not only ordered militia members to be armed, but statutes required the arming of entire households.86

These laws began to expand the traditional English right to keep arms in the sense that colonists were required to bear them as well.87 Even after quashing

78 Kates, supra note 30, at 238.
79 While Parliament sought to protect the commoner’s rights from the crown, the right was qualified with the phrase “as are allowed by Law.” This indicates that the right was not absolute and that Parliament reserved the ability to disarm the subjects if it so desired. Today, England’s firearms regulations demonstrate that is exactly what they meant. See Kates, supra note 30, at 237-38. This qualification of an individual right and Parliament’s actions against the Colonies provide strong support for the individual rights view. See discussion infra Part III.A.2.
80 See Emerson, 46 F. Supp.2d at 602.
81 See MALCOLM, supra note 65, at 138.
82 See id.
83 See id. at 139.
84 See id.
85 See id.
86 See MALCOLM, supra note 65, at 139. Malcolm cites a 1623 law of the Plymouth colony: “[I]t is further ordered that every freeman or other inhabitant of this colony provide for himselfe and each under him able to bear armes a sufficient musket and other serviceable peace of war.” Id. (quoting LAWS OF NEW PLYMOUTH 1623, repr. in THE COMPACT WITH THE CHARTER AND LAWS OF THE COLONY OF NEW PLYMOUTH 31 (Boston, 1836)). In addition, Malcolm cites a similar statute in Virginia: “[A]ll masters of families [are required] to furnish themselves and ‘all those of their families which shall be capable of arms (excepting Negroes) with arms both offensive and defensive.’” Id. (quoting “An Act Preventing Negroes from Bearing Arms” (1640), THE OLD DOMINION IN THE SEVENTEENTH CENTURY: A DOCUMENTARY HISTORY OF VIRGINIA 1606-1689 172 (W. Billings ed., Chapel Hill 1975)).
87 See MALCOLM, supra note 65, at 139. Malcolm cites a 1639 Newport law that required arms to be carried to all public meetings and for trips of more than two miles from town. See id. Additionally, she cites early Virginia statutes that required the carrying of arms when on trips, while working the land, and even
Bacon's Rebellion in 1676, the Governor of Virginia still recognized that an individual's right to bear arms was fundamental.\textsuperscript{88} Subsequently, Virginia passed acts stating that a gathering of five or more armed subjects "without being legally called together in arms" was deemed to be "riotous and mutinous;" otherwise "liberty is granted to all persons to carry arms wheresoever they go."\textsuperscript{89} This need for carrying personal arms did not fade with time in the colonies. Over 100 years later, Connecticut's militia act continued to require that all citizens keep arms, including both members of the militia and "every other householder."\textsuperscript{90} Additionally, in 1770, the colony of Georgia required all white male residents to carry arms to church to defend the colonists "from internal dangers and insurrections."\textsuperscript{91} Thus, throughout the colonial era, the American colonies relied on the armed individual for protection. As a result, the colonists developed a deep sense of self reliance both in defending the colony and in defending themselves from the dangers of the frontier.

In the late eighteenth century, tensions between the British government and the colonies began to mount, primarily due to taxation. With the advent of George III to the throne, the crown was determined to see that the colonies reimbursed them for expenses incurred on their behalf.\textsuperscript{92} These taxes, created by Parliament without representation, caused great concern in the colonies.\textsuperscript{93} As tensions between the colonies and England grew, the government began attempts to disarm the colonists.\textsuperscript{94} Through the militia acts of 1757 and 1763, British officers were empowered to seize arms whenever an officer felt it was necessary for the peace.\textsuperscript{95} Thus, the standing army in the colonies had great power to disarm at their discretion. Adding to the fears of the colonists, the army was not stationed on the frontier but also within the cities.\textsuperscript{96} As a result, fearful colonists began to look to

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\textsuperscript{88} See HALBROOK, supra note 43, at 57.
\textsuperscript{89} Id. (quoting "An Act for the Releife of Such Loyall Persons as have Suffered Losse by the Late Rebells," 29 Car. II, II Hening, STATUTES AT LARGE (VA.) 385 (1676-77)).
\textsuperscript{90} MALCOLM, supra note 65, at 139. The act states that all citizens should "always be provided with and have in continual readiness a well fixed firelock ... or other good fire-arms ... a good sword, or cutlass ... .one pound of good powder, four pounds of bullets ... and twelve flints." Id. (quoting RECORDS OF COLONY OF CONNECTICUT, 8:380).
\textsuperscript{91} Id. (quoting THE COLONIAL RECORDS OF THE STATE OF GEORGIA vol. I, XIX, pt. I, pp. 137-139 (Atlanta, 1904-1910)).
\textsuperscript{92} See MALCOLM, supra note 65, at 143.
\textsuperscript{93} See id. at 144.
\textsuperscript{94} See id.
\textsuperscript{95} See id.
\textsuperscript{96} See id.
\end{flushleft}
themselves for defenses to the looming British army.\textsuperscript{97} When calls for gathering arms were criticized as unlawful, the Boston Evening Post replied that British subjects have the right to possess arms, citing the English Bill of Rights, natural law, and Blackstone.\textsuperscript{98} In 1770, the colonists' fears were confirmed when a group of individuals were fired on by soldiers in Boston in what has became known as the Boston Massacre.\textsuperscript{99} Although the colonists may have started the confrontation by throwing snowballs and other objects, the British soldiers responded with deadly superior force firing on the crowd.\textsuperscript{100} The subsequent occupation of Boston and seizure of the citizens' arms in 1775 was roundly criticized by the founders.\textsuperscript{101}

Throughout this time period, the colonists began to arm themselves and form independent militia groups.\textsuperscript{102} These groups, the familiar Minute Men, became the foundation of the Continental Army.\textsuperscript{103} As the militias grew in numbers, the British moved to seize stores of arms and ammunition held by the colonies.\textsuperscript{104} It was an attempt seize these arms at Lexington that led to the shot heard around the world.\textsuperscript{105}

Reliance on their rights to possess arms was critical to the success of the colonists. When England revoked the colonial charters, it was questioned whether the colonists still possessed the rights of natural born Englishmen.\textsuperscript{106} The Americans responded by declaring these rights were irrevocable, natural rights that "common law might propound but did not create and could not revoke."\textsuperscript{107} Judge Cummings sums up the historical significance of the individual right and its importance to the founders:

The individual right to bear arms, a right recognized in both England and the colonies, was a crucial factor in the colonists' victory over the British army in the Revolutionary War. Without

\begin{itemize}
  \item \textsuperscript{97} See MALCOLM, supra note 65, at 144.
  \item \textsuperscript{98} See id. at 144-45.
  \item \textsuperscript{99} See HALBROOK, supra note 43, at 58.
  \item \textsuperscript{100} See id. at 58-59.
  \item \textsuperscript{101} See id. at 59-60. In drafting the Declaration of Causes of Taking up Arms of 6 July 1775, Thomas Jefferson and John Dickinson stated that General Gage seized arms "in open violation of honour." Id.
  \item \textsuperscript{102} See HALBROOK, supra note 43, at 60; MALCOLM, supra note 58, at 145.
  \item \textsuperscript{103} See HALBROOK, supra note 43, at 60-61.
  \item \textsuperscript{104} See id.
  \item \textsuperscript{105} See id. at 62-63; see also MALCOLM, supra note 65, at 145.
  \item \textsuperscript{106} See MALCOLM, supra note 65, at 145.
  \item \textsuperscript{107} Id.
\end{itemize}
that individual right, the colonists never could have won the Revolutionary War. After declaring independence from England and establishing a new government through the Constitution, the American founders sought to codify the individual right to bear arms, as did their forebears [sic] one hundred years earlier in the English Bill of Rights.\footnote{Emerson, 46 F. Supp.2d at 603.}

Thus, upon arrival on these shores, the colonists came to depend on their natural right to self-defense, and it is that right they sought to codify in the Second Amendment.

\textbf{B. The Ratification Debates}

As we have seen, both English history and common law support an individual rights view to possess arms. The debates over the ratification of the Constitution further demonstrate that the founders intended an individual right to keep and bear arms. After casting off the oppression of Britain, early Americans expressed a deep concern for protecting themselves from tyranny and government oppression. Throughout the ratification debates both the Federalists and Anti-Federalists voiced this concern, often citing the right to arms as the chief defense to a tyrannical government.\footnote{See MALCOLM, supra note 65, at 157.} Perhaps Noah Webster phrased it best by arguing:

\begin{quote}
Before a standing army can rule the people must be disarmed; as they are in almost every kingdom in Europe. The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any band of regular troops that can be, on any pretense, raised in the United States.\footnote{MALCOLM, supra note 65, at 157 (quoting NOAH WEBSTER, AN EXAMINATION INTO THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION (1787), reprinted in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, at 56 (Paul L. Ford ed.) (1888)); see also HALBROOK, supra note 43, at 68 (also quoting Webster).}
\end{quote}

\begin{quote}
The Federalists's promise was that the people would always be sufficiently armed to check a standing army.\footnote{See HALBROOK, supra note 43, at 66.} In Federalist No. 28, Hamilton wrote, "[i]f the representatives of the people betray their constituents, there is then no recourse left but in the exertion of that original right to self-defense which is paramount to all positive forms of government."\footnote{\textit{Id.} at 67 (quoting THE FEDERALIST NO. 28, at 180 (Alexander Hamilton) (Arlington House ed. n.d.).}}
\end{quote}

He also stated in Federalist No. 29 that should
circumstances "at any time oblige the government to form an army of any magnitude that army can never be formidable to the liberties of the people while there is a large body of citizens . . . who stand ready to defend their rights and those of their fellow citizens.\footnote{Id. (quoting THE FEDERALIST No. 29, at 184-85 (Alexander Hamilton) (Arlington House ed. n.d.).)}

In Federalist No. 46, Madison argued that the "ultimate authority" resides in the people.\footnote{Id. (quoting THE FEDERALIST No. 46, at 294 (James Madison) (Arlington House ed. n.d.).}} He predicted that encroachments by government would result in resistance that could ultimately result in "an 'appeal . . . of force.'\footnote{Id. (quoting THE FEDERALIST No. 46, at 298).} Madison added that "a militia amounting to near half a million citizens with arms in their hands . . . fighting for their common liberties" would oppose the government's regular army.\footnote{David Harmer, Securing a Free State: Why the Second Amendment Matters, 1998 BYU. L. REV. 55, 83-84 (1998) (quoting THE FEDERALIST No. 46, at 321 (James Madison) (Jacob E. Cooke ed. (1961)).} Madison reflected with pride that "[t]hose who are best acquainted with the last successful resistance of this country against the British arms" would deny the possibility that the militia could ever be conquered by such a standing army.\footnote{Id. at 84.} He adds that in addition to "the advantage of being armed, which Americans possess over the people of almost every other nation," the state governments who would appoint the militia officers form an "insurmountable barrier" to such ambition.\footnote{Id.} Madison believed that the combination of the right to keep and bear arms and the existence of State government would prevent the federal government from misusing its power.\footnote{See id.} He went on to suggest that a benevolent federal government "would have nothing to fear from an armed [citizenry].\footnote{Id. at 68 (quoting TENCH COXE, EXAMINATION OF THE CONSTITUTION (1788), reprinted in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, at 151 (Paul L.Ford ed.) (1888)).} unlike the kingdoms of Europe who are "afraid to trust the people with arms," whose people if armed would overturn "the throne of every tyranny in Europe . . . in spite of the legions which surround it."\footnote{Halbrook, supra note 43, at 67-68 (quoting THE FEDERALIST No. 46, at 300 (James Madison) (Arlington House ed. n.d.).} Tench Coxe, another prominent Federalist, wrote "[t]he militia, who are in fact the effective part of the people at large . . . will form a powerful check upon the regular troops, and will generally be sufficient to over-awe them . . .\footnote{Id. at 68 (quoting TENCH COXE, EXAMINATION OF THE CONSTITUTION (1788), reprinted in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, at 151 (Paul L.Ford ed.) (1888)).} In a later
writing Coxe expands on this principle:

> The power of the sword, say the minority of Pennsylvania, is in the hands of Congress. My friends and countrymen, it is not so, for THE POWERS OF THE SWORD ARE IN THE HANDS OF THE YEOMANRY OF AMERICA FROM SIXTEEN TO SIXTY. The militia of these free commonwealths, entitled and accustomed to their arms, when compared to a possible army, must be tremendous and irresistible. Who are the militia? are they not ourselves. Is it feared, then, that we shall turn our arms each man against his own bosom. Congress have no power to disarm the militia. Their swords, and every other terrible implement of the soldier, are the birth-right of an American. . . [T]he unlimited power of the sword is not in the hands of either the federal or state governments, but, where I trust in God it will ever remain, in the hands of the people.123

Thus, the proponents of the Constitution promised an individual right to bear arms. They believed this right would put the people in a position to overcome the threat of a standing army, and because the people would have nothing to fear from the government, a bill of rights was unnecessary.124

The opponents of the Constitution did not find these arguments reassuring. Anti-Federalist John Dewitt stated that “a well regulated militia, composed of yeomanry of the country, have ever been considered the bulwark of a free people.”125 He believed that the Constitution, without a bill of rights, would allow the disarming of “all or any part of the freemen of the United States . . . [which will] put it out of the power of the freemen militia of America to assert and defend their liberties. . . .”126 The most influential arguments against ratification of the Constitution without a statement of rights came from the writings of Richard Henry Lee.127 Many of Lee’s proposed rights were later adopted in the Bill of Rights.128 In addition to listing fundamental rights, Lee expressed a fear that Congress would eventually create a “select militia” that could be used by the federal government to dominate the people.129 He believed that these troops would be set apart, resulting

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123 _Id._ at 68-69 (quoting Coxe, _Pennsylvania Gazette_, 20 Feb 1788, 2 DOCU. HY. at 1778-1780 (emphasis added)).

124 _See id._ at 69.

125 _HALBROOK, supra_ note 43, at 69 (quoting _The Antifederalist Papers_ 75 (John Dewitt) (M. Borden ed. 1965)).

126 _Id._

127 _See id._ at 70.

128 _See id._

129 _See id._ at 71.
in the remaining people being "without arms, without knowing the use of them, and defenseless."\textsuperscript{132} Lee adds that "to preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them."\textsuperscript{131}

Out of these concerns, there came a general request from the state conventions for a bill of rights. Among these rights was the right of the individual to keep and bear arms. At the Virginia Convention, Patrick Henry warned that all should "[g]uard with jealous attention the public liberty. Suspect every one who approaches that jewel. Unfortunately, nothing will preserve it but downright force. Whenever you give up that force, you are ruined."\textsuperscript{132} He later proclaimed to the assembly that "[t]he great object is that every man be armed. . . . Everyone who is able may have a gun."\textsuperscript{133} Arguments such as these were common in the states' conventions.\textsuperscript{134} Anti-Federalist sentiments prompted New Hampshire to recommend a bill of rights that included "Congress shall never disarm any citizen, unless such as are or have been in actual rebellion."\textsuperscript{135} Subsequently, New York and Rhode Island followed suit with similar recommendations.\textsuperscript{136}

It is clear from the debates that both the Federalists and the Anti-Federalists desired to protect an individual right. Thus, what was drafted and eventually approved necessarily embodied the individual right they sought to protect.

\section{C. Meaning of the Text}

Having waded through the historical origins of the Second Amendment, we now turn to the text that was drafted and ultimately included in our Bill of Rights. What did the founders mean? How is this meaning understood today? In order to understand and apply any statutory or legal rule of law, it is necessary that

\textsuperscript{130} HALBROOK, supra note 43, at 71 (quoting R. Lee, ADDITIONAL LETTERS FROM THE FEDERAL FARMER 53, at 170 (1788)).

\textsuperscript{131} Id. at 72.

\textsuperscript{132} Id. at 73 (quoting 3 ELLIOT at 45).

\textsuperscript{133} Id. at 74 (quoting 3 ELLIOT at 386).

\textsuperscript{134} See HALBROOK, supra note 43, at 72-75; see also MALCOLM, supra note 65, at 155-58. Both Malcolm and Halbrook review the debates at the conventions in detail.

\textsuperscript{135} Kates, supra note 30, at 222 (quoting 1 J. Elliot, Debates in the Several State Conventions 326 (2d ed. 1836)).

\textsuperscript{136} See id. The importance of these recommendations is the number of states that supported an individual right to arms. Five state conventions endorsed a constitutional amendment for a right to arms. In contrast, only four sought a protection for the right to assemble, due process, and protection from cruel and unusual punishment. See id. What is more astonishing is that only three states recommended that free speech be guaranteed. See id.
we understand the plain meaning of the text. Thus, a thorough examination of the key phrases is required. First, let us examine the “well regulated [m]ilitia.”

1. A Well Regulated Militia

After the Revolution, the “militia” was comprised of all full citizens of the community. George Mason declared, at the Virginia Convention, “[w]ho are the militia? They consist now of the whole people, except a few public officers.” Similarly, in Letters from the Federal Farmer, Richard Henry Lee stated that “[a] militia, when properly formed, are in fact the people themselves . . . and include . . . all men capable of bearing arms.” These statements are consistent with the colonial dependence on the armed individual to protect both himself and the colony from attack. Thus, the militias that helped win the Revolutionary War were not a select group of trained soldiers, but were simple citizens that “rose in mass . . . [in the spirit of revolt] and . . . armed themselves. . . .”

In keeping with this reality, in the Militia Act of 1792, Congress declared that every able bodied citizen between the age of eighteen and forty-five shall be enrolled in the militia. Congress required all those enrolled to provide themselves

137 U.S. CONST. amend. II.

138 See Levinson, supra note 24, at 646-47.

139 HALBROOK, supra note 43, at 74 (quoting 3 J. ELLIOT, DEBATES IN THE GENERAL STATE CONVENTIONS 425 (3d ed. 1937)). See also Levinson, supra note 24, at 647 (citing Kates, supra note 30, at 216 n.51).

140 HALBROOK, supra note 43, at 71 (quoting R. LEE, ADDITIONAL LETTERS FROM THE FEDERAL FARMER 53, at 170 (1788)). See also Levinson, supra note 24, at 647 (citing Kates, supra note 30, at 216 n.51).

141 See supra Part III.A.2.

142 HALBROOK, supra note 43, at 63-64 (quoting HENRY LEE, MEMOIRS OF THE WAR 90, at 173 and 317 (1869) (father of Robert E. Lee and lieutenant colonel commandant of the partisan legion)). Halbrook states that an “armed populace” consisting of “partisans, militias, independent companies, and the continental army won the American Revolution.” Id. at 63 (citing J. SHY, A PEOPLE NUMEROUS AND ARMED (1976); W. MARINA, MILITIA, STANDING ARMIES, AND THE SECOND AMENDMENT, 2 LAW AND LIBERTY 1, 4 (1976); and MARINA, REVOLUTION AND SOCIAL CHANGE, 1 LITERATURE OF LIBERTY 5, 21-27 (Apr./June 1978)). Halbrook goes on to discuss Lee’s descriptions of the value of “armed citizens vying with our best soldiers,” in particular, the role of the “chiefly undisciplined militia” that forced the surrender of Burgoyne’s veterans in 1777. Id. (quoting Lee’s memoirs). In that battle, a large group of farmers, mountaineers, and other commoners using their own arms were crucial in defeating the British. Despite being characterized as “corps of peasants . . . defectively armed with fowling pieces, and muskets without bayonets,” the militia was a very effective fighting force. Id. (quoting Lee).

143 The Militia Act states:

Be it enacted . . . That 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 (except as is herein after excepted) shall severally and respectively be enrolled in the militia . . . . That every citizen so enrolled and notified, shall, within six months thereafter, provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch with a box therein
with arms and ammunition within six months of notice of the Act's declaration.\textsuperscript{144} In this statute, Congress not only defined who was to enroll in the militia, it also codified that the militia's source of arms was to be the individual.\textsuperscript{145} A militia could not effectively fulfill its role as a check to tyranny if wholly dependent on that entity for its arms, so the founders, by guaranteeing an individual right to keep and bear arms, ensured that the militias would be independently armed.\textsuperscript{146}

2. Necessary to the Security of a Free State

The Second Amendment refers to the "security of a free State."\textsuperscript{147} The text does not refer to the security of "the state."\textsuperscript{148} Certainly, there are provisions in many national constitutions in which the security of the state is emphasized.\textsuperscript{149} These constitutions make no reference to the people "keeping and bearing arms," unless in state service.\textsuperscript{150} The rationale for not allowing individuals to possess arms rests upon a belief that trusting "the people" with arms represents a threat to the security of the state.\textsuperscript{151} In some cases, these constitutions are correct because an armed populace is a threat to any state that rules with the iron fist of oppression. In a free nation, however, the government serves the will of "the people" and protects their liberties. Therefore, there is nothing to fear from its citizens. It is this free state that the militia and its armed citizens ultimately protect. Thus, our Second

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\textsuperscript{144} See id.

\textsuperscript{145} See id.

\textsuperscript{146} This was only one of the purposes of the founders in guaranteeing an individual right. See Kates, supra note 30, at 217. The founders saw no distinction between the arms of the individual and the arms of the militia. See id. They believed that the "character and spirit of the republic rested on the freeman's possession of arms as well as his ability and willingness to defend himself and his society. This was the bedrock ... of republican liberty." Id. at 217 n.53. This Amendment provided three key elements to republican liberty. First, the "independence and self reliance necessary to a citizen of the republic" is fostered by an individual's right to possess arms to defend and provide food for his family. Second, it guaranteed arms for the militia. Finally, it provides the "posse comitatus" for military and law enforcement. Id.

\textsuperscript{147} U.S. CONST. amend. II.

\textsuperscript{148} See William Van Alstyne, The Second Amendment and the Personal Right to Arms, 43 DUKE L.J. 1236, 1244 (1994).

\textsuperscript{149} See id.

\textsuperscript{150} See id.

\textsuperscript{151} See id. Van Alstyne goes on to conclude that the text refers to security within a free state. A free state where "the right of the people to keep and bear arms shall not be infringed." Id. at 1249 (quoting U.S. CONST. amend. II). This is an interesting point, but I wish to emphasize my own thoughts on the matter.
Amendment was designed to ensure that the state remained free.

3. The Right of the People

The text of the Second Amendment that gives the collective rights school the most difficulty is the independent clause because it provides that "the right of the people to keep and bear Arms shall not be infringed."152 The use of "the people" is significant because if the founders had intended to protect a state's right, then why did they not state simply the "right of the States?"153 This phrase appears in four other amendments where it has always been interpreted to reflect its natural meaning of an individual right.154 To accept the exclusive states' rights view, one must necessarily accept the proposition that when the founders used "the people" in the First,155 Fourth,156 Ninth,157 and Tenth158 amendments in a manner that stands in direct contradiction to its meaning in the Second Amendment.159 In other words, "the people" should be read to mean "the states" only when interpreting the Second Amendment, but when reading the other amendments, the definition should magically shift back to it's plain meaning. Acceptance of this proposition flies in the face of common sense. The weakness of reading "the people" as "the states" is demonstrated by the Tenth Amendment's use of both "the people" and "the states" as separate entities within a single phrase.160 It is unlikely that the founders would make a conscious decision to distinguish the two terms in one amendment and

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152 U.S. Const. amend. II.
153 Kates, supra note 30, at 218.
154 See id. at 218.
155 The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.
156 The Fourth Amendment states:
   The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
   U.S. Const. amend. IV.
157 The Ninth Amendment states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX.
158 The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.
159 See Kates, supra note 30, at 218.
160 U.S. Const. amend. X.
simply fail to do so in the Second Amendment. 161 Thus, the founders made a deliberate choice in employing the phrase, “the people,” and that phrase necessarily embodies an individual right.

In the Bill of Rights, the founders first use “the people” in the First Amendment with regard to the right “to [peaceably] assemble and to petition the Government for a redress of grievances.” 162 There is no doubt that the rights embodied within the First Amendment are for the protection of the individual. One could argue that the right to assemble might be a collective or group right if it stood alone, but clearly the right to petition the Government is an individual one. Thus, when read in context with the entire clause, “the people” is used with reference to the right of the individual.

The most compelling argument may be the structure of the Fourth Amendment. Clearly, “[t]he right of the people to be secure in their persons, houses, papers, and effects . . .” refers to the right of the individual. 163 Any other interpretation is not plausible. 164 Again, “the people” is used to denote an individual right. In addition, the structure of this clause is very similar to the independent clause of the Second Amendment.

The Ninth and Tenth Amendments also reinforce the status of the right to keep and bear arms as an individual one. 165 In the Ninth Amendment, the founders declared that the enumeration of certain rights “shall not be construed to deny or disparage others retained by the people.” 166 This implies that the enumerated rights, including the right to keep and bear arms, were rights retained by the people, not the states. 167 In addition, several state bills of rights, drafted contemporaneous with the Constitution, speak of “the right of the people to bear arms.” 168 Since these rights are secured against the state, “the people” must refer to a distinct separate entity from the states or governments suggesting an individual right. 169 Clearly, the founders deliberately chose to use “the people” and not “the states” when drafting the Second Amendment.

The Supreme Court agrees that the meaning of “the people” should be interpreted consistently. In 1990, the Court held that “the people” was a term of art

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161 See Kates, supra note 30, at 218.

162 U.S. CONST. amend. I.

163 See Levinson, supra note 24, at 645.

164 See id.

165 See Harmer, supra note 116, at 61.

166 U.S. CONST. amend. IX (emphasis added).

167 See Harmer, supra note 116, at 61.


169 See id.
employed in the Constitution and has the same meaning in the Preamble to the Constitution and in the other amendments in the Bill of Rights. The court has also held that the amendments in the Bill of Rights that contain similar language should be construed similarly. Thus, the court seems to agree that the term “the people” found in the First and Fourth Amendments should be construed to have the same meaning and import in the Second Amendment.

On the other hand, it may be argued that the powers embodied in the Tenth Amendment are not conferred on the individual, but bestowed on “the people” as a whole. This is an example of framer’s intention to use “the people” in a collective sense rather than the individual sense. Even if the drafters intended this to be so, it appears they chose to address these powers at the end of the Bill of Rights after dealing with individual rights. Thus, the position of the Second Amendment between the First and Fourth, both of which have been consistently construed to grant individual rights, indicates that the drafters intended it to be interpreted to secure a similar right.

In summary, the founders chose to use the phrase “the people” when drafting the Second Amendment and the Supreme Court has determined that this phrase should be read consistently within the framework of the Bill of Rights. Therefore, because the phrase “the people,” when used within other nine amendments within the Bill of Rights, applies to the individual and not the States collectively, the same should be true of the Second Amendment.

4. To Keep and Bear Arms

The phrase “to keep and bear arms” within the Second Amendment sets forth two purposes. First, the use of “to keep” describes arms possession by individuals in all contexts, within colonial America. Colonial statutes required militiamen and others “to keep” arms in their homes, while barring only blacks and Indians from doing so. Generally, “to keep” meant to possess arms in your home for any lawful purpose.

On the other hand, the phrase “to bear” is used to describe the carrying of arms in the context of the militia. Colonial statutes generally referred to individuals as “carrying” arms when traveling. Thus, “to keep and bear arms”

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172 See Kates, supra note 30, at 219.
173 See id.
174 See id.
175 See id.
176 See id.
refers to possession of firearms for lawful purposes in one's home or on one's property, but only in the context of the militia does an individual have the right "to bear arms" in public.

5. Shall Not Be Infringed

Although our Second Amendment has its roots in the English Bill of Rights, there is one stark difference; the right is absolute and cannot "be infringed." By contrast, the English right was qualified by the phrase "as allowed by law." Through this clause, Parliament retained the right to control the arms possession of British citizens. As tensions between Britain and the colonies grew, this qualification caused hardship in the colonies because the British government sought to disarm the colonists. Specifically, Parliament's militia acts of 1757 and 1763 granted British officers broad powers to disarm the colonists at their discretion throughout the period leading up to the Revolution. Thus, the drafters choice of "shall not be infringed" reflects their intent to place this right beyond the reach of the government.

D. Construction

Turning to the construction of the amendment, its very inclusion in the bill of rights implies that it is an individual right. When Madison proposed the amendments to Congress he intended them to protect individual rights. His own notes on the amendments state that they "relate first to private rights." Additionally, his proposed placement in the Constitution indicates his intent of an individual right. His proposal sought to place the amendments within the text of the Constitution, not listed at the end in a single bill. Had Madison thought that the right to arms was merely a limitation of congressional control over the militia he would have placed them in Article I, Section 8 that deals with the Militia. However, Madison proposed to insert the right to arms, freedom of religion, freedom of the press and other personal rights in Section 9, immediately after Clause 3, which established rights against bills of attainder and ex-post facto laws,

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177 See discussion supra Part III.A.1 (discussion of the English Bill of Rights and common law interpretations).
178 See discussion supra Part III.A.2 (discussion of the seizing of arms in the Colonies).
179 See Kates, supra note 30, at 223.
180 Id. (quoting 12 PAPERS OF JAMES MADISON 307, at 193-94 (R. Rutland & C. Hobson ed., 1977)).
181 See id.
182 See id.
183 See id.
indicating they should be read together.\textsuperscript{184} Also, the reactions by his colleagues demonstrate the understanding of a personal right to arms, as several Congressmen summarized his proposal as protecting personal liberties in letters describing the event.\textsuperscript{185} In addition, ten days after the proposal, Tenche Coxe, again writing under the name "A Pennsylvanian," published his \textit{Remarks on the First Part of the Amendments to the Federal Constitution} in the Federal Gazette.\textsuperscript{186} The article included the following:

As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow-citizens, the people are confirmed in their next article in their right to keep and bear their \textit{private arms}.\textsuperscript{187}

Thus, the members of Congress to whom the Bill of Rights was presented understood Madison's intent to be a guarantee of a personal right.

The text of the Second Amendment with its justification clause is unique when compared to the other Amendments in the Bill of Rights. This construction naturally has led some people to think that it was some sort of signal from the founders requiring special interpretation. In fact, when examining contemporaneous state constitutional amendments, there are dozens of amendments of similar construction.\textsuperscript{188} Subsequently, none of these amendments have been interpreted in such a way that the justification clause controls the meaning of the operative clause.\textsuperscript{189} Simply, when read in the same manner as these amendments, there is no reason to find that the Second Amendment guarantees anything other than a right of the individual.

Turning to the text, those who espouse the collective rights school argue that the justification clause places a limitation or a condition precedent on the


\textsuperscript{185} See HALBROOK, supra note 43, at 76.

\textsuperscript{186} See id.

\textsuperscript{187} \textit{Id.} (citing \textit{Remarks on the First Part of the Amendments to the Federal Constitution}, \textit{FEDERAL GAZETTE}, June 18 1789, at 2) (emphasis added).

\textsuperscript{188} See Volokh, supra note 168, at 793-94.

\textsuperscript{189} Volokh conducts an extensive analysis of interpretation of the Second Amendment in light of contemporaneous amendments to state constitutions. Examination of these amendments demonstrates that (1) the Second Amendment is commonplace; (2) they rebut claims that the right expires when a court finds its justification clause no longer necessary; (3) they show that the operative clause exists even when it does not further goals set forth by its justification; and (4) they demonstrate how the clauses can be read together. See generally \textit{id}.  
right. This would be plausible if the text read “[t]o the extent a well regulated Militia is necessary . . . .” \[^{190}\] A look at the plain language shows that the clause's function “is not to qualify the right, but rather to explain why the right must be protected.” \[^{192}\] The right of the people is independent of the Militia, but the Militia depends on the existence of this right. \[^{193}\] Thus, as long as this right exists, the Militia will provide the necessary ingredient to the security of a free state. \[^{194}\]

In conclusion, the structure of the Second Amendment demonstrates an individual right. First, it is demonstrated by Madison’s placement of it in his proposed amendments to the Constitution. Second, examining contemporaneous amendments demonstrates that the text was not at all unusual at the time. Finally, the plain construction of the text demonstrates that the justification clause does not qualify or limit the right but demonstrates the importance of the right granted. Thus, the construction of the Second Amendment from its historical understanding to its plain meaning supports the interpretation of an individual right to keep and bear arms.

E. Historical Interpretation

To further understand the meaning of the Second Amendment, we now turn to those who interpreted it first such as Thomas Jefferson and other early nineteenth century scholars. Their perspective in the years following the ratification of the Bill of Rights casts a bright light on proper interpretation of the Amendment.

In France during the drafting of the Bill of Rights, Ambassador Jefferson was a remote silent figure. \[^{195}\] However, his views on any aspect of our Constitution bear great weight in any discussion of its meaning. Jefferson’s views on the right to keep and bear arms are evident in the model state constitution he wrote for Virginia in 1776. \[^{196}\] Jefferson wrote that “[n]o free man shall be debarred the use of arms in his own lands.” \[^{197}\] It is clear Jefferson was strongly in favor of personal arms. In June of 1796, Thomas Jefferson wrote to George Washington, “one loves to possess arms.” \[^{198}\] In fact, Jefferson was a talented gunsmith and kept an extensive

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\[^{191}\] Id.

\[^{192}\] Id. at 201.

\[^{193}\] See id.

\[^{194}\] See id.

\[^{195}\] See Kates, supra note 30, at 229.

\[^{196}\] See id.

\[^{197}\] Id. (quoting THE JEFFERSON CYCLOPEDIA 51 (Foley ed., reissued 1967)).

\[^{198}\] Id. at 228 (quoting 9 WRITINGS OF THOMAS JEFFERSON 341 (A.A. Lipscomb ed. 1903)).
collection of pistols and long guns at his armory at Monticello. As an inventor, Jefferson also introduced the concept of interchangeable parts in manufacturing firearms. It is no surprise that in a letter to a nephew, Jefferson expressed his love for arms by offering the following advice:

A strong body makes the mind strong. As to the species of exercises, I advise the gun. While this gives a moderate exercise to the Body, it gives boldness, enterprise and independence to the mind. Games played with the ball, and others of that nature, are too violent for the body and stamp no character on the mind. Let your gun therefore be the constant companion on your walks.

Jefferson’s attitude reflects what one historian has summarized as an “almost religious quality about the relationship between men and arms” expressed by the founders. This attitude, taken with the militia tradition and the inalienable natural right of self-defense from which the founders derived their right to revolt, explain why they sought to guarantee an individual right.

Nineteenth century Second Amendment commentary provides additional support in the writings of three nineteenth century giants: St. George Tucker, Supreme Court Justice Joseph Story, and late nineteenth century commentator Thomas Cooley. These scholars clearly support the individual rights view of the Second Amendment.

The first scholarly writing on the Second Amendment appears in St. George Tucker’s American Edition of Blackstone’s Commentaries, published in 1803. Tucker was a prominent lawyer, war hero, law professor, and judge from looking at his collection of guns, it is presumable that Washington agreed. In his own writings, Washington refers to many firearms he owned and examined throughout his life. See id.

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199 See id.
200 See Kates, supra note 30, at 229.
201 Id. (quoting THE JEFFERSON CYCLOPEDIA, supra note 173, at 318).
203 See id. at 229-30.
204 See David B. Kopel, The Second Amendment in the Nineteenth Century, 1998 B.Y.U. L. REV. 1359 (1998). Kopel completes an extensive analysis of nineteenth century commentary and interpretation of the Second Amendment. Kopel concludes that the individual rights view was basically the only view during this time period and that no scholar “should claim that the Standard Model individual rights view is a fraud or a myth.” Id. at 1544-45 (Kopel’s conclusion).
the state of Virginia. This annotated edition of Blackstone’s Commentaries was the first treatise on the common law written specifically for the American legal community. Used by virtually every law student, this text was recommended by Jefferson as the best source for mastering American law. Today, Tucker’s treatise is “generally considered our single most important early legal text created by an American scholar.”

In Tucker’s second volume, he addresses Blackstone’s discussion of the five auxiliary rights of the subject. The fifth auxiliary right addresses the English right to possess arms. In his discussion of the British right, Tucker states that “[t]he right of the people to keep and bear arms shall not be infringed ... and this is without any qualification as to their condition or degree, as is the case in the British government.” In short, Tucker declares that the Second Amendment contains none of the limitations Parliament placed on the English right. Later, Tucker restates Blackstone’s objections to the English game laws that effectively served to disarm the people. In further commentary, Tucker condemns the British laws, stating that the nation was disarmed and at the mercy of the government on the “pretext of preserving the breed of hares and partridges” exclusively for wealthy country gentlemen. He further states that “[i]n America we may reasonably hope that the people will never cease to regard the right of keeping and bearing arms as the surest pledge of ... liberty.”

In the appendix of his treatise, Tucker analyzed the new American Constitution in great detail. Specifically, Tucker had this to say regarding the Second Amendment:

This may be the true palladium of liberty . . . . The right to self defence is the first law of nature: in most governments it has been the study of rulers to confine this right within the narrowest limits possible. Wherever standing armies are kept up, and the right of

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206 See Kopel, supra note 204, at 1370-71.
207 See id. at 1371.
208 Id. (quoting Don Riddick, The Second Most Powerful Pen in Early Virginia: St. George Tucker, 4 J. S. Leg. Hist. 71, 73 (1997)).
209 See id. at 1373.
210 See supra Part III.A.1 (citing block quotation of Blackstone).
211 Kopel, supra note 204, at 1373 n.40.
212 See id. at 1374 n.41.
213 Id. at 1374.
214 Id. at 1374-75.
215 See id. at 1375.
the people to keep and bear arms is, under any color or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.\(^{216}\)

Tucker goes on to state that in England, under the pretext of the game laws, the people have been disarmed such that "not one man in five hundred can keep a gun in his house without being subject to penalty."\(^{217}\) Tucker's understanding of the Second Amendment is clearly that it guarantees an important natural right of the individual essential to preserving liberty. Thus, St. George Tucker, perhaps the most important legal scholar of his day, firmly believed that the Second Amendment embodies a personal right to keep and bear arms for both hunting and defense against tyranny.\(^{218}\)

The next major commentary on the Constitution was the 1833 Commentaries on the Constitution of the United States written by Joseph Story.\(^{219}\) Madison appointed Story, a Harvard Law professor, to the Supreme Court. At the age of thirty two, he was the youngest Justice ever nominated. Justice Story served until 1845,\(^{220}\) and by all accounts was considered the premier legal scholar in the pre-Civil War era.\(^{221}\) Story's commentaries differed from earlier treatises in that he supported broad federal powers and created the doctrine of the "indissoluble union."\(^{222}\) His writings were widely used even into the twentieth century.

In Justice Story's commentaries, he states the following regarding the Second Amendment:

> The right of the citizens to keep and bear arms has justly been considered as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them. And yet, though this truth would seem so clear, and the importance of a well regulated militia so undeniable, it cannot be disguised that, among the American people, there is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burdens, to be rid of all

\(^{216}\) Kopel, supra note 204, at 1377.

\(^{217}\) Id. at 1377-78.

\(^{218}\) See id. at 1378-79.

\(^{219}\) See JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (Frd B. Rothman & Co. 1991) (1833).

\(^{220}\) Kopel, supra note 204, at 1388-89.

\(^{221}\) See id. at 1389.

\(^{222}\) Id.
regulations. How it is practicable to keep them duly armed, without some organization, it is difficult to see. There is no small danger that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine all the protection intended by this clause of our national bill of rights.\footnote{223}{Id.\ (emphasis added)\ (quoting \textit{STORY}, \textit{supra} note 219, at 746-47).}

First, Justice Story writes something unique in Second Amendment commentary. He states that the Amendment guarantees the right of “the citizens” to keep and bear arms. This departure from the Amendment’s phrase “the people” clearly demonstrates a reference to a citizen’s individual right. However, opponents of the individual right view state that the discussion of the people’s growing indifference and the dangers of undermining the protection intended by the Amendment demonstrates a weakness with the individual rights view.\footnote{224}{See \textit{id.}} That is not the case. Story’s complaints about people’s apathy do not contradict his statement of a right of the citizens to keep and bear arms. Simply, his comments reflect a concern that an untrained militia might cease to be a protection from tyranny, but clearly, he saw it as an individual right.\footnote{225}{See \textit{Kopel}, \textit{supra} note 204, at 1390-94.}

Finally we turn to the leading constitutional scholar in the post-Civil War era, Michigan Supreme Court Justice Thomas Cooley.\footnote{226}{See \textit{id. at} 1461.} At the time, many considered him to be “the greatest authority on constitutional law in the world.”\footnote{227}{Id.\ (emphasis added)\ (quoting \textit{STORY}, \textit{supra} note 219, at 746-47).} Cooley served on the Michigan Supreme Court for twenty-one years, and would likely have been appointed to the Supreme Court but for politicians who feared his independence.\footnote{228}{Id.\ (quoting \textit{STORY}, \textit{supra} note 219, at 746-47).} Cooley was also a professor at what is now the Michigan Law School, serving as the law department’s first dean.\footnote{229}{See Kopel, \textit{supra} note 204, at 1461-62.} Judge Cooley was well respected in legal circles and was “the most influential legal author of the late nineteenth and early twentieth centuries.”\footnote{230}{See Kopel, \textit{supra} note 204, at 1461-62.}

In 1863, Cooley published his first major publication, the 1868 volume \textit{A Treatise on Constitutional Limitations}.\footnote{231}{See \textit{THOMAS M. COOLEY}, \textit{A TREATISE ON CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION} 350 (Little, Brown 1972) (1868).} This book was foundational to his success as a scholar.\footnote{232}{See Kopel, \textit{supra} note 204, at 1462.} It was used for many years eventually becoming the “canon of this text.
for jurists.”  

In this treatise, Cooley discusses the Second Amendment in light of the purpose of the militia’s role in checking a standing army stating that the people must be trained in arms for it to be successful. During this discussion, he mentions in passing that how far this right extends is yet to be determined by the courts. However, in 1880 Cooley published an abridged version of this treatise, The General Principles of Constitutional Law. This version, a popular college text, had a much more detailed discussion of the Second Amendment. In General Principles, Cooley discusses the history of the Second Amendment stating that its roots rest in the English Bill of Rights. Cooley stated that the Amendment “stood as a protest against arbitrary action of the overturned dynasty in disarming the people, and as a pledge of the new rulers that this tyrannical action should cease.” Simply put, the Amendment was in response to Britain’s attempts to disarm the colonists, and was drafted as a promise that this would not happen in the United States. Cooley goes on to state that the purpose of the right was a check against the government. Next, Cooley describes the right embodied in the Second Amendment as general, specifically stating that:

The Right is General. -- It may be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent. The militia, as has been elsewhere explained, consists of those persons who, under the law, are liable to the performance of military duty, and are officered and enrolled for service when called upon. But the law may make provision for the enrol[ment] of all who are fit to perform military duty, or of a small number only, or it may wholly omit to make any provision at all; and if the right were limited to those enrolled, the purpose of this guaranty might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. The meaning of the provision undoubtedly is, that the people, from

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233 Id.
234 See id. at 1462-63.
235 See id. at 1463.
237 See Kopel, supra note 204, at 1464.
238 See id. at 1464-65.
239 Id. (quoting Cooley, supra note 236, at 281-82).
240 See id.
whom the militia must be taken, shall have the right to keep and bear arms, and they need no permission or regulation of law for the purpose.\textsuperscript{241}

First, Cooley specifically states that interpreting the Second Amendment to only guarantee a right of the militia to keep and bear arms was not warranted by the intent of the founders.\textsuperscript{242} Cooley goes on to state that the meaning of the Second Amendment “undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms” without permission or regulation of law.\textsuperscript{243} In short, Cooley directly supports the individual rights view of the people, not just the militia, keeping and bearing arms. Cooley goes on to note that bearing arms means more than just to keep, it implies a right to meet for practice but only with the laws of public order.\textsuperscript{244} Thus, Cooley supports the individual right to possess arms and he would see no problem with regulations governing their public use.

In conclusion, the writings of Jefferson, Tucker, Story, and Cooley clearly demonstrate support for an individual’s right to arms. Their interpretations, close in time to the actual drafting, demonstrate an ongoing understanding that the Second Amendment was intended to embody a right of the individual to keep and bear arms.

\textbf{F. Conclusion – The Uncomfortable Reality}

In conclusion, this section has explored the Second Amendment’s historical origins in both England and Colonial America. It has also explored the debates of the founders at the ratification conventions and their statements in the press in search of public support. In addition, this section has delved into the meaning of the text of the Amendment and examined its construction. Finally, this section turned to nineteenth century scholarship to seek the Amendment’s meaning. In each case, this comment demonstrates an inescapable conclusion that the Second Amendment embodies an individual right to keep and bear arms for both personal defense and to resist government tyranny.

The uncomfortable reality of the individual rights model is that the founding fathers built into the Constitution the ability of the people to revolt against a tyrannical government. The question that must be answered and is seldom addressed by proponents of that view is when is revolution proper? When should we as a free people rise up to defend our liberties? The answer may disturb those that have organized so-called “militia groups” across the country.

\textsuperscript{241} Id. at 1465 (quoting COOLEY, supra note 236, at 282-83) (emphasis added).

\textsuperscript{242} See Kopel, supra note 204, at 1465 (quoting COOLEY, supra note 236, at 282-83).

\textsuperscript{243} Id.

\textsuperscript{244} See id. at 1465.
First, who are the militia? As answered previously, they are simply all those capable of bearing arms for defense. The Militia represents a wide cross-section of society, not a small group who gather out of fear of their government and anger over recent gun control laws.\(^{245}\) Many of these so called “militia” members understand the intent of the Second Amendment, but most have no understanding of what the framers considered a tyrannical government.\(^{246}\) Taxation without representation is quite different than taxation in a representative republic.\(^{247}\) Unfortunately, many of these groups have been formed due to the collective rights theory of the Amendment which states that only the militia have a right to be armed.\(^{248}\) By organizing and calling themselves a militia, they feel they have ensured their right to keep and bear arms.\(^{249}\) Unfortunately, even constitutional theories can have an adverse affect on society.\(^{250}\)

Looking at the Declaration of Independence will give some indication of what the framers considered valid reasons for revolt.\(^{251}\) The core of the complaints of the colonies was the lack of political participation with no ability to affect their government resulting ultimately in an appeal to arms.\(^{252}\) The framers intentions regarding a valid revolt can be summed up as follows:

Republicans were aware of the danger implicit in vouchsafing this right of resistance in the citizenry and sensitive to the charge that they were inciting violence. They developed a number of limits on the right: It must be a product of the “body” of the people, i.e., the great majority acting in consensus; it must be a course of last resort; its inspiration must be a commitment to the common good; and its object must be a true tyrant, committed to large-scale abuse, not merely a randomly unjust or sinful in private life. An uprising that failed to meet these criteria was considered an illegitimate rebellion, rather than an act of true republican resistance.\(^{253}\)

\(^{245}\) See Reynolds, supra note 184, at 506.

\(^{246}\) See id.

\(^{247}\) See id.

\(^{248}\) See id. at 511.

\(^{249}\) See id.

\(^{250}\) See Reynolds, supra note 184, at 511.

\(^{251}\) See id. at 507.

\(^{252}\) See id.

\(^{253}\) Id. at 510 (quoting David C. Williams, Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment, 101 YALE L.J. 551, 582 (1991)).
Thus, there can be no legitimate claim by any individual or group of individuals that the Second Amendment "guarantees a right . . . to declare war against the federal government whenever he or she thinks the government is unjust." Today, our government, despite its problems, is a far cry from the government the founders cast off by revolution. It does not lack political participation, nor does any militia group rising up in arms today meet the test discussed above. In simple terms, if our government is one that does not meet our needs, the proper approach for change is the political process. If that process is denied, and the people have exhausted all means of appeal, then and only then would an appeal to arms be justified.

IV. TREATMENT BY THE COURTS

The Supreme Court has yet to settle the issue of what right is granted by the Second Amendment. Many lower courts have adopted the collective rights or states' rights theory, holding that the Amendment does not protect the individual and is not a bar to firearms regulation. This section will discuss a few of the cases where the courts have addressed the Second Amendment.

A. Supreme Court

The Supreme Court first mentions the Second Amendment in Dred Scott v. Sanford. In its discussion of property rights regarding slaves, the Court states that Congress cannot deny the people the right to keep and bear arms, equating it with freedom of speech, trial by jury, and rights of private property. Earlier in the opinion, the Court, in holding that blacks could not be citizens, listed liberties bestowed on citizens. Among these liberties were free speech, the right to assemble, and "to keep and carry arms wherever they went." The Court concluded that allowing blacks to exercise these rights would produce discontent among the races resulting in "endangering the peace and safety of the State." Clearly, the Court in Dred Scott refers to an individual right conferred by the Amendment.

In 1876, the Court next discusses the Second Amendment in United States v. Emerson.
Cruikshank and others were charged with lynching two blacks under the 1870 Enforcement Act. The defendants were indicted for interfering with their victims' rights to assemble and to keep and bear arms. In dismissing the indictment, the Court stated that the Second Amendment was only a control on Congress and provides no protection against violation by fellow citizens. The Court states that people should turn to their local governments for protection because they hold police powers not surrendered to the federal government. The issue specifically addressed was one of citizens denying individuals their rights, not a State denying the right.

The Court addresses infringement of the Second Amendment by the state in Presser v. Illinois. In Presser, the issue was that the state of Illinois had passed a law barring individuals, other than the organized militia, from gathering with arms to train as a military company. In this case, the Court held that this law did not infringe on the right to keep and bear arms. Relying on Cruikshank, the Court stated that the Amendment is only a limitation on the national government, not the state. However, the Court went on to state that all citizens capable of bearing arms act as a reserve force for the United States as well as the states. The Court concluded that "the [s]tates cannot . . . prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government." Presser seems to have been a narrow holding. A state law preventing a private army assembling with arms does not violate the Second Amendment.

The holdings in Cruikshank and Presser both deal with who is limited by

260 92 U.S. 542 (1876).
261 See id. at 544.
262 See id. at 545.
263 See id. at 553.
264 See id.
265 Brannon Denning discusses this case in greater detail. See Denning, supra note 11 at 977-79.
266 116 U.S. 252 (1886).
267 See id. at 253-55.
268 See id. at 264-66.
269 See id.
270 See id. at 265-66.
272 For a detailed discussion refer to Denning's article. See Denning, supra note 11, at 980-81.
the Second Amendment. Neither case discusses whether the right is an individual
one. In subsequent cases, occurring in the late nineteenth and early twentieth
century, the Court’s discussions of the Amendment generally deal with
incorporation and do not address the individual rights issue.273

The only modern Supreme Court case involving the Second Amendment is
United States v. Miller.274 In this case, Miller was indicted for moving a sawed-off
shotgun in interstate commerce, a violation of the National Firearms Act of 1934.275
After the lower court dismissed the charge accepting Miller’s argument that the Act
violated his Second Amendment rights, the Supreme Court granted certiorari and
reviewed the case.276 It is interesting to note that the government’s position was
unchallenged at oral argument.277 For whatever reason, the appellees chose not to
have counsel argue their position before the Supreme Court.278 In fact, after the
district court decision, Miller and his codefendant disappeared rather than wait the
outcome of the appeals process.279 After the ex parte hearing, the Court
unanimously struck down the lower court’s decision.280 Justice McReynolds’
opinion emphasized that there was no reasonable relationship between a sawed-off
shotgun and “the preservation or efficiency of a well regulated militia.”281 Thus,
“we cannot say the Second Amendment guarantees the right to keep and bear such
an instrument.”282 The Court goes on to add that this weapon is not “ordinary
military equipment” nor does its use “contribute to the common defense.”283 In
applying this holding to other Second Amendment cases, it is difficult to interpret

273 See, e.g., Twining v. New Jersey, 211 U.S. 78, 98 (1908) (not incorporated); Maxwell v. Dow, 176
U.S. 581, 597 (1900) (cites Presser in support that right to jury trial like keeping and bearing arms is not
incorporated); Robertson v. Baldwin, 165 U.S. 275, 281-82 (1897) (dicta stating that concealed carry laws do
not infringe the right to keep and bear arms); Miller v. Texas, 153 U.S. 535, 538-39 (1894) (not incorporated
under the 14th Amendment); Logan v. United States, 144 U.S. 263, 286-87 (1892) (stating the Second
Amendment is limited in scope).


275 See id. at 175.

276 See id. at 176-77.

277 See Denning, supra note 11, at 973.

278 See id.

279 See id.

280 See id at 974.

281 Miller, 307 U.S. at 178. The Court goes on to state that the “[m]ilitia comprised all males
physically capable of acting in concert for the common defense.” Id. at 179. Further, “when called for service
these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the
time.” Id.

282 Id. at 178.

283 Id.
Miller as preventing the Second Amendment from acting as a control on Congress.\textsuperscript{284} One could even read Miller as support for the extremist argument that individuals may only possess arms directly related to the military, such as artillery, rocket launchers and other modern military arms.\textsuperscript{285} Miller simply did not address the issue of an individual versus a collective right. Thus, the court in Miller chose a very narrow holding on possession of a particular weapon and left the question open.\textsuperscript{286}

B. Lower Courts

Turning to the lower courts, one finds that most rely on Miller to support the collective rights argument.\textsuperscript{287} Based upon Justice McReynolds’ discussion of the militia, many courts have held that Miller supports the argument that there is no guarantee of an individual right.\textsuperscript{288} Rather, these courts hold that the Second Amendment affords only a collective right of the state to maintain a militia.\textsuperscript{289} The court in Emerson, however, stands in direct contradiction stating that the Second Amendment establishes an individual right.\textsuperscript{290}

V. THE DISTRICT COURT’S DECISION IN EMERSON

Following an indictment for possession of a firearm while being under a restraining order, Emerson moved for dismissal stating that the federal statute was unconstitutional.\textsuperscript{291} Specifically, Emerson claimed that the statute “is an unconstitutional exercise of congressional power under the Commerce Clause and the Second, Fifth, and Tenth Amendments to the United States Constitution.”\textsuperscript{292}


\textsuperscript{285} See id.

\textsuperscript{286} See id. at 608-09 (citing Printz v. United States, 521 U.S. 898, 937-38 & n.1, 2 (1997) (Thomas, J., concurring)). See also Denning, supra note 11, at 972-76 (detailed discussion of Miller).

\textsuperscript{287} Although the Fifth Circuit is undecided on the issue, many other circuit courts have adopted this view. See, e.g., Hickman v. Block, 81 F.3d 98, 100-01 (9th Cir. 1996); Love v. Pipersack, 47 F.3d 120, 124 (4th Cir. 1995); United States v. Warin, 530 F.2d 103, 106-07 (6th Cir. 1976); Cases v. United States, 131 F.2d 916, 920-23 (1st Cir. 1942).

\textsuperscript{288} See Emerson, 46 F.Supp.2d at 608.

\textsuperscript{289} See Id. For a detailed discussion of holdings in the lower courts and the misguided evolution of the collective rights theory see Denning’s article, Can the Simple Cite be Trusted. See Denning, supra note 11, at 981-99.

\textsuperscript{290} See Emerson, 46 F.Supp.2d at 610.


The court denied Emerson’s Commerce Clause and Tenth Amendment claims, but sustained the dismissal on both the Second and Fifth Amendments.

In the Commerce Clause claim, Emerson relied on the Supreme Court’s holding in *United States v. Lopez.* Emerson argued that the statute was an unconstitutional exercise of Congressional power stating that the statute did not regulate commercial activity and was therefore unconstitutional. In response, the court found that the Fifth Circuit Court of Appeals had previously examined this statute under the Commerce Clause and found it constitutional. Accordingly, the court held that the motion could not be sustained under a Commerce Clause challenge.

Turning to the Tenth Amendment claim, the court examined the issue under the two lines of inquiry set forth in *New York v. United States.* Under the first line of inquiry, the court must determine if the statute in question was authorized by Article I of the Constitution. In addition, the second line of inquiry requires the court to determine whether the statute “invades a province of State sovereignty reserved by the Tenth Amendment.” These lines of inquiry are mutually exclusive, a power granted to Congress by the Constitution is not reserved to the states. Also, a power that is clearly one of state sovereignty reserved by the Tenth Amendment is expressly one not conferred on Congress.

Applying the first line of inquiry, the statute is a valid exercise of Congressional power under the Commerce Clause enumerated under Article I of the Constitution. Thus, because the statute was enacted by Congress pursuant to a valid constitutional power, it does not violate the Tenth Amendment. The court then turned to the second line of inquiry, whether an area of State sovereignty was invaded. In *New York,* the court held that an act that compelled the state legislatures to enact and enforce a federal regulatory scheme was unconstitutional under this amendment. Later, the Supreme Court refined this holding in *Printz v. United States.* The court in *Printz* held that even though Congress was acting under a

294 See Emerson, F. Supp.2d at 599-600.
295 See id. at 600. The court cites *United States v. Pierson,* 139 F.3d 501 (5th Cir. 1998).
297 See Emerson, F. Supp.2d at 613 (citing New York, 505 U.S. at 155).
298 Id.
299 See id.
300 See id.
301 See id.
valid Commerce Clause power it could still violate principles of the Tenth Amendment.\(^{303}\) In *Printz*, the Brady Act forced state law enforcement officers to conduct background checks on handgun purchasers. In light of these two cases, the court states that the statute is constitutional because it does not require action on the state legislature nor does it commandeer state officials into federal service.\(^{304}\) The court stated that while the statute does encroach into family law, traditionally an area of state concern, it does not command state activity and does not clearly violate the Tenth Amendment. Thus, the motion could not be sustained on Tenth Amendment grounds.\(^{305}\)

Next, the court examined Emerson’s challenge under the Second Amendment.\(^{306}\) Emerson claimed that the Second Amendment guarantees him a personal right to arms which has been infringed by the statute and the government claimed that “it is ‘well settled’ that the Second Amendment creates a right held by the States and does not protect an individual right to bear arms.”\(^{307}\) In this case, Emerson can only succeed if the Second Amendment guarantees an individual right. Since this issue is unsettled in the Fifth Circuit, the court examined the Second Amendment in detail and ultimately concluded that the Amendment guarantees and individual right that “should be as zealously guarded as the other individual liberties enshrined in the Bill of Rights.”\(^{308}\)

Next, the court addressed the constitutionality of the statute. The court stated that the statute is “unconstitutional because it allows a state court divorce proceeding, without particularized findings of the threat of future violence, to automatically deprive a citizen of his Second Amendment rights.”\(^{309}\) The statute does not require that the order include a finding of a “credible threat to the physical safety of the intimate partner or child.”\(^{310}\) The court goes on to conclude that if the statute barred possession of a firearm based on a particularized finding of the possibility of violence then it “would not be so offensive, because there would be a reasonable nexus between gun possession and the threat of violence.”\(^{311}\) However, the court found the statute to be unacceptable because it exposes someone to

\(^{303}\) See Emerson, F. Supp.2d at 613-14 (citing Printz, 521 U.S. at 933).

\(^{304}\) See id. at 614.

\(^{305}\) See id.

\(^{306}\) See Emerson, F. Supp.2d at 600.

\(^{307}\) Id.

\(^{308}\) Id. at 610. The court’s analysis spans several pages and is quite detailed. See id. at 600-11. Additionally, the detailed examination of the individual right above follows the path of the court’s examination of the Second Amendment setting forth the same conclusion as the court. See infra Part III.

\(^{309}\) Emerson, F. Supp.2d at 610.

\(^{310}\) Id.

\(^{311}\) Id. at 611.
federal felony prosecution if an order merely prohibits any attempt or threat of physical force.³¹² Basically, since all that the statute requires for prosecution is a "boilerplate order with no particularized findings," there are no "safeguards" to prevent an "arbitrary abridgment of Second Amendment rights."³¹³ Thus, the court found the statute to be overbroad and in direct violation of the Second Amendment.

In contrast, the court examined the "felon-in-possession" statute.³¹⁴ By his conduct, a felon has separated himself from law abiding citizens. Additionally, the felon is admonished in court that he has lost certain civil rights, including his right to bear arms.³¹⁵ That is not the case with the statute in question. Under this statute, an individual may lose his right to bear arms, not because of wrongful conduct, or because a judge finds credible future threat, "but merely because he is in a divorce proceeding."³¹⁶ As a result, he is stripped of his right to keep and bear arms like a convicted felon. The court concludes with the following statement:

It is absurd that a boilerplate state court divorce order can collaterally and automatically extinguish a law abiding citizen’s Second Amendment rights, particularly when neither the judge issuing the order, nor the parties nor their attorneys are aware of the federal criminal penalties arising from firearm possession after entry of the restraining order. That such a routine civil order has such extensive consequences totally attenuated from divorce proceedings makes the statute unconstitutional. There must be a limit to government regulation on lawful firearm possession. This statute exceeds that limit, and therefore it is unconstitutional.³¹⁷

Lastly, we look at the court’s decision regarding Emerson’s Fifth Amendment claim. Emerson argued that “generic temporary orders” from his divorce resulted in his exposure to federal criminal prosecution for “engaging in [the] otherwise lawful conduct” of firearms possession.³¹⁸ The court stated that possessing firearms is a “valuable liberty interest imbedded in the Second Amendment,” and that “there is a long tradition of widespread lawful gun

³¹² See id.
³¹³ Id.
³¹⁴ The statute states that “[i]t shall be unlawful for any person . . . (1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year . . .” to possess a firearm. 18 U.S.C. § 922(g)(1) (1996).
³¹⁵ See Emerson, F. Supp.2d at 611.
³¹⁶ Id.
³¹⁷ Id.
³¹⁸ Id.
ownership by private individuals in this country.\textsuperscript{319} Thus, the court concluded, Emerson’s firearms possession is a protected liberty interest under the Fifth Amendment.\textsuperscript{320}

The court stated that it offends the notions of due process to convict Emerson for a crime because of an obscure criminal statute.\textsuperscript{321} Unlike a felon who when convicted is admonished by the sentencing judge or his parole officer that he cannot possess a firearm, Emerson could only have found out about the provision from the judge issuing the order or his counsel.\textsuperscript{322} In this case, Emerson was not represented by counsel and the Judge made no mention of the requirement to dispose of his firearms.\textsuperscript{323} In fact, the text of the order made no mention of guns, allowing for no notice.\textsuperscript{324} The court relies on Lambert v. California, which places limits on laws that remove any “mens rea” or the element of knowledge that they are committing a crime.\textsuperscript{325} In Lambert, the Supreme Court stated that the legislature could enact such statutes, but the constitutional requirements of due process must be met.\textsuperscript{326} In a subsequent decision, the Supreme Court stated that the absence of “mens rea” is so unusual in Anglo-American jurisprudence that courts have demanded clear legislative intent before enforcing them.\textsuperscript{327} Thus, due process requires that a person under a protective order receive some “adequate, meaningful form of a fair warning or notice” that his firearms possession is a crime.\textsuperscript{328} The court concluded by stating that “[b]ecause [this statute] is an obscure, highly technical statute with no mens rea requirement, it violates Emerson’s Fifth Amendment due process rights to be subject to prosecution without proof of knowledge that he was violating the statute.”\textsuperscript{329} Accordingly, the motion to dismiss was supported on these grounds.

In conclusion, the court stated that this statute violates Emerson’s rights under the Second and Fifth Amendments to the Constitution. Therefore, Emerson’s

\textsuperscript{319} Id. (quoting Staples v. United States, 511 U.S. 600, 610 (1994)).

\textsuperscript{320} See Emerson, F. Supp.2d at 611.

\textsuperscript{321} See id. at 612.

\textsuperscript{322} See id.

\textsuperscript{323} See id.

\textsuperscript{324} See id.

\textsuperscript{325} 355 U.S. 325 (1957).

\textsuperscript{326} See Emerson, F. Supp.2d at 612. (citing Lambert, 355 U.S. at 228).

\textsuperscript{327} See id. at 612-13 (citing Staples v. United States, 511 U.S. 600, 605-06 (1994)).

\textsuperscript{328} Id. at 613.

\textsuperscript{329} Id.
motion to dismiss the indictment was granted on these grounds.\footnote{See id.} Subsequently, the Government appealed the case to the United States Court of Appeals for the Fifth Circuit.\footnote{United States v. Emerson, 46 F. Supp.2d 598 (N.D. Tex. 1999), appeal docketed, No. 99-10331 & 99-10499 (5th Cir.). No hearing date has been set at this time but it would be expected by early 2000.} If \textit{Emerson} is upheld, there will be a split among the circuits and the question of the Second Amendment may be ripe for settlement by the United States Supreme Court.

\section{VI. A SUPREME COURT APPEAL: WHAT IF?}

There are many reasons, beyond a split in the circuits, for the court to grant \textit{ceteriori}. First, this case does not involve an individual arguing to keep a machine gun or some other weapon that public policy would abhor. Second, it addresses complete removal of an individual’s right to possess any firearm. In this case, there will be no need for the court to address the issue of limiting an individual right and where the line should be drawn. Finally, the court need not address whether the Second Amendment creates an absolute right that cannot be subjected to regulation. With this case, the court need only address whether it is an individual or collective right.\footnote{In \textit{Emerson}, Judge Cummings lists several cases where the individual right argument was not upheld. The facts in this case are easily distinguishable and may explain why the Supreme Court found them unpalatable. \textit{See}, United States v. Emerson, 46 F. Supp.2d 598, 607-08 (1999).} Considering these aspects and the possible split among the circuits, \textit{Emerson} is an excellent vehicle through which the court might confront and settle the issue.

To date, two of the current Supreme Court Justices have gone on the record indicating an interest in hearing a Second Amendment case. Judge Thomas, in his concurring opinion in \textit{Printz v. United States}, stated:

\begin{quote}
This Court has not had recent occasion to consider the nature of the substantive right safeguarded by the Second Amendment . . . .
Perhaps, at some future date, this Court will have the opportunity to determine whether Justice Story was correct when he wrote that the right to bear arms “has justly been considered, as the palladium of the liberties of a republic.”\footnote{521 U.S. 898, 937-38 (1997) (Thomas, J., concurring).}
\end{quote}

This statement leaves little doubt as to Justice Thomas’ desire to hear a Second Amendment case. In a footnote, he cites articles from both sides of the issue demonstrating an open mind and, perhaps, the need for a full debate of the issues before the Court.\footnote{Sanford Levinson, \textit{Is the Second Amendment Finally Becoming Recognized as Part of the Constitution?} (1999).}
In addition to Justice Thomas, Justice Scalia has also indicated an interest in a Second Amendment case. Scalia stated that if the Second Amendment were to be held to protect only the National Guard, it would prove:

"[T]hat the founders were right when they feared some (in their view misguided) future generation might wish to abandon liberties that they considered essential, and so sought to protect those liberties in a Bill of Rights. We may like the abridgment of property rights and like the elimination of the right to bear arms; but let us not pretend that these are not reductions in rights."

In a footnote, Justice Scalia responds to the argument that the Amendment refers to a state’s right by stating that "[i]t would also be strange to find in the midst of a catalog of rights of individuals a provision securing to the states the right to maintain a designated ‘Militia.’ Dispassionate scholarship suggests quite strongly that the right of the people to keep and bear arms meant just that." Based on these comments, Scalia may very well be interested in hearing a Second Amendment case.

With both Thomas and Scalia open to hearing a Second Amendment case, Emerson may have two of the required four votes for the Court to grant certiorari. Considering recent events, at least two of the "liberal" justices may join them in hopes of getting a majority vote upholding the collective rights theory. Thus, with the attractiveness of this case, and the likely possibility of the four votes for certiorari, Emerson has a good shot at becoming the vehicle that is used to settle the issue, provided the decision of the Fifth Circuit creates the split in opinion.

VII. A SECOND AMENDMENT WITH TEETH: EFFECT ON CURRENT AND FUTURE LAW

Where do we go from here? What effect will a strong Second Amendment have on our current and future firearms laws? Recognizing an individual right does not mean an end to reasonable gun control measures. Don Kates, in his 1983 article, sets forth a three-part test to determine what weapons would be protected based on Miller and the historical evidence. Kates states that "the weapon must
provably be (1) 'of the kind in common use' among law-abiding people today; (2) useful and appropriate not just for military purposes, but also for law enforcement and individual self-defense, and (3) lineally descended from the kinds of weaponry known to the Founders. This test solves many of the issues surrounding arguments over what weapons could be protected. For example, handguns clearly would be protected because they are commonly used by law-abiding citizens, the police, and the military. On the other hand, weapons of gangsters "like brass knuckles, . . . switchblade knives and sawed-off shotguns" would not be protected because they are not commonly used by law-abiding citizens. "[F]ully automatic weapons, grenades, rocket launchers, flame throwers, artillery pieces . . ." would fail because they are not useful for law enforcement purposes or self-defense, nor are they commonly used by law-abiding citizens, and most are weapons inconceivable by the founders. Thus, a protected class of weapons could be established. As a result, only laws that affect this class would undergo strict scrutiny by the courts.

The level of scrutiny would possibly be similar to protected areas of freedom of expression, such as the test in Widmar v. Vincent. In Widmar, regulations affecting speech that is not in an unprotected category must be necessary to serve a compelling state interest and the regulation must be narrowly drawn to achieve that objective. In the case of firearms regulations, they too would have to be necessary to serve a compelling interest drawn narrowly to achieve that goal. Although in the case of firearms, one would expect that many courts may not find that strict scrutiny is fatal with the ease they have in the past. Therefore, a balance would likely be achieved and reasonable regulation would develop.

Turning to State regulations, the Second Amendment would only affect State law if it were incorporated under the Fourteenth Amendment. The Supreme Court, as mentioned above, has refused to incorporate the Second Amendment. However, there is evidence that the drafters of the Fourteenth Amendment envisioned just the opposite. Where this would lead is too broad a topic for this comment. Its discussion will have to be left for another day.

339 Id. at 259.
340 See id. at 259-60.
341 Id. at 260.
342 Id.
344 See id. at 270.
345 See cases cited supra note 273.
346 See Harmer, supra note 116, at 75-76; Kates, supra note 30, at 252-57; Levinson, supra note 24, at 652-54.
If the Second Amendment is held to guarantee an individual right it will put a bite in future federal firearms regulation. Specifically, before passing legislation, Congress will have to spend considerable time fact finding to create regulations that have the ability to survive the strict scrutiny of the courts and draw them narrowly to achieve that end.

VIII. CONCLUSION

In conclusion, the founding fathers intended the Second Amendment to guarantee the right of the individual to keep and bear arms. Further, Judge Cummings was correct in holding that the statute in question violated Timothy Emerson’s Second Amendment rights and was justified in dismissing the government’s case. In addition, Fifth Circuit approval of Emerson will result in a clear split among the Circuit Courts, hopefully forcing the Supreme Court to hear a Second Amendment case. In light of the historical evidence and the silence of the Supreme Court in the past, it is time to settle the issue. The question remains: When Emerson is presented on appeal, will the Court shine the bright light of justice through the lens of the Constitution, or will it turn away leaving the republic’s “palladium of liberties” alone in the darkness?

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