INCORPORATION REVISITED: HOW HELLER AND MCDONALD MISCONSTRUED THE ORIGINS OF THE SECOND AMENDMENT

by

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ABSTRACT

The case of *McDonald v. Chicago* in 2010 is responsible for the incorporation of the Second Amendment against the States through the Fourteenth Amendment in a contentious plurality opinion. The groundwork for this decision was laid down in *District of Columbia v. Heller*, a pivotal case two years prior where the Court pronounced that the right to bear arms inherent in the Second Amendment was an individual one, embodying the principles of personal self-defense in the home.

I am arguing that the holding in the *McDonald* decision, incorporating the Second Amendment, was merely a continuation of the fallacies committed in the *Heller* opinion. Utilizing Justice Antonin Scalia’s own framework, I analyze the Second Amendment’s right to bear arms through the lens of a textual originalist, compiling an original understanding of the provision through the use of relevant history. It will be argued that the proper conception of the right to bear arms as originally understood was akin to a collective right, serving as a bulwark against a tyrannical central government and ensuring that a standing army would never come to fruition.

The Court’s precedent on incorporation necessitates that in order for a provision in the Bill of Rights to serve as a restriction at the state level, it must meet certain standards of fundamentality. As for the right to bear arms in the Second Amendment, the use of firearms for personal self-defense falls far short of the criteria.
I. Introduction

Very few topics in the realm of constitutional law are as divisive and misunderstood as the right to bear arms. Since the founding of the United States, the Supreme Court has directly confronted the Second Amendment only a minimal number of times, perpetuating the ambiguity inherent within the provision. The 2008 decision in District of Columbia v. Heller changed all of that by pronouncing for the first time that the right to bear arms codified in the Second Amendment was akin to an individual right unconnected with service in a militia.\(^1\) The majority opinion, authored by Justice Antonin Scalia, utilized references from Sir William Blackstone in England through the post-ratification commentary of Joseph Story and beyond, resulting in one of the most exhaustive reviews of the historical record in all of the Court’s jurisprudence. The question weighing on everyone’s mind following the declaration in Heller was when the matter of incorporation would arise. Sure enough, there was a call and response in 2010. In McDonald v. Chicago, headed by Justice Samuel Alito in a controversial plurality opinion, the Court came down in favor of incorporating the individual right to bear arms against the States, finding its fundamentality self-evident.\(^2\) Justice Alito affirmed all of the conclusions from two years earlier by boldly stating, “We therefore hold that the due

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process clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.”

The argument formulated here refutes the grounds on which the *Heller* Court drew their conclusions regarding the original understanding of the Second Amendment, and thus, refutes its incorporation in *McDonald*. It must be conceded at the outset that *Heller’s* conception of an individual right to bear arms unconnected with militia service is, as of today, legitimate precedent. It will be accepted that this idea of the Second Amendment is at least plausible from a contemporaneous point of view. In fact, the *Heller* decision itself, “although written in the language of originalism, is actually a classic example of the processes of living constitutionalism in operation.” The concerted efforts of special interests like the National Rifle Association have only contributed in recent times to reading the Second Amendment as protecting an individual right to possess firearms for personal self-defense. The late Chief Justice Warren Burger commented that the Second Amendment was “one of the greatest pieces of fraud – I repeat the word ‘fraud’ – on the American public by special interest groups that I have ever seen in my lifetime.” Nonetheless, the *Heller* Court followed this shift in popular opinion, greatly distancing itself from interpreting the Second Amendment as a bulwark against an oppressive central government in the form of collective security.

The idea that the Constitution not only guarantees a fully functioning militia but also protects an individual right to bear arms unconnected with such service has recently

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3 Ibid. at 44.
5 Ibid. at 595.
6 Ibid.
been dubbed as the “Standard Model.”\textsuperscript{7} The fallacies committed and accepted by
decisions like \textit{McDonald}, however, reading the historical record out of context and
anachronistically, are a far cry from the standard, original meaning of the Second
Amendment.\textsuperscript{8} The contention here is that the fundamental understanding of the right to
bear arms in the United States, the understanding necessary for incorporation, was
centrally concerned only with ensuring that the populace would retain the right to
collectively protect themselves against domestic and foreign threats. This quasi-
concurrence with \textit{Heller}, accepting only the holding itself on living constitutionalist
grounds, disagrees with the historical soundness of the opinion. Following this
divergence, the disagreement extends to the rationale in \textit{McDonald}, where it will be
argued that the majority’s survey of the historical record to determine whether the
individual right to bear arms is fundamental enough to warrant incorporation is flawed,
making the decision overtly defective.

The crux of this argument will be approached through the lens of a textual
originalist, garnering the true collective nature of the original meaning of the Second
Amendment. A variety of sources from England prior to the establishment of the United
States will be utilized to set the foundation of the right to bear arms that greatly
influenced early American thought. Following this analysis, the commentaries and
relevant discussions preceding the adoption of the Second Amendment in the United
States will be thoroughly examined. Upon concluding this section of the argument, a

\textsuperscript{7} Cornell, Saul. \textit{Commonplace or Anachronism: The Standard Model, The Second Amendment, and the
\textsuperscript{8} Ibid. at 223.
review of relevant post-ratification commentary and a multitude of state constitutional provisions that protected the right to bear arms from the Founding era through the late twentieth century will be scrutinized as it sheds light on the shifting perception of firearms in the United States. Finally, a brief review of the Supreme Court’s precedent on the Second Amendment will fill in the remaining gaps. Before the history surrounding this misunderstood provision can be analyzed, though, it is necessary to set the parameters of constitutional interpretation.
II. Originalism and Selective Incorporation: Coming to Terms

*Out With Privileges or Immunities, In With Due Process*

The question of whether the Fourteenth Amendment’s Privileges or Immunities Clause and due process clause were originally understood to incorporate the Bill of Rights against the States has generated an enormous amount of contentious debate. According to legal scholar Karl Llewellyn, “the whole expansion of the due process clause has been the enforcement of the majority’s ideal of government-as-it-should-be.”

In oral arguments for *McDonald v. Chicago*, Justice Scalia, a leading originalist, criticized attorney Alan Gura for suggesting that incorporation of the Second Amendment revert to the Privileges or Immunities Clause. He balked that “it’s…contrary to 140 years of our jurisprudence. Why do you want to undertake that burden instead of just arguing substantive due process? Which, as much as I think it’s wrong, I have – even I have acquiesced in it.”

Scalia largely accepts selective incorporation on due process grounds because of its accepted precedent and relatively narrow scope. For the purposes of this discussion, there will be no attempt at a historical analysis of the legitimacy of incorporation through the due process clause or its reconciliation with originalism. In fact, if the Supreme Court were asked today to decide whether originalist theory was

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10 McDonald v. Chicago 08-1521, Respondent’s Argument, Transcript Page 7, Lines 10-13.
compatible with the incorporation of substantive rights through the due process clause as it was originally understood, they would likely come out in the negative. Instead, modern selective incorporation doctrine will be accepted as legitimate and the normal standards of fundamentality employed by the Court in previous cases will be utilized. While the argument will be made that incorporation of the Second Amendment is irreconcilable with such standards, it is crucial to distinguish textual originalism as a distinct mode of constitutional interpretation.

**Distinguishing Textual Originalism as a Mode of Interpretation**

The conservative pockets of law professors, judges, and attorneys in the legal community have a tendency to interpret the Constitution through an originalist lens. Consistent with the Supreme Court’s marked shift to the right in recent years, there has also been a corresponding upsurge in this mode of interpretation. An aspect that binds all brands of originalists together in interpreting the Constitution is a focus on the specific time period in which a given provision, clause, or portion of text was ratified. One of the leading and most outspoken Supreme Court justices in this movement is Antonin Scalia. In his view, the idea of a document that allows judges to impart evolving standards of rights like free speech and privacy is utterly antithetical to a written

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15 GOLDFORD, DENNIS J. *THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM*. 112 (2005) [e.g. 1780’s, 1790’s, 1860’s, etc.].
constitution.\textsuperscript{16} Even more specifically, Scalia adheres to a strand known as textual originalism, which seeks to interpret the Constitution as it was originally understood by the public and leading thinkers contemporaneously with its ratification.

For our aims, originalism will refer exclusively to Scalia’s brand of textual originalism. In an interview with C-Span on constitutional interpretation, he emphasized the distinction, stating that “[I don’t believe in original intent, I believe in original meaning. What was the meaning of the Constitution when the people ratified it?”\textsuperscript{17} In the case of incorporating provisions in the Bill of Rights against the States, the originalist tries to parse out an objective public meaning of the words and clauses at the time of ratification,\textsuperscript{18} and then decide its fundamentality. A pragmatic reason for interpreting the Constitution in this way is embedded in the legal system itself. One of the biggest proponents of originalism, Robert Bork, posits that “law is a public act. Secret reservations or intentions count for nothing. All that counts is how the words used in the Constitution would have been understood at the time.”\textsuperscript{19} Interpreting constitutional text as it was understood at the time of ratification ensures that the will of the legislature, mandated by democratic authority, will be preserved and respected. After all, future legislatures have the capacity to change the Constitution by amendment if they so choose.

\textsuperscript{18} Calabresi, Steven G. The Tradition of the Written Constitution: Text, Precedent, and Burke, 57 Ala. L. Rev. 636, 636 (2006).
\textsuperscript{19} Goldford, Dennis J. The American Constitution and the Debate Over Originalism. 116 (2005).
at any time, avoiding the injection of developing standards that were not originally understood to have existed.\textsuperscript{20}

The Constitution, as opposed to ordinary statutes and legislation, is a unique document in and of itself. A thorough analysis often involves sources such as “dictionaries,” “The Federalist,” and “writings of contemporaries during ratification,” to resolve ambiguity or textual discrepancies.\textsuperscript{21} Many of these works, such as the Federalist, were authored before codification and are usually dismissed by the textual originalist. Nevertheless, explaining why he uses the documents of certain prominent thinkers prior to the adoption of the Constitution, Scalia explains:

\begin{quote}
I do so, however, not because they were Framers and therefore their intent is authoritative and must be the law; but rather because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood. Thus, I give equal weight to Jay’s pieces in the Federalist, and to Jefferson’s writings, even though neither of them was a Framer. What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.\textsuperscript{22}
\end{quote}

Sources that illuminate the thought process of those who ratified a statute or provision are oftentimes necessary in the case of the Constitution, especially when a provision is unclear.\textsuperscript{23} Historically, when a vaguely worded clause has been brought before the Supreme Court, a thorough historical analysis has proven to be a useful tool.

for purposes of clarification.\textsuperscript{24} The acclaimed Judge Richard Posner states that “when [legislators] vote for a bill they are assenting, in a sense, to at least some of what is in that history.”\textsuperscript{25} Looking at legislative history to provide an intelligible landscape of an issue that Congress was trying to remedy or address, especially in the case of the Constitution, is a handy instrument for the originalist that purports to avoid searching for authoritative intent.\textsuperscript{26}

Advocates in opposing camps of constitutional interpretation will agree that finding an absolutely objective meaning in the historical record does not always result in black and white conclusions. Justice Scalia anticipates this critique by claiming that the originalist, as opposed to the living constitutionalist, at least knows what he or she is looking for. He proudly states that “often—indeed, I dare say usually—that is easy to discern and simple to apply.”\textsuperscript{27} In a further rebuttal to critics of originalism, he argues that “by trying to make the Constitution do everything that needs doing from age to age, [the people] shall have caused it to do nothing at all.”\textsuperscript{28} Thus, this method adheres to a staunch and fierce resistance to judicial subjectivity, abating concerns that cases will be decided according to the motivations of the majority.\textsuperscript{29} Having now established the originalist model, it is integral to understand the Supreme Court’s selective incorporation

\textsuperscript{26} Molot, Jonathan T. \textit{The Rise and Fall of Textualism}, 106 Colum. L. Rev. 1, 3 (2006).
\textsuperscript{28} Ibid. at 47.
\textsuperscript{29} Ibid.
framework in order to construct the theoretical basis necessary for assessing the validity of incorporating the Second Amendment and the right to bear arms.

**Forging a Standard**

Beginning a few decades into the twentieth century, the avenue taken by the Supreme Court to incorporate a variety of amendments against the States has been the due process clause of the Fourteenth Amendment. The doctrine of threshing out specific provisions in the Bill of Rights and making them applicable against the States on a case by case basis, known as “selective incorporation,” has been the standing precedent for over eighty years. Although this framework is currently accepted as a legitimate model, it had been historically rejected up until the end of the 1930’s. The revolutionary period following the New Deal era experienced a patent shift in the Supreme Court’s willingness to accept this method of substantive due process. During that time, the Court would radically reshape previous conventions of judicial review and significantly alter how the Constitution was to be read for years to come.

Justice Benjamin Cardozo is credited with creating the first solidified, doctrinal framework to balance whether or not a given right was fundamental enough to be incorporated against the States. In *Palko v. Connecticut* in 1937, Cardozo explained that there existed certain rights which lie at the “very essence of ordered liberty,” and were

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31 Ibid. at 463.
important enough for incorporation.\textsuperscript{32} He continued by stating that “immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.”\textsuperscript{33} As per the actual holding, Cardozo ultimately concluded that to abolish the right of double jeopardy, which was at issue in \textit{Palko}, would not be to violate a “principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental.”\textsuperscript{34} Nonetheless, \textit{Palko} was pivotal in that it explicitly granted the Supreme Court power to selectively decide which amendments and clauses in the Bill of Rights were crucial enough to be made applicable as restrictions upon the States.\textsuperscript{35} By the time of this decision, the acceptance of bringing in provisions through the due process clause was gaining momentum while the Privileges or Immunities Clause, also in the Fourteenth Amendment, had been effectively shut down as a path for potential incorporation.\textsuperscript{36}

Since \textit{Palko}, there have been a variety of opinions put forth regarding the appropriate methodology for incorporation, most of which have been rejected by the Court. Justice Hugo Black’s dissent in \textit{Adamson v. California} is famous for the explication of the “total incorporation” doctrine. In his view, all of the provisions enshrined in the Bill of Rights should be made applicable against the States through the

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\item\textsuperscript{33} \textit{Palko v. Connecticut}, 302 U.S. 319, 325 (1937).
\item\textsuperscript{34} Ibid. at 325-326 [this would later be overturned by \textit{Benton v. Maryland}, 395 U.S. 784 (1969)].
\item\textsuperscript{35} Vogel, Howard J. \textit{The Ordered Liberty}” of Substantive Due Process and the Future of Constitutional Law as a Rhetorical Art: Variations on a Theme From Justice Cardozo in the United States Supreme Court, 70 Alb. L. Rev. 1473, 1473 (2007).
\item\textsuperscript{36} See generally Slaughter-House Cases 83 U.S. 36 (1873) [although this was the method preferred by Justice Clarence Thomas in \textit{McDonald}].
\end{itemize}
Fourteenth Amendment in the same way that they served as prohibitions on the National Government. Another view that was expounded in Adamson, and subsequently rejected, was Justice Felix Frankfurter’s objection to any incorporation whatsoever. He felt that States should be bound by ideas of fundamental fairness and ordered liberty, and, although these standards would often coincide with the first eight amendments in the Bill of Rights, they would not be contingent upon that document for protection. Frankfurter’s main reservation with regards to selective incorporation was that “it resulted in judicial invalidation of otherwise reasonable legislation, and it did so by way of subjective judicial selection of certain liberties in the Bill of Rights.” Justice Stanley Reed, speaking on behalf of the Adamson majority, rejected both Black’s and Frankfurter’s view of the Bill of Rights and the Fourteenth Amendment. Accepting selective incorporation, Reed importantly noted that “the due process clause of the Fourteenth Amendment…does not draw all the rights of the Federal Bill of Rights under its protection. That contention was made and rejected in Palko v. Connecticut.”

Fast forwarding to 1969, twenty two years after Adamson, the Supreme Court had effectively applied the majority of the first eight amendments and their respective provisions against the States using the selective incorporation model. The most recent manifestation of the incorporation standard was presented in Duncan v. Louisiana in 1968. The Duncan

38 Ibid.
40 Thomas, George C. The Riddle of the Fourteenth Amendment: A Response to Professor Wildenthal, 68 Ohio St. L.J. 1627, 1636 (2007).
41 Ibid. (The only rights that have not been incorporated are the 3rd Amendment’s protecting against quartering soldiers, the 5th Amendment’s grand jury indictment requirement, the 7th Amendment’s right to a jury trial in civil cases, and the 8th Amendment’s prohibition on excessive fines).
Court, in deciding the incorporation of the right to a jury trial, asked whether a given provision in the Bill of Rights was “fundamental to the American scheme of justice.”

During oral arguments for *McDonald*, Justice Scalia quickly dismissed the attorney for the city of Chicago when he argued that the Second Amendment was not “implicit in the concept of ordered liberty” by asking, “when is the last time an opinion of ours made that the test, implicit in the concept of ordered liberty? It sounds very nice. But when is the last time we used it? I think it was 1937.” Mr. Feldman correctly responded that it had been utilized in *Mapp v. Ohio* to incorporate the Fourth Amendment against the States in 1961. The utilization of the *Palko* standard in the 1960’s, the last decade of incorporation cases prior to *McDonald* in 2010, demonstrates the Court’s continued use of a variety of standards to determine whether a right is deemed fundamental enough to enjoy incorporation.

**The Controversial Second Amendment**

Customarily, when a given provision in the Bill of Rights is incorporated, the core questions have focused on whether the right should be applied based on certain standards of fundamentality, and secondly, how far the Court will view the scope of that right. The more contentious of these two prongs has traditionally been the latter criteria, where the Court has read a number of provisions more narrowly at the State level than at the

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43 McDonald v. Chicago 08-1521, Respondent’s Argument, Transcript Page 30, Lines 2-5.
Federal level.\textsuperscript{44} In \textit{McDonald}, Justice Alito balks at the idea that “the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights.”\textsuperscript{45} However, there are examples on the record of varying levels of restrictions from the Federal to the local level; the Sixth Amendment right to a trial by jury in criminal cases being such an instance. Additionally, although a unanimous jury is required for cases tried in Federal Court, unanimity is not always obligatory in state courts. The Fourth Amendment was also first incorporated against the States in part in 1949, leaving them unbound by the exclusionary rule until \textit{Mapp} in 1961.\textsuperscript{46}

Following the Court’s 2008 pronouncement in \textit{Heller}, that the right to bear arms inherent in the Second Amendment included an individual right to possess a firearm unconnected with militia service, came the question of whether to incorporate that right against the States. Had the \textit{Heller} Court decided that the protections afforded by the Second Amendment were merely a collective right of the people to bear arms, the question of incorporation would have been an impossible matter to resolve.\textsuperscript{47} Despite the decidedly individualistic interpretation, the scope and breadth of the provision was still left ambiguous by the Court’s holding. The difficulty with the Second Amendment specifically is that of deciding whether restrictions placed upon State governments and

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\textsuperscript{44} \textsc{Curtis, Michael Kent. No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights.} 206 (1986).
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\textsuperscript{45} Otis McDonald, et. al., Petitioners v. City of Chicago, Illinois, et. al., 130 S. Ct. 3020, 3035 (2010).
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localities should mirror the existing constraints at the Federal level, or if the span of regulation should differ for localized conditions.

Many proponents of incorporating the Second Amendment have argued that it should be read analogously with the rights protected in the First Amendment. However, this reading presupposes negligible differences between the nature and scope of the rights conferred in these two very distinct provisions. There is little doubt that the First Amendment, among many other things, unambiguously protects the dissemination and circulation of ideas\textsuperscript{48} as evidenced by its uncontroversial incorporation against the States. In the case of the Second Amendment, much of the storm that persists in the post-

\textit{McDonald} world is the lack of clarity as to what extent, to whom, and for what purposes, the right to bear arms should be protected at the State level, which was left relatively abstruse by \textit{Heller}. Standing on Scalia’s and Alito’s platform of textual originalism, it will be the original, historical conception of the Second Amendment that will answer the questions necessary to determine whether an individual right to bear arms should be incorporated against the States. Contrary to the \textit{McDonald} holding, the answer is a resounding “no.”

\textsuperscript{48} Lieber, David A. \textit{The Cruikshank Redemption: The Enduring Rationale for Excluding the Second Amendment from the Court’s Modern Incorporation Doctrine}, 95 J. Crim. L. & Criminology 1079, 1123-1124 (2005)
The English Bill of Rights of 1689

Embedded in the Supreme Court’s string of incorporation decisions is a focus on English history, common law, and the works of many prominent thinkers prior to the founding of the United States. Consistently, they have paid special attention to the authority of the English Bill of Rights of 1689 and Sir William Blackstone’s famous *Commentaries on the Laws of England* as support for a variety of assertions.\(^49\) In *Heller*, Justice Scalia uses both of these sources on numerous occasions to lend support to the idea that the Second Amendment’s right to bear arms was centrally concerned with the natural tenet of personal self-defense in the home.\(^50\) In this same vein, Justice Alito reiterated that history in *McDonald* to champion the idea that the Second Amendment’s shared history with the 1689 English Bill of Rights and the works of Blackstone deemed the individual right to bear arms fundamental enough to be incorporated through the Fourteenth Amendment.\(^51\) While both of these English references invoked by Scalia and Alito are read to unequivocally support an individual right, a thorough analysis provides us with a legitimate alternative. Taken as a whole, these predecessors to the American

\(^{49}\) See generally Near v. Minnesota, Benton v. Maryland, Duncan v. Louisiana.


Bill of Rights stand in strong favor for a collective right to bear arms that is associated with republican values and shared duties to society.

The closest English ancestor to the Second Amendment is enshrined in the English Bill of Rights of 1689. Entrenched in the debates prior to their ratification was a prevalent concern of standing armies during peacetime that lacked the consent of Parliament, leaving the Crown at liberty to disarm the militia at any time.52 Before codifying these rights, a committee submitted a list of complaints on February 2, 1689. Three of these are of particular importance for contextualizing how the right to bear arms was originally understood, specifically in the English context. The first of the three complaints53 stated that “the Acts concerning the Militia are grievous to the Subject,” the second, that the “raising and keeping of a Standing Army within this Kingdom in time of Peace, unless it be with the Consent of Parliament, is against Law.”54 Finally, the third of these exclaimed that “it is necessary for the public Safety, that the Subjects which are Protestants, should provide and keep Arms for their common Defence; and that the arms which have been seized, and taken from them be restored.”55 The provision eventually included in the English Bill of Rights is similar to the final of these grievances, which emphasized the need for citizens to collectively bear arms to ensure the security of their communities.56 There appears to be no vocalized concern that the disarmament of

53 Labeled No. 5 within the actual report, with the following two labeled six and seven respectively.
55 Ibid. [emphasis added].
56 Ibid.
citizens somehow infringed or precluded the people from self-defense in the home or any other venue.

The language adopted in the English Bill of Rights of 1689 reaffirmed the right of cooperative security for the citizens of England, stating that “the Subjects, which are Protestants, may have Arms for their Defence suitable to their Conditions and as allowed by Law.”57 The affirmation of Protestant English citizens to keep and bear arms in the interest of their own protection, serving as a bulwark against the Crown, is extremely revelatory. As historian Lois G. Shwoerer puts it, “there was no ancient political or legal precedent for the right to arms. The Ancient Constitution did not include it; it was neither in Magna Charta 1215 nor in the Petition of Right 1628. No early English government would have considered giving the individual such a right.”58 Schwoerer continues by highlighting that the right to bear arms was also absent from the famous militia laws of hundreds of years ago such as the Henry II’s Assize of Arms (1181) and Edward I’s Statute of Winchester (1285). In the English context, then, the right to bear arms was granted to Protestant citizens by law in order to defend their societies and communities in a collective sense.59 The influence that the English Bill of Rights of 1689 had on the eventual Second Amendment in the United States is without question; the people should enjoy the right to bear arms for “their common Defence.”60

59 Ibid.
60 Ibid at 33.
Sir William Blackstone

Among the prominent English thinkers who were highly influential in the drafting of the United States Constitution was Sir William Blackstone. To begin to appreciate the significance of Blackstone’s impact on the American Bill of Rights and his relation to the Second Amendment specifically, it is appropriate to highlight what portions of his discussion in the *Commentaries on the Laws of England* have been utilized in some of the previous incorporation decisions. First, in the case of *Near v. Minnesota*, the Supreme Court cited Blackstone as saying that “every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press.” 61 The *Near* Court incorporated the freedom of the press, in part, using Blackstone’s unambiguous explanation of this individual right. For both Blackstone and the American Framers, to revoke one’s right to express their own thoughts and disseminate them to the public at large would be to destroy a sacred part of democratic society. The Court in *Benton v. Maryland* uses Blackstone to highlight the importance of protecting individuals against double jeopardy, citing “that no man is to be brought into jeopardy of his life more than once for the same offence.” 62 Blackstone’s invocation of the word “man” obviously signifies a purely individual safeguard, ensuring that the dangerous possibility of being tried twice for the same crime be prohibited. In addition to these strategic references to Blackstone, the Supreme Court invokes his comments yet again in *Duncan v. Louisiana* in order to incorporate the Sixth Amendment’s assurance

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that individuals would be guaranteed a trial by jury for crimes committed. In all three instances, the utilization of Blackstone’s *Commentaries* was integral in incorporating specific Bill of Rights provisions against the States. His clear view of these rights as pertaining to individual citizens, specifically the freedom of the press, protection against double jeopardy, and right to jury trial for English citizens, was mirrored in the drafting of the United States Constitution. His discussion of the right to bear arms, however, paints a very different picture; one replete with concerns of collective security and fears of tyrannical central authority.

Blackstone, along with many others in late seventeenth century England, was surprised at the specificity of qualifications in the 1689 English Bill of Rights arms provision, specifically the confinement of the right to Protestants citizens. He made his own modifications in the *Commentaries on the Laws of England*, crafting the right to bear arms much more broadly than had previously been understood. Blackstone stated that:

> The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence, suitable to their condition and degree, and such as are allowed by law. Which is also declared by the same statute, and is indeed a *public* allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.

In particular, Blackstone’s 5th auxiliary right broadened the entitlement of bearing arms to all English citizens who would act as a safeguard against despotic action by the Crown.

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63 Duncan v. Louisiana 391 U.S. 145, 151-152 (1968)
65 *BLACKSTONE, WILLIAM. COMMENTARIES ON THE LAWS OF ENGLAND. VOL. 1*. 139 (1979) [emphasis added].
According to historian Saul Cornell, Blackstone’s view of the right to bear arms for English subjects in order to stand against the “violence of oppression” is closer to the right of assembly codified in the First Amendment than that of more individualistic provisions like free speech and religion.\(^{66}\) Although the right was understood more broadly than had been the case with the English Bill of Rights of 1689, the political nature of the provision was not identical to the more personal rights\(^{67}\) discussed in *Near, Duncan*, and *Benton*. The right to bear arms described by Blackstone was one that fulfilled a civic responsibility and purpose. It merely operated as “another political safeguard protecting English liberty against arbitrary power.”\(^{68}\)

In *Heller*, Justice Scalia very intentionally highlights limited aspects of Blackstone’s text to justify an individual right in the operative clause of the Second Amendment. Referring to the right to bear arms, he says, “[Blackstone’s] description of it cannot possibly be thought to tie it to militia or military service. It was, he said, ‘the natural right of resistance and self-preservation.’”\(^{69}\) The *McDonald* decision, building off of this, states that the individual right to bear arms was “valued because the possession of firearms was thought to be essential for self-defense. As we put it, self-defense was ‘the central component of the right itself.’”\(^{70}\) It is odd that from an originalist standpoint, neither Scalia nor Alito considers the possibility that the conception of self-defense in the twenty-first century may connote a different meaning than it did over two hundred years

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\(^{68}\) Ibid.


ago. For example, Blackstone mentions that the right of self-preservation was to be invoked “when the sanctions of society and laws are found insufficient to restrain the violence of oppression.”71 This calls into question the notion that discussions of self-defense in the seventeenth and eighteenth centuries automatically imply the protection of the individual against home robbers and the like. There is ample evidence like this throughout the history surrounding the Second Amendment, much of which will be analyzed in the pages to follow, where self-defense was understood as the protection of a whole community to ensure the integrity of liberty.72

The way in which Blackstone framed the scope and parameters of the right to bear arms is equally important here. Following the initial explication that English citizens should be granted this right, he continued that they should be “suitable to their condition and degree, and such as are allowed by law.”73 The restrictions placed on who could own or possess firearms, particularly those of “social status and legal restrictions,”74 were calculated and purposeful. The final caveat for arms possession, “as allowed by Law,” permitted the Parliament to retain and implement all of the restrictive measures placed on firearms prior to the adoption of the English Bill of Rights of 1689.75 The Standard Modelers’ pipe dream of an age where citizens had an unfettered ability to bear arms in the name of individual liberty, free of governmental regulation, is more of a myth than a reality; Blackstone’s view of Parliament itself is indicative of this. He viewed the

71 BLACKSTONE, WILLIAM. COMMENTARIES ON THE LAWS OF ENGLAND. VOL. 1 139 (1979).
73 Ibid.
popularly elected Parliament as “coequal with the kingdom itself,” affirming that their power was “transcendent and absolute.”\textsuperscript{76} It is evident from the context in which Blackstone writes in\textit{ Commentaries}, that he felt the peoples’ right to bear arms was a prescription or law handed down by Parliament to the people, subject to all the normal restrictions and stipulations that were imposed for the good of society.\textsuperscript{77} Although his conception of the right to bear arms is an accepted predecessor to the Second Amendment, and rightly so, the incorporation decision in\textit{ McDonald} misconstrues his focus on communal rights where regulations like the one imposed by Chicago would likely not be have been considered a violation of the Constitution.\textsuperscript{78}

Another aspect of Blackstone’s work sheds light on the relationship between the prefatory clause and the operative clause of the Second Amendment. Regarding the entire first half of the Second Amendment, Justice Scalia states in\textit{ Heller} that “apart from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause.”\textsuperscript{79} However, since the operative clause of the Second Amendment on its own does nothing to clarify the scope of the right, reading only that “the right of the people to keep and bear arms shall not be infringed,”\textsuperscript{80} the prefatory language is essential in illuminating the meaning of the provision as a whole. While Blackstone provides ample advice on resolving such ambiguities, the\textit{ Heller} opinion, accepted by\textit{ McDonald}, completely omits any reference to his discussion. Blackstone asserts that when analyzing

\textsuperscript{76} Bogus, Carl T. \textit{The Hidden History of the Second Amendment}, 31 U.C. Davis L. Rev. 309, 399 (1998).
\textsuperscript{77} Ibid.
\textsuperscript{80} United States Constitution, Amendment II.
a provision or statute, “if words happen to be still dubious, we may establish their meaning from the context; with which it may be of singular use to compare a word, or a sentence, whenever they are ambiguous, equivocal, or intricate. Thus the proeme, or preamble, is often called in to help the construction of an act of parliament…”\textsuperscript{81} With this framework available, it is peculiar that the bulk of the \textit{Heller} opinion analyzes the ambiguous operative clause of the Second Amendment in isolation of its instructive preamble. It is also interesting that part of \textit{McDonald’s} justification for incorporating the Second Amendment utilizes selective portions of Blackstone’s work as a preeminent ancestor for the American right to bear arms but simultaneously ignores methodology that would guide the interpretation of such an unclear text.

\textit{John Locke}

Moving away from Blackstone, another extremely influential English thinker to American philosophy and thought is John Locke. Working in the middle and late seventeenth century, his writings are tangentially related to the Second Amendment right to bear arms for their role in conceptualizing how self-defense and self-preservation was understood over two centuries ago. To begin with, Locke felt that the unrestrained use of force by individuals is causally related to a legislature’s need to restrict and rein in certain actions to sustain a properly functioning society.\textsuperscript{82} When individuals have the ability to gauge each and every situation as they arise, the likelihood that he or she will “act out of

passion and self-interest,” pursuing only his or her own goals at the risk of jeopardizing others is extremely prevalent.\textsuperscript{83} When the American system was later established, crafting a constitutional government with enumerated powers, citizens entered into a social contract where they were required to give up certain natural rights in order to create a functioning community “for the preservation of their life, liberty, and property.”\textsuperscript{84} In Locke’s own view, he describes that individuals acquiesce:

\begin{quote}
power…of doing whatsoever he thought fit for the Preservation of himself, and the rest of Mankind, he gives up to be regulated by Laws made by the Society, so far forth as the preservation of himself and the rest of that Society shall require; which Laws of the Society in many things confine the liberty he had by the Law of Nature.\textsuperscript{85}
\end{quote}

Following this logic in \textit{United States v. Cruikshank}, the Supreme Court stated that “bearing arms for a lawful purpose…was not a right granted by the Constitution. Neither is it dependent upon that instrument for its existence.”\textsuperscript{86} If the individual right to bear arms is not contingent upon the Constitution, then, it is important to understand exactly what \textit{was} granted by the Second Amendment and what sorts of natural rights fall outside of the scope of that protection.

Importantly for our discussion on incorporation, John Locke did believe that certain rights were vital regardless of any societal contract, such as the right of conscience to believe what one chooses. Accepting that the liberty to think freely does not infringe upon the ability of others to exercise their own rights, Locke did not have the same restrictive views as he did regarding the right to use force in the name of individual

\begin{flushleft}
\textsuperscript{83} Ibid.
\textsuperscript{84} Ibid.
\textsuperscript{85} Ibid. at 243 [ellipsis in original].
\textsuperscript{86} United States v. Cruikshank et al. 92 U.S. 542, 553 (1875).
\end{flushleft}
self-preservation outside the laws proscribed by government. He succinctly makes his point by stating:

we must consider that men’s uniting into political societies, though they have resigned up to the public disposal of all their force, so that they cannot employ it against any fellow-citizen, any further than the law of their country directs—yet they retain still the power of thinking well or ill, approving or disapproving the actions of those they live amongst and converse with.\(^87\)

This ostensibly places the use of force by individuals, whether by firearm or other instrument, squarely in the hands of the government to restrain; another instance of historically legitimate regulation that did not extend to aspects such as the freedom of conscience.

Even with Locke’s narrow opinion of individuals acting as they wish in the name of their own self-defense, he made clear that citizens should always retain the ability to revolt in unison if a situation should arise. Locke felt that the retention of this right was the “Fundamental, Sacred, and unalterable Law of Self-Preservation,” proving that “the community may be said in this respect to be always the supreme power.”\(^88\) He believed that the preservation of society was best exercised through a community acting in solidarity against a government that had lost connection with its people rather than a few scattered individuals in armed resistance.\(^89\) It is also worth pointing out that Locke, similarly to Blackstone, invokes “self-preservation” in a collective sense when dealing with the right of a revolution against an autocratic government. It would be a strange

\(^{87}\) Noelle-Neumann, Elisabeth. The Spiral of Silence. 70 (1993) [emphasis in original].


\(^{89}\) Heyman, Steven J. Natural Rights and the Second Amendment, 76 Chi.-Kent L. Rev. 237, 249 (2000).
interpretation of John Locke to understand his works as concerned with individual self-defense when he specifically focuses his energy on the importance of the community.

**Further Influential English Sources**

Aside from the most well known English scholars, there is a rich body of literature that lends further support to the collective nature of the right to bear arms prior to the codification of the Second Amendment. The prominent Scottish thinker, James Burgh, authored an influential book entitled *Political Disquisitions* between 1774 and 1775. His book was considered by many Americans to be among the most prominent works of the time. Cited in *The Federalist*, the book was extremely influential among early citizens in the United States for its “sympathetic evocation of shared ideas and grievances,” mainly those between the citizens of Scotland and America. Within the actual literature, Burgh recapitulates some of the important views between “the militia and the preservation of liberty,” providing further insight into the original understanding of the Second Amendment itself. The discussion is full of sharp criticisms of standing armies and holds the citizen-soldier in high esteem as an effective check. Although Burgh thought that “a militia is the only natural defence of a free country from both invasion and tyranny,” he made sure to state that “men of property, must be our only resource….A militia consisting of any others than the men of property in a country,

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90 Konig, David T. *The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of 'the Right of the People to Keep and Bear Arms,'* 22 Law & Hist. 119, 125-126 (2004).


is no militia; but a mongrel army." Burgh considered it essential to ensure that only those who had a vested interest in the preservation of society and the community at large should be at liberty to have arms in their hands. This was most likely to ensure that the proper organization and regulation of firearms amongst the citizenry could be executed without undue repercussions. It is also important to bear in mind that the threat of English rule over Scotland in a militaristic fashion from across borders was pervasive in Burgh’s fears. This worry prompted him to emphasize how fundamental it was to bear arms in a militia, acting in the interest of the community, seemingly unconcerned with bearing arms for a lawful, individual purpose. Highly pivotal writings like The Federalist and a multitude of others during the Revolutionary Era replicated this fundamental tenet of Burgh’s work.

Similar to Burgh, historian Lawrence D. Cress argues that James Harrington’s influential book entitled the Commonwealth of Oceana also held the belief that “the citizen bore arms not to deter personal assault or to protect the limits of his freehold; for Harrington, bearing arms, like voting, symbolized political independence that allowed for an ensured commitment to civic virtue.” On the same token, Protestant minister Simeon Howard, delivered a sermon to a Boston artillery company in 1773, emphasizing this focus on bearing arms in the name of societal protection. Howard reiterated that

a safer way, and which has always been esteemed the wisest and best by impartial men, is to have the power of defence in the body of the people,

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94 Konig, David T. The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of 'the Right of the People to Keep and Bear Arms,' 22 Law & Hist. 119, 127 (2004).
to have a well-regulated and well disciplined militia. This is placing the sword in the hands that will not be likely to betray their trust, and who will have the strongest motives to act their part well, in defence of their country, whenever they shall be called for.\[^{96}\]

That both Harrington’s and Howard’s discussion emphasize that citizens motivated by the conservation of their societies should retain the right to protect their communities is indicative of a focus on militia discipline and subsequently, regulation of firearms by governments who enjoy the peoples’ faith and trust.

Writings prior to the Glorious Revolution of 1688 also bolster the significance of the militia to the collective security of society and the underlying danger of standing armies. One of the coauthors of *Cato’s Letters*, John Trenchard, wrote that “standing armies…were the agents of political intrigue and corruption. Only a militia could be counted on to protect both the territory and the liberties of a free people.”\[^{97}\] The very idea of an armed individual, acting in his own self interest, had no relation to this “neo-Harringtonian” conception of a functioning society.\[^{98}\] One of the men responsible for the republication of Harrington’s *Commonwealth of Oceana*, John Toland, highlighted the importance of limiting arms only to those who were committed to the public good. Toland describes the danger inherent in the unmonitored proliferation of firearms, stating that “Most Men do as much Mischief as lay in their Power,” believing that it was most desirable to “take away all Weapons by which they may do either themselves or others an Injury.”\[^{99}\] Toland’s feeling that “arms [should] never [be] lodged in the Hands of any

\[^{98}\] Ibid.
who had not an Interest in preserving the publick Peace,”\textsuperscript{100} is strong evidence that his primary and fundamental view of the right to bear arms rested with collective security.

Grounding our discussion of bearing arms and self-defense within the abounding body of English rights, history, and literature, contributes an invaluable amount to understanding how the Second Amendment was influenced by relevant predecessors. As shown, bearing arms in the English context was perceived as a civic responsibility for the majority of scholars writing in late sixteenth century England all the way through to the ratification of the Bill of Rights.\textsuperscript{101} Citizen retention of the power to defend their communities against centralized governmental oppression set the tone of discussion; the same apprehension that was echoed in the United States beginning in the eighteenth century and beyond.

\textsuperscript{100} Ibid. at 25.
IV. The Founding of the Second Amendment and Beyond

Placing the Right to Bear Arms in Context

Our next foray into the original understanding of the Second Amendment is the integral history of the right to bear arms in the United States. The vast expanse of literature, discussions, and state constitutional provisions, provides us with an enormous piece to the puzzle of the Founding generation’s thought process in establishing the Bill of Rights. As the majority opinion in McDonald states, “the right to keep and bear arms was considered no less fundamental by those who drafted and ratified the Bill of Rights,“\(^\text{102}\) than it was for their English predecessors. Justice Alito affirms all of the conclusions in Heller, citing references such as the ratification debates in 1788 as evidence of “the fear that the federal government would disarm the people in order to impose rule through a standing army or select militia....“\(^\text{103}\) Just to drive home the point, he also points to The Federalist Papers, the ratification history of the Constitution, and contemporaneous state analogues.\(^\text{104}\) Although Alito, like Scalia in Heller, does the job of underscoring the fundamentality of the right to bear arms in the interest of collective security for the people through these sources, there is a lack of clear evidence pointing to

\(^{103}\) Ibid.
\(^{104}\) Ibid.
any concern whatsoever of an individual right at the time of the founding or soon thereafter.

Before immersing ourselves into an analysis of the history surrounding the Second Amendment in the United States, it is important to qualify the extent of our discussion. In *Heller*, Scalia asserts that “Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.” Following this reasoning, it should be no logical fallacy to posit that both future legislatures and judges should also not concern themselves with whether or not they think a specific right too narrow. Despite this rationale, however, the restrictions laid out by the majority in *Heller* and perpetuated in *McDonald* actually view the right to resist an oppressive government, which is inherent in the Second Amendment as originally understood in 1791, essentially null and void. One of the most glaring contradictions within these opinions is the justification regarding the changing role of the militia. As Scalia puts it:

> It may be objected that if weapons that are most useful in military service – M-16 rifles and the like – may be banned, then the Second Amendment right is completely detached from the prefatory clause. But as we have said, the conception of the militia at the time of the Second Amendment’s ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty. It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large. Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks. But the fact that modern developments have limited the degree of fit

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between the prefatory clause and the protected right cannot change out interpretation of that right.\textsuperscript{107}

In this passage, Scalia lays out a number of restrictions regarding the various types of weapons that the Second Amendment arguably protects, which “the majority concedes would disable exercise of the right for the amendment’s textually enunciated purposes.”\textsuperscript{108} His recognition that the government is free to place restrictions on firearms that are inextricably linked to the collective right of the people to resist oppression while in the same breath stating that restrictions on handguns in the home for personal self-defense are unconstitutional stands on extremely shaky ground. It is curious that the majority, from an originalist perspective, treats the “civic republican understandings of [the Second] amendment as antiquated, and refuse[s] to protect arms a militia needs to defend against tyranny.”\textsuperscript{109} The trajectory of the following discussion will detail why the civic flavor of the Second Amendment encapsulates the truly fundamental nature of the right to bear arms. It will be evident that the right to own firearms for individual self-defense did not figure prominently, if at all, in the original understanding of the Second Amendment, confirming the rationale in \textit{McDonald} as seriously flawed.

\textit{The Federalist Papers: An Armed Populace}

An excellent place to embark on an understanding of how the right to keep and bear arms was originally conceived by the Founding generation is in \textit{The Federalist}. To


\textsuperscript{109} Ibid. at 193.
get under way, in Federalist No. 46 James Madison dispels the fear of many critics to the proposed Constitution that a standing army was possible within the confines of the newly formed government. He boldly retorts that “to these would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affection and confidence.”\textsuperscript{110} As can be seen, Madison grounds his discussion of arms bearing in the context of a universal militia that is bound by the shared interest of protecting societal liberties, not individual ones.

Sanford Levinson falls prey to a distorted use of Madison’s language in his famous essay, \textit{The Embarrassing Second Amendment}. In attempts to support an individual right to bear arms in \textit{The Federalist}, Levinson commits the egregious error later replicated in \textit{Heller}.\textsuperscript{111} He cites Federalist No. 46 as stating, “The advantage of being armed, which the Americans possess over the people of almost every other nation”\textsuperscript{112} and severing the quote just before discussion that places the right to bear arms in the context of a militia. Madison, however, presses on by explaining, “The existence of subordinate government to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprizes of ambition, more insurmountable than any which a simple government of any form can admit of.”\textsuperscript{113} Madison does not say that the importance of an armed populace was to protect the

\textsuperscript{110} \textit{Bell, Terence Ed.}, \textit{Hamilton, Madison, and Jay: The Federalist with Letters of “Brutus.”} 233 (2003).
\textsuperscript{111} The \textit{Heller} majority commits the identical error found in Levinson’s work of wrenching Madison’s quote out of context, citing him only in part and severing the discussion from the militia aspect.
\textsuperscript{113} \textit{Bell, Terence Ed.}, \textit{Hamilton, Madison, and Jay: The Federalist with Letters of “Brutus.”} 233 (2003).
individual in their home. He makes clear that resistance to tyranny and oppression begins with a dialogue among the various State governments which are subordinate to the people, and an assurance that they would have the means to combat the threat to liberty from a Federal authority.\textsuperscript{114} This is not an argument that the best guarantor of freedom is individual gun owners as the \textit{Heller} majority states and the \textit{McDonald} majority acknowledges, but rather that a community armed for the defense of society, regulated by the States in which they are bound to protect, serve as the true safeguard.\textsuperscript{115}

To bolster the individual rights argument further, the \textit{Heller} majority remarks that the militia itself did not have to be designated by the government since it was already in existence and composed of “all able-bodied men,”\textsuperscript{116} possessing their own personal arms. Although Federalist No. 46 paints the picture of a militia that seemingly encompasses the entire citizenry, Federalist No. 29, authored by Alexander Hamilton, takes a much narrower view of the institution.\textsuperscript{117} Hamilton asserts that “though the scheme of disciplining the whole the nation must be abandoned as mischievous or impracticable…the attention of the government ought particularly to be directed to the formation of a select corps of moderate extent, upon such principles as will really fit them for service in case of need.”\textsuperscript{118} What is remarkable, are the reasons why Hamilton felt that it would be a dangerous ideal to hold all citizens responsible for militia service.

\textsuperscript{114} Anderson, Casey and Joshua Horwitz. \textit{Taking Gun Rights Seriously: The Insurrectionist Idea and Its Consequences}, 1 Alb. Gov’t L. Rev. 496 (2008) [at footnote 48].
\textsuperscript{115} Ibid.
\textsuperscript{118} BELL, TERENCE ED., HAMILTON, MADISON, AND JAY: THE FEDERALIST WITH LETTERS OF “BRUTUS.” 134 (2003).
Hamilton states that such a mandatory requirement of all people “would form an annual deduction from the productive labour of the country…” and “would abridge the mass of labour and industry to so considerable an extent would be unwise….”\(^{119}\) He importantly proclaims that “little more can reasonably be aimed at with respect to the people at large than to have them properly armed and equipped; and in order to see that this be not neglected, it will be necessary, to assemble them once or twice in the course of a year.”\(^{120}\) Hamilton’s belief that it was the responsibility of State governments to ensure that the people were armed by calling their constituents to muster a few times a year is indicative that his take on the right to bear arms was linked to a cooperative function of society. This comports perfectly when read in context with Madison’s discussion, that while all citizens were not required to bear arms in a militia per se, the whole populace would be equipped in the event of necessity.

**Self-Defense to the Framers’ Generation**

As was discussed in the review of English history, the concept of self-defense in the seventeenth and eighteenth centuries was perceived very differently than in the twenty-first century.\(^{121}\) There are important examples of this from the Founding period in the United States that dispel the idea that self-defense and the right to bear arms are indicative of an individual right. In Federalist No. 28, Hamilton explicitly links the right to bear arms to self-defense in a very different fashion than both *Heller* and *McDonald*

\(^{119}\) Ibid. at 134.

\(^{120}\) Ibid.

\(^{121}\) Look to the discussions on William Blackstone and John Locke.
are willing to accept, as displayed by their omission of his discussion. The language in Federalist No. 28 maintains, “If the representatives of the people betray their constituents, there is then no resource left but in the exertion of that original right of self-defence, which is paramount to all positive forms of government.” Hamilton’s perception of the citizens’ right of self-defense was triggered when the government founders on their constitutional promise to the people they are entrusted to govern. He does not embed the right of self-defense in a discussion over personal rights and the preservation of the individual, but rather chooses the context of a disassociated government. Hamilton continues, highlighting the right of the community to defend against even an oppressive local government if need be by exclaiming that “in a single State, if the persons entrusted with supreme power become usurpers…the citizens must rush tumultuously to arms, without concert, without system, without resource; except in their courage and despair.” Here, as in the previous example, Hamilton places his discussion of bearing arms as a reaction to any government, Federal or local, that violates the liberties of their contract. Although the natural right of self-defense in this case falls outside the scope of a designated militia, it is at least suggestive of citizens acting to preserve their liberties as a people, plural.

Even one of the most prominent Antifederalists, “Brutus,” was explicit about leaving the role of individual self-defense to the State governments. Within the published

123 Ibid.
Brutus makes his position on the matter very clear. While openly arguing that protection of citizens should be kept out of the hands of the Federal government, he explained that:

it ought to be left to the state governments to protect a *private* right of self defense of the citizen against the hand of private violence, and the wrongs done or attempted by individuals to each other – Protection and defence against the murderer, the robber, the thief, the cheat, and the unjust person, is to be derived from the respective state governments.\(^{125}\)

Seeing that this prominent Antifederalist felt that the protection of individuals against private violence should be left to the State governments is extremely significant. Not only is the idea of individual self-defense as being “fundamental to the American scheme of justice”\(^{126}\) called into question under the incorporation criteria, but the very notion that the Second Amendment included this right in the first place is highly suspect.

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**The Observations on the New Constitution Concur**

One of the most respected female Antifederalists during the Founding period, Mercy Otis Warren, authored the influential *Observations on the New Constitution and on the Federal and State Conventions*.\(^{127}\) Warren, who had regular correspondence with such influential thinkers as Thomas Jefferson\(^{128}\) and John Adams,\(^{129}\) had much to offer in

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124 *Publius* was the general name that signified Hamilton, Madison, and Jay, the three authors of *The Federalist*.
127 The Library of Congress Special Collections notes that this piece was originally thought to have been authored by Elbridge Gerry of Massachusetts but was later identified as Mercy Otis Warren.
assessing the scope of the Second Amendment as originally understood, specifically the right of self-defense. Early on in the *Observations on the New Constitution*, Warren addresses this concept as a vital aspect of American citizenship, worthy of detailed treatment. Surprisingly, however, she does not aim her discussion towards the individual but rather the collectivist approach as seen by Blackstone, Locke, Hamilton, Brutus and others. Warren begins by stating that “self defence is a primary law of nature, which no subsequent law of society can abolish.”[^130] If the analysis ended here, there would be a persuasive argument for reading individuality into her treatise. Taken in full context, Warren continues that “this primeval principle, the immediate gift of the Creator, obliges every one to remonstrate against the strides of ambition, and a wonton lust of domination, and to resist the first approaches of tyranny…”[^131] Although Warren does not explicitly mention this as resistance to an oppressive government, the evocative use of words like “domination” and “tyranny” are strongly indicative of such a view. Warren does not appear to be concerned with arming individuals for their self-defense against personal enemies, but rather understood in the Lockean sense that:

> the principle aim of society is to protect individuals in the absolute rights which were vested in them by the immediate laws of nature, but which could not be preserved in peace, without the mutual intercourse which is gained by the institution of friendly and social communities.”[^132]

[^131]: Ibid.
Following this trend, Warren also had an immensely high view of the role of government in protecting the community, recognizing that “when society has thus deputed a certain number of their equals to take care of their personal rights, and the interest of the whole community, it must be considered that responsibility is the great security of integrity and honor…”\textsuperscript{133} Although she was comfortable leaving the security of individuals to the State, Warren was vociferously outspoken about the lack of a few rights in particular in the new Constitution. Citing Blackstone, Warren objected to the lack of enumerations for the “right of conscience,” the “liberty of the press,” and “jury trial in civil cases,”\textsuperscript{134} all of which were later considered fundamental enough during the Founding generation to be codified in the Bill of Rights and incorporated by the Supreme Court in the twentieth century.

A further aspect of \textit{Observations on the New Constitution} that is pertinent to a comprehensive discussion of the Second Amendment is Warren’s thoughts on the Federal Government. Right at the forefront of this heated debate, Warren rails against standing armies, decrying that “freedom revolts at the idea, when the Divan, or the despot, may draw out his dragoons to suppress the murmurs of a few…”\textsuperscript{135} She continues that “standing armies have been the nursery of vice, and the bane of liberty, from the Roman legions, to the establishment of the artful Ximenes, and from the ruin of Corates of Spain, to the planting of the British Cohorts in the capitals of America.”\textsuperscript{136} To Warren, the entire scheme of liberty is threatened by an army that looms over the citizenry during

\begin{footnotesize}
\begin{enumerate}
\item Ibid. \textsuperscript{133}
\item Ibid. at 9-10. \textsuperscript{134}
\item Ibid., at 10. \textsuperscript{135}
\item Ibid. \textsuperscript{136}
\end{enumerate}
\end{footnotesize}
peacetime. Aware of the need to subordinate the army to the people, Warren warns that when the Federal Government installs an oppressive standing army, “the bulwark of defence, and the security of national liberty, [is] no longer under the controll of civil authority.”\(^\text{137}\) Her fear in this regard seems to have taken precedence to any discussion of bearing arms for the “lawful purpose of [individual] self-defense,”\(^\text{138}\) since there is no mention of it in the entire pamphlet. As per the incorporation criteria of the Supreme Court over the last eighty years, it would make much more sense to see concerns of a tyrannical, oppressive Federal Government as “implicit in the concept of ordered liberty,”\(^\text{139}\) while concern of an individual right to bear arms appears to not have been on the radar of thinkers like Warren at all.

Towards the end of the pamphlet, Warren states one final idea that relates to the conception of regulating the right to bear arms among the citizenry. She recognizes that it is true this country lately armed in opposition to regal despotism – impoverished by the expences of a long war, and unable immediately to fulfil their public or private engagements, have appeared some instances with a boldness of spirit that seemed to set at defiance all authority, government, or order on the one hand, while on the other, there has been not only a secret wish, but an open avowal of the necessity of drawing the reins of government much too taught, not only for republicanism, but for a wise and limited monarchy. But the character of this people is not averse to a degree of subordination…)\(^\text{140}\)

The need for regulation to maintain order and safety for all citizens shows that Warren would likely disagree with an unfettered right to bear arms for individual purposes, free from rational restrictions. Importantly, and as understood by many historians, the anxiety

\(^{137}\) Ibid.
that individuals would be disarmed and unable to use firearms for their personal needs was not an explicit concern among most of the Founding generation. The fundamentally important aspect regarding self-defense for Mercy Otis Warren was protecting societal liberties from the repressive hand of a central authority.

**As Apprehension Over Ratification Mounts**

In addition to Mercy Otis Warren’s views on the proposed Constitution, there are numerous examples that are instructive as to the original meaning of the Second Amendment. For example, in a letter to James Madison, Thomas Jefferson explicitly states the various areas of the Constitution with which he took issue. In the correspondence, Jefferson mentions, “First the omission of a bill of rights providing…for freedom of religion, freedom of the press, protection against standing armies, restriction against monopolies, the eternal and unremitting force of the habeas corpus laws, and trials by jury in all matters of fact triable by the laws of the land and not the laws of Nations.”

It was not the government’s disarmament of citizens’ private firearms that was expressed as a concern, but rather the lack of a viable militia, run by the state, to counteract a standing army. This is an especially interesting departure from Jefferson’s earlier proposed provision to the Virginia Declaration of Rights in 1776 that

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would have protected an unambiguous individual right to bear arms. The shift in mentality reflected in the letter to Madison appears to be indicative of Jefferson’s view of fundamental rights. If he had been troubled with the lack of protecting an individual right to bear arms in the new Constitution, it would have likely shown up in a letter addressing concerns to one of his close friends and colleagues, James Madison; unfortunately for the Standard Modelers, it is absent. One plausible explanation, is that although Jefferson was an advocate of an individual right to bear arms in his own state of Virginia, he did not feel that it was appropriate to make it a fundamental in the Constitution.

One of the most outspoken Antifederalists, George Mason, authored a widely disseminated piece entitled *Objections to the Constitution of Government* in 1787. Addressing his fears over the new Constitution, he avows that “there is no declaration of any kind, preserving the liberty of the press, or the trial by jury in civil cases; not against the danger of standing armies in time of peace….” Similar to Jefferson’s apprehensions expressed in the letter to Madison, the crux of Mason’s concerns revolved around the fear of standing armies during peacetime and the lack of protection for States and the citizens within them to safeguard themselves against intrusion. This is just another example of a principal focus on the deep-seated requirement to ensure protection of the community, not a principal focus on the right of individuals to bear arms.

Mason also expressed his concern with too much Federal control over the various State militias during various debates over the Second Amendment. He worried that “they

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143 District of Columbia, et. al., Petitioners v. Dick Anthony Heller 128 S. Ct. 2783, 2803 (2008) [“no freeman shall ever be debarred the use of arms (within his own lands or tenements)].

144 YOUNG, RALPH F. DISSENT IN AMERICA: THE VOICES THAT SHAPED A NATION. 105-106 (2006) [ellipsis in original].
may easily abolish them, and raise a standing army in their stead. There are various ways of destroying the militia…That is, by rendering them useless, by disarming them.”\textsuperscript{145} Mason’s trepidations were fueled by a proposition forty years prior by Governor Keith to “disarm the people ‘in order to enslave them.’”\textsuperscript{146} When Mason expressed his fear that under the new Constitution, “Congress may neglect to provide for arming and disciplining the militia, and the State Governments cannot do it, for Congress has an exclusive right to arm them…,”\textsuperscript{147} his counterpart Patrick Henry, proposed “that each State respectively shall have the Power to provide for organizing, arming, and disciplining its own Militia, whersoever the Congress shall omit or neglect to provide for the Same.”\textsuperscript{148} Mason’s anxiety, along with many other Antifederalists, is inextricably linked to Madison’s creation and eventual codification of the Second Amendment. By proposing the Second Amendment as a close relative to Mason’s proposal, Madison assured critics that both the National Government and the governments of the States would have concurrent power over the arming of the militias.\textsuperscript{149}

A pamphlet held in the Library of Congress Special Collections, authored by Jeremiah Townley Chase and John Francis Mercer, echo similar sentiments. Chase, a prominent lawyer, jurist, and delegate to the Maryland ratifying convention, stood in opposition to the new Constitution on the grounds that the powers granted to the Federal

\textsuperscript{146} Ibid. at 138.
\textsuperscript{147} Ibid.
\textsuperscript{148} Ibid.
Government threatened powers previously held by the State.\textsuperscript{150} Mercer, also a delegate to the Maryland ratifying convention, had walked out of a meeting on the Constitution displeased with the new grants of powers to the Federal Government.\textsuperscript{151} Together, Chase and Mercer authored a pamphlet that served as a recommendatory Bill of Rights Declaration, which read: “Bill of Rights. Liberty of Conscience. Trial by Jury. No Excise. No Poll Tax. No Standing Armies in Peace, Without Limitation. No Whipping Militia, Nor Marching Them Out of the State, Without Consent of the General Assembly. No Direct Taxation, Without Previous Requisition.”\textsuperscript{152} Neither of these two prominent American citizens advocated for making the private use of firearms a fundamental right to be protected in the Bill of Rights of the new Constitution, but rather focused on ensuring the integrity of the militia.

Reactions shared in the Antifederalist work, \textit{Letters from the Federal Farmer to the Republican}, are referenced in \textit{McDonald} to demonstrate that the individual right to bear arms meets the fundamentality standards for incorporation. However, read closely, the letters explicate a familiar theory of the balance of power between the Federal and State governments, not a personal right to bear arms. They read, “First, the constitution ought to secure a genuine guard against a select militia, by providing that the militia shall always be kept well organized, armed, and disciplined, and include, according to the past and general usage of the states, all men capable of bearing arms.”\textsuperscript{153} The reasoning

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\item \textsuperscript{151} Ackerman, Bruce and Neal Katyal. \textit{Our Conventional Founding}, 62 U. Chi. L. Rev. 475, 514 (1995).
\item \textsuperscript{152} CHASE, JEREMIAH T. \textit{AND JOHN FRANCIS MERCER. BILL OF RIGHTS DECLARATION}. (1789).
\item \textsuperscript{153} BENNETT, WALTER H. \textit{ED. LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN}. 123-124 (1978).
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behind the Federal Farmer’s view that select militias were so dangerous is an important aspect of analysis. The letter states:

that all regulations tending to render this general militia useless and defenceless, by establishing a select corps of militia, or distinct bodies of military men, not having permanent interests and attachments in the community to be avoided….This arrangement combines energy and safety in it; it places the sword in the hands of the solid interest of the community, and not in the hands of men destitute of property, of principle, or of attachment to the society and government….”

The importance in maintaining a militia composed of those who with strong ties to the community, resounding in the earlier proclamations of John Toland, James Burgh, and Simeon Howard, is a familiar motif. In fact, the Federal Farmer, who is often used by Standard Modelers, openly objected to such instances as Shay’s Rebellion, the Massachusetts uprising of citizens in arms against the state by labeling it an instance of “leveler democracy.” The moderate Democrats of the day were much more apprehensive about an unorganized, armed mob than they would have been to “trust that such a mob might serve as the ultimate check on governmental tyranny.” The need for a structured and regulated framework for the possession of firearms was central to this conception. Understanding the militia as a suppressant against unwarranted revolutions and insurrections, not an instrument of starting one, is also inherent in the original understanding of the Second Amendment.

154 Ibid. at 123-124 [emphasis added].
157 Ibid.
158 Spitzer, Robert J. Symposium on the Second Amendment: Fresh Looks: Lost and Found: Researching
Delving further into the letters from the Federal Farmer, there is mention that “the militia are the people, immediately under the management of the state governments, but on a uniform federal plan, and called into service, command, and government of the union, when necessary for the common defence and general tranquility.”\(^{159}\) This is especially important in regards to a much neglected aspect of the Second Amendment; its relationship in conjunction with the powers conferred to the Federal government in Article I, Section 8. This description reinforces the idea of a militia that is representative of the entire population through powers delegated on both levels of government.\(^{160}\)

One of the most often cited portions of the Federal Farmer by the Standard Modelers in support of an individual right, reads, “whereas, to preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them.”\(^{161}\) Taken out of context, this statement is twisted to affirm a personal right to bear arms outside of militia service or any relationship to the common defense. Read in its entirety, however, the words produce a different result. The subsequent section reads:

Nor does it follow from this, that all promiscuously go into actual service on every occasion. The mind that aims at a select militia, must be influenced by a truly anti-republican principle; and when we see many men disposed to practice upon it, whenever they can prevail, no wonder true republicans are for carefully guarding against it. As a farther check, it may be proper to add, that the militia of any state shall not remain in the

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\textit{The Second Amendment}, 76 Chi.-Kent L. Rev. 349, 360 (2000).
\textsuperscript{159} BENNETT, WALTER H. ED. \textsc{Letters from the Federal Farmer to the Republican.} 123-124 (1978).
\textsuperscript{161} BENNETT, WALTER H. ED. \textsc{Letters from the Federal Farmer to the Republican.} 124 (1978).
\end{flushleft}
service of the union beyond a given period, without the express consent of the legislature.\textsuperscript{162}

The proper contextualization of this statement is deeply entrenched in an ode to the militia and the security of the people as a whole. While the Federal Farmer, like Madison and Hamilton, thought that all citizens should be armed, it was confined to the defense of both local communities as well as the United States, not of individual ownership for personal purposes. The objective of a proficiency in the handling and use of arms was to ensure that all citizens would be ready when the occasion called for it; a far cry from demonstrating the fundamentality of personal protection via such instruments.

\textbf{In the Words of James Madison}

Equally imperative to an intelligible framework of the Second Amendment is how the right to bear arms was discussed by Americans who had a hand in steering the conversation. James Madison understood that many of those opposed to the Constitution were concerned that a variety of powers previously left to the States would be subjugated by new powers granted to the Federal Government in the Constitution. He proudly refuted this apprehension, stating that “it has been a fortunate thing that the objection to the government has been made on the ground I stated; because it will be practicable on that ground to obviate the objection, so far as to satisfy the public mind that their liberties will be perpetual….\textsuperscript{163}” Since Madison’s campaign for Congress during this time was contingent upon his promise to draft a Bill of Rights, he is widely regarded as a primary

\textsuperscript{162} Ibid.
\textsuperscript{163} MADISON, JAMES, ED. JAMES MADISON: WRITINGS, 441 (1999) AND GALEs, JOSEPH. THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES (ANNALS OF CONGRESS) VOL. 1. 449-450 (1834).
architect of that document. Drawing on authority from the various conventions of the States, provisions already protected within State constitutions, declarations of rights, the English Bill of Rights of 1689, Blackstone, and the correspondence between fellow congressman and citizens alike, Madison set forth on his journey to parse out which rights were worthy of codification in the Constitution.

For Madison, among the most fundamental protections to be included in the Bill of Rights were the affirmations that “no State shall infringe the right of trial by Jury in criminal cases, nor the rights of conscience, nor the freedom of speech, or of the press.” A complete list of rights was not set forth until later in Madison’s speeches where he first lays out a provision analogous to the Second Amendment. The initial proposition read, “The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.” If one of Madison’s primary concerns was protecting the individual right to bear arms, he assuredly could have included it in his list of the most fundamental individual liberties to be included in the Bill of Rights. Many Standard Modelers who claim that Madison unequivocally desired an individual right to bear arms are faced with the conundrum of its absense from this initial list.

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The Debate Rages on in the Annals of Congress

Stemming from James Madison’s proposal, the discussion in the Annals of Congress over the Second Amendment is instructive. On Monday, August 17, 1789, Elbridge Gerry of Massachusetts spoke to Congress in regards to the slightly modified provision, “A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms.”

Grounding his focus in familiar language, he asked, “What sir, is the use of a militia? It is to prevent the establishment of a standing army, the bane of liberty…Whenever Governments mean to invade the rights and liberties of the people, they always attempt to destroy the militia, in order to raise an army upon their ruins.” Gerry expressed no concern that either the Federal or State governments would disarm the people in a way that prevented them from the individual use of firearms. His worry over the disintegration of the militia came from a longstanding fear of the British Monarch’s success in doing so. It is thus coherent that the Second Amendment was understood as both a reminder and a safeguard against this empirically verified possibility.

Pressing on in the conversation, Gerry expresses opposition to the religious exemption clause in the initial Second Amendment, wishing to confine it more narrowly to specific religious sects with scruples about participation in the militia. He worried that “if we give a discretionary power to exclude those from the militia duty who have

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168 GALES, JOSEPH. THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES (ANNALS OF CONGRESS) VOL. 1. 778 (1834).
169 Ibid.
170 Ibid.
religious scruples, we may as well make no provision on this head.”¹⁷¹ James Jackson, seeking not to eliminate but to amend the clause, proposed to add “upon paying an equivalent, to be established by law.”¹⁷² John Vining disagreed, maintaining that “if it was amended so as to compel a man to find a substitute, which, with respect to the Government, was the same as if the person himself turned out to fight.”¹⁷³ Due to the apprehension over the clause, Egbert Benson, suggested deleting it and declared that “this humane provision should be left to the wisdom and benevolence of the government…If this stands part of the constitution, it will be a question before the Judiciary on every regulation you make with respect to the organization of the militia….”¹⁷⁴ One would have to wonder how it is a reasonable analysis that these remarks were anything other than a focus on exemption from militia service. It may be true, as *Heller* argues, that Quakers and others with religious scruples would have “opposed the use of arms not just for militia service, but for any violent purpose whatsoever.”¹⁷⁵ What is without question, is that the initial exemption highlights that the Second Amendment was centrally focused on participation in the militia. A compelling assurance of this is the placement of the religious exemption clause *after* the language stating that “the right of the people to keep and bear arms shall not be infringed.”¹⁷⁶ By sandwiching the right to bear arms between the prefatory militia language and the concluding language that grants exemption from

¹⁷¹ GALES, JOSEPH. THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES (ANNALS OF CONGRESS) VOL. 1. 778 (1834).
¹⁷² Ibid. at 779.
¹⁷³ Ibid.
¹⁷⁴ Ibid.
¹⁷⁶ GALES, JOSEPH. THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES (ANNALS OF CONGRESS) VOL. 1. 778 (1834).
militia service, any analysis of the provision as a whole must take this into account. Reading the right to bear arms with a broader scope than the language of militia service both before and after it would be a strained construction of the text, running free from both the context and syntax clues of the original provision.

Road to the Second Amendment

Those who adhere to the Standard Model often read the ratification comments and drafting history of the Second Amendment as evidence of an individual right of firearm possession. For example, Nelson Lund claims that “all the major changes made during the congressional process increased the clarity with which the Second Amendment protects an individual right, not a right of the states to maintain military organizations.”

One change in the ratification process was the removal of the religious exemption clause from the proposed Second Amendment. Reviewing the remarks in the Annals of Congress, which confirm that the clause threatened the very existence of a universal militia and allowed the Government to exclude large swathes of citizens based on religious affiliation, makes the idea that its elimination was to clarify an individual right to bear arms problematic.

A second change in the drafting process was that “the description of the militia as an entity ‘composed of the body of the people’ was omitted.” As leading Antifederalist Richard Henry Lee puts it, “a militia, when properly formed, are in fact the people themselves, and render regular troops in a great

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178 Ibid. at 667.
179 Ibid. at 666.
measure unnecessary.”

Comments such as these suggest that the elimination of the phrase, “composed of the body of the people,” was done to avoid confusion and to be more succinct, since it was generally understood that the militia itself, by definition, was comprised of all citizens in the United States.

A third modification from Madison’s initial proposal, and reflected in the Annals, switched the right to bear arms to the operative clause and the militia language to the preamble, “so that the ringing endorsement of the ‘well regulated militia’ moved to the beginning of the text, where it remains in the version ratified by the states.”

This is persuasive evidence that the preamble to the Second Amendment is a necessary condition for the right to bear arms. It follows that the operative clause cannot be read in isolation without being unfaithful to the original understanding of the text. A fourth and extremely important alteration to Madison’s provision was the replacement of “country” with “State” to modify the “best security” clause. Regarding the agreed upon language, “security of a free State,” Justice Scalia argues that this “meant ‘security of a free polity,’ not security of each of the several States….”

Looking to the ratification committee’s conscious choice to replace “country” with “State,” it is difficult to see how his assertion can be legitimate. For example, in assessments of other phrases, Scalia claims that the “right of the people” in the Bill of Rights appears in three instances, every

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182 Ibid. at 429.
183 Ibid. 499.
184 United States Constitution, Amendment II.
time “unambiguously refer[ring] to individual rights, not ‘collective’ rights, or rights that may be exercised in some corporate body.”\textsuperscript{186} He uses this as evidence that the “right of the \textit{people} to keep and bear arms”\textsuperscript{187} should be understood as protecting the same individual right. Discussing particular uses of “State” throughout the Constitution, Scalia concedes that the term “elsewhere…refers to individual States…,”\textsuperscript{188} and not merely a unified polity. The glaring hypocrisy that “the people” must refer to an individual right in every context while advocating that the use of “State” throughout the Constitution can refer to both individual states and a single polity depending on where it is being used, is a dangerous precedent; yet another example of a results oriented approach to interpretation.

These linguistic changes are useful to understand how, why, and in what context, the prominent members of the ratification process were discussing and framing the right to bear arms. Another integral aspect of Second Amendment history that is both consistent with the Court’s previous incorporation doctrine, and a device used to illuminate that the fundamentality of the right to bear arms is fixed in the tenet of collectivity, are the various proposals to the United States Constitution from State conventions. The Maryland Minority, for example, proposed “That no standing army shall be kept up \textit{in time of peace}, unless with the consent of two thirds of the members present of each branch of congress,” and “That no person conscientiously scrupulous of bearing arms in any case, shall be compelled \textit{personally} to serve as a soldier.”\textsuperscript{189} This proposal addresses concerns of both the threat of a tyrannical standing army and qualms

\textsuperscript{186} Ibid. at 2791.
\textsuperscript{187} United States Constitution, Amendment II [emphasis added].
\textsuperscript{189} COGAN, NEIL H., ED. THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS. 181 (1997) [emphasis in original].
about requiring religious observers to bear arms, strictly understood in the context of military service.

There were certainly proposals during this time that invoked an individualistic right, at least in some sense, such as the provisions from New Hampshire, the Pennsylvania Minority, and Massachusetts.  

New Hampshire’s proposal read that “Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion.” The Pennsylvania minority’s proposal stated, “That the people have a right to bear arms for the defence of themselves and their own state, or the United States, for the purposes of killing game, and no law shall be passed disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals….” In the Massachusetts ratifying convention in 1787, Samuel Adams suggested that “the proposed Constitution should ‘never [be] construed…to prevent the People of the United States who are peaceable citizens, from keeping their own arms.’” The language in these three proposals can be understood to have “plainly referred to an individual right.” However, it is important to keep in mind where exactly these proposals fall in the landscape of relevance to the Second Amendment. It is significant that these provisions have been frequently cited as “highly influential” and indicative of an individual right to bear arms in the Founding generation.

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190 As did the proposal in Massachusetts drafted by Samuel Adams.
191 Ibid.
192 Ibid. at 182.
195 CHARLES, PATRICK J. THE SECOND AMENDMENT: THE INTENT AND ITS INTERPRETATION BY THE
three of these proposals refer to a personal right, the operative clause adopted in the Second Amendment dropped any qualifying language that would have explicitly protected the individual use of firearms and included the militia driven prefatory clause instead.

The proposals from four other state conventions, which were by and large accepted for inclusion, bear much more on the original meaning of the Second Amendment. Aside from minor variations in grammatical structure, these proposals read, “That the people have a right to keep and bear arms; that a well regulated Militia composed of the body of the people trained to arms is the proper, natural and safe defence of a free State….“196 These provisions are cognate to what would eventually become the Second Amendment, albeit the syntax change in the ratified provision, solidifying the parameters of bearing arms in the environment of a militia. The majority in Heller mocks Justice John Paul Stevens’ dissent for explicating that these four state proposals were “embedded…within a group of principles that are distinctly military in meaning.”197 The opinion instead focuses on the three rejected proposals, stating that “New Hampshire’s proposal, the Pennsylvania minority’s proposal, and Samuel Adams’ proposal in Massachusetts unequivocally referred to individual rights.”198 It is peculiar how much weight Justice Scalia places on the discarded proposals while simultaneously brushing over the relevant predecessors. He provides no evidence that the provisions he cites had any influence on the actual language agreed upon in the Second Amendment.

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198 Ibid.
Furthermore, the clear fact that the Second Amendment’s language is painfully analogous to the propositions in the four state proposals mentioned should be testament enough to their highly influential impact over their rejected relatives.

Post-Ratification Commentary

Within the literature produced after the ratification of the Second Amendment, there are numerous works that shed light on the original meaning of the right to bear arms. As the Heller Court notes, there were “three important founding-era legal scholars [who] interpreted the Second Amendment in published writings.” 199 Scalia argues that these three authors, St. George Tucker, William Rawle, and Joseph Story, all lend credence to the idea of protecting individual gun ownership “unconnected with militia service.” 200 In McDonald, Alito also utilizes these authors to argue that the individual right to bear arms was the original understanding inherent in the Second Amendment. 201 Taken out of their proper context, there is evidence from all three of these scholars that can be stretched to support to such a view. Read in their proper milieu, however, the commentaries all reinforce the idea that the Second Amendment was originally understood to protect a collective right to the people.

The first of the authors discussed in Heller and McDonald is St. George Tucker, specifically his annotations and observations on William Blackstone’s *Commentaries on the Laws of England*. Scalia quotes Tucker as stating that the Second Amendment:

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200 Ibid.
may be considered the true palladium of liberty….The right to self-defence is the first law of nature: in most governments it has been the study of rulers to confine the right within the narrowest limits possible. Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.202

It is worth note that the discussion of self-defense in this context reiterates a familiar concern of governmental oppression and fear of standing armies as opposed to any assurance of individual protection. In McDonald, Alito makes even shorter work of the text, citing Tucker as referencing “the right to keep and bear arms as ‘the true palladium of liberty,’” and explaining that certain prohibitions of the right would place liberty “on the brink of destruction.”203 Although the clarity of individualism which Scalia and Alito seek is dubious even within the language they provide, there is extended evidence that St. George Tucker had other ideas regarding the right to bear arms.204

Within his annotations to Blackstone’s Commentaries, St. George Tucker speaks about the Second Amendment two times, both in ways that illuminate his understanding of the issue. The one omitted from both Heller and McDonald is his discussion of the Second Amendment in relation to the militia clause in Article I, Section 8 of the Constitution. Tucker is clear that these powers granted to the Federal Government over the militia “were thought to be dangerous to State governments.”205 He notes that “the convention of Virginia, therefore, proposed the following amendment to the constitution;

202 Ibid. [ellipsis in original].
‘that each state respectively should have the power to provide for organizing, arming, and disciplining it’s own militia, whenever congress should neglect to provide for the same…’”206 As exemplified by this proposal, the initially blurry lines between Federal and State control of the militia were bothersome for many. Tucker thus asserts that:

all room for doubt, or uneasiness upon the subject, seems to be completely removed, by the fourth article of amendments to the constitution, since ratified, viz. ‘That a militia being necessary to the security of a free state, the right of the people to keep, and bear arms, shall not be infringed’ ….To which we may add, that the power of arming the militia, not being prohibited to the states, respectively, by the constitution, is, consequently reserved to them, concurrently with the federal government.207

Tucker’s discussion of the Second Amendment in this context makes evident that it was at least understood in part to clarify the scope of militia control among the various levels of government.208 He reiterates that “an opinion, however, which will never be justified, if the duty of arming, organizing, training and disciplining [the militia], be neglected: a neglect the more unpardonable, as it will pave the way for standing armies; the most formidable of all enemies to genuine liberty in a state.”209 This fear was quickly abated, however, with the passage of the Second Amendment which ensured the integrity of the militias through State control. Looking now to Tucker’s words quoted in Heller and McDonald, we can see that a much clearer picture is painted. His discussion of enumerated powers over the militia granted to Congress, the aversion to standing armies,

206 Ibid.
207 Ibid.
and his desire to ensure the protection of the right to bear arms in a State militia, renders any concern of individual firearm use for personal protection virtually absent.

The second author utilized by *Heller* and *McDonald* in support of the individual rights argument is William Rawle, a lawyer who served in the Pennsylvania Assembly that ratified the Bill of Rights. Rawle had published an “influential treatise” on the Constitution where he addresses the Second Amendment at length.\(^\text{210}\) On this subject specifically, Rawle begins by explaining that “in the second article, it is declared, that a *well regulated militia is necessary to the security of a free state*; a proposition from which few will dissent.”\(^\text{211}\) Following Scalia’s use of this language in *Heller*, he inserts a convenient ellipsis and moves on to another portion of the commentary.\(^\text{212}\) Importantly, however, Rawle spends a great deal of time discussing this tenet of the Second Amendment. He explains that “although in actual war, the services of regular troops are confessedly more valuable; yet, while peace prevails, and in the commencement of a war before a regular force can be raised, the militia form the *palladium* of the country.”\(^\text{213}\) It is notable that Rawle uses the evocative word, “palladium,” to describe the importance of the militia and an armed populace acting in concert with one another; the same description used by Tucker in his annotations on the Second Amendment’s right to bear arms. Rawle further highlights the integral role of the militia “to repel invasion, to

\(^{210}\) Ibid. at 2805-2806.
\(^{211}\) RAWLE, WILLIAM. A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA. 125 (2009) [emphasis in original].
\(^{213}\) RAWLE, WILLIAM. A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA. 125 (2009) [emphasis added].
suppress insurrection, and preserve the good order and peace of government,”

reminding his readers that “the duty of the state government is, to adopt such regulations as will tend to make good soldiers with the least interruptions of the ordinary and useful occupations of civil life. In this all the Union has a strong and viable interest.”

His analysis of the prefatory clause is an important first step in understanding how the right to keep and bear arms fits within the context of the Second Amendment as a whole. Rawle spends a great deal of time emphasizing the fundamental necessity for the well being of a regulated militia to the entire community, a description Scalia and Alito saw fit to leave out of their discussions.

The subsequent portion of William Rawle’s commentary is illustrative of the Second Amendment’s operative clause in relation to the preamble. Rawle states, “The corollary, from the first position, is, that the right of the people to keep and bear arms shall not be infringed.”

He goes further that:

the prohibition is general. No clause in the Constitution could by any rule of construction be conceived to give congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretence by a state legislature. But if in any blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both.

Rawle describes the operative clause as a “corollary” to the militaristic language in the preamble. According to the Oxford English Dictionary, “corollary” meant the same in the early nineteenth century as it does today, mainly “something that follows in natural

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214 Ibid.
215 Ibid.
216 Ibid. [emphasis in original].
217 Ibid. at 125-126.
course; a practical consequence, result."\textsuperscript{218} It can logically be conceived, then, that Rawle understood the right to keep and bear arms as a reasonable consequence of the prefatory language. However, it must be conceded that the individual rights view cannot be completely ruled out from Rawle’s description, as an exact understanding of “inordinate power” rests in the eye of the beholder. It is at least conceivable that given his absence of a definition or relevant qualifying language, though, the prohibition of handguns in the home for personal self-defense would fall well outside any classification of “inordinate power.”

It is likely that Scalia reproduces Rawle’s discussion of the operative clause in its full form while shortchanging the portion of the militia discussion to downplay their relationship with one another. On an even more basic level, Scalia’s entire analysis in \textit{Heller} does not comport either with the Court’s precedent or Rawle’s methodological analysis of the Second Amendment. His procedure of beginning with the operative clause and returning to the prefatory language just to ensure that there is a logical connection is extremely problematic.\textsuperscript{219} It was this approach that prompted Justice Stevens to balk in his dissent that the majority’s methodology “is not how this Court ordinarily reads such texts, and it is not how the preamble would have been viewed at the time the Amendment was adopted.”\textsuperscript{220} This tactic was also not of the sort utilized by Rawle in his treatise on the Constitution. As has been shown, Rawle began by discussing the prefatory clause, explicating the integral and fundamental role of the militia to the


\textsuperscript{219} Cornell, Saul. \textit{Heller, New Originalism, and Law Office History: “Meet the New Boss, Same as the Old Boss,”} 56 UCLA L. Rev. 1095, 1107 (2009).

preservation of American society. Only then did he explain the “corollary,” or “the right to keep and bear arms,”\textsuperscript{221} as the logical consequence of the preceding language. It would have been impossible to comprehend the scope of the Second Amendment had Rawle begun with an analysis of the operative clause in isolation.

Rawle concludes his discussion over the Second Amendment by tracing the reasons for its codification. Speaking on the influence of the English experience with citizen disarmament under a variety of pretexts, he says, “Blackstone, in whom we regret that we cannot always trace the expanded principles of rational liberty, observes however, on this subject, that the prevention of popular insurrections and resistance to government by disarming the people, is oftener meant than avowed, by the makers of forest and game laws.”\textsuperscript{222} Rawle proceeds that the right to bear arms “ought not, however, in any government, to be abused to the disturbance of the public peace.”\textsuperscript{223} Here, he embeds Blackstone’s fear of citizen disarmament by the government in the context of a central authority attempting to prevent rebellion, an aim clearly related to the idea of a standing army free from opposition. Secondly, Rawle makes clear that the citizens’ right to bear arms does not extend to “the disturbance of the public peace.”\textsuperscript{224} It cannot be ruled out, that if a local government perceived certain firearms as posing a threat to the health and safety of the community, the regulation of them would accord with the Constitution.

The third author to be analyzed from the few decades subsequent to the ratification of the Bill of Rights, and cited almost ubiquitously in the gun rights debate, is

\textsuperscript{221} RAWLE, WILLIAM. A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA. 125 (2009).
\textsuperscript{222} Ibid. at 126.
\textsuperscript{223} Ibid.
\textsuperscript{224} Ibid.
Joseph Story. *Heller* and *McDonald* both use him as evidence for an individual right to bear arms in the Second Amendment.²²⁵ Interestingly enough, an analysis of Story’s comments as a whole yield very different conclusions than is to be found in these decisions. Initially, Scalia quotes Story as stating that “one of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by disarming the people, and making it an offence to keep arms, and by substituting a regular army in the stead of a resort to the militia.”²²⁶ As is typical of the Standard Modelers, this quote is both misconstrued and taken out of a context that would likely be unrecognizable to the late Supreme Court Justice who authored it.

Scalia’s use of Story revolves around discussions of authoritarian leaders disarming citizens, which he uses to imply that the right to bear arms in the Second Amendment was understood as an assurance of an individual right. What is left out, however, is the portion directly following Scalia’s reference, which reads:

> the importance of this article will scarcely be doubted by any persons, who have duly reflected upon the subject. The *militia* is the natural defence of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers. It is against sound policy for a free people to keep up large military establishments and standing armies in times of peace, both from enormous expenses, with which they are attended, and the facile means, which they afford to ambitious and unprincipled rulers, to subvert the government and trample upon the rights of the people.”²²⁷

Anyone assessing this description in full would immediately see that the context in which Joseph Story discusses the disarmament of citizens is rooted in a deep appreciation of the militia’s role in preserving liberty. Story exclaims that the fundamentality of the Second Amendment is without question, not because it granted or reinforced the individual right to own firearms in the name of personal self-defense, but rather because it served as an unwavering reminder that the people, acting in concert, are the best defense against a monolith government and a standing army. Had Scalia included this subsequent portion of the text, he would have been forced to reconcile the militaristic tone of the entire discussion.

Alito’s use of Story’s *Commentaries on the Constitution of the United States*\(^\text{228}\) is one that is also often isolated to support an individual right to bear arms in the Second Amendment.\(^\text{229}\) The quote reads, “The right of the citizens to keep, and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.”\(^\text{230}\) Interpreted on its own, it is reasonable to posit that Story was referring to a personal right to own firearms as a core aspect of the Second Amendment. However, read in its entirety, one can see that the subsequent language intensely emphasizes the militia, relegating an individual right to the background. This next piece to the Joseph Story puzzle reads:

And yet, though this truth would seem so clear, and the importance of a well regulated militia would seem so undeniable, it cannot be disguised, that among the American people there is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of burthens, to be rid of all regulations. How it is practicable to keep the people duly armed without some organization, it is difficult to see. There is certainly no small danger, that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine all the protection intended by this clause of our national bill of rights.  

Taking all of this into account, it is no mystery as to why Scalia, Alito, and most other proponents of the individual rights argument keep this from the record. Story once again reinforces the idea that the right to bear arms is a function of the militia, and a well regulated one at that. Interestingly, he is also perturbed with the growing disdain for local regulation of the institution. For Story, the inimical attitude towards any control of firearms has the potential to “undermine all the protection intended by this clause of our national bill of rights.” Story’s Commentaries, read in full, reveal no concern of bearing arms as an individual right of self-defense; if it exists, it is buried deep in semantics and metaphorical wordplay.

Before we depart from an analysis of Joseph Story, it is important to touch on his view of constitutional interpretation as it relates to the Second Amendment. As mentioned previously in this discussion, Scalia and many others believe that the use of “people” invoked in the Second Amendment necessarily implies an individual right by virtue of other uses in the Bill of Rights that are understood as such. Don Kates, a famous gun rights advocate, argues that if the Second Amendment is truly anomalous

\[231\text{Ibid. [emphasis added].}\]
\[233\text{STORY, JOSEPH. COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES. 709 (1987).}\]
within the Bill of Rights, certain propositions must be accepted. To begin with, he contends that “when the first Congress drafted the Bill of Rights it used ‘right of the people’ in the first amendment to denote a right of individuals (assembly)” and secondly “some sixteen words later, it used the same phrase in the second amendment to denote a right belonging exclusively to the states.”

A careful look at Story’s idea of constitutional interpretation assures us to tread lightly in such assertions.

While it is not being challenged that particular rights were held exclusively for individuals, there were others reserved to the collective body; the Second Amendment is such an example. Joseph Story eloquently summarizes the importance of interpreting everything in context:

> And this leads us to remark, in the next place, that it is by no means a correct rule of interpretation to construe the same word in the same sense, wherever it occurs in the same instrument. It does not follow, either logically or grammatically, that because a word is found in one connexion in the constitution, with a definite sense, therefore the same sense is to be adopted in every other connexion, in which it occurs. This would be to suppose, that the framers weighed only the force of single words, as philologists or critics, and not whole clauses and objects, as statesmen and practical reasoners. And yet nothing has been more common than to subject the constitution to this narrow and mischievous criticism... They have thus distorted it to the most unnatural shapes, and crippled, where they have sought only to adjust its proportions according to their own opinions.”

Seeing that Story had no qualms about construing the Second Amendment in its proper environment of a collective right, coupled with his fiery critique that words should be

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235 Ibid.
236 STORY, JOSEPH. COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES. 159-160 (1987) [emphasis added].
read in their proper surroundings, there ought to be no inconsistencies with viewing the right to bear arms in this regard despite the many neighboring individual rights. In summation, it makes little sense for Standard Modelers to use Joseph Story as support for the individual right to bear arms as originally understood in the Second Amendment.

Following the misconstrued analysis of Joseph Story’s essential commentary, the *Heller* Court concedes that “we have found only one early 19th – century commentator who clearly conditioned the right to keep and bear arms upon service in the militia—and he recognized that the prevailing view was to the contrary.” Scalia was referring to the literature of Benjamin Oliver, published in 1832, in a work entitled *The Rights of an American Citizen*. This influential legal writer of the nineteenth century stated boldly of the Second Amendment that:

> the provision of the constitution, declaring the right of the people to keep and bear arms, &c. was probably intended to apply to the right of the people to bear arms for such [militia-related] purposes only, and not to prevent congress or the legislatures of the different states from enacting laws to prevent the citizens from always going armed. A different construction however has been given to it.

Essentially, Oliver argues that since the ratification of the Second Amendment, which was originally understood in terms of a militia, had been a growing expansion of the view that the right to bear arms was one that was granted to the individual. For our purposes, the relevant aspect of his work is the view that the Second Amendment was

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237 e.g. Freedom of speech, freedom of the press, free exercise of religion, etc.
originally understood as a collective right, not how the idea of the right to bear arms may have been shifting decades after the Bill of Rights was ratified.

**Commentary from the Latter Half of the 19th Century**

A significant tenet of Alito’s argument in *McDonald* is that half of a century into the 1800’s, “the fear that the National Government would disarm the universal militia – had largely faded as a popular concern, but the right to keep and bear arms was highly valued for purposes of self-defense.” To bolster this point, he references many of the debates and laws prior to the ratification of the Fourteenth Amendment, arriving at some questionable conclusions. For example, Alito quotes Representative Stevens in 1868 as saying, “disarm a community and you rob them of the means of defending life. Take away their weapons of defense and you take away the inalienable right of defending liberty.” Another source Alito points to is the Freedman’s Bureau Act of 1866, which emphasized that “the right…to have full and equal benefit of all laws…including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens…without respect to race, color, or previous condition of slavery.” As Justice Stephen Breyer makes clear in his dissent, “this sounds like an antidiscrimination provision….There is thus every reason to believe that the fundamental concern of the Reconstruction Congress was the eradication of discrimination, not the provision of a new substantive right to bear arms free from reasonable state police power regulation.”

242 Ibid. at 3041 [emphasis added].
243 Ibid. at 3031[emphasis in original].
244 Ibid. at 3133 [emphasis in original].
Arguably, neither Representative Stevens’ comments nor the Freedman’s Bureau Act of 1866 for that matter, say anything clear and definitive about the scope of the right to bear arms in the Second Amendment or its original understanding when it was ratified.

Our final discussion of legal commentary on the Second Amendment, then, will tackle the period following the ratification of the Fourteenth Amendment to seek some clarity. In *Heller*, Scalia mentions that “every late-19th-century legal scholar that we have read interpreted the Second Amendment to secure an individual right unconnected with militia service.”

Justifying the use of scholars during this era as a textual originalist, he says that “since those discussions took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources,” but nonetheless, “their understanding of the origins and continuing significance of the Amendment is instructive.”

Alito follows along with this assumption, reiterating that “legal commentators from the [Reconstruction] period emphasized the fundamental nature of the right [to bear arms].” In direct contrast to Scalia’s and Alito’s assertions, it will be shown that there were a variety of legal scholars writing in the late 1800’s, subsequent to the ratification of the Fourteenth Amendment, that interpreted the Second Amendment as a collective right.

The first of our authors, John Norton Pomeroy, wrote *An Introduction to the Constitutional Law of the United States* in 1868, the same year as the ratification of the Fourteenth Amendment. Speaking about the Second Amendment, Pomeroy says:

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246 Ibid. at 2180.
247 Ibid.
The right of the people to keep and bear arms. The object of this clause is to secure a well-armed militia. It has always been the policy of free governments to dispense, as far as possible, with standing armies, and to rely for their defence, both against foreign invasion and domestic turbulence, upon the militia. Regular armies have always been associated with despotism.249

This descriptive affirmation of the Second Amendment’s function should feel strikingly familiar by this point, harkening back to the ideas of the Founders just seventy years prior. Pomeroy, like many of his predecessors, unambiguously viewed the right to bear arms in the context of a protective measure against standing armies.

Scalia, utilizing selective portions of Pomeroy’s work, quotes him as saying, “the right of the people to keep and bear arms”250 and skipping the aforementioned text to a statement that reads:

But a militia would be useless unless the citizens were enabled to exercise themselves in the use of warlike weapons. To preserve this privilege, and to secure to the people the ability to oppose themselves in a military force against the usurpations of government, as well as against enemies from without, that government is forbidden by any law or proceeding to invade or destroy the right to keep and bear arms.251

The reference used by Scalia indeed emphasizes citizen familiarity with firearms, but only such as are used during wartime, highlighting the militaristic essence of the right to bear arms. Secondly, Pomeroy makes clear that the privilege of bearing arms was to ensure that the people could defend against a despotic government and that they should be trained in such a manner as to be effective; he makes no broader claims about arms

249 POMEROY, JOHN N. AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES. 157 (1868).
250 POMEROY, JOHN N. AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES. 157 (1868).
bearing. Third, Scalia uses yet another ellipsis to cut out a crucial portion at the end of Pomeroy’s discussion that is highly illustrative. The omitted section calls attention to the essence and framework of the Second Amendment, declaring that “this constitutional inhibition is certainly not violated by laws forbidding persons to carry dangerous or concealed weapons, or laws forbidding the accumulation of quantities of arms with the design to use them in a riotous or seditious manner.” It is likely that this was absent from Scalia’s discussion because of Pomeroy’s clear assertion that the regulation of firearms that do not pertain to the military (e.g. handguns and other easily concealable weapons), fall under the regulatory umbrella of governmental authority.

In the Heller decision, Scalia justifies his analysis of beginning with the operative clause and only later coming to the prefatory language by citing legal scholar Joel Prentiss Bishop’s opus on constitutional interpretation. Interestingly enough, he does not take into account Bishop’s own work regarding the right to bear arms due to the detrimental results that would have ensued. In 1873, just five years after Pomeroy’s piece, Bishop provides a helpful insight into the Second Amendment and its meaning in his celebrated Commentaries on the Law of Statutory Crimes. Bishop’s discussion of the right to bear arms must be quoted at length to truly convey his unambiguous views. He states:

The Constitution of the United States provides, that, ‘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 provision is found among the amendments; and, though most of the amendments are

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252 POMEROY, JOHN N. AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES. 157 (1868).
restrictions on the General Government alone, not on the States, this one
seems to be of a nature to bind both the State and National
legislatures…that the provision protects only the right to ‘keep’ such
‘arms’ as are used for purposes of war, in distinction from those which are
employed in quarrels, brawls, and fights between maddened individuals;
since such, only, are properly known by the name of ‘arms;’ and such,
only, are adapted to promote ‘the security of a free State.’ In like manner,
the right to ‘bear’ arms refers merely to the military way of using them,
not to their use in bravado and affray.254

Bishop’s clear and explicit description of the Second Amendment makes obvious
why Scalia only cited this scholar in a way that suited his needs, disregarding the part of
his work that actually bears direct relevance on the question at hand. There is no
ambiguity within Bishop’s description, recognizing that the right to bear arms is
contingent upon service in the militia and all that relates to it.255 Although Scalia says of
the word “bear,” that “the term was applied, then as now, to weapons that were not
specifically designed for military use and were not employed in a military capacity,”256
Bishop’s description vehemently insists otherwise. As for the specific invocation of the
word “arms” in the Second Amendment, Bishop is also unequivocal that only those
weapons that “promote ‘the security of a free State’”257 were encompassed by this
definition.

254 Bishop, Joel Prentiss. Commentaries on the Law of Statutory Crimes: Embracing the
General Principles of Interpretation of Statutes: Particular Principles Applicable in
Criminal Cases; Leading Doctrines of the Common Law of Crimes, and Discussions of the
Specific Statutory Offences, As to Both Law and Procedure. 497 (1873).
255 Ibid.
257 Bishop, Joel Prentiss. Commentaries on the Law of Statutory Crimes: Embracing the
General Principles of Interpretation of Statutes: Particular Principles Applicable in
Criminal Cases; Leading Doctrines of the Common Law of Crimes, and Discussions of the
Specific Statutory Offences, As to Both Law and Procedure. 497 (1873).
Individual rights proponent David B. Kopel analyzes Bishop’s treatise and concedes some very important points. He explains, “(1) the Second Amendment guarantees a right of individuals to own guns; (2) the right’s sole purpose was insurrection against tyranny; (3) the arms which could be kept included only arms suitable for warfare.” Most importantly, his final point mentions that “the right to ‘bear’ arms included only the right to carry arms in public during militia activity.” Despite Kopel’s strained belief that Bishop “obviously adhered to the Standard Model individual rights view,” his analysis attempts to mask the true understanding of Bishop’s work. That Bishop believed the right to bear arms was a personal right is undeniable in the sense that individuals must physically bear the arms necessary for the security of a free state. Beyond this elementary observation, Kopel’s concession that Bishop’s view of the right to keep and bear arms was limited to military purposes is indubitably problematic to the Standard Model, which adheres to the function of firearms protected by the Second Amendment as unconnected with such service.

Another legal scholar writing in the late nineteenth century that Scalia uses to bolster the individual rights argument is Thomas Cooley, a famous judge and professor who authored multiple treatises and works on Constitutional law. It should be mentioned at the outset, that Cooley did in fact have a slightly broader interpretation of the right to bear arms than some proponents in the collective rights camp. For example, writing on the question of the Second Amendment in 1868, Cooley stated that “it might be supposed

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259 Ibid.
260 Ibid. at 1474.
from the phraseology of this provision that the right to keep and bear arms was only
guaranteed to the militia; but this would be an interpretation not warranted by the
intent.”261 In any case, Cooley continues on that “the militia, as has been elsewhere
explained, consists of those persons, who, under the law, are liable to the performance of
military duty, and are officered and enrolled for service when called upon.”262 Repeating
sentiments of a universal militia, Cooley recognizes the importance of all citizens
engaging in this duty. The reason he felt it necessary that the population be armed was
that the physical act of bearing of firearms “implies something more than the mere
keeping; it implies the learning to handle and use them in a way that makes those who
keep them ready for their efficient use; in other words, it implies the right to meet for
voluntary discipline in arms, observing in doing so the law of public order.”263 From this
reading, it is certainly valid to interpret Cooley as advocating that the entire population
should be entitled to bear arms whether or not they were in the designated militia set out
by the government. It also follows, however, that the right to bear arms in the Second
Amendment was confined to the assurance that all citizens would be ready to defend the
community if a situation should present itself that required such action.

In a later work in 1898 that both Scalia and Alito pass over, entitled *The General
Principles of Constitutional Law in the United States of America*, Cooley provides us
with an unequivocal explanation of the types of arms he was referring to in his previous
treatise. Regarding the class of arms that can be kept under authority of the Second

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261 Ibid. at 2811.
262 Ibid.
263 Ibid. at 2811-2812.
Amendment, Cooley is overt that they must be related to the purposes set out by countless other scholars and commentators analyzed in our discussion. He writes, “the arms intended by the Constitution are such as are suitable for the general defence of the community against invasion or oppression, and the secret carrying of those suited merely to deadly individual encounters may be prohibited.”

This is a significant clarification for both the content and language employed by this legal scholar. Assessing these parameters in conjunction with his earlier remarks on the Second Amendment, it is even more evident that the function of the provision was to enable citizens to use firearms for “the general defence of the community” as well as to bear arms that could be used “against invasion and oppression.” None of these purposes, by any stretch of the imagination, could be construed as having any concern of bearing arms for the purpose of shooting an invader in the home in the name of personal or familial self-defense. Furthermore, in the final sentence of the excerpt, Cooley asserts that arms used for “individual encounters” that could result in a deadly struggle fell directly under the mandate of the government to regulate and prohibit if necessary without being in violation of the Second Amendment.

**Distinguishing the Right to Bear Arms from Relevant Predecessors**

The next platform for developing the original understanding of the Second Amendment shifts from legal commentary to a review of relevant predecessors,

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264 COOLEY, THOMAS M. THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA. 299 (1898).
265 Ibid.
266 Ibid.
267 Ibid.
specifically rejected provisions and State analogues that protected the right to bear arms in a number of ways prior to the adoption of the Bill of Rights. Understanding the different contexts in which the right bear arms was protected prior to the ratification of the Second Amendment, focusing on why certain language was chosen over others, is integral to getting at this concept of original meaning. One of the oft cited propositions in support of an individual right to bear arms is that of Thomas Jefferson’s proposal to the Virginia Declaration of Right in 1776, alluded to previously. Advocating strongly in this regard, he proposed that “No free man shall be debarred the use of arms [within his own lands or tenements].” This proposition for inclusion in the list of rights for Virginians, similar to Samuel Adams’ rejected proposal in the Massachusetts ratifying convention some years later, is reminiscent of a personal right to bear arms unconnected with the militia or collective security. Interestingly, however, it was George Mason, not Thomas Jefferson, who was responsible for the final drafting of the arms provision in the Declaration of Rights and the Constitution in Virginia.

Mason’s provision read, “That a well-regulated Militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State.”

Nowhere in this language is there mention of the need to protect a citizen’s right to bear arms.

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269 Ibid. [Burgh was an important figure in warning against the dangers of a militia being disarmed by a distant and powerful government, while Cesare Beccaria, an important Italian Enlightenment theorist, worried more about laws which prohibited citizens from owning firearm for fear that when this occurs, only the outlaws will have guns. Significantly, Historian David Konig argues that Burgh’s understanding of the right to bear arms was a heavy influence on both The Federalist and the debates over the militia in the Virginia Ratifying Convention].
arms for purposes of individual self-defense in the home against criminals or other similar dangers. The crux of this provision, as the McDonald majority agrees about the Second Amendment generally, “was prompted by fear that the Federal Government would disarm and thus disable the militias.” The Heller majority attempts some damage control to try and discredit the influence of this proposal on the Second Amendment, explaining that “there is no evidence that the drafters regarded the Mason proposal as a substitute for the Jefferson proposal.” The fact that the Second Amendment’s prefatory clause and Mason’s provision in Virginia are almost identical is strong evidence of its influence; the same cannot be said of Jefferson’s rejected proposal.

Certain other provisions enshrined in state constitutions around this time were either similarly worded to Mason’s proposal or can reasonably be construed as such. For example, the Delaware Declaration of Rights in 1776 discussed the right to bear arms in a three tiered fashion. First, “that a well regulated militia is the proper, natural and safe defence of a free government,” secondly, “that standing armies are dangerous to liberty, and ought not to be raised or kept up without the consent of the Legislature,” and finally “that in all cases and at all times the military ought to be under strict subordination to and governed by the civil power.” The central component of the right to bear arms for those in Delaware and Virginia was the preservation of the militia and a fear of standing armies. Nowhere in Delaware’s three provisions is there any concern with a personal right to bear arms. The New York Constitution of 1777 was more of the same, reading

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AND WHEREAS it is of the utmost Importance to the Safety of every State, that it should always be in a Condition of Defence; and it is the Duty of every Man who enjoys the Protection of Society, to be prepared and willing to defend it…And that a proper Magazine of warlike Stores, proportionate to the Number of Inhabitants, be for ever hereafter at the Expence of this State…  

Reinforcing the citizens’ duty to defend their community in return for the protection it offers underscores the concern for maintaining security, not merely in a passive sense but as an active obligation of each and every individual. Despite the obvious relevance of these provisions, the majority in Heller disregards them as bearing no real relationship to the Second Amendment. The provisions utilized by Heller and McDonald are four State analogues worded similarly to the Second Amendment, adopted prior to its ratification. In the case of incorporation specifically, the McDonald majority uses these State provisions as evidence of the fundamentality of the individual right to bear arms for eighteenth century Americans.

The first two provisions cited are those set forth in the North Carolina Declaration of Rights of 1776 and the Massachusetts Constitution of 1780. The provision in North Carolina read “That the people have a right to bear arms, for the defence of the State…,” and the Massachusetts provision, with a slight variation in language, declared that “the people have a right to keep and bear arms for the common defence….” In Heller, Scalia reasons that “this could plausibly be read to support only a right to bear arms in a militia --but that is a peculiar way to make the point in a constitution that...”

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274 Ibid.
276 Ibid. at 2804.
elsewhere repeatedly mentions the militia explicitly.”277 He continues down this path, arguing that the Massachusetts provision’s use of the phrase, “for the common defence,” does not necessarily connote a collective right either. His intriguing use of evidence for this argument is taken from a state court ruling forty five years after the adoption of the provision in Massachusetts. It was concluded that “the liberty of the press was to be unrestrained, but he who used it was to be responsible in cases of its abuse; like the right to keep fire arms, which does not protect him who uses them for annoyance or destruction.”278 For the Heller opinion, this holding would not be plausible without any sense of an individual right to own firearms.279 However, there is sufficient evidence on the historical record to the contrary of Scalia’s claims.

One of the noteworthy aspects of the Massachusetts Constitution was the ratification process, which allowed towns to submit their responses to the various proposals for feedback and potential revision. Regarding the right to bear arms specifically, only two western towns responded with anxiety over its wording. The reaction from the town of Northampton recommended that “the people have a right to keep and bear arms as well for their own as the common defense.”280 The other town, Williamsburgh, voiced their concerns with a proposition to change the language to read “1st. That we esteem it an essential privilege to keep Arms in our houses for Our Own Defense and while we Continue honest and Lawful Subjects of Government we Ought

277 Ibid. at 2802.
278 Ibid. at 2803.
279 Ibid.
never to be deprived of them.”

The reasoning behind this provision, was that based on the language as it stood, “the legislature in some future period may Confine all the fire Arms to some publick Magazine and thereby deprive the people of the benefit of the use of them.”

Long standing fears from the English Crown’s disarmament of the militia was directly reflected in the hesitations expressed in Williamsburgh. It is this analysis below the surface that gets at the heart of the original meaning of the right to bear arms, albeit a very distinct one than portrayed in Heller and McDonald. The wording of the Massachusetts provision, unchanged by the two pleas for explicit individual protection of firearms, is overwhelming evidence that the phrase “for the common defense” chosen for their Constitution was an unequivocal affirmation of the right to bear arms in the collective sense.

The other two provisions cited in the Heller decision were from the constitutions of Pennsylvania and Vermont. The Pennsylvania Declaration of Rights read “that the people have a right to bear arms for the defence of themselves, and the state….”

Vermont’s provision in 1777 uses identical language to that of Pennsylvania, save for some differentiation in grammatical structure.

Although the Heller Court argues that both of these States “clearly adopted individual rights” without any analysis, there is evidence to counter such notions. For example, Lawrence Cress not only argues that the

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281 Ibid.
282 Ibid. at 25.
283 [These propositions were similar to the individualistic provisions that were proposed by Samuel Adams and Thomas Jefferson, but ultimately rejected within their respective states].
284 Ibid. at 26.
286 Ibid. at 2802.
287 Ibid.
early Virginia Declaration of rights was centrally concerned with the collective right of citizens to protect themselves, but he also advocates that the same is true about the Pennsylvania Declaration of Rights drafted in 1776. As Cress concludes, even though these two provisions were drafted with slight variations, the meaning was unaltered; “only the citizenry, trained, armed, and organized in the militia, could be depended on to preserve republican liberties for ‘themselves’ and to ensure the constitutional stability of ‘the state.’”288 The lack of an organized police force in the late eighteenth century coupled with the understanding that militias often served this protective role for citizens, calls into question the legitimacy that “in defense of themselves” automatically implies an individual right and not a collective right of protection on both an interstate and intrastate level.289

**The Pennsylvania Restrictions on Arms: The Test Acts**

The case of Pennsylvania merits special attention that challenges the legitimacy that their provision protected an individual right independent of militia service. Not long after they declared that “the people have a right to bear arms for the defense of themselves and the state”290 within their state constitution, came “a series of Test Acts which imposed severe penalties on citizens who refused to take an oath of allegiance to the state. Individuals who refused to take the oath were disarmed.”291 Importantly for

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291 Ibid. at 670.
the incorporation question, and similar to Lockean sentiments, the Test Acts allowed for the disarmament of citizens who failed to take the oath, but rejected analogous penalties for the rights of freedom of the press or the freedom of religion. The idea of bearing arms contained in the Pennsylvania constitution was still maintained with the understanding “that the state could disarm peaceful citizens when the good of the community required such action.”292 The fact that the disarmament of citizens who failed to take the loyalty oath in the name of the state did not violate the arms provision in Pennsylvania further tests the authenticity that “in defense of themselves,”293 “unambiguously refer[red] to the carrying of weapons outside of an organized militia.”294

In the *Heller* decision, Scalia quotes John Smilie, an Antifederalist in Pennsylvania, as a proponent of the individual right to bear arms. Specifically, he cites Smilie’s fears that “[w]hen a select militia is formed; the people in general may be disarmed.”295 Scalia further states, “Federalists responded that because Congress was given no power to abridge the ancient right of individuals to keep and bear arms, such a force could never oppress the people.”296 However, the *Heller* majority fails to mention that Smilie was a supporter of the Pennsylvania Test Acts. It reasonably follows, then, that Smilie placed a significant amount of trust and faith in the ability of State governments to retain the power of the regulation of firearms. By virtue of supporting the Test Acts, it also follows that Smilie believed that “the state would decide who among

292 Ibid.
296 Ibid.
the people demonstrated sufficient virtue to be trusted with the important task of serving in the militia.™ Incorporating the individual right to bear arms against the States has the potential to violate this long standing tradition of reasonable regulation in the interest of the community.

**Beyond Heller and McDonald: Bearing Arms Coast to Coast**

Moving past the early predecessors that have been used as evidence of an intrinsically collective right in the Second Amendment are examples from across the United States, spanning in time from the Founding period to the present, which demonstrate how the right to bear arms was originally understood and how that conception has changed in many regards over the years. A great place to begin analyzing the marked shift in thinking is through the tangible modifications to the state of Georgia’s constitution. Georgia made no reference to the right to bear arms until 1865, when they adopted language analogous to that of the Second Amendment. Under the fourth enumerated right to the people, the Georgia constitution stated that “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.”™ In 1877, Georgia dropped the preamble that explicated the role of the militia from their constitution. While this does feel more individualistic, there are aspects worth taking into consideration. The reason for bearing

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298 THORPE, FRANCIS N. THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL ChARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA. 810 (1906).
arms, which had been stated by the preamble, was removed as the articulated function of the right. While the military essence of the amendment was disconnected at the state level in Georgia, the Second Amendment of the United States Constitution retains the textually enunciated purpose to this day. If the preamble served no other purpose than to announce the importance of the militia, having no effect on the operative clause as the Standard Modelers advocate of the Second Amendment generally, Georgia would have had little reason to remove it entirely from their constitution.

In Louisiana in 1879, the right to bear arms was protected in an identical fashion to the Second Amendment with the addition of, “This shall not prevent the passage of laws to punish those who carry concealed weapons” following the phrase “shall not be infringed.” Similar to the trend in Georgia, the provision remained unaltered until 1974, when Louisiana dropped the militia clause from their constitution. To reiterate, this very purposeful shift in focus over the scope of the right to bear arms is certainly demonstrative of the waning emphasis on the militia over the years as cited in *McDonald*. These changes at the state level in the late nineteenth century, though, do not reflect how the right to bear arms was originally understood in the Second Amendment one hundred years earlier. As understood by precedent, the standards of fundamentality required to incorporate a given provision in the Bill of Rights at least requires that the meaning of an amendment at the time of codification is as important, if not more, than how that understanding has changed over time. Thus, the shifting

provisions that protect the right to bear arms at the State level can be indicative of a changing mentality but need have no bearing on an original understanding of the Second Amendment.

Another type of right codified within the states over time has been the collective right of the people to bear arms in the name of their own security. Mimicking the previously referenced Massachusetts provision of 1780, Arkansas stated in their constitution of 1868, that “The citizens of this State shall have the right to keep and bear arms for their common defense.”\(^{301}\) This was altered and broadened from their initial provision in 1836, which only provided “That the free white men of this State”\(^{302}\) had the right to bear arms. By granting the right for the common defense, making certain to include all citizens, Arkansas affirmed the Second Amendment’s promise in the Federal Constitution – that citizens would be armed and capable to defend themselves in the name of their own security. Other states since the ratification of the Second Amendment followed suit with the protection of the right to bear arms for the common defense. South Carolina’s provision replicated the language in 1868, including at the end, “As, in times of peace, armies are dangerous to liberty, they shall not be maintained without the consent of the General Assembly. The military power of the State shall always be held in subordination to civil authority and be governed by it.”\(^{303}\) In 1895, they changed the portion prior to “As, in times of peace,” to be identical to the Second Amendment.\(^{304}\) The likely reason for this alteration was to shift the parameters of the “common defense,”

\(^{301}\) Ibid. at 193.  
\(^{302}\) Ibid. at 194.  
\(^{303}\) Ibid. at 202.  
\(^{304}\) Ibid.
which could imply a collective right of security generally, to the more militia focused language in the Second Amendment.

Tennessee’s constitution, from the initial explication of the right to bear arms protection in 1796, through the revisions in 1834 and 1870 read the same as the Massachusetts provision. Also, in 1870, Tennessee added, “but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime.”\textsuperscript{305} This type of caveat lies at the core of the issue in \textit{McDonald} over state regulatory power to prevent crime versus the necessity for individual self-defense. Tennessee’s constitution is patent that the preventative measures necessary to deter and reduce crime, even if those measures are best pursued through the regulation of firearms, is permissible and within the scope of State authority. The constitution of Maine read the right to bear arms for the common defense into their constitution in 1819.\textsuperscript{306} It was not until late into the twenty first century, in 1987, that they adopted a right that was individualistic in nature\textsuperscript{307}

In a similar genre to these provisions was Idaho’s initial protection of the right to bear arms in 1889, echoing the collective model by stating, “The people have the right to bear arms for their security and defense; but the Legislature shall \textit{regulate} the exercise of this right by law.”\textsuperscript{308} It was not until 1978 that Idaho modified their constitution to read, “The people have the right to keep and bear arms, which right shall not be abridged…,” continuing to list the parameters of the right, specifically allowing the legislature to regulate the use of concealed weapons, and the possession of firearms by criminals. It

\textsuperscript{305} Ibid. at 203.
\textsuperscript{306} Ibid. at 197.
\textsuperscript{307} “[Every citizen has a right to keep and bear arms and this right shall never be questioned].”
\textsuperscript{308} Volokh, Eugene. \textit{State Constitutional Right to Keep and Bear Arms}, 11 Texas Rev. of Law & Politics 191, 196 (2006) [emphasis added].
would be seemingly unnecessary for the Idaho legislature to have modified the provision’s language in 1978 from that of the original phrasing had the initial protection of bearing arms been understood as an individual right. The constitution of Kansas in 1859 closely mirrored Idaho’s, reading that “The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power.” Similar to the scope of Idaho’s protection, Kansas’s safeguard of the right to bear arms was confined to that of collective participation in a militia, or at least a community, to serve those ends. This reading was further solidified by a court decision in 1905, which affirmed the reading of the Kansas provision in this way. Ohio’s provision enacted in 1851, despite some negligible word differences, read identically to its counterpart in Kansas.

The next version of the right to bear arms historically protected in State constitutions is also one already discussed in regards to the *Heller* and *McDonald* decisions, specifically the cases of Pennsylvania and Vermont. This type of provision, similarly worded in numerous states across the country save for some minor differences in syntax and phrasing, reads that citizens generally have a right to bear arms “in defense of themselves and the state.” Most of the provisions that protected the right to bear arms in this sense were enacted in the mid to late nineteenth century, except for Kentucky. The constitutions of South Dakota in 1889, Wyoming in 1889, Oregon in

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309 Ibid.
310 Ibid. at 206 [see City of Salina v. Blaksley, 83 P. 619].
311 [with slight variations (e.g. “shall not be kept up,” as opposed to “shall not be tolerated”).
1857, Indiana in 1851, and Kentucky in 1792, \textsuperscript{313} all protected the right to bear arms in this fashion. As already analyzed and confirmed by historians Lawrence D. Cress and Saul Cornell, the phrase “in defense of themselves” was analogous to the affirmation that the militia and the collective security of the state were one and the same. As Cornell points out, the fact that there was explicit language for bearing arms available at this time that would have connoted an individual right, but not utilized in these provisions, is significant. \textsuperscript{314} An example of this expressly individualistic language is the substitution of “themselves” for “himself” in certain states, a much more pointed indication of exactly who can bear arms and for what purpose.

The next variation of the right to bear arms found in state constitutions involves this more personal language referenced by Cornell. Alabama serves as the archetypal example, holding first in 1819, “That every citizen has a right to bear arms in defence of himself and the state.”\textsuperscript{315} There are similar examples of this phraseology scattered throughout states such as Connecticut, \textsuperscript{316} Michigan, \textsuperscript{317} Texas, \textsuperscript{318} Washington, \textsuperscript{319} and Arizona. \textsuperscript{320} Other variations of this arose in the nineteenth, and into the twentieth century, exemplifying the desire of certain states to protect an explicitly individual right

\textsuperscript{313} [with subtle changes in the wording in 1799, 1850, and 1891].
\textsuperscript{316} Ibid. at 194 [“Every citizen has a right to bear arms in defense of himself and the state”].
\textsuperscript{317} Ibid. at 198 [“Every person has a right to keep and bear arms for the defense of himself and the state”].
\textsuperscript{318} Ibid. at 203 [“Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State…”].
\textsuperscript{319} Ibid. at 204 [“The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired…”].
\textsuperscript{320} Ibid. at 193 [“The right of the individual citizens to bear arms in defense of himself or the State shall not be impaired…”].
of firearms in a host of areas outside the realm of the militia or collective security. Specifically, Colorado in 1876, provided that “The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called into question…”Mississippi in 1890 and Montana in 1889 followed suit, changing their provisions to an unequivocal right to possess firearms outside the confines of a militia.

There are examples of other state constitutions where the protection of the right to bear arms must be scrutinized to make a critical point. The states of Delaware, Nebraska, New Hampshire, Nevada, North Dakota, Utah, West Virginia, Wisconsin, and Oklahoma did not change their constitutions to protect an individual right to bear arms until well into the twentieth century. In fact, except for Oklahoma’s provision in 1907, the other seven states first ratified an individual right to bear arms in the 1980’s. This development is extremely relevant to the incorporation question for a number of different reasons. The idea that these individualistic rights first cropped up in the 1900’s, most of them in the late 1900’s, calls serious attention to the claim that the unambiguous individual right to arms is “fundamental to the American scheme of Justice” or “implicit in the concept of ordered liberty.” A right that was not codified until almost two hundred years after the ratification of the Second Amendment would, by definition,

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321 Ibid. at 194.
322 Ibid. at 198 [from “all persons have a right to keep and bear arms for their defence,” to “the right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power when thereto legally summoned, shall not be called in question…”].
be wholly irrelevant to a textual originalist understanding of how the right to bear arms was originally understood. Even more interestingly, the constitutions of California, Iowa, Maryland, Minnesota, New Jersey, and New York, omit a right of the people to bear arms from their constitutions even today. The lack of protection for this right in these six states across the country speaks volumes as to their priorities, or lack thereof, in the realm of firearm possession, demonstrating that it is not as ubiquitously fundamental as the Standard Modelers subscribe to.

In order to conclude the points of contrast between the Second Amendment and other state provisions that were enacted decades and centuries later, are the provisions in Missouri and Illinois. Missouri’s initial right to bear arms was codified in 1820, reading “That the people have the right to peaceably assemble for their common good, and to apply to those vested with the powers of government for redress of grievances by petition or remonstrance; and that their right to bear arms in defense of themselves and the State cannot be questioned.”

In the context of reading the right of the “people” in the Second Amendment as an analogously collective right like the freedom of assembly in the First Amendment, it is unsurprising that *Heller* and *McDonald* ignore Missouri’s example. The linking of the right to bear arms with the right to peaceably assemble in the name of the common good and the right of the people to act as a unit in expressing grievances with the government is indicative of their shared relationship to societal liberties in the collective sense.

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326 Ibid. at 199.
327 A position that was rejected by Justice Scalia in *Heller*. 
The provision for bearing arms protected in the state of Illinois is also pertinent in the case of Second Amendment incorporation. As the city of Chicago in *McDonald* made clear, their ban on handguns was intended to “protect its residents ‘from the loss of property and injury or death from firearms,’”\(^{328}\) clearly an invocation of the police powers enjoyed by the States. Reading their constitution, it is clear that the Illinois provision which protects the right to bear arms easily allows for this type of firearm regulation under the powers afforded to them. The right, first codified in 1970, held that “Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed.”\(^ {329}\) The explicit declaration that the individual right to bear arms falls within the bounds of the regulatory powers granted to the State undoubtedly comports with Chicago’s handgun ban. Since the Illinois provision is stricter in this sense than proponents of an unfettered individual right preferred, it was necessary to turn to the Second Amendment. This was especially easy following the historically inaccurate decision of *Heller*, fallaciously affirming the individual right to bear arms in the Second Amendment, unconnected with a militia. With this in mind, we turn now to our final analysis of the Court’s sparse precedent on the Second Amendment as it pertains to incorporation.


The Supreme Court’s Terse Second Amendment Precedent

Within the Supreme Court’s jurisprudence, the only other provision in the Bill of Rights that has received less attention than the Second Amendment over the years is the Third Amendment. Although precedent on the Second Amendment all occurred well after the adoption of the Bill of Rights, no analysis on the incorporation of the right to bear arms would be complete without a brief venture into these decisions. The Court first addressed the Second Amendment directly in 1875, in the famous decision, United States v. Cruikshank. In the opinion, Chief Justice Waite was confronted with the matter of “bearing arms for a lawful purpose,” and whether that was protected by the Constitution. As mentioned in the discussion on Locke, Waite says that “this is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence.” Alito’s opinion in McDonald states that “Cruikshank has not prevented us from holding that other rights that were at issue in that case are binding on the States through the Due Process Clause,” referencing, for example, that the right of assembly was initially rejected for incorporation. He then goes on to cite De Jonge v. Oregon as an example where the right of assembly was incorporated despite Cruikshank’s holding. What Alito leaves out, however, is that while De Jonge did indeed incorporate the right of assembly, the Court still utilized the Cruikshank decision to explicate its fundamentality in the fabric of the United States.

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331 United States v. Cruikshank Et Al. 92 U.S. 542, 591 (1876).
332 Ibid. at 591-592.
the era before selective incorporation does not change what the Court said about the right itself, which, according to De Jonge, is still instructive today. For our purposes, then, Cruikshank’s holding that “bearing arms for a lawful purpose”\textsuperscript{335} is not one that was granted by the Second Amendment should still be authoritative as to the actual nature of the provision itself.

We are confirmed in the collective reading of the Second Amendment by the next relevant Supreme Court decision, Presser v. Illinois in 1886. The Court decided that the section under consideration, “which only forbids bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law, do[es] not infringe the right of the people to keep and bear arms.”\textsuperscript{336} Justice William Burnham Woods remarked:

> it is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States, and, in view…the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintain[ing] the public security.\textsuperscript{337}

Woods emphasized that the State was not granted the power to deprive citizens of the right to protect themselves as a whole. However, since the plaintiff was not a member of the organized volunteer militia in Illinois, nor a part of the United States military as a troop, the deprivation of his right to bear arms was consonant with the Second Amendment. \textit{Miller v. Texas}, decided in 1894, rejected a defendant’s claim that a Texas

\begin{itemize}
\item \textsuperscript{335} United States v. Cruikshank Et. Al. 92 U.S. 542, 591 (1875).
\item \textsuperscript{336} Presser v. Illinois 116 U.S. 252, 264-265 (1886).
\item \textsuperscript{337} Ibid. at 265 [emphasis added].
\end{itemize}
statute forbidding the carrying of certain hazardous weapons violated the Second Amendment.\textsuperscript{338}

The final Supreme Court decision on the Second Amendment prior to \textit{Heller} that is directly applicable for understanding how the Court should view the scope of the right to bear arms today is \textit{United States v. Miller}. Decided in 1939, two years after the \textit{Palko} decision, the case revolved around two men who were charged with intentionally and unlawfully transporting a double barrel 12-gauge Stevens shotgun with a barrel less than 18 inches in length via interstate commerce. Justice James Clark McReynolds delivered the opinion of the Court:

\begin{quote}
In the absence of any evidence tending to show that possession of a ‘shotgun having a barrel of less than eighteen inches in length’ at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is in any part of the ordinary military equipment or that its use could contribute to the \textit{common defense}.\textsuperscript{339}
\end{quote}

The Court makes a profound statement regarding the understanding of the Second Amendment and its relationship with the powers granted to the Federal government in Article I, Section 8. Namely, McReynolds states that “with obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.”\textsuperscript{340}

\begin{itemize}
\item \textsuperscript{338} Miller v. Texas 153 U.S. 535, 538 (1894).
\item \textsuperscript{339} United States v. Miller 307 U.S. 174, 175, 178 (1939) [emphasis added].
\item \textsuperscript{340} Ibid. at 178.
\end{itemize}
Scalia, in an attempt to make *Heller* compatible with the *Miller* decision, says that “this holding is not only consistent with, but positively suggests, that the Second Amendment confers an individual right to keep and bear arms (though only arms that ‘have some reasonable relationship to the preservation or efficiency of a well regulated militia’).”³⁴¹ He later remarks that “indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks.”³⁴² The *McDonald* Court, building off of the *Heller* opinion, says that the city of Chicago’s firearm ban is unconstitutional because handguns “are ‘the most preferred firearm in the nation to ‘keep’ and use for protection of one’s home and family.’”³⁴³ How, then, can the *Heller* and *McDonald* Courts, recognizing that handguns have a relationship only to personal self-defense and no reasonable relationship to a militia or the collective security of the community, say that the Chicago restriction in question is unconstitutional while still upholding *Miller*? Either the *Heller* or *McDonald* Courts should have overturned *United States v. Miller* to justify striking down a restriction on handguns, an aspect that concededly did not figure in the original understanding of the Second Amendment, or they should have ruled that the regulations from the city of Chicago in no way infringed with Second Amendment protections.

³⁴² Ibid. at 2817.
V. Concluding Remarks

And thus, the bind for a strict textual originalist like Scalia and Alito is precisely this dilemma. Since “the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right,” they are forced to either declare the Second Amendment an antiquated provision with no place in modern society or to sever the operative clause from its proper historical context and create a right that is antithetical to the original meaning of the Second Amendment. In the case of McDonald v. Chicago, it seems that the modern conception of personal self-defense and the obsolescence of the eighteenth century militia have emerged victorious as the proper reading of the Second Amendment. This pronouncement, comporting more with that of living constitutionalism than originalism, is an important shift in the incorporation debate. As has been emphasized, the mere location of a given provision in the Bill of Rights is not enough to warrant its application against the States. The right being incorporated must be shown to be “fundamental to the American scheme of justice” and “implicit in the concept of ordered liberty.” The historical fallacies committed in Heller were reproduced in the McDonald decision, determining incorporation on erroneous grounds. These mistakes, endorsed by the Standard Model camp, “have not

only read constitutional texts in an anachronistic fashion, but have also ignored important historical sources vital to understanding what Federalists and Anti-Federalists might have meant by the right to bear arms. This essay has attempted to show that the true, original understanding of the Second Amendment’s right to bear arms was a collective right of the people to defend themselves in solidarity against a tyrannical central authority. This deeply rooted tradition of societal defense in the name of liberty conforms to the tests of fundamentality set forth in *Palko* and *Duncan*. Unfortunately for the Standard Modelers, however, the heart of this discussion was silent on the issue of personal use of firearms for self-defense in the home, continuing to allow discretionary regulation by the State for the health and safety of the community.  

An individual right to bear arms cropping up in modern times may be deemed important by contemporary society but it is certainly not embedded deeply enough in the foundations of American history to warrant incorporation of the Second Amendment against the States. The focus on English sources and the history leading up to the codification of the Bill of Rights laid the groundwork for establishing the original understanding of the right to bear arms in the Second Amendment as a collective one. The post-ratification commentary, with works from scholars such as St. George Tucker, Joseph Story, Joel Prentiss Bishop, and others, confirmed this interpretation. State constitutions protecting the right to bear arms that evolved into more individualistic provisions over the years were illustrative of changing ideologies. Importantly, they

showed the departure of many provisions from that of the militia oriented protections of firearms towards protection for recreation, defense of home, family, and self; the Second Amendment, however, has experienced no such shift.

The city of Chicago’s ban on handguns in the interest of the community in no way infringes the right of the people to protect themselves against standing armies or authoritarian rule. Furthermore, as the *Heller* decision concedes, handguns cannot possibly be thought to contribute to the preservation of a well-regulated militia. Unless a given state or locality completely usurps the peoples’ right of collective self-preservation, the issue of incorporating the Second Amendment should have remained a non-issue. The *McDonald* decision has effectively established that every challenge to reasonable gun regulation at the State level can now be decided by Federal Courts as an appeal to a violation of the Second Amendment. This increasing disdain for regulation of firearms at the State level threatens to jeopardize exactly what the Second Amendment originally intended to protect. As the late Joseph Story remarked, “among the American people there is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burthens, to be rid of all regulations. How it is practicable to keep the people duly armed without some organization, it is difficult to see. There is certainly no small danger, that indifference may lead to disgust, and disgust to contempt; and thus, gradually undermine all the protection intended by this clause of our national

bill of rights.” The decision to incorporate the individual right to bear arms in
*McDonald v. Chicago* is the first step in deteriorating this once noble provision.

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