Heller, the Second Amendment, and the Right to Arms

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By Don B. Kates and Clayton E. Cramer

ABSTRACT: D.C. v. Heller (2008) was immediately recognized as a dramatic change in how the U.S. Supreme Court interprets the Second Amendment. This paper explains why the Court accepted what is now called the Standard Model of the Second Amendment—and rejected various other theories. It also explains why the Heller decision may actually make it easier to move forward and adopt moderate gun control laws, now that the Court has recognized that the Constitution protects an individual right of law-abiding adults to possess firearms for self-defense.

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“One loves to possess arms....” Thomas Jefferson letter to George Washington, 1796

Thomas Paine, 1775: “I am thus far a Quaker, that I would gladly agree with all the world to lay aside the use of arms, and settle matters by negotiation, but unless the whole will, the matter ends, and I take up my musket and thank heaven he has put it in my power.”

Thomas Jefferson letter to his nephew Peter Carr: “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 of your walks.”

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1 The authors gratefully acknowledge the helpful advice of C.B. Kates and Nelson Lund. For errors the authors alone are responsible.
2 Yale, LL.B., 1966.
4 9 WRITINGS OF THOMAS JEFFERSON 341 (A.A. Lipscomb ed., 1903).
Heller: Restoring the Standard Model

Firearms are unique among weapons: only they allow weaker people to resist predation by stronger ones. A recent evaluation argues:

Reliable, durable, and easy to operate, modern firearms are the most effective means of self-defense ever devised. They require minimal maintenance and, unlike knives and other weapons, do not depend on an individual’s physical strength for their effectiveness. Only a gun can allow a 110 pound woman to defend herself against a 200 pound man.7

Moreover it is now established that: 1) “firearms are used over half a million times a year [in America] against home invasion burglars; usually the burglar flees as soon as he finds out that the victim is armed, and no shot is ever fired”; 2) annually, three to six times as many victims use handguns to defend against criminals as criminals use handguns to commit crimes8 – so guns do up to six times more good than harm; and 3) “Resistance with a gun appears to be the most effective [response to criminal attack] in preventing serious injury [to victims, and] .... for preventing property loss....”10

In District of Columbia v. Heller, decided June 27, 2008, a bare majority of the Supreme Court held that law-abiding, responsible adults have a constitutional right to possess this uniquely effective means of self-defense.11 Superficially at least, it is odd that this issue has been the subject of so much confusion and controversy in the twentieth and twenty-first centuries. In contrast, the Second Amendment’s meaning and purposes were clear to eighteenth and nineteenth century Americans. A constitutional commentary by Justice Joseph Story explained the Amendment in terms of the (then) commonplace axiom that, “One of the ordinary modes, by which tyrants accomplish their purpose without resistance is, by disarming the people and making it an offense to keep arms.”12 Moreover, in

7 Linda Gorman & David B. Kopel, Self-defense: The Equalizer, 15 FORUM FOR APPLIED RESEARCH AND PUBLIC POLICY 92 (2000)(emphasis added). Compare Don B. Kates, The Limits of Gun Control: A Criminological Perspective in Timothy Lytton, ed., SUING THE FIREARMS INDUSTRY (2005) at 70: “A gun is the only mechanism that gives a weaker victim parity with an attacker (even if the attacker also has a gun). The next best alternative, a chemical spray, is ineffective against precisely those who are most likely to engage in violent attacks: people who are under the influence of drugs or alcohol or who are extremely angry. [Emphasis added.]”


9 Kates in Lytton supra at 68-69 (collecting studies).


11 All citations herein to Heller are to the slip opinions issued June 27, 2008.

12 Joseph Story, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 264 (1840
the eighteenth and nineteenth centuries, Americans were familiar with (indeed were the intellectual heirs of) earlier writers who deemed the right of self defense to be the cardinal human right – and saw it as encompassing the “auxiliary right” to be armed.\(^{13}\) Late eighteenth century Americans saw the right to arms as inherent in the sacrosanct right to self-defense\(^{14}\) which right was understood by the Founders and their philosophers to include a person’s – and a people’s – right to self-preservation against lawless officials as well as apolitical crime.\(^{15}\) Epitomizing the inextricable relationship the Founders saw between the right of self-defense and the right to possess arms for self-defense is the following quote from a 1790 lecture by Supreme Court Justice James Wilson, who had been the

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\(^{13}\) Blackstone was the single English writer most cited by eighteenth century Americans. Joyce Lee Malcolm, \textit{TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT} 142 (Harvard, 1994). He “constituted the preeminent authority on English law for the founding generation.” Alden v. Maine, 527 U.S. 706, 715 (1999). It was apparently Blackstone who first used "auxiliary" in describing the right to arms as an appendage of the right to self-defense. Id. 143.

\(^{14}\) Typical are the Virginia Declaration of Rights (“That all men... have certain inherent Rights [including] the Means of... pursuing and obtaining ... Safety”) [Quoted in Stephen Halbrook, \textit{THE FOUNDERS’ SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS} (hereinafter cited as Halbrook FOUNDERS) 129 (2008)] and Sam Adams’ listing of the "Natural Rights of the Colonists as Men," as including the rights to life, liberty and property “together with the right to support and defend these in the best manner they can.” Sam Adams' February 27, 1769 letter to the \textit{Boston Gazette} quoted Blackstone that “To vindicate these rights... when actually violated or attack’d,” the last resort was “to the right of having and using arms for self-preservation and defence.” Scott J. Hammond, Kevin R. Hardwick, and Howard Leslie Lubert, \textit{CLASSICS OF AMERICAN POLITICAL AND CONSTITUTIONAL THOUGHT} (Hackett Publishing, 2007) 226. Compare the Virginia Declaration of Rights (1776) listing of the rights of man as including “the Means of...pursuing and obtaining ... Safety.” For other examples see Joyce Lee Malcolm, \textit{TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT} 149 (Cambridge, Harvard U. Press: 1994), Don B. Kates, \textit{The Second Amendment and the Ideology of Self-Protection}, 9 \textit{CONSTITUTIONAL COMMENTARY} 87 (1992) and Randy E. Barnett & Don B. Kates, \textit{Under Fire: The New Consensus on the Second Amendment}, 45 \textit{EMORY L. J.} 1139 (1996) at 1176-79.

\(^{15}\) \textit{The Second Amendment and the Ideology of Self-Protection}, supra. Inter alia, eighteenth century Americans thought that if a people were armed, governments could not persecute them for religious dissent. Malcolm, supra at 157.
principal draftsman of the Pennsylvania Constitution. He evidently did not even see a distinction between the right to self-defense and the right to be armed for self-defense. Here is how Wilson explained the right to use deadly force to repel a homicidal attacker:

"[I]t is the great natural law of self preservation which, as we have seen, cannot be repealed or superseded, or suspended by any human institution. This law, however, is expressly recognized in the Constitution of Pennsylvania: ‘The right of the citizens to bear arms in defense of themselves shall not be questioned.’"16

Today such views are abhorrent to many academics.17 As discussed below, that abhorrence is the only reason the central meaning of the Second Amendment has ever been a subject of dispute. The majority opinion in Heller cites early nineteenth century commentaries and court opinions that, like Wilson, equated the right to arms and the right to self-defense from which it was derived.18 In late eighteenth century America, such views were universally embraced across the political spectrum by figures as diverse (and often antagonistic) as James Madison, Sam Adams, Thomas Jefferson, James Monroe, Patrick Henry, and Thomas Paine.19 Such views were even espoused, at least for the purpose of construing the Amendment, by an eighteenth century Pennsylvania Quaker such as William Rawle, author of America’s first constitutional treatise.20 Equally were they embraced across the English political spectrum. Thus in a casual aside, the Tory MP Edward Gibbon – a faithful supporter of George III and Lord North – remarked that

A martial nobility and stubborn commons, possessed of arms, tenacious of property, and collected into constitutional assemblies, form the only balance capable of preserving a free constitution against the

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16 James Wilson, 3 THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. 84 (Bird Wilson, ed., 1804), emphasis added. Compare Roger Sherman’s avowal that he “conceived it to be the privilege of every citizen, and one of his most essential rights, to bear arms, and to resist every attack on his liberty and property, by whomsoever made.” Halbrook, FOUNDERS supra p. 262.

17 Early in the last century a great legal analyst could still justify the legal right of deadly force self-defense in terms of the “universal judgment that there is no social interest in preserving the lives of the aggressors at the cost of those of their victims.” Wechsler, A Rationale of the Law of Homicide, 27 COLUM. L. REV. 701, 736 (1937) emphasis added. That is not a universal judgment today. As of 1985, 13% of respondents to a Gallup Poll answered negatively the question, “If the situation arose, would you use deadly force against another person in self-defense?” No less telling is the language in which the Gallup Poll described self-defense: “Do you feel that taking the law into one's own hands, often called vigilantism is justified by circumstances?” Emphasis added. See also the denunciations of self-defense by Betty Friedman, Garry Wills et al, detailed in Barnett & Kates supra, 45 EMORY L. J. 1176-79.

18 Heller majority opinion at p. 12. All citations herein to the various Heller opinions are to the slip opinions issued June 27, 2008.


20 W. Rawle, A VIEW OF THE CONSTITUTION 125-26 (2d ed., 1829). St. George Tucker’s commentary preceded Rawle’s treatise but Tucker’s work was the first American edition of Blackstone rather than a freestanding constitutional commentary like Rawle’s.
The equally conservative Sir William Blackstone extolled the right to arms for personal defense as both an inalienable natural right, and as the indispensable mainstay of free institutions and government (along with due process and the right of petition). These virtual truisms were enthusiastically embraced in the study of English government by DeLolme, a Swiss emigrant who was so influential with late eighteenth century Englishmen that he was commonly called "the English Montesquieu."

When Parliament debates the Seizure of Arms Act in 1819, opponents of the bill called it a violation of the right to be armed. In the House of Lords, Earl Grey called it a violation of the rights of Englishmen “not only for defence against the assassin or the midnight robber, but to enforce his constitutional right of resistance to oppression, if deprived of the benefit of the laws.”

In the Commons, M.P. Bennet argued the same point:

[T]hat the distinctive difference between a freeman and a slave was a right to possess arms, not so much… for the purpose of defending his property as his liberty. Neither could he do, if deprived of those arms, in the hour of danger.

Even those who argued for the bill, such as Lord Castlereagh, then foreign secretary, admitted: “[I]t was an infringement upon the rights and duties of the people, and that it could only be defended upon the necessity of the case. But that necessity now existed….”

The right was still revered in 1850 when "the great Whig historian Thomas Macauley maintained that [the Englishman’s right to arms] was 'the security without which every other is insufficient.'”

And:

Nearly forty years later James Patterson [wrote] ... that "in all countries where personal freedom is valued, however much each individual may rely on legal redress, the right of each to carry arms -- and these be the best and the sharpest -- for his own protection in case of extremity, is a right of nature indelible and irrepressible."

Though Congressional debate on the Second Amendment, and on the Bill of Rights in general, was extremely sparse, we know what eighteenth and nineteenth century Americans thought about the

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21 I DECLINE AND FALL OF THE ROMAN EMPIRE 53 (Mod. Lib. ed.) (emphasis added).
22 I W. Blackstone, COMMENTARIES * 121; see also 3 COMMENTARIES * 4.
23 Malcolm supra at 166.
24 T. C. Hansard, 41 THE PARLIAMENTARY DEBATES FROM THE YEAR 1803 TO THE PRESENT TIME 749, December 6, 1819.
25 Hansard, 41 PARLIAMENTARY DEBATES 1130, December 14, 1819.
26 Hansard, 41 PARLIAMENTARY DEBATES 1136, December 14, 1819.
27 Malcolm supra at 169.
28 Id. at 169-70.
29 The record of Congressional debates "was prepared by a shorthand reporter whose skills were hampered by
right to arms from legal treatises, early court decisions, newspaper commentaries, articles as well as the private notes and letters of legislators. Thus from an extensive review of their utterances historian Robert Churchill concludes that late eighteenth century Americans saw the right to arms as a vital, inviolable incident of their citizenship.

Contemporaries understood the Second Amendment to guarantee that the law abiding, responsible citizenry would not be deprived of what Federalist and Anti-federalist articles (respectively) described as “their own arms,” “their private arms.” This is not to say that eighteenth and nineteenth century Americans rejected states’ right/collective right theories such as those set out in the Heller dissents. Americans of the eighteenth and nineteenth centuries could not have rejected such theories, because they had never heard of them. Both theories are artifacts of the twentieth century gun debate and were entirely unknown to the First Congress and the state legislatures that enacted the Second Amendment. As William Van Alstyne has jocularly observed (quoting a preeminent expert on the history of the Amendment):

“In recent years it has been suggested that the Second Amendment protects the ‘collective right’ of states to maintain militias, while it does not protect the right of ‘the people’ to keep and bear arms. If anyone entertained this notion in the period during which the Constitution and Bill of Rights were debated and ratified, it remains one of the most closely guarded secrets of the eighteenth century, for no known writing surviving from the period between 1787 and 1791 states such a thesis.”

excessive drink. Madison himself is said to have condemned the Register as exhibiting 'the strongest evidences of mutilation and perversion.' Malcolm supra fn. 129 at p. 219.

30 See, e.g. the respective contemporary private letters to and from Congressmen cited in Randy E. Barnett, Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia? 83 TEXAS L. REV. 238, 252 and 253 (2004) and Original Meaning, supra 82 MICH. L. REV. at 223.

31 See generally Robert Churchill, Gun Regulation, the Police Power and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment, 25 LAW & HIS REVIEW 1, 139-175 (2007).

32 Original Meaning supra, 82 MICH. L. REV. supra at 224 quoting Federalist and Anti-Federalist newspaper articles respectively. Compare Churchill supra at 142: “...at no time between 1607 [the founding of the American colonies] and 1815 did the colonial or state governments of what would become the first fourteen states exercise a police power to restrict the ownership of guns by members of the body politic. In essence, American law recognized a zone of immunity surrounding the privately owned guns of citizens.” Emphasis added. See Cramer, ARMED AMERICA, 15-16, for some examples of specific exemptions of privately owned firearms from civil process and military impressments.

33 See Barnett, supra 83 TX L REV 260 and 263 noting that, in contrast to proponents of the individual rights view, advocates of the various states’ right/collective rights theories have been unable to produce even a single example of those theories being mentioned by any eighteenth century American. Compare Kopel’s comprehensive review of a century of post-1789 references to the Amendment which finds none stating the states’ right theory. David B. Kopel, The Second Amendment in the Nineteenth Century, 1998 BYU L. REV. 1359. It bears emphasis that the Heller dissents could produce no eighteenth century expression of the states’ right/collective right theories of the Amendment.

In contrast see the various invocations of the individual right to arms by late eighteenth century Americans referenced throughout Churchill, supra.

This dearth of historical support did not prevent ardent modern opponents of gun ownership from inventing the states’ right/collective right theories championed by the Heller dissents. Yet modern scholarly support for the individual right view of the Second Amendment is so overwhelming that it has come to be called the “Standard Model” by its adherents and opponents alike.\textsuperscript{35} We shall so refer to it throughout this article.

The Bill Of Rights: How Federalists Outfoxed Anti-Federalists

Key to understanding the Bill of Rights historically is to eschew any notion that it involved some great compromise between the opposing political parties. To the contrary, by the time of its enactment the Bill of Rights was just a big yawn to most of the legislators who enacted it. Its own author, James Madison, deemed the Bill of Rights irrelevant and superfluous.\textsuperscript{36} He wrote and introduced it because he had promised in the Virginia ratifying convention that a bill of rights would be forthcoming in the First Congress.\textsuperscript{37} (Doubtless he was also influenced by Jefferson’s urging, “The few cases wherein these things may do evil, cannot be weighed against the multitude where the want of them will do evil.”)\textsuperscript{38}

Correlatively, it is necessary to correct some twentieth century misunderstandings that have distorted the background of the Second Amendment. These misunderstandings derive from projecting onto the Amendment concerns that actually arose -- and were decisively rejected! -- in the tumultuous prior debate regarding ratification of the original Constitution. The opponents of ratification, whom we term Anti-Federalists, were principally motivated by antagonism to multiple provisions of the proposed Constitution, among them the sections dealing with the military and the militia. But as a “smokescreen” they also denounced the Constitution’s lack of a bill of rights.\textsuperscript{39} The


\textsuperscript{36} Christopher Hitchens, \textit{THOMAS JEFFERSON: AUTHOR OF AMERICA} 104 (2005) discussing Madison’s correspondence with his mentor Thomas Jefferson who was then ambassador to France.


\textsuperscript{39} The term “smokescreen is Leonard Levy’s: “[The Anti-Federalists] had used the bill of rights issue as a smokescreen for objections to Constitution’s provisions on direct taxes ... [etc. that] could not easily be popularized...." Levy, “Bill of Rights” entry in the \textit{ENCYCLOPEDIA}, supra.
Anti-Federalists were a minority, certainly in political offices and probably in the nation as a whole. Ironically, popular sentiment reversed the importance of their arguments against ratification. On the one hand, there appears to have been a deeply felt popular concern for a Bill of Rights, something that many of the state constitutions adopted during and after the Revolution had featured. On the other hand, insofar as popular sentiment can be judged from legislative action, the Anti-Federalists’ objections to specific features of the Constitution did not prove persuasive.\footnote{For instance, “not one of the ninety-seven distinct [constitutional] amendments proposed by the state ratifying conventions asked for a \textit{return} [to the states] of any control that had been allocated to the federal government over militia.” Malcolm, supra, p. 163, italics in original.}

It is crucial to recognize that the Federalist leader James Madison effectively foreclosed response to the real Anti-Federalist concerns when, in the Virginia Convention, he committed the Federalists to producing a Bill of Rights to be added once the Constitution was ratified. Implicit in that commitment was nonresponsiveness to all the Anti-Federalists most cared about. If James Madison, the Federalist “author of the Constitution,” were to draft a Bill of Rights, the Anti-Federalists could be sure it would not subvert or undercut any of the federal powers in the original Constitution to which they objected. On the balance of federal power vis-a-vis the states, Madison was among the most extreme of all of the Federalists. His pet proposals included a federal veto power over all state legislation and a Congress whose membership was exclusively based on population with no concession to the states as units of government. So wedded was he to these things that he thought the Constitutional Convention a failure because it rejected them, and provided instead for a Senate based on equal representation of the states.\footnote{See Joseph Ellis’ account of the Convention, AMERICAN CREATION 143-210 (2007).}

No bill of rights Madison was to author could be expected to compromise federal power vis-a-vis the states in any respect.

This was fully borne out by Madison’s own assertions to Congress about the Bill of Rights. In explaining his proposed amendments, Madison flatly denied that it would restore any “powers of the State Governments;” instead characterizing them as seeking to satisfy “the great mass of the people who opposed” the Constitution only because it lacked a bill of rights.\footnote{\textit{Annals of Congress}, House of Representatives, 1\textsuperscript{st} Cong., 1st sess., 450.} Not coincidentally, this corresponded to the view Madison’s mentor Thomas Jefferson had expressed to him: the Constitution’s allocations of power to the federal government rather than the states were not objectionable—but the document would benefit from adding a charter of personal rights.\footnote{Hitchens, \textit{Jefferson} supra at 104.}

Madison stressed that his proposed Bill of Rights would not detract one whit from the powers the Constitution had given the federal government.\footnote{Malcolm, supra at 149.} To understand Madison’s assertion to this effect we
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must focus on a major difference between the federal government the Federalists thought was being created and the one which Chief Justice John Marshall later (mis) construed into existence. The Federalists saw the Constitution as an express grant of express powers. “[N]o power can be exercised but what is expressly given.”45 Thus when Anti-Federalists darkly warned that without a bill of rights the federal government might deprive the people of arms46 or free speech or infringe on free exercise of religion, the Federalists responded that Congress could not do such things for the Constitution created no federal power to deal in any way with any of those subjects.47 Indeed, the Federalists capitalized on the late eighteenth century American faith in private gun ownership “to claim that no bill of rights was necessary – that is, so long as the people were armed, no government could limit their freedom.”48

But still the Federalists were beset by popular demands for a federal bill of rights; as Robert Allen Rutland observes, “In the states, however, bills of rights were accepted almost everywhere as a necessary adjunct of the fundamental law…. Bills of rights were the “higher law” of the eighteenth century, and they were created to be an instrument of service for every citizen.”49 In vain did the Federalist protest that all this was a category error. In Federalist eyes, the reason state constitutions needed bills of rights was because the states were governments of general jurisdiction: If a state constitution did not specifically deprive it of power to legislate certain things, the state would enjoy

45 Halbrook FOUNDERS 242 (quoting a North Carolina Federalist leader). Compare Amar, supra at 36 citing as typical the rejection by the original constitutional convention of a proposal for a bill of rights including freedom of the press, Roger Sherman observing, “It is unnecessary. The power of Congress does not extend to the press.” Emphasis added. When Congress considered Madison’s proposal many Federalists felt it unnecessary: As to “the liberty of the press, how is this in danger? There is no power given to Congress to regulate this subject as they can commerce or peace or war.” Halbrook FOUNDERS 235 quoting Congressman James Jackson.

Federalists reiterated this in the state ratification debates. For instance: in the Massachusetts ratifying convention “Colonel Joseph Bradley Varnum [responded] that Congress had only express powers and thus no bill of rights was necessary;” in the South Carolina convention Charles Cotesworth Pinckney declared “by delegating [only] express powers we certainly reserve to ourselves every power and right not mentioned in the Constitution;” 3 RECORDS OF THE FEDERAL CONVENTION 256 (Max Farrand ed. Rev. 1937), and in the Georgia convention a Federalist said that Congress possessed only the powers expressly reserved to it and that “everything that in not reserved is given” back to the people. Halbrook FOUNDERS at pp. 200, 203 and 211.

46 See examples quoted id. at pp.

47 For instance, Federalists pooh-pooed the suggestion of the Anti-federalist minority in the Pennsylvania ratifying convention that the Constitution should be amended to explicitly recognize the right to possess arms for personal defense and other purposes. A Virginia Federalist responded “that Congress clearly has no power over rights such as the private right of bearing arms.” Likewise, a Pennsylvania Federalist responded that Congress was without power to disarm the people. Indicative of late eighteenth century American attitudes he asserted that to be armed was “the birthright of an American.” Both quoted in George A. Mosca, Explaining Away the Obvious: The Infeasibility of Characterizing the Second Amendment as a Nonindividual Right, 76 FORDHAM L. REV. 2113, 2127, 2128 and footnotes 115 and 119 (2008).


power to so legislate. In contrast, the federal government (as they saw it) was one of limited powers that could not operate at all in any subject area unless the Constitution expressly authorized it to do so. As Madison himself explained in *Federalist* 45: “The powers delegated by the proposed Constitution are few and defined.” Likewise in the Virginia ratification debate he insisted that “the general government had no power but what was given it.”

Madison was not anticipating that decades later, Chief Justice Marshall would misconstrue the Constitution as a list of objectives with the federal government having implicit power to legislate on any subject as necessary or conducive to achieving any of those objectives. Likewise in the Virginia ratification debate he insisted that “the general government had no power but what was given it.”

Randy Barnett has described how this turned on its head Madison’s vision of the federal government as one of limited jurisdiction:

> The Constitution that was actually enacted and formally amended [by the Bill of Rights] creates islands of government powers in a sea of liberty. The judicially redacted Constitution creates islands of liberty rights in a sea of government powers.

In sum, neither Madison nor other Federalists had any real impetus for concern about a Bill of Rights for they all believed it would not affect any power the federal government had been given by the original Constitution.

Thus Madison’s Bill of Rights had virtually nothing to do with prior controversies about the various specific provisions of the original Constitution. On the contrary, his Bill of Rights was an unneeded (in his view) invocation of eighteenth century American platitudes – a “mom-and-apple-pie” statement of rights in which contemporary Americans believed – rights which Madison did not believe the federal government could ever violate, because it lacked the authority to do so. Conscious that his proposal needed a two-thirds vote in both the Senate and the House, and ratification by three-quarters of the states, Madison included nothing that might stir opposition within or between either faction; he assiduously avoided “all controvertible points.” The most “urgent” reason imaginable for having a Bill of Rights was that a bill of rights could do little harm and conceivably might do some good. That is to say it did not seem urgent at all.

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51 See Levy’s essay on *McCulloch v. Maryland* in *3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION*.
53 E.g. Roger Sherman’s comments noted earlier, note 45.
54 Madison explained “that he had selected those rights for inclusion which were unexceptional and thus most likely to win approval.” Malcolm, supra, at 149. See *1 ANNALS OF CONGRESS* 450: “But I do wish to see a door opened to consider, so far as to incorporate those provisions for the security of rights, against which I believe no serious objection has been made by any class of our constituents....”
56 Information on seventeenth and eighteenth century American gun laws suggests that the Second Amendment may be a partial exception to our generalization that the Bill of Rights was a reification of platitudes. While no one thought the
Hence the lackadaisical manner in which the members of both factions in the First Congress treated Madison’s proposal; as described by the great modern historian of the Bill of Rights, Leonard Levy:

In the first Congress Representative Madison sought to fulfill his pledge [to the Virginia convention.] His accomplishment in the face of opposition and apathy entitles him to be remembered as “father of the Bill of Rights” even more than as “father of the Constitution.” Many federalists thought that the House had more important tasks, like the passage of tonnage duties.57

The First Congress’s Anti-Federalists showed equally little interest. Earlier they had only carped about “the lack of a bill of rights in the Constitution, [because they] hoped for either a second [constitutional] convention or amendments that would cripple the substantive powers of the government.”58 Such a strategy no longer applied once the Constitution was ratified. At that point, the Anti-Federalists sought to scuttle Madison’s ... [bill of rights]. They began by stalling, then tried to annex amendments aggrandizing state powers, and finally deprecated the importance of the very protections of individual liberty that they had previously demanded. ***

Supporters of Madison informed him that Anti-Federalists did not really want a bill of rights... [His] proposals went to a select committee [whose Federalist chairman] thought the House ‘had more important business.’”59

At the same time the Anti-Federalists disdained Madison’s proposed amendments as mere platitudes of negligible import.

Aedanus Burke of S.C., an Anti-Federalist, thought the amendments were ‘not those solid and substantial amendments which the people expect; they are little better than whip-syllbub, frothy and full of wind.’ ... Virginia Senators William Grayson and Richard Henry Lee, both Anti-Federalists, opposed the amendments because they left “the great [errors in the original Constitution] ... to stand as they are....” Lee informed Patrick Henry that they had erred in their strategy of accepting ratification on the promise of subsequent amendments. Grayson reported to Henry that the amendments adopted by the Senate “are good for nothing.”***

But for Madison’s persistence the amendments would have died in Congress. Our precious Bill of Rights was in the main the result of the political necessity for certain reluctant Federalists to make their own a cause what had been originated, in vain, by the Anti-Federalists to vote down the Constitution. The party that had at first opposed a Bill of Rights inadvertently wound up with the responsibility for its

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58 Id.
59 Id.

colonies (later states) had “police power” authority to confiscate private arms, they had sometimes exercised an emergency military power to do so. Various colonies had confiscated arms for the purpose of stockpiling arms themselves or to disarm groups who were deemed to be disaffected, e.g., Tories during the Revolution. Churchill supra at 158-61. Thus one effect of the Second Amendment was to guarantee Americans against federal confiscations of their private arms. Nevertheless this was not an urgent matter in 1789. Impressment of arms had excited such great public indignation that by 1787 colonial or state statutes authorizing it had been formally repealed (Churchill supra at 153-56) and the federal government never enacted any.
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framing and ratification, while the party that had first professed to want it discovered too late that it was not only embarrassing but politically disastrous for ulterior purposes.\(^60\)

The difficulty so many modern academics seem to have in understanding the Second Amendment may arise from their disagreement with, even horror at, views universally shared by Madison and his contemporaries. The Framers looked back on the fact that in the prelude to the Revolution the British government had sought to confiscate the colonists’ private arms and preclude the importation and sale of arms.\(^61\) Beyond the practical effect of such efforts were the ideological implications: to late eighteenth century Americans a defining characteristic of free government was that “there is not the slightest difficulty or jealousy about putting arms into the hands of every man in the country” (as a Maryland patriot put it in 1774);\(^62\) conversely, late eighteenth century Americans saw government attempts to ban arms as evidencing an intent to tyranny.\(^63\) As one late eighteenth century American wrote, from “the original, unalterable truth, that all men are equal in their rights” flowed the inevitable conclusion “that the people will be universally armed.”\(^64\)

Eighteenth century Americans and Englishmen believed that the defenselessness of being unarmed “allures the ruffian [whereas] arms like laws discourage and keep the invader and plunderer in awe and preserve order in the world”\(^65\) so that “a Man that hath a Sword by his side, shall have the least occasion to make use of it.”\(^66\) The Founders concurred in Machiavelli’s dictum that to be unarmed was to be “contemptible.”

In words that might today seem hopelessly utopian, Jefferson’s friend,\(^67\) the writer and sometime diplomat Joel Barlow, extolled to Europeans the contemporary American attitude toward arms:

[T]heir conscious dignity, as citizens enjoying equal rights, [precludes an armed citizenry having any desire] to invade the rights of others. The danger (where there is any) from armed citizens, is only to the government, not to the society: as long as they have nothing to revenge in the government (which they

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\(^{60}\) Levy, et al., “Bill of Rights” supra, emphasis added.

\(^{61}\) Halbrook FOUNDERS supra pp. 2-3; Heller majority at p. 21.

\(^{62}\) Quoted Halbrook FOUNDERS at p. 50.

\(^{63}\) George Mason: “to disarm the people; that it was the best and most effectual way to enslave them....” Elliot, DEBATES, 3:380. This attitude was common; compare a 1776 article in the PENNSYLVANIA EVENING POST describing “The inhibition of bears Arms” as “the most flagitious Characteristic of abject Slavery.” Quoted in Stephen Halbrook, The Right to Bear Arms in the First State Bills Of Rights, 10 VT. L. REV. 225, 270 (1985). See also the quotation in the text about free governments not fearing their people being armed and compare the 1789 description by another patriot of Venice as an “unfree republic” because it forbade its people carrying arms. Halbrook FOUNDERS supra 198-99.


\(^{65}\) 1 WRITINGS OF THOMAS PAINE 56 (M. Conway ed. 1894).


\(^{67}\) Hitchens, supra, 199.
cannot have while it is in their own hands) there are many advantages in their being accustomed to the use of arms and no possible disadvantage."

Unrealistic though this may seem to some today, it accords surprisingly well with modern criminological research. Just as Barlow and his contemporaries viewed them, criminals and especially murderers, are extreme aberrants – a tiny minority in a vast sea of ordinary people who have proven trustworthy though armed with more than 280 million guns. Only 15% of American juveniles and adults have ever been arrested and violent criminals are a small minority even among them.

Insofar as studies (of which those detailed below are but a representative sample) focus on perpetrators, they show that neither a majority, nor many, nor virtually any murderers are ordinary 'law abiding folks', 'law abiding citizens.' Rather, almost all murderers are extreme aberrants with life histories of violence, psychopathology, substance abuse and other dangerous behaviors.

Thus our current laws against such people possessing guns would virtually eliminate gun violence – if extreme aberrants who incline to serious violence could somehow be induced to obey gun laws.

Coming back now to the attitudes of the founding generation, we find Madison assuring his fellow-countrymen that they need not fear government "because of the advantage of being armed, which the Americans possess over the people of almost every other nation." He contemptuously contrasted American government which trusted its people with arms with "the several kingdoms in Europe, which [exist through dependence on military power and] ... are afraid to trust the people with arms." Likewise Thomas Paine was mirroring the near-universal beliefs of eighteenth century Americans in declaring that, "The peaceable part of mankind will be continually overrun by the vile and abandoned while they neglect the means of self-defense.... Horrid mischief would ensue were [the good] deprived of the use of [arms;] the weak will become a prey to the strong."

In light of the above it is ironic that the Heller dissents and much twentieth century writing on the Second Amendment construe it as if it had been an urgent product of the Anti-federalist opposition.

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68 J. Barlow, ADVICE supra at 17 (London, 1792, 1795 & reprint 1956). To the same effect see 1 T. Dwight TRAVELS IN NEW ENGLAND AND NEW YORK xiv (London, 1823).
70 Ibid. Delbert S. Elliott, Life Threatening Violence is Primarily a Crime Problem: A Focus on Prevention, 69 COLO. L. REV. 1081-1098 (1998) (collecting studies) at 1087-88: "Relatively few minor offenders go on to become involved in life-threatening violent crimes, but virtually all individuals who become involved in life-threatening violent crime have prior involvement in many types of minor (and not so minor) offenses."
71 Kates & Mauser, 30 HARV. J. OF LAW & P.P. supra at 663ff. (collecting studies).
72 FEDERALIST 46.
73 Ibid.
74 WRITINGS OF THOMAS PAINE 56 (M. Conway ed. 1894) (emphasis added.)
instead of the arch-Federalist Madison. Modern writers on the subjects may be blinded to the origins of the Amendment by their personal antagonism toward “one thing all the Framers agreed on [which] was the desirability of allowing citizens to arm themselves.”

To reiterate, eighteenth century Americans deemed self-defense the cardinal human right and saw the right to be armed as inherent in the right of self-defense. They received that vision from Cicero, Sidney, Hobbes, Locke, Blackstone, Montesquieu and the rest of the thinkers whose views shaped eighteenth century American political thought.

The Enactment Of The Second Amendment

Though they ratified the Constitution, several of the state ratifying conventions recommended the addition of a bill of rights and specified particular rights that it should guarantee. In constructing his Bill of Rights, Madison took inspiration from these state ratifying convention recommendations as well as from the provisions of the existing state bills of rights. (As to the Second Amendment specifically, Madison's notes show inspiration also by the English right to arms provision. The English right “was clearly an individual right having nothing whatever to do with service in a militia.”)

Some indication of the strength of contemporary attitudes may be deduced from the number of state conventions that, though ratifying the Constitution, recommended adding a guarantee of the

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75 Original Meaning supra, 82 Mich. L. Rev at 220-21. Consider, for instance, the Pennsylvania Declaration of Rights' guarantee of a right to arms for personal defense as well as various other rights. Though several of other rights provisions (notably the religious ones) sparked extended controversy, no objections were made to the unmistakably individual guarantee of a right to arms. Halbrook FOUNDERS supra at 137.

76 See footnote 13.


78 “Mr. Madison has introduced his long expected amendments. They are the fruit of much labor and research. He has hunted up all the grievances and complaints of newspapers, all the articles of convention, and the small talk of their debates.” Fisher Ames to Thomas Dwight, June 11, 1789, in William B. Allen, ed., WORKS OF FISHER AMES (Liberty Classics: Indianapolis, 1983), 1:642.


80 Heller majority opinion, p. 20. For evidence of how the English Bill of Rights’ arms guarantee was understood at the time, note Heller’s mention of a House of Lords debates in 1780 in which Lord Richmond, Lord Amherst, and Earl Bathurst all refer to the “right to keep and bear arms” specifically for individual self-defense: (“who had very properly armed themselves for the defence of their lives and property”). THE LONDON MAGAZINE, OR, GENTLEMAN’S MONTHLY INTELLIGENCER, October, 1780, 467-8; Heller majority opinion at p. 18.
personal right to keep and bear arms. Of the state ratifying conventions that recommended provisions for a bill of rights, five suggested a right of individuals to arms. Of the state ratifying conventions that recommended provisions for a bill of rights, five suggested a right of individuals to arms. Only four mentioned due process, or sought a prohibition on cruel and unusual punishment, or requested that the right to assemble for redress of grievances be guaranteed. By way of further comparison, only three mentioned free speech and the various specific criminal procedure rights – except for double jeopardy, which only New York mentioned.

And these are only the official requests. In addition to the five conventions recommending that the individual right to arms be guaranteed, at least two others give us clues that the right was recognized as both fundamental and individual. The Anti-federalist minority in Pennsylvania urged adoption of a guarantee for an individual right to bear arms. (To this Federalists responded that there was no need of such a guarantee for arms were “the birthright of every American” with which Congress had no power to interfere.) The Massachusetts ratifying convention came very close to passing a bill of rights request that included a prohibition on Congress passing any law “to prevent the people of the United States, who are peaceable citizens, from keeping their own arms….”

**Prefatory Clauses And Eighteenth Century Meaning**

The Second Amendment reads: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” This language has been the subject of multiple twentieth and twenty-first century glosses. Though we shall review the specifics, first it is necessary to set out an overall caveat because these glosses generally rest on the language of the prefatory (“militia”) clause. As Eugene Volokh has shown, prefatory clauses were

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83 Elliot, DEBATES, 1:328 (New York), 1:335 (Rhode Island), 3:658 (Virginia), 4:244 (North Carolina).
84 Elliot, DEBATES, 1:328 (New York), 1:335 (Rhode Island), 3:658-9 (Virginia), 4:244 (North Carolina).
85 Elliot, DEBATES, 1:335 (Rhode Island), 3:659 (Virginia), 4:244 (North Carolina).
86 Elliot, DEBATES, 1:328 (New York).
88 See footnotes 47 and 132 supra.
common to many rights guaranteed in late eighteenth century American state constitutions. So Madison, the First Congress, and the authors of those state constitutional prefatory clauses must be presumed to have been aware of, and legislating within, contemporary principles which rendered such prefatory clauses inapplicable as limitations on the operative clauses: "but when the words of the enacting clause are clear and positive, recourse must not be had to the preamble." (The Heller majority opinion makes this point citing other early and modern authorities.)

Suffice it to say that, absent confusion created by reference to the prefatory clause, there is no ambiguity as to the central meaning of the words of the operative clause, "the right of the people to keep and bear arms shall not be infringed." Of course there may be ambiguities about the operative clause’s periphery, but that is equally true of many declarations of constitutional rights. For instance: how far – if at all – does "freedom of the press" extend to writings and pictures which are deemed pornographic? Does "freedom of religion" include a right to sacrifice animals or to consumption of illegal substances like peyote? Does "free speech" extend to non-political speech? Notwithstanding such peripheral questions, the essential meaning of the "right of the people to keep and bear arms" clearly is that ordinary people have a right to possess ordinary firearms – just as "freedom of the press" clearly includes the right to publish ordinary newspapers, books and magazines despite possible ambiguities as to peripheral issues.

The operative clause being substantially clear, neither at the time of enactment nor today are questions stemming from the preamble relevant to, or a basis for challenging, the Standard Model of the Second Amendment. That being said, we nonetheless proceed to consider questions that have been raised based on the prefatory clause.

In Madison’s original draft, the preamble part of the Second Amendment referred to a “free country.” Because the Congress later changed that to “free state,” some have claimed that Congress’s actions show that the reference is to the states of the union. From that they further infer that what was being guaranteed was only state rights to have armed militias, not a right of individuals to be armed.  

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91 James Kent, 1 COMMENTARIES ON AMERICAN LAW 516 (9th ed. 1858). The same principle prevails today. See, e.g., Norman Singer, 2A SUTHERLAND ON STATUTORY CONSTRUCTION § 47.04, at 224-25 (6th ed. 2000) ("The preamble can neither limit nor extend the meaning of a statute which is clear. Similarly, it cannot be used to create doubt or uncertainty." Emphasis added.).

92 Heller, majority opinion at p. 4.

93 Intellectually, though no longer legally, this is a very serious unclarity. Another intellectually serious, though no longer legally serious, unclarity about free speech is whether it protects the speaker from prosecution for the speech or only bars prior restraints.

94 For a discussion reaching this conclusion on grammatical grounds, see Nelson Lund’s illuminating D.C.’s Handgun Ban and the Constitutional Right to Arms: One Hard Question? supra.

Given that “free state” and “free country” mean exactly the same thing, and the lack of any historical evidence for it, this alternative reading is not much more than a pun. In any event, Eugene Volokh has recently shown that “free state” was a term that eighteenth century Americans and the philosophers they revered often used to describe foreign nations that were free from despotism.

Critics of the Standard Model seize on the phrase “well-regulated militia” to claim that it signals that states are free to ban private arms. The Heller majority (p. 23) disposed of this in one sentence: “the adjective ‘well-regulated’ implies nothing more than the imposition of proper discipline and training.” It supported this by eighteenth century references to which we add the following: The term “well-regulated militia” appears to have been something of a catch phrase among Americans at least in the last quarter of the eighteenth century. Over and over and over again the term “well-regulated militia” was used in hailing the organization of bodies of armed citizens who were not only wholly independent of the formal British-appointed colonial governors but at least implicitly opposed thereto (albeit not opposing them by active military operations).

Most important for understanding the Framers’ intent is Federalist 29, where Hamilton discusses the adverse economic consequences of drilling the entire militia sufficiently to “[e]ntitle them to the character of a well regulated militia.” Certainly, the militia of Hamilton’s time was “regulated” in the sense of being governmentally controlled and directed so his usage here would seem to mean, “properly trained.” Indeed, even today, the process by which the barrels of a double-barreled shotgun are made to shoot to the same point is called “regulating a shotgun”—a distinctly non-governmental process, but one that results in a shotgun that can be properly used. As to weapons use and proficiency, for something or someone to be "well regulated" meant properly trained and well practiced in the use of arms. "In eighteenth century military usage, 'well regulated' meant 'properly disciplined', not 'government controlled.'"

Even in general parlance eighteenth and nineteenth century Americans often used "regulate" not in the sense of regulation by law but rather in the now less prominent uses given by Webster's:

2. to adjust to some standard or requirement, as amount, degree, etc.: to regulate the temperature. 3. to adjust so as to assure accuracy of operation: to regulate a watch. 4 to put in good order: to regulate the digestion.

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96 See the Heller majority opinion’s dismissal of the issue at p. 24.
98 See examples quoted in Halbrook FOUNDERS, supra at pp. 31, 49, 140, 141, 142, 143, 144, 161, 164, 180, 202, 226, and 290.
99 FEDERALIST 29.
101 Lund above, 39 ALA. L. REV. 103, 107, n. 8.
102 WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 1209 (1989)
British usage in the century preceding adoption of the Second Amendment also suggests that “well-regulated” refers to effective control, not to governmental control.\(^\text{103}\) And Webster’s 1828 dictionary of American English, while somewhat after the Framers’ time, also suggests the notion of well-disciplined or effective. While the first definition of “well-regulated” refers to governmental regulation, the second definition includes: “To put in good order; as, to regulate the disordered state of a nation or its finances.”\(^\text{104}\) The OED’s principal definitions of “well-regulated” include examples of governmental regulation, but also an example from 1812 where the sense is “properly adjusted,” such as a clock or sundial. For the word “regulated,” the second OED definition is, “Of troops: Properly disciplined,” with the note that such use is rare, and gives only a 1690 example.\(^\text{105}\)

At most the phrase “well-regulated” embodies the centuries old tradition that the right to arms is limited to virtuous citizens, i.e., it guarantees nothing to criminals, juveniles or the mentally unbalanced.\(^\text{106}\) To construe the Amendment’s use of “well-regulated” as authorizing gun bans makes the operative clause in the Amendment ungrammatical -- syntactically senseless. In contrast, when understood in terms of eighteenth century usage, the clause tracks perfectly: "A well regulated [i.e., orderly and properly trained and disciplined] Militia, being necessary to the security of a free State...."

No honest attempt to discern the meaning of “well-regulated” could view it as affirmatively authorizing restrictive gun laws. It simply does not say that. Contrast what a proviso would say to authorize some state regulation (albeit not total prohibition) of an aspect of the constitutional right to keep and bear arms: “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 abridged. This shall not prevent the passage of laws to punish those who carry weapons concealed.”\(^\text{107}\)

\(^{103}\) Andrew Fletcher, David Daiches, ed., SELECTED POLITICAL WRITINGS AND SPEECHES, 16-17 (Edinburgh: Scottish Academic Press, 1979), where Fletcher’s "A Discourse of Government With Relation to Militias" uses the expressions "well-regulated militias" and "ill-regulated militias," apparently in the sense of properly disciplined and not properly disciplined. THE MONITOR, OR THE BRITISH FREEHOLDER (London: J. Scott, 1757), 2:235 uses the phrase "well-regulated militia" in distinction from a standing army, and in the following paragraph, “As to the unnatural suggestion; that whenever there should be a necessity for a regular army and a disciplined militia to act in conjunction....” A fair inference is that “disciplined” and “well-regulated” were equivalent in meaning.

Similarly, Geo. III c. 20 (1761) provides for “raising and training the militia” in England. It starts with “WHEREAS a well regulated militia has been found to be of great utility....” 25[part 1] THE STATUTES AT LARGE, FROM MAGNA CHARTA TO THE END OF THE ELEVENTH PARLIAMENT OF GREAT BRITAIN, ANNO 1761, 101 (London: Joseph Bentham, 1763).

\(^{104}\) Webster, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE, II, s.v. “Regulate”.

\(^{105}\) OED, 13:524.


\(^{107}\) Art. 3 of the 1879 Louisiana Constitution. Art. I, § 11 of the 1978 Idaho Constitution is virtually identical.
Finally, note that the suggestion that “well-regulated” implies that government may regulate is inconsistent with the anti-Standard Model argument that the Amendment has nothing to do with private arms. If the Amendment really is a guarantee only of the arms of the state, how does “well regulated” imply anything about banning private arms?

The Militia Preface To The Second Amendment

For reasons having more to do with their predilections and abhorrence of guns than the militia preface itself, that preface is the mainstay of opponents of the Standard Model. A major source of modern misunderstandings of the preface is the confusion of the “militia” the preface mentions with a body of troops (presumably raised by states). Although it allows states to have a “militia,” the Constitution flatly forbids states to raise or have any body of troops unless by express consent of Congress. Moreover the militia’s military aspect should not obscure the fact that in England and the colonies alike, the militia and the armed populace often performed civil law enforcement duties.

Rather than troops, every colony except Pennsylvania, and from the Revolution onward, every state militia law, triply mandated an armed populace, i.e., universal personal weapons ownership. First, with limited exceptions, every free white man of military age who was physically fit for service was required to own a militia weapon and to muster when the militia was called out (whether for training or actual service). Second, most colonies required every household to have at least one gun – whether or not anyone subject to militia call up was a member of the household. Women, seamen, the physically unfit and some political or religious leaders generally were exempt from militia call-up but still they were required to keep armed households. Third, several colonies required travelers to carry arms when traveling away from settlements, or when attending church or

Compare Art. II, § 13 of the 1876 Florida constitution (declaring the right to arms but adding “nothing herein contained shall be construed to justify the practice of carrying concealed weapons.”) and the virtually identical wording of the Colorado and several other constitutions.

108 Amar, supra, at 51.
111 The colonial definition of military age differed depending on the colony. At a minimum it was 18-45 but some colonies set the lower boundary as early as 16 and some set the upper boundary as late as age 60. See Clayton E. Cramer, ARMED AMERICA: THE REMARKABLE STORY OF HOW AND WHY GUNS BECAME AS AMERICAN AS APPLE PIE 3-9 (Nashville, Tenn.: Nelson Current, 2006), for examples of statutory obligations to own militia weapons, as well as exemptions in some colonies for “Sickness or Lameness,” Quakers, and occupations whose function was so vital that they were exempted: “all Justices of the Peace, Physicians, Lawyers, and Millers.”
112 See Churchill, supra at 148-9, giving examples. One colonial statute that was a little more explicit than others read: “that every house keeper or housekeepers within this Province shall have ready continually upon all occasions within his her or their house for him or themselves and for every person within his her or their house able to bear armes one Serviceable fixed guinne of bastard muskett boare…” along with a pound of gunpowder, four pounds of pistol or musket shot, “match for matchlocks and of flints for firelocks,….” William Hand Browne, ed., 1 ARCHIVES OF MARYLAND (Baltimore: Maryland Historical Society, 1885) 77. Emphasis added; original spelling retained.
public meetings. This applied no less to overage men than to those of military age.113

Thus, far from being inconsistent with gun ownership, the militia concept required and depended on gun ownership in every household, and gun availability for the entire responsible law-abiding adult citizenry. In order to eliminate any excuse for gunlessness, those financially unable to afford a gun were given their own by the colony and required to pay the cost back over time.114

So attempts to imply limitations on the right to arms from the militia preface are difficult to understand except as exercises in wishful thinking by those who fervently desire to ban guns. The preface plainly does not say anything like that.115 (It bears emphasis that if some military-based limitation on the right to arms could be read into that clause, its contours would be unlikely to please opponents of gun ownership. The most such a limitation would imply is that the right to arms is limited to the kinds of powerful high-quality firearms deemed suitable for military use. That would only exclude from the Amendment’s coverage, and allow bans of, the tiny low-powered .25-caliber handguns as well as poor-quality handguns in all calibers.116)

But there is no reason to treat the militia preface as giving authority for any kind of gun ban. Again, it says nothing to authorize such laws. The idea that it expresses – that a well-regulated Militia is necessary to the security of a free State – was just another late eighteenth century American platitude. As Eugene Volokh has shown, such opening clauses were common in the state bills of rights of the 1770s and 1780s from whence the idea of having a federal Bill of Rights sprang.117 For instance, some state constitutions prefaced their guarantees of free speech or free press with declarations that these rights are essential to a free state.118 Alexander Meikeljohn might have cited such prefaces as support for his position that freedom of expression applies only to overtly political expression, not to such things as the writings of D.H. Lawrence – much less those of Henry Miller – or to apolitical plays or movie reviews, obituary notices, etc. But Meikeljohn himself eventually withdrew from that position and we are unaware of any constitutional scholar who would today say

113 Anent this tripartite system of universal gun ownership see Malcolm supra 139ff. and Randy E. Barnett & Don B. Kates, Under Fire: The New Consensus on the Second Amendment, 45 EMORY L.J. 1139, 1205 (1996). For examples of mandatory gun carrying laws, see Cramer, Armed America, 9-11.


115 “A well regulated Militia, being necessary to the security of a free State....”

116 Throughout the twentieth century the standard U.S. Armed Forces weapons were the .45 caliber semi-automatic pistol and a variety of rifles of roughly .30 caliber. Currently the standard U.S. Armed Forces pistol is the 16-round semi-automatic M9 (Beretta) with the 15 shot M-11 (Sig-Sauer 226) being an alternate standard. The chosen rifle is the .223 M16 in various versions although plans have been announced to replace it with a larger bore rifle. Throughout the twentieth century various other major national armies adopted a wide variety of handguns in calibers down to and including .32. For training purposes some armies used target-quality firearms in .22 caliber.

117 Volokh in NYU L Rev supra, at 794-6.

118 E.g., Massachusetts 1780 Constitution: “The liberty of the press is essential to the security of freedom in a State: it ought not, therefore, to be restrained in this commonwealth.”
that government is free to ban or censor sports or society pages or books and magazines on the basis that they are not about political affairs. Nor have courts applying such provisions of state constitutions held them to be limited by their preambles.\footnote{119} “It was quite common for prefatory language [in eighteenth and nineteenth century American constitutional provisions] to state a principle of good government that was narrower than the operative language used to achieve it” but that does not narrow the constitutional guarantee that the provision makes.\footnote{120} The militia clause was not intended to limit or define the right to arms but to emphasize a particular aspect of that right, to wit, that by guaranteeing the right to be armed the Amendment was necessarily guaranteeing the militia’s arms, because those were the arms of its members who constituted virtually the entire military age male populace.\footnote{121}

The Second Amendment must be seen as two connected but independent parts, just as the First Amendment consists of the five more or less connected but independent guarantees: freedom of religion; freedom of speech; church-state separation; free press; and the right to assemble and petition for redress of grievances. The Second Amendment combines (a) a precatory preamble lauding the militia\footnote{122} with (b) a guarantee to ordinary people of a right to arms for defense of their selves and their liberties. The distinctiveness of these disparate parts is clear given that Anti-Federalists had previously advocated including such a precatory declaration in the Constitution without any relationship to the right to arms, a change Madison had himself supported.\footnote{123}

Madison’s “offer[ing] the Second Amendment’s preamble” has been viewed as trying “to palliate Anti-Federalist concerns about the continued existence of the popular militia.”\footnote{124} But if that was part of his intent, it failed. The Anti-Federalists did not dissent from the operative clause, Madison’s “mom and apple pie” guarantee of the universally endorsed personal right to arms.\footnote{125} But, ignoring

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\item \footnote{119} Volokh in \textit{NYU L REV} supra, at 796ff.
\item \footnote{120} Parker, supra 478 F.3d at 389 (citations omitted).
\item \footnote{121} The Second Amendment’s language “was an expression of the drafters’ view that the people possessed a natural right to keep and bear arms, and that the preservation of the militia was the right’s most salient political benefit – and thus the most appropriate to express in a political document.” Parker, supra at 390.
\item \footnote{122} Amar supra at 322, fn. 44 points out that in passing the Bill of Rights Congress explicitly described it as involving declaratory provisions as well as prohibitions. Thus United States v. Darby, 313 U.S. 100,124 (1941) (Tenth Amendment is a mere cautionary declaratory statement not a grant of affirmative powers to the states); followed, New York v United States, 505 U.S. 144, 156 (1992).
\item \footnote{123} Compare Lund, supra, \textit{GEORGE MASON C.R. L. REV.} supra “Nor should one suppose that [the First Congress] ... could not or would not have put something [precatory] in the Constitution just to soothe the fears of citizens who worried about the power of the new federal government. The Supreme Court has concluded that the framers of the Second Amendment did exactly that in the Tenth Amendment, which moreover is an entire and distinct provision of the Bill of Rights, not just a preambular comment.” Emphasis in original; footnote omitted.
\item \footnote{124} \textit{2 RECORDS OF THE FEDERAL CONVENTION} 616-17 (Max Farrand ed. Rev. 1937). See also Halbrook \textit{FOUNDERS} 234-35 (virtually identical wording proposed in New York without any mention of the right to arms).
\item \footnote{125} Ibid. at 390.
\end{itemize}
the fact that some in their own party had originally proposed such a precatory statement, when Madison did so Anti-Federalists bitterly objected that the preface was precatory and did nothing to vitiate the military and militia provisions of the original Constitution that the arch-Federalist Madison approved but that the Anti-Federalists opposed.126 (And thereafter when “[t]he proposed Bill of Rights was [reviewed by the state legislatures] ... [n]o record exists of any criticism of [the right to arms clause] although the militia clause was taken to task for not actually doing anything.”127)

So the Anti-Federalists proposed separate constitutional amendments to modify the Constitution by guaranteeing state power vis-a-vis the militia. But as the Anti-Federalists were only a minority in the First Congress, their proposed constitutional amendments were rejected even as the Second Amendment with its universally endorsed guarantee of an individual right to arms was enacted.128 In fact, the preemption doctrine originated in cases holding that federal power over the militia is plenary, with state authority existing only insofar as consistent with federal.129 This brings up yet more evidence that the states’ right/collective right theories are not legitimate theories but just inventions designed to offer some explanation – any explanation however fanciful – for the Second Amendment, alternative to the Standard Model. Were these theories legitimate attempts to ascertain the Amendment’s meaning, their proponents would have explored them and their implications sufficiently to find that proposals to do exactly what they claim the Amendment was supposed to do

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126 For instance, the Anti-Federalist CENTINEL complained of the Second Amendment’s precatory preface, “‘[T]he absolute command vested by [the original Constitution] in Congress are [sic] not in the least abridged by this Amendment.’” Quoted by Malcolm, supra, at 163.

127 Halbrook, FOUNDERS supra at 4. See generally Halbrook supra ch. 13 citing describing objections over various portions of the Bill of Rights including the precatory preface to the Second Amendment, but no objection to its rights clause.

128 Original Meaning, 82 MICH L. REV. supra at 225. For instance, two proposed constitutional amendments dealing with the regulation of the militia were rejected by the First Congress. See Robert Dowlut, Federal and State Constitutional Guarantees to Arms, 15 U. DAYTON L. REV. 59, 65 (1989). As to rejection of a proposal that would have directed how the militia was to be regulated see Stephen P. Halbrook, The Right of the People or the Power of the State: Bearing Arms, Arming Militias, and the Second Amendment, 26 VALPARAISO U. L. REV. 131, 189 (1991).

The following text, for example, was considered, and rejected by the First Congress—language that would have indeed created a states’ right to arm the militia: “That each State respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same. That the militia shall not be subject to martial law, except when in actual service, in time of war, invasion or rebellion, and when not in actual service of the United States, shall be subject only to such fines, penalties and punishments, as shall be directed or inflicted by the laws of its own state.” FIRST JOURNAL OF THE SENATE at 75.

129 Houston v. Moore, 18 U.S. 1, 24 (1820) (federal militia legislation preempts state), Martin v. Mott, 25 U.S. 19 (1827) (president's power to call militia from state control into federal service), Selective Draft Law Cases, 245 U.S. 366, 383 (1918) (Congress has authority to abolish states militia by bodily incorporating them into federal army), Perpich v. Department of Defense, 496 U.S. 334 (1990) (state militias may be called into federal service over state objection; federal authority over the militia is paramount). See J. Norman Heath, Exposing the Second Amendment: Federal Preemption of State Militia Legislation, 79 U. DET. MERCY L. REV. 39 (2001), which provides a detailed treatment of these issues.
were considered and rejected by Congress\(^\text{130}\) as well as the federal preemption cases on the militia just cited. No proponent of those theories has discovered these things – or at least none have discussed them and attempted to reconcile them with the states/collective right theories. To reiterate, those theories exist not because anyone believes them but only as makeweights to answer their firearms-averse inventors’ desperate need to provide something resembling a content for the Second Amendment alternative to the Standard Model.

In sum, as the Fifth Circuit concluded in *Emerson v. United States*:

> to give the Second Amendment’s preamble its full and proper due there is no need to torture the meaning of its substantive guarantee into the collective rights or sophisticated collective right model which is so plainly inconsistent with the substantive guarantee’s text, its placement within the bill of rights, and the wording of the other articles thereof and of the original Constitution as a whole.\(^\text{131}\)

### The Second Amendment In The Eighteenth and Nineteenth Centuries

The only commentary Congress had before it concerning the Second Amendment when it considered the Bill of Rights in 1789 was an article by the Federalist author Tench Coxe who had previously described arms as “the birthright” of every American.\(^\text{132}\) His article, which appeared in Federalist newspapers in Philadelphia and elsewhere in the nation, called the Amendment a guarantee to Americans of a right to “their private arms.”\(^\text{133}\) Subsequently Madison endorsed this commentary.\(^\text{134}\)

The first formal legal analysis of the Amendment was by Madison’s Virginia colleague, the jurist St. George Tucker in his 1803 edition of Blackstone, annotated with Tucker’s own notes on American constitutional law.\(^\text{135}\) To Blackstone's comments on the limited (but absolute and clearly individual) right to arms in the English Bill of Rights, Tucker added a discussion of the Second Amendment quoting it in a truncated form *omitting any mention of militia* as, “The right of the people to keep and bear arms shall not be infringed.” Tucker briefly commented that in their federal constitution Americans are guaranteed the right to arms “without any qualifications as to their condition and degree as in England.”\(^\text{136}\)

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\(^{130}\) See note 128 supra.

\(^{131}\) Emerson, 270 F.3d at 237.

\(^{132}\) See note 47, supra; Stephen P. Halbrook and David B. Kopel, *Tench Coxe and the Right to Keep and Bear Arms, 1787-1823*, 7 WILLIAM AND MARY BILL OF RIGHTS JOURNAL 347, 363.


\(^{134}\) Original Meaning, 82 MICH L. REV. supra at 224; Halbrook and Kopel, “Tench Coxe,” supra at 367.


\(^{136}\) Tucker’s BLACKSTONE’S COMMENTARIES, supra at v. 1, p. 144. It bears emphasis that the limitations on the English right to arms were virtually opposite to the position of the dissenting justices in *Heller*. Commoners, like the
Tucker’s Appendix contained a more extensive discussion that did quote the whole Amendment. Here Tucker recognized the militia purpose, but only as the second of three purposes. The first purpose he offered for constitutionally guaranteeing the right to arms was individual self-defense and the third purpose was for hunting. Indicative of the profound late eighteenth century American faith in the right to arms, Tucker went on to denounce any attempt “to confine this right within the narrowest limits possible”; for the right to arms is “the true palladium of liberty” and where it “is, under any color or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.”

Further indication of how Tucker’s views mirror those of his contemporaries may be adduced from how his discussion tracks Madison’s own private notes on the Amendment to which Tucker had no access (though he might, perhaps, have discussed it with Madison, an old acquaintance). Madison’s notes contradistinguished the Amendment from the English Bill of Rights on the grounds that the American right to arms is neither limited as the English right was (with the arms a wealthy aristocrat could possess being far beyond what a peasant could) nor was it subject to legislative repeal. Note that, though limited to Protestants and as to what kinds of arms commoners could have, the English right unquestionably guaranteed individuals the right to possess arms for personal defense.

Much more can be said about the Second Amendment in the nineteenth century. For instance, that century’s constitutional commentaries show no understanding that anything like the modern states’ right/collective right interpretation was even possible. Rather, the writers routinely analogized the Second Amendment to freedom of speech and the other personal rights guaranteed in the Bill of Rights. Likewise consider the references to the Second Amendment in nineteenth century debates

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Id. at 300.

137 Id. at 300.

138 James Madison, Charles F. Hobson & Robert A. Rutland, ed., 12 THE PAPERS OF JAMES MADISON 194 (Charlottesville, Va.: University Press of Virginia, 1977); Original Meaning, 82 MICH. L. REV. at 237, fn. 144. The English right was binding only on the king and thus was subject to repeal by Parliament.

139 Malcolm, above, ch. 7; 1 Blackstone, COMMENTARIES *144; see House of Lords debates in 1780 in which Lord Richmond, Lord Amherst, and Earl Bathurst all refer to the “right to keep and bear arms” specifically for individual self-defense: (“who had very properly armed themselves for the defence of their lives and property”). Cited by the Heller majority opinion at p. 18.

140 See David B. Kopel, The Second Amendment in the Nineteenth Century, 1998 BYU L. Rev. 1359 collecting references, e.g.: p. 1402 (Francis Lieber, 1853, analogizing Second Amendment to Third); p. 1469 (Tiffany, 1869, same); p. 1470 (Farrar, 1867, analogizing Second Amendment to rights of trial by jury, habeas corpus and due process); and p. 1476 (Poweroy, 1870, analogizing Second Amendment rights to First Amendment rights). See also United States v. John P. Sheldon, 5 Blume Sup. Ct. Trans. 227 (Mich. 1829) (comparing the right to keep and bear arms to freedom of the press, “[t]he constitution of the United States also grants to the citizen the right to keep and bear arms. But the grant of this privilege cannot be construed into the right in him who keeps a gun to destroy his neighbor.”
over slavery. Abolitionist legal theorists argued that slavery was unconstitutional because slavery laws deprived blacks of their right to keep and bear arms.\footnote{See the references to the abolitionist theorists Tiffany and Farrar in the preceding footnote.} This begs the question of why the legal defenders of slavery did not respond as those who deny the Standard Model now do – that this argument was erroneous because the Amendment does not guarantee any right to arms to individuals of any race. The short answer is that no such response existed for eighteenth and nineteenth century Americans. The very concept of the right to arms being something other than a right of individuals was unknown to them. Once again, the states’ right/collective right theories are anachronistic inventions of the twentieth century debate over gun control. Having no such theories to rely on, Dred Scott had to hold that blacks could not have the rights of American citizenry – wherefore they did not have the personal right to arms that Chief Justice Taney attributed to all other Americans.\footnote{Scott v. Sanford, 60 U.S. (19 How.) 393, 417, 450 (analogizing the constitutional right to arms to the rights of speech, assembly, jury trial and against self-incrimination – and holding that because of their race blacks could have none of these rights possessed by whites). Compare Herman v. State, 8 Ind. 545 (1855). (“It cannot so declare the holding of political meetings and making speeches, the bearing of arms, publishing of newspapers, &c., &c., however injurious to the public the legislature might deem such practices to be; and why? Because the constitution forbids such declaration and punishment, and permits the people to use these practices.”)}

It is unnecessary for us to further address the issues so exhaustively covered by Kopel.\footnote{David B. Kopel, The Second Amendment in the Nineteenth Century, 1998 BYU L. REV. 1359.} Suffice it to note that his 183 page article could find no nineteenth century references to the states’ right or collective right theories of the Amendment.

**The States’ Right/Collective Right Theories as Fictions**

One fact suffices to demonstrate that the states/collective right theories are not honest efforts to explain the Amendment. Rather, they are desperate inventions intended to supply any explanation, however fanciful, other than the Standard Model. The fact that demonstrates this is that those who put forward the states/collective right theories have offered only the barest explanation of what those theories entail and have made no attempt to explore their implications.\footnote{In fact, only Standard Model advocates have sought to explore those theories’ implications. See Glenn Harlan Reynolds & Don B. Kates, The Second Amendment and States’ Rights: A Thought Experiment, 36 W. & M. L. REV. 1737 (1995); this article’s conclusions are discussed in the text infra.} Those who put those theories forth have no interest in what their own theories imply; for the only point of those theories is to provide a makeweight alternative to the Standard Model.

Moreover their denunciations of the Standard Model often contradict the states’ rights/collective right theories in which they claim to believe. Consider their denouncing the Standard Model as an "insurrectionary" theory and their consequent assertion that the Founders would have been “complete fools” to arm the people in contemplation of a revolt against the federal government.\footnote{For the assertion that the Founders would have been “complete fools” had they armed the people in contemplation of overthrowing tyranny see John Randolph Prince, The Naked Emperor: The Second Amendment and the Failure of}
alternative such authors offer is an “insurrectionary” theory that (insofar as they bother to explain it) posits the Founders as such complete fools that they guaranteed the states a right to arms to resist an oppressive federal government.\footnote{See, e.g., David Yassky, The Second Amendment: Structure, History and Constitutional Change, 99 Mich. L. Rev. 588, 605 (2000) (asserting that the Amendment exists so that “if the unthinkable were to happen, and the federal government did indeed overstep its constitutional boundaries, relying on its army to quell opposition, the state militia would be there to resist.”), Richard H. Fallon, The ‘Conservative’ Paths of the Rehnquist Court’s Federalism Decisions, 69 U. Chi. L. Rev. 429, 441 (2002) (“state militias provided a potential source of resistance to tyrannical assertions of federal authority” – citing Yassky supra) and George C. Thomas, When Constitutional Worlds Collide: Resurrecting the Framers’ Bill of Rights and Criminal Procedure, 100 Mich. L. Rev. 145, 158 (2001) (“Even more important, the Second Amendment sought to keep state militias as a viable force in opposing the federal government ....”). To the same effect see Gun Crazy supra, 75 BOSTON U. L.REV at 64 (Amendment assures that “state militias [serve] as a counterweight to the expanding federal power.”) and Ehrman and Henigan, The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately? 15 U. DAYTON L. REV. 5, 21 (1989). (same); also John Levin, The Right to Bear Arms: The Development of the American Experience, 48 CHI-KENT L. REV. 148, 159 (the Amendment’s purpose was to assure “that the federal government would not emasculate the states and leave them at the mercy of federal troops.”).}

The most extreme example of perfervid opposition to guns presented as scholarship anent the Second Amendment is the Bellesiles Scandal. Michael Bellesiles, then a professor of history at Emory University, assailed the Standard Model in various articles and a book\footnote{Jefferson’s belief that every twenty years the tree of liberty needs to be nourished with the blood of tyrants and patriots does not stand alone. Compare the declamation of a Massachusetts patriot “The man who arms himself in defence of his LIFE, LIBERTY, FORTUNE, LAWS and CONSTITUTION of his country, can never be accounted a Rebel by any but a Banditti of villains....” quoted in Halbrook FOUNDERS 24 and 219, and the denunciation by the New Hampshire Constitution of 1784, Part I §10, that “the doctrine of non-resistance against arbitrary power and oppression” as “absurd, slavish and destructive to the good and happiness of mankind.”} asserting that firearms were actually little used, owned or valued in pre-Civil War America: “the majority of [eighteenth century] American men did not care about guns. They were indifferent to owning guns, and they had no apparent interest in learning how to use them.”\footnote{Michael Bellesiles, ARMING AMERICA: THE ORIGINS OF A NATIONAL GUN CULTURE (2000); Michael Bellesiles, Suicide Pact: New Readings of the Second Amendment, 16 CONST. COMMENTARY 221 (1999); Michael Bellesiles, Gun Laws in Early America: The Regulation of Firearms Ownership, 1607-1794, 16 LAW & HIST. REV. 567 (1998); Michael Bellesiles, The Origins of Gun Culture in the United States, 1760-1865, 83 J. OF AMERICAN HISTORY 425 (1996).}

Moreover, Bellesiles claimed, women were flatly prohibited from owning guns in colonial America as also were all non-property owners.\footnote{ARMING AMERICA, supra at 297.}

The problem with all this is that Bellesiles’ “research” was just a well-executed fraud. Typical was his false assertion that he had verified his claims of very low eighteenth and nineteenth century American gun ownership by research in more than forty probate record repositories. When reporters discovered that the San Francisco records Bellesiles claimed to have examined had been destroyed in the earthquake-cum-fire of 1906 he proceeded to suggest that he might have viewed them at UC-Berkeley and/or in San Francisco at the Sutro Library, the Mormon Family Research Library, or the Public Library. But all officials at these libraries who were questioned both denied they had the records and affirmed that any such records had burned up decades before Bellesiles was born.\footnote{David Mehegan, \textit{New Doubts About Gun Historian}, BOSTON GLOBE, Sept. 11, 2001; Melissa Seckora, \textit{Disarming America: One of the Worst Cases of Academic Irresponsibility in Memory}, NATIONAL REVIEW, Oct. 1, 2001.} When Northwestern University law professor James Lindgren undertook his own research in extant probate record collections he discovered that Bellesiles had never even been to the more than forty collections to review them. What Lindgren and others found was that the records showed that early American
gun ownership had been very high, not very low.\textsuperscript{159}

Bellesiles buttressed his probate research by asserting that his "examination of eighty travel accounts written in America from 1750 to 1860 indicate[s] that the travelers did not notice that they were surrounded by guns and violence," or that many Americans hunted with guns.\textsuperscript{160} Assuming Bellesiles had even bothered to read these travel accounts, he falsely described them.\textsuperscript{161} For instance, Bellesiles falsely invoked Delineations of American Scenery and Character by John James Audubon. As anyone familiar with his life knows, Audubon was a gun nut and hunter such as to make Charlton Heston look like an avatar of the animal rights movement by comparison. One can scarcely read ten pages in this and Audubon's other books without coming across an account of him or others shooting down some poor bird or animal. Despite Bellesiles' claim that Audubon and other authors "just did not see the guns that were supposedly all around them," Audubon saw enough guns that at least 58 pages of the book mention them, including three separate chapters devoted to different forms of hunting with guns.\textsuperscript{162}

In the denouement Bellesiles was forced to resign his tenured professorship. Columbia University rescinded the Bancroft Prize and demanded that Bellesiles return the prize money.\textsuperscript{163} The following month, Bellesiles’ publisher announced that they would no longer publish Arming America—and copies returned by bookstores would not be sold as remainders, but pulped instead.\textsuperscript{164} (This scandal, however, did not prevent another respected publisher, Oxford University Press, from publishing other books by Bellesiles.)\textsuperscript{165}

Though far less obviously incredible, the work of historian Saul Cornell has similar aspects. To reiterate, St. George Tucker saw (and extolled) the Second Amendment as an individual right, commenting that its purposes were three-fold: self-defense, preservation of a militia composed of gun owners, and hunting.\textsuperscript{166} Indisputable as this is, Prof. Cornell has ignored it in an article which harps on irrelevancies\textsuperscript{167} and over and over and over again misquotes, as if they supported Cornell’s contrary

\begin{footnotes}
\item[159] James Lindgren & Justin Lee Heather, Counting Guns in Early America, 43 WM. & MARY L. REV. 1777 (2002); James Lindgren, Fall from Grace: Arming America and the Bellesiles Scandal, 111 YALE LAW JOURNAL 2195 (2002); Cramer, ARMED AMERICA, supra, 51-55.
\item[160] ARMING AMERICA, supra, p. 306; see generally 305ff.
\item[161] Cramer, ARMED AMERICA, 194ff; also see Clayton E. Cramer, Why Footnotes Matter: Checking Arming America's Claims, 1 PLAGIARY 1-31, for examples of widespread and grotesque falsification of primary sources by Bellesiles.
\item[162] See John James Audubon, Delineations of American Scenery and Character, 3, 6-12, 14, 16-22, 26, 33, 41-47, 57, 59-63, 68-76, 82, 88, 93, 117, 122, 206, 210-16 and 281-86 (1926).
\item[163] Robert F. Worth, Prize for Book Is Taken Back From Historian, NEW YORK TIMES, Section C; Business/Financial Desk; Page 4, December 14, 2002.
\item[165] Christopher Waldrep and Michael Bellesiles, DOCUMENTING AMERICAN VIOLENCE: A SOURCEBOOK (New York: Oxford University Press, 2006).
\item[166] See notes 135-137, supra.
\item[167] Tucker’s unpublished notes do discuss state power over the militia – but not as Cornell suggests as an aspect of the
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view, phrases or half-sentences torn from their individual right context so as to mislead.\(^{168}\)

In another article Cornell tries to mitigate the implausibility of the “collective right” theory of the Second Amendment by analogizing it to the “collective right” to assemble.\(^{169}\) This is remarkably disingenuous. Individuals may sue to vindicate their “collective” right to assemble.\(^{170}\) But the whole point of a “collective right” theory of the Second Amendment is to argue that because the right is “collective,” no individual deprived of it can seek to vindicate it judicially.\(^{171}\) (In fact, several constitutional rights may be viewed as “collective” in the sense that they protect group rights, e.g. the rights to assemble, and to be treated equally rather than being discriminated against and to vote without discrimination because of race, color or gender. But none of these rights are “collective” in the sense that no member of the group may vindicate the right for herself or the whole group.)\(^{172}\)

Bellesiles, Cornell, and many other fervent opponents of firearm ownership seem to be convinced that they represent a higher moral consciousness than the brutal atavistic firearms owners – wherefore, opponents like themselves are not bound by normal canons of truth or scholarship.\(^{173}\)

**Should the Courts Enforce “Obsolete” Provisions?**

Should Americans today, many of whose elite reject the legitimacy of self-defense, be bound by the unanimous opinions of an earlier age? Some elite writers argue that courts should ignore the Second Amendment because “Ours is a ‘Living Constitution,’ one that must be read against the backdrop of changing social circumstances.”\(^{174}\) This strikes us as a rather dubious application of the late Justice William Brennan's use of that concept. He offered it in favor of expanding constitutional protections where necessary to apply the protections of the Bill of Rights to circumstances that have only arisen since its enactment. But we are not aware that any justice has suggested that such changes allow the courts to set a constitutional provision aside. On the contrary, innumerable opinions affirm that courts have no power to rewrite the Constitution and that, however obsolete, its provisions

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\(^{171}\) See, e.g. *Prince*, supra, 40 BRAND L. J. at 689-94.

\(^{172}\) See discussion in the Heller majority opinion, pp. 5-7.


\(^{174}\) *Gun Crazy*, supra at 66-67.
This is both comforting and inescapably necessary because most, if not all, provisions of our eighteenth century Constitution could be discarded if changed conditions were deemed to justify judicial flouting or alteration of them. Consider the provision fixing thirty-five years as the minimum age for assuming the presidency. It is unlikely that eighteenth century Americans believed achieving that age to be some magic indication of presidential competence. Certainly the fact that no person so young has been elected president suggests that at least nineteenth, twentieth and twenty-first Americans have generally thought older people better qualified. Doubtless the low thirty-five year age requirement was adopted of necessity in the late eighteenth century when average life expectancy was in the 40s. But conditions have changed. Today life expectancy is about double that of the late eighteenth century. Yet surely no one would claim this change in circumstances could justify the judiciary revising the constitutional thirty-five year age minimum upward to a higher minimum more consonant with today’s life expectancies.

Consider the Seventh Amendment right to jury trial in all cases in which more than $20.00 is in controversy. Twenty eighteenth century dollars would be equivalent to hundreds of dollars today. Yet, though justices have criticized jury trial as less than optimum for disposing of many modern legal controversies (e.g. complex anti-trust actions), the Supreme Court has never suggested it has the power to rewrite the literal words of the Seventh Amendment to take account of monetary inflation since the eighteenth century.

The same point may be made with reference to the modern technology of free expression. In 1791 television, radio and movies did not exist; so reception for a defamatory statement was more or less limited to those who heard it made and perhaps the readers of some local newspaper. Yet the Supreme Court has rejected claims that today’s enormously greater circulation of “the press” justifies statutes regulating the press.

Many, if not most, parts of our eighteenth century Constitution and Bill of Rights could be deemed obsolete if so deeming them empowered the courts to ignore or alter them. Nor would a judicial power to nullify constitutional provisions be limited to eighteenth century provisions. Enacted in the early twentieth century, women’s suffrage (the Nineteenth Amendment) was based in part on racism and in part on a belief in the moral superiority of women. Women’s suffrage was expected to stamp out electoral and political corruption. This expectation has not been validated by

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176 Barnett & Kates supra at 1226.


178 Leading arguments for women's suffrage were that: (a) because women are more moral than men, enactment of the Amendment would clean up government and end corruption; (b) it was an insult to white women that they were not
ensuing events. The underlying beliefs would today be generally rejected as repugnant (racism) and laughable (female moral superiority) by men and women of all races. Do those changed conditions obliterate the binding effect of the words “The right ... to vote shall not be denied ... on account of sex”?

What about the Fifteenth Amendment: May it be ignored or diminished if a majority of Americans (or at least a majority of Supreme Court justices) come to believe that modern social science has proven that African-Americans are intellectually inferior and their votes degrade the voting process?

By the same token, even if ordinary twenty-first century firearms were much deadlier than eighteenth century ones, that would only be a basis for repeal or alteration of the Second Amendment, not for courts to ignore or downplay the rights it currently guarantees. Perhaps a more meaningful question than whether the improvement in weapons technology renders the Second Amendment obsolete is whether any provision of the Bill of Rights could survive such a test. The technology of mass communications in 1791 limited a publisher to printing a few hundred “dangerous opinions” an hour; modern broadcasting and the Internet make it possible to NBC to promote a particular viewpoint to tens of millions of people in a few minutes. Would this dramatic technological advance justify a more restrictive view of the First Amendment’s freedom of the press?

Similarly, should we use the dramatic improvements in the technology of travel as an excuse to declare obsolete the Eighth Amendment’s guarantee of bail in non-capital cases? Does the increased

allowed the vote while "non-white" (a term that then included Southern and Eastern Europeans) men were; (c) adding millions of women to the intelligent electorate (Northern Europeans) would offset the corruption caused by allowing the ignorant and degraded (African-Americans and Southern and Eastern European immigrants), to vote, and would maintain white supremacy for "non-white" women were too irresponsible, bovine and benighted to vote. See generally, Aileen S. Kraditor, THE IDEAS OF THE WOMEN'S SUFFRAGE MOVEMENT 1899-1920 (N.Y., Columbia U. Press, 1965) chapters 6 and 7 and Louise Michele Newman, WHITE WOMEN'S RIGHTS: THE RACIAL ORIGINS OF FEMINISM IN THE UNITED STATES (Oxford, Oxford University Press, 1999).

Though Susan B. Anthony had been an outspoken abolitionist before and during the Civil War, after it her private letters, as well as her public speeches, boiled over in fury at the insult to "white" women that they were not allowed to vote while Italian (men) were. See Kraditor, p. 129, n. 3. Anthony's close colleague, Elizabeth Cady Stanton, addressing the National Women's Suffrage Convention in 1869, inveighed against laws under which white women could not vote but "Patrick [Irishmen], Sambo [Afro-Americans], and Hans [Germans] and Yung Tung [Asians]" could, though "they do not know the difference between a monarchy and a republic... and can not read the Declaration of Independence" or even a dictionary. The Nineteenth Amendment was enacted long after Stanton and Anthony were both dead, by successors who retained no vestige of the original suffragette concern for racial justice. In seeking the vote these successors, who included highly vociferous Southern suffrage associations, played the "race (and nativist) card" for all it was worth, especially the insult-to-white-womanhood point. Id.


risk of terrorism in an age of biological and radiological weapons justify excluding telecommunications from the Fourth Amendment’s protections against warrantless search and seizure? There are legitimate questions that might be asked about how technological change may render the concepts of 1791 out of date—but if this is true, then the courts should treat the entire Bill of Rights in a consistent way.

As Mr. Justice Frankfurter said in dismissing arguments that the privilege against self-incrimination was anachronistic in a mid-twentieth century nation beset with rampant crime, “If it be thought that the privilege is outmoded in the conditions of this modern age, then the thing to do is to take it out of the Constitution, not to whittle it down by the subtle encroachments of judicial opinion.”

How Heller May Make Reasonable Gun Control Laws Easier

Speaking intellectually as opposed to ideologically, there can be no serious doubt that the Second Amendment guarantees responsible, law-abiding adults the right to possess ordinary civilian firearms in order to defend themselves, their families and homes. As legal historian James E. Ely, Jr. summarized the matter in the leading journal of early American history, the evidence “demolishes the notion that the framers envisioned the right to keep arms only in the context of organized militia bodies.”

But this is hardly the be-all and end-all of “gun control.” The Amendment gives no sanction to gun possession by felons, juveniles or the demented. Neither does it sanction possession of atomic weapons, Stinger-type missiles, cannon, tanks or the other indiscriminate super-destructive weaponry of modern warfare. Without going into details, we note that one of us has previously suggested that firearms registration and permit requirements are facially constitutional; and that the law may control firearms in a host of ways that could be justified by public safety requirements. Such laws might include: prohibitions on felons in possession of firearms; restrictions on the quantity of ammunition that could be stored in residential districts for fire safety reasons; regulations prohibiting certain highly dangerous and foolish methods of carrying weapons (such as carrying semiautomatic weapons loaded and cocked with the manual safety off).

While some regulations might indeed be constitutional with respect to the Second Amendment, such as mandatory registration of all firearms, it is important to remember that constitutional is not

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181 Book Review, 52 W. & M. Q. (3rd Series) 212, 213 (1995). Compare Lund, supra, 17 CONST COMM. at 708 (“At least as an intellectual matter the debate about the states’ right versus individual interpretations seems now to be essentially over.”)
183 Reynolds & Kates, supra at 1756-7.
necessarily good public policy. Since Haynes v. U.S. (1968), convicted felons and others who are prohibited by law from owning a firearm may not be punished for failure to register it—only for unlawful possession. Only those who may lawfully possess a firearm may be punished for failure to register.\footnote{185}{Haynes v. U.S., 390 U.S. 85 (1968).} The public policy value of punishing those who are are seldom criminal misusers of firearms seems highly questionable—especially when those who are the most likely criminal abusers of guns are exempted.

Ironically, the cause of rational firearms control has for decades been retarded by the controversy caused by fanatic, unprincipled denials that the Second Amendment guarantees the right of responsible law abiding adults to possess arms for the defense of their homes and families. Now that the Supreme Court has finally laid these canards to rest we can look forward to a more rational discussion of moderate, reasonable gun controls. As Professors Cottrol and Diamond have summarized the matter:

> Overwhelming majorities of the American people support the right of individuals to own firearms [but polls also show that the public also wants]... measures that would keep guns out of the hands of criminals, the mentally unbalanced and likely to abuse the right. And it is this public consensus that should be the starting point of a new, more productive debate over the Second Amendment...\footnote{186}{Robert J. Cottrol & Raymond T. Diamond, Public Safety and the Right to Bear Arms, in AFTER 200 YEARS: THE BILL OF RIGHTS IN MODERN AMERICA (D. Bodenhamer & J. Ely eds., 1993), 85-86.} The debate should thus focus on ways of developing fair and effective measures for screening out those who should be prevented from purchasing firearms and how to do so in ways that would not seriously impair the rights the Second Amendment was designed to protect. Whether such procedures should involve waiting periods, registration, background checks, licensing procedures, or combinations of these policies should be part of the debate...\footnote{187}{Teddy Davis, ABC News, Gun Control Group Braces for Court Loss: 'We've Lost the Battle on What the 2nd Amendment Means,' Brady Campaign Head Says, June 12, 2008, http://abcnews.go.com/Politics/story?id=5055064&page=1 .} Ironically, an acceptance of the individual rights component of the Second Amendment may be necessary for effective gun control measures. The political difficulty in securing effective national screening measures is directly related to the fear on the part of many who value the right to keep and bear arms that such measures are merely way stations on the road to firearms prohibition. That fear has been fed by those who have sought to read the Second Amendment's guarantee out of the Bill of Rights. The recognition that the Constitution does indeed protect the right to keep and bear arms may be the first step in the needed process of fashioning laws that both contribute to public safety and preserve a right long valued in this society.\footnote{188}{Notably this perspective has recently been accepted even by the president of the nation’s foremost anti-gun group, the Brady Campaign (formerly Handgun Control, Inc.). If this reflects a real change in attitude by anti-gun activists, we may be approaching a consensus that will allow us to move forward as a society: prepared to accept reasonable gun control laws aimed at public safety because...}
the right of law-abiding adults to “keep and bear arms” will no longer be in question.