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IS THE RIGHT TO KEEP AND BEAR ARMS CONDITIONED ON A MILITIA?

by Randy E. Barnett*

In their book, “The Militia and the Right to Arms, or, How the Second Amendment Fell Silent,” Richard Uviller and William Merkel characterize the Second Amendment “right to keep and bear arms” as an individual right. However, they further claim that, because the right to arms may be exercised only while participating as part of an organized militia, its existence as a constitutional right is conditioned on the continued existence of a well-regulated militia. In their words, “historical developments have altered a vital condition for the articulated right to keep and bear arms.”¹ One is hard-pressed to know how to label this position for purposes of exposition. It is not a collective or state’s rights position to be sure, but neither is it the individual rights position defended by numerous scholars to which it must be contrasted. I believe the best nonpejorative name for it is the “militia-conditioned individual right” and I shall refer to it as such in what follows.

Though not entirely original to them, this militia-conditioned individual right represents an advance for the anti-gun-rights position over those who have insisted on the patently false view that this right included in the Bill of Rights actually protected a never-very-well-specified power of states. In this essay, I will comment briefly on the authors’ interpretive methodology before moving to specific problems with their effort to interpret the Second Amendment.

The Author’s Originalism

The authors are to be commended for explicitly discussing their method of interpretation. Few law professors and even fewer historians even attempt this. Unfortunately, I found their discussion of originalism rather confused. Increasingly originalists, like myself, focus entirely on the original meaning of the text—that is, the meaning that would have been attached to the words used in the text by a reasonable speaker of the language at the time of its enactment.² What

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¹H. Richard Uviller & William G. Merkel, *The Militia and the Right to Arms, or How the Second Amendment Fell Silent* 35 (2002).

²I explain and defend the version of originalism described in this section in Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 *Loyola Law Review* 611 (1999). I shall greatly elaborate on this defense in Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton University Press, forthcoming, February 2004).

did “militia” mean in 1791; or “well-regulated,” or “arms” or “bear” or “right” or “the people”? Of course speakers then, like speakers today, would be influenced by the context in which a particular word or phrase is used. For example, because of this context we can be quite sure that the term “arms” in the Second Amendment refers to weapons, not the appendages to which our hands are attached.

Discerning the original public meaning of the text requires an examination of linguistic usage among those who wrote and ratified the text as well as the general public to whom the Constitution was addressed. Evidence of specialized meaning or intent by framers or ratifiers is only relevant if it is shown that such specialized meaning would have been known and assumed by a member of the general public. Where more than one contemporary meaning is identified, it becomes necessary to establish which meaning was dominant. In practice, the default rule is to assume that the meaning of words has remained the same since the time they were enacted unless historical investigation reveals that the prevailing public meaning of the word was different then. Any such historical claim is an empirical one that requires actual evidence of usage to substantiate. If possible, a quantitative assessment to distinguish normal from abnormal usage should be undertaken.³

Of course, the original public meaning of the text, like the meaning of laws enacted yesterday, requires application to facts of particular cases. Though general language of the sort used in the Constitution may exclude many possible outcomes, often it does not dictate a unique result, thus leaving room for some discretion on the part of the interpreter. This is the unavoidable cost of using language, especially general abstract language, to guide behavior. On the other hand, the benefit of general language is that it can last a very long time without becoming antiquated.

Sometimes it sounds like the authors are endorsing an original public meaning approach but it is not what they practice. In particular they present very little evidence of the public meaning of the words used and, where disagreement exists, no quantitative evidence by which to distinguish dominant from deviant meaning. In practice they seem to be searching for what is called original intent, rather than original meaning.

Those originalists who favor original intent would want to fill the gaps in the original public meaning and cabin the discretion of interpreters by appealing to the intent of the framers who used them. Some also contend that where

³I offer such a quantitative assessment of the meaning of the words “commerce” and “regulate” in Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101 (2001), and *Id.* *New Evidence of the Original Meaning of the Commerce Clause*, 55 University of Arkansas Law Review 847 (2003). Such a quantitative survey is not always possible, however given the state of the evidence or the particular word at issue. For example, the term “necessary” is too common to establish by quantitative survey a dominant public meaning to which the Necessary and Proper Clause must have referred. One must then fall back on more traditional reliance on statements of various participants in the historical period about the clause in question. See e.g., Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. Penn. Const. L. Rev. (forthcoming 2003).

original intent is discernable, it should trump the original public meaning of the terms. This approach has been roundly criticized for reasons I shall not rehearse here, many of which I think are sound. In practice, given how few of the future cases to which their words are applied they could possibly imagine, this method usually consists of what I call “channeling the framers” to discern what they “would have” thought of a particular case or controversy.

The authors appear to be rejecting this approach when they several times cite the work of H. Jefferson Powell with approval, though this rejection is not at all consistently practiced by them,⁴ especially when they rely heavily and uncritically on such original intent originalist authors as Raoul Berger. They also seem not to be aware that the historical evidence cited by Powell actually supports the conclusion that the founding generation, while rejecting original intent originalism, ended to favor original meaning interpretation.

Finally, there are the new-fangled so-called “translation theory” originalists such as Larry Lessig and Michael Treanor who start with original meaning or intent (its not always clear which) to discern the principles underlying the text, and then purport to “translate” those principles—not the text itself—into the modern day context. In practice this usually results in the rejection of the original text and the adoption of its complete opposite in the name of its underlying principles. While this does not sound like the view they endorse, nor practice in most cases, they do cite Larry Lessig’s work with approval without seeming to appreciate the difference between his approach and that of other originalists.⁵

As I said, I find their discussion of methodology confusing but no more so than the well-known historian Jack Rakove, whose discussion of interpretive methodology the authors also say they found helpful. They seem not to realize the differing strains of originalism, or if they do, not consistently keep within one strain or another. This makes it harder to respond to their claims since, for example, they might present evidence of intent that, while valid as far as it goes, is irrelevant to the public meaning of the text or, at minimum, not dispositive.

The obvious source of this confusion is the fact that the authors are not themselves originalists, although they either never tell the reader this or I missed where they did.⁶ They therefore fall into the class of nonoriginalists who make originalist arguments, one assumes, to persuade others who care more about

⁴See e.g. Uviller & Merkel, at 98 (“By inference, as well as from the record of the debate in the House, the process casts light on the Amendment’s intended meaning.”).

⁵See *id* at 296, n.6.

⁶I learned for the first time that they are not originalists during their talks at the symposium on the book held at William and Mary. Until that moment, I had assumed from the book that they were. I was perhaps misled by their statement near the beginning of the book that: “Our historical approach is simply this: we take seriously the words chosen by the drafters, and seek their meaning to the ratifying generation.” *Id.* at 37. Perhaps like other readers, I took this to describe their approach to constitutional interpretation.

original meaning than they do. This probably describes every opponent of the individual rights interpretation of the Second Amendment who offers historical evidence that this interpretation is in error. Even the historians among them insist, like the authors, on a crabbed originalist interpretation for the right to bear arms—a right they coincidentally do not care for—though they would never think to apply this method to limit other constitutional rights of which they approve. Of course, if courts need not follow original meaning (or intent), then courts are perfectly free to adopt a robust individual right interpretation of the Second Amendment even if this should contradict original meaning.

The Author's Originalist Claims

So far as I could tell, the authors present no new evidence on the original meaning of the Second Amendment and confine themselves to reliance on secondary sources or to discussing evidence already well-known to Second Amendment scholars of all stripes. There is nothing wrong, of course, with offering a new interpretation of previously discussed evidence, but readers should not begin this book expecting to find anything that has not been previously considered by other writers in the field. Nothing new has been uncovered. And unfortunately for a book-length work they do not treat comprehensively all the available evidence of original meaning. This is particularly regrettable as the quantity of such historical evidence is not so great that it could not all be evaluated.

Let me turn now from generalities to particulars. For it will come as no surprise to those familiar with my writings in this area⁷ to learn that I am not persuaded by their originalist arguments and therefore disagree with their conclusions. Most of the book is taken up with a lengthy and largely uncontroversial description of the history of the militia before and after the adoption of the Constitution, along with a discussion of classical republicanism, so its treatment of the Second Amendment is actually rather brief. Their conclusion rests on a few claims I shall treat separately.

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

⁷See Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 *Emory L. J.* 1139 (1996).

Was “Bear Arms” Exclusively a Military Term?

The authors claim that: “*Bearing* arms implied making muster, equipped and ready for service; *keeping* entailed steady readiness to serve when called to duty.”⁸ For this proposition they cite with uncritical approval Garry Wills’ essay in *The New York Review of Books* that “bearing arms had, from its earliest recorded employment and through the late eighteenth century, an *exclusively* military connotation.”⁹ I say uncritical because they do not scrutinize Wills’ evidence—nor present any new historical evidence of their own—but simply accept his conclusions. From him they conclude that “the verb ‘to bear,’ . . . would not have been used in the eighteenth century—as it would not commonly be today—to connote purely private use of arms.”¹⁰

To make out this claim it is not enough, of course, to present examples of the use of “bear arms” in a military context for their and Wills’ claim that this is its exclusive use. Claims of exclusivity are hard to establish because it must be shown that there are no other competing uses of a particular word. Just a few counter-examples call such a claim into question and then forces those making it to do a systematic survey to distinguish normal from abnormal or deviant uses.

Individual rights scholars have pointed to several examples of the term “bear” arm being used in a nonmilitary context. One discussed by the authors is the recommendation of the minority report of the Pennsylvania Ratification Convention that the Constitution be amended to include the following:

That the people have a right to bear arms for the defense of *themselves and their own state*, or of the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they out not to be kept up; and that the military shall be kept under strict subordination to and governed by the civil power.¹¹

The authors readily concede that this proposal clearly uses “bear arms” to include both military and nonmilitary contexts, thus undercutting the claim that “bear arms” had an exclusively military connotation, but dismiss it repeatedly as reflecting a “marginal voice[],”¹² “disaffected minority,”¹³ and “some radical,

⁸Uviller & Merckell, at 29 (original emphasis).

⁹Id. at 194 (emphasis added).

¹⁰Id. at 146.

¹¹Neil H. Cogan, *The Complete Bill of Rights 182* (1997) (emphasis added).

¹²Uviller & Merckell, at 82.

¹³Id at 83.

libertarian support for an unrestricted right to weapons.”¹⁴ They go so far as to claim that the minority report’s “view of arms-related rights did not represent majority opinion in Pennsylvania”¹⁵ and that “the assertion of an individual right to arms for purposes beyond services in the lawful state militia may have resonated with some groups of anarchical radicals, but that majority sentiment and enlightened reason failed to embrace claims for such a right in Pennsylvania.”¹⁶ They even claim that “[t]hese supporters of constitutional right to own weapons for private purposes were atypical even within the anti-federalist movement, and they remained insignificant within the nation as a whole.”¹⁷ They offer absolutely no evidence or secondary support for any of these claims about popular opinion—though it says something of their own biases that they think the Pennsylvania proposal to be so radical that “enlightened reason” ought reject it.¹⁸

One supposes they base their opinion on the fact that this is a recommendation made by a “minority” of delegates to the Pennsylvania convention, but it is well known that several of the earlier constitutional conventions were packed by the comparatively well-organized Federalists. The fact this particular sentiment was held by a minority of delegates tells us next to nothing about whether it reflects the common view among Pennsylvanians at large. Further, this individualist view of the right to keep and bear arms could easily have reflected the view of the majority of delegates themselves who nevertheless supported ratifying the Constitution without amendments. Indeed, the strategy of ratification conventions proposing amendments to Congress developed later in the ratification process.

Finally, and most tellingly, the authors fail to include the wording of the right-to-arms provision of the Pennsylvania Constitution of 1776 that reads: “That the people have a right to bear arms for the defense *of themselves and the state*. . . .”¹⁹ This right was reaffirmed in the 1790 Constitution in a passage that reads: “That the right of citizens to bear arms, in defense *of themselves and the state*, shall not be questioned.”²⁰ Neither provision even mentions the militia. So there

¹⁴ Id at 83.

¹⁵ Id at 83.

¹⁶ Id at 85.

¹⁷ Id at 81. See also id at 91 (referring to “the radical fringe”); id at 100 (referring to “a few radicals outside Congress”), it at 241 n.71 (“these endorsements almost invariably issue from the pens of marginal, radical figures who did not represent the mainstream of either federal or antifederal thought.”).

¹⁸ The only footnote reference is to an article by Saul Cornell that does not make any claims about majority versus minority sentiments on the pages cited.

¹⁹ Cogan, 184 (emphasis added).

²⁰ Id. (emphasis added).

is good reason to believe that the Pennsylvania Dissenters were merely elaborating the right to bear arms already included in their state constitution. Nor was the Pennsylvania Constitution unique in this wording. The Vermont Constitution of 1777 contains identical language. In fairness then, the Pennsylvania Dissenters can hardly be “discount[ed] . . . as the rambling catch-all compendium of one man bent on scuttling ratification”²¹ without some evidence that this was so.

Nor was the Pennsylvania minority alone. Included in the minority recommendation of the Massachusetts Convention was an amendment that the

Constitution be never construed . . . to prevent *the people of the United States, who are peaceable citizens, from keeping their own arms*, . . . ; or to prevent the people from petitioning, in a peaceable and orderly manner, the federal legislature, for a redress of grievances; or to subject the people to unreasonable searches and seizures of their persons, papers or possessions.²²

This proposed amendment does not mention the militia. The proposed amendment is clearly a list of purely individual rights, including a right to arms unconditioned by service in the militia. In addition, the New Hampshire ratification convention officially proposed that the Constitution be amended to read that “Congress *shall never disarm any Citizen* unless such as are or have been in Actual Rebellion.”²³ Uviller and Merkin concede that this is a purely individual rights formulation.²⁴ It should also be noted that none of the other right-to-arms proposals made by New York, North Carolina, Virginia, or Rhode Island was expressly limited to “the common defense” or “the defense of the state,”²⁵—though, as the authors note, the Massachusetts Bill of Rights was qualified in this way.²⁶

The authors are estopped from responding that the language in the Pennsylvania and Vermont constitutions does not reflect an individual right that

²¹Uviller & Merkel, at 270 n.90.

²²Cogan, 181 (emphasis added). This recommendation is in sharp contrast with the Massachusetts state constitution that protected only the right to bear arms “for the common defense.” *Id.* at 183.

²³*Id.* The authors claim, again without evidence, that this proposal “sought to push the republic further than any of the other states desired to go.” Uviller & Merkel, at 82.

²⁴*Id.* at 81-82. Even a single example of a patently individual right to bear arms rebuts a charge commonly made by collective rights proponents that the individual rights formulation is a pure invention of modern gun rights enthusiasts with no basis in history.

²⁵*Id.* at 181-182.

²⁶*Id.* at 82.

may be exercised both within and outside of militia service.²⁷ For when discussing the later Kentucky case of *Bliss v. Commonwealth*,²⁸ which interprets the very same language in the Kentucky Constitution as protecting an individual right, they readily concede it does indeed have this broader meaning and they respond by distinguishing it on the ground that this wording differs from that of the Second Amendment. By striking down a law banning concealed weapons, they write, “the [Kentucky] Court of Appeals acknowledged a private, state constitutional right for purposes having nothing to with militia service.”²⁹

The authors also dismiss the Georgia case of *Nunn v. Georgia*, in which the state judge found a law banning certain pistols was unconstitutional under both the Georgia constitution and the Second Amendment. Here they criticize the judge for not considering himself sufficiently bound by the “revered” John Marshall’s earlier opinion in *Barron v. Baltimore* in which he held that the Bill of Rights applied only to the federal government. “[F]or those who seek a coherent doctrine,” they write, “*Nunn v. Georgia* is a case of no importance whatever.”³⁰ But the case is highly relevant to those who purport to seek the original meaning of the right to keep and bear arms and claim that such a right only existed in the context of militia service.

Moreover, Uviller and Merkel authors fail to appreciate that many viewed the Bill of Rights, at least in part, as declaratory of preexisting rights and therefore as good authority to anyone, including a state court, trying to ascertain what the fundamental rights of persons might be. Surprisingly, nowhere in their book do they discuss how the right to keep and bear arms related to the natural right of self-defense, though the wording of the Pennsylvania Constitution and other statements invokes a right of “defense.” Instead they claim that the right-to-arms “did not readily lend itself to Locke’s rational and enlightened discourse about the nature of man and the entitlements appurtenant thereto.”³¹ That the right to keep and bear arms was viewed as an extension of the fundamental natural right of self defense is much-discussed in the literature but passes unnoticed in this book. But even if they are correct in their criticism of the Georgia opinion as improperly disregarding *Barron v. Baltimore*, the case

²⁷Others not so constrained may contend that “in defense of themselves” was a still a collective notion referring to “the community,” and such defense was to be done entirely within the context of the militia. I address this claim—which is not made by Uviller and Merkin and is inconsistent with their interpretation of these passages—at the end of this section.

²⁸12 Ky. 90, 2 Litt. 90 (1822).

²⁹Id at 28. They then gratuitously observe that subsequent Kentucky Constitutions expressly “allowed the legislature to pass gun control laws.” id. This textual qualification, however, supports the view that the unmodified language protected an individual right free of militia connotation.

³⁰Id at 30.

³¹Id at 164.

nevertheless still stands as an example of an acceptance of the right to bear arms as an individual right outside the military context.

The authors attempt to balance this case by discussing a Tennessee case interpreting a state constitutional provision that they say is “similar in form and words to the federal Second Amendment.” But unlike the Second Amendment (and the other proposed amendments discussed above), the Tennessee provision qualifies the right to bear arms by the phrase “for their common defense.” As they acknowledge elsewhere,³² this language suggest a more military or defense meaning.

Indeed, when considering the Second Amendment, the Senate rejected a proposal to add the qualifier “for the common defense” to the language of the Second Amendment. Though the authors dismiss the significance of the Senate’s refusal on the ground that this qualifying language was redundant,³³ this assertion requires independent proof that the unqualified right is already *limited* to uses of arms for the common defense and does not *also* include the use of arms by the people in defense of themselves as several state constitutions specify. In other words, only if you assume that you have established the meaning of the right to keep and bear arms can you contend that this additional language was superfluous. Equally if not more plausible is the inference that the qualifying language might well have been rejected because it unduly narrowed the scope of the right. In the absence of any recorded debate we just do not know.

To determine original meaning, as opposed to original intent, far more significant than the cryptic and unreported Senate deliberations is the existence of state constitutional right-to-arms guarantees that included the broader “defense of themselves and the states” language. Someone reading the Second Amendment would be unlikely to assume that the unqualified right in the Amendment actually meant something narrower than the broad right to arms for both personal and collective self-defense already protected by their state constitution.

Take for example, this reaction to Madison’s proposed amendments by Samuel Nasson, an Antifederalist representative to the Massachusetts ratification convention in a letter to George Thatcher a Federalist Congressman from Massachusetts:

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

³²See *id.* at 104.

³³*Id.* at 104 (“invocation of arms bearing in the militia already clearly proclaimed the purpose of common defense to eighteenth century ears.”). Surely not to some ears in Pennsylvania or New Hampshire.

*us by fowling and for our Defence against a common enemy. . . .*³⁴

Nasson then goes on to extol the virtue of popular resistance to a “foreign foe” and condemn standing armies in time of peace.

Notwithstanding his concern for common defense, Nasson nevertheless reads a right to keep arms as also a personal one. This quote appears in the Fifth Circuit’s opinion in *U.S. v. Emerson*,³⁵ but not in the book by Uviller and Merkel. Instead of letting readers make up their own minds about these this and other contemporary statements they all are dismissed in a single conclusory sentence: “Contrary to many commentators and to our own interpretations, the court finds ‘many instances’ where the words were employed to connote that the term refers to carrying or wearing arms generally.”³⁶

This passage by Nasson, along with the previously quoted proposal from the Massachusetts’s minority, highlights a signal fact overlooked by the authors and by all those who have recently shifted their historical argument to the supposedly military meaning of “bear arms.” The Second Amendment also protects the right to *keep* arms. Not a single piece of evidence is presented by the authors (or Gary Wills) to show that “keep” was a military term at all, much less exclusively so. Nasson’s and the Massachusetts minority’s reference to a personal, individual right to keep arms is significant, therefore, because even if an exclusively military meaning of “bear arms” is conceded, the individual right to “keep” arms still colors the meaning of the Second Amendment as a whole.

Several times the authors assert, once again without evidence, that the term “bear arms” was chosen because it did not connote the mere carrying of guns. “In late-eighteenth century parlance, *bearing arms* was a term of art with an obvious military connotation. ‘Carrying a gun’ lacks the implication of *bearing arms* and, of course, the Constitution nowhere mentions a ‘right to carry a gun.’”³⁷ Yet though they purport to comprehensively discuss the few times that the Supreme Court has discussed the Second Amendment—including even a TV interview with Chief Justice Warren Burger—they neglect to discuss the treatment of the right to arms by Chief Justice Taney in his infamous in *Dred Scot*

³⁴Letter from Samuel Nasson to George Thatcher (July 9, 1789) in Helen E. Veit, et al. eds., *Creating the Bill of Rights: Documentary Record from the First Federal Congress 260-61* (1991) (emphasis added).

³⁵270 F.3d 203, 253 (5th Cir., 2001).

³⁶Id at 222.

³⁷ Id at 26-27. See also id at 149 (“The right to arms is declared by the verbs, “keep and bear,” a phrase carefully selected to alternatives such as “have,” “own,” “carry,” or “possess.”) There is no independent evidence offered as to the “care” that went into this verbal choice. That this phrase must have been carefully chosen from these other words that connote a different meaning assumes what must be shown: that these other words would indeed have connoted a different meaning.

v. *Sandford*.³⁸

In *Dred Scott*, Taney denies that blacks could have been considered citizens of the United States for, if this were the case, then blacks would enjoy along with whites “the full liberty of speech . . . and to keep and carry arms wherever they went.”³⁹ Not only does Taney believe that such a right is an individual right unconnected with militia service—and clearly thinks that his readers would share this belief—he uses “carry” as a synonym for “bear” and implies that the right protected in the Second Amendment is to carry weapons wherever one travels.

The authors cannot have omitted Taney’s opinion because of its racist outcome since they rely on the nearly-as-vile ruling in *U.S. v. Cruikshank*⁴⁰, an opinion in which the Supreme Court frees some members of the Ku Klux Klan who were convicted of violating the civil rights of blacks in Louisiana by torturing and murdering them. According to the reasoning of the Court in *Cruikshank*—and cited approvingly by the authors—the defendants could not have been guilty of violating the victims’ rights under color of state law because the entire Bill of Rights, including the rights of assembly and to keep and bear arms, applies only to federal and not state exercises of power.⁴¹ Clearly, if the later doctrine of incorporation applies to the right of assembly it could just as easily apply to the right to arms, *Cruikshank* notwithstanding. The protection of the right to arms against infringement by states is more properly thought of as falling under the Privileges or Immunities Clause of the Fourteenth Amendment, as I discuss below.

Some might object to the relevance of these nineteenth century cases for establishing original meaning of an amendment enacted in 1791 and I sympathize with the objection. I offer this information because nineteenth century cases are discussed by the authors at considerable length in their opening chapter and because they concede that these cases interpreting the language “defense of themselves and the state” represent the antithesis of their view. Also, more recent cases are useful to establish the late development of a collective or states-rights view of the amendment—a view unknown at the founding and correctly rejected by the authors. Moreover, the *Dred Scott* case also refutes the author’s suggestion that the Supreme Court has never considered the Second Amendment to protect an individual right unconditioned on militia service. In its earliest consideration of the Amendment, it clearly did.

Returning to the founding era, the authors strangely fail to discuss the first learned treatise on the Constitution authored by the jurist and law professor St.

³⁸ *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856).

³⁹ *Id.* at 417.

⁴⁰ *United States v. Cruikshank*, 92 U.S. 542 (1875).

⁴¹ *Id.* at 14. The authors do not inform the reader that the *Cruikshank* court also found that the right of assembly does not apply to the states via the Fourteenth Amendment.

George Tucker in his annotated edition of Blackstone’s Commentaries published in 1803 and based on lectures he gave in the 1790s. There, Tucker offers the following example of judicial review under the Necessary and Proper Clause:

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

Tucker here is clearly discussing the right to keep and bear arms outside of any militia context and he ignores entirely the preface to the Amendment. Though no one quote from any single source is definitive, the authors would have had to skip over this quote in articles they cite to reach the quotation from the later treatise by Joseph Story which they choose discuss at some length.⁴³

None of this is to suggest, of course, that the term “bear arms” did not also include a military connotation, but only that usage suggests it had a broader meaning as well that the public would reasonably have attributed to it unless the right was qualified expressly like the Senate declined to do. This evidence also suggests that the unconditioned individual rights interpretation of the amendment can be found in the historical record and is no invention of the NRA—an organization the authors mention disparagingly—or of individual rights scholars, who the authors repeatedly disparage throughout the book as “advocates”⁴⁴ rather than historians—or worse.⁴⁵

By the end of the book the authors get a little carried away and assert that “[t]o the ratifiers, bearing arms unequivocally meant rendering military service.”⁴⁶ As we have seen, the examples discussed and others they omit include numerous uses of the term outside the military context. No quantitative evidence is presented here, or elsewhere by anyone else, to show that these uses were aberrant. To the contrary, the authors present not a single example of any person from the founding era or immediately thereafter who suggested that the right to keep and bear arms was exclusively a military right.

Let me repeat. Though there are numerous examples of the right being

⁴²St. George Tucker, *Blackstone’s Commentaries with Notes of Reference to the Constitution and Law of the Federal Government* 289 (1803)

⁴³See *id.* at 30-31.

⁴⁴*Id.* at 246 n.9.

⁴⁵See discussion below.

⁴⁶*Id.* at 194.

used more broadly, there is no record of anyone at the time asserting that the right in the Second Amendment was as narrow or conditioned as the authors claim. No one. Three types of statements could directly evidence their empirical claim that the original meaning of the right was exclusively a military one:

- (a) a statement asserting the opinion of the speaker that the right to keep and bear arms in the Second Amendment is conditioned on the continued existence of an organized militia;
- (b) a statement explicitly rejecting the assertions of the importance of an individual right to keep and bear arms independent of an organized militia;
- (c) a statement decrying the Second Amendment for having rejected the individual right to keep and bear arms for their own as well as common defense in favor of a purely militia-conditioned right.

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

Before moving on to the next form of argument offered by Uviller and Merkin, let me briefly consider a different militia-conditioned interpretation of “for the defense of themselves and the state” that they do not offer. As we saw, Uviller and Merkin concede that this passage from the Pennsylvania minority report, but also in the Pennsylvania state constitution and elsewhere, included a personal right to bear arms outside the militia context. That is why they go to such lengths to marginalize these speakers.

Someone else, however, might claim that the phrase “for the defense of themselves” was the equivalent of “for the defense of the community,” a right that too was to be exercised exclusively in the context of the militia.⁴⁷ Let me list briefly the problems with this theory:

- (1) First, and most importantly, there is no direct evidence of anyone at the time of the founding asserting that this is what “in defense of themselves” means.
- (2) As a textualist matter, “in defense of themselves” seems most obvious to be simply the plural of the personal right of self-defense, a usage that was appropriate given that the subject of the right is the plural term “the people.” In other words, if you, as a drafter, wanted to use the term “the

⁴⁷Frankly, this alternative reading did not occur to me until it was advocated in private correspondence by an historian associated with the militia-conditioned interpretation of the right to arms.

people” here as they had in other amendments, and “the people” is the plural of individual person, how else would you protect the right to bear arms for personal self defense besides making the second term “themselves.” You would not write within to defend “himselves,” or “him or herselfes.”

- (3) Indeed, this same grammatical choice is made in the Fourth Amendment that refers to the right of “the people to be secure in *their* persons, houses, papers, and effects. . . .”⁴⁸ So here “the people” is being used as the plural of individual person as reflected in the use of the word “their” here—just like “themselves” in the state constitutions. Similarly, the English bill of rights refers to the right of individual protestant “subjects” to “have arms for *their* defense”⁴⁹
- (4) True the founders used “no person” and “any person” in the Fifth Amendment to refer to individuals but this is a grammatical consequence of shifting from affirming that *everyone* has a particular right to a claim about *particular individuals* not being denied a right. In the absence of direct and compelling historical evidence to the contrary, nothing in the public meaning would turn on this grammatical flip between the Fourth and Fifth Amendments (or the Second or First Amendment either).
- (5) Consider this language from the very same 1776 Pennsylvania declaration of rights in which the “in defense of themselves” language appears: “[T]he people have a right to hold *themselves*, their houses, papers, and possessions free from search and seizure, and therefore warrants without oaths or affirmations first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described, are contrary to that right, and ought not to be granted.”⁵⁰ Nearly identical language appears in the 1777 Vermont Constitution.⁵¹ Other state constitutional protections from unreasonable searches refer to “every subject” (Massachusetts 1780; New Hampshire 1783) with no apparent difference in meaning. Or consider

⁴⁸U.S. Const. Amend XIV. To forestall future debate on this point, “persons” in this passage refers to their bodies as distinct from their possessions.

⁴⁹See Joyce Lee Malcolm, *To Keep and Bear Arms: The Origin of an Anglo-American Right* 119 (1994) (describing the legislative history of this formulation).

⁵⁰Cogan, at 235 (emphasis added).

⁵¹Id. (“That the People have a right to hold *themselves*, their Houses, Papes and Possessions free from Search or Seizure” [emphasis added]).

this from both the 1780 Massachusetts and the 1783 New Hampshire constitutions: “that the judges of the supreme judicial court should hold their offices as long as they behave *themselves* well; and that they should have honorable salaries ascertained and established by standing laws.”⁵²

- (6) As was already discussed, language expressing “in defense of the community” was readily available and in use in, for example, the Massachusetts constitution that refers to “a right to keep and bear arms for the common defense”—qualifying language that was proposed and rejected in the Senate as an amendment to the Second Amendment.
- (7) Finally, this interpretation of “in defense of themselves” leads to a bizarre interpretation of the Pennsylvania minority report itself that Uviller and Merkel and others claim to be a pure (and radical, exceptional, and rejected) statement of individual rights. By this interpretation even the Pennsylvania dissenters did not seek to protect an individual right of self defense! They sought instead to protect the right to defend the community (“in defense of themselves”), the right to defend the state (“and their own state”—notice the use of the word “their” by the way—just like in the Fourth Amendment), and the right to kill game, but NOT the right to personal self defense. This interpretation would not only be bizarre, it would contradict Uviller and Merkel’s repeated aspersion that the Pennsylvania dissenters were weird radicals and anarchists.

The Structure of the Text

At its root, and despite the pages of historical narrative, the Uviller and Merkin’s argument is not based on any new or direct evidence of original meaning. Apart from ritualistic invocations of “historical context,” and their various assertions about the meaning of “bear arms,” it rests almost entirely on their own analysis of its textual wording. “[A]s a matter of textual analysis,” they contend “we regard it as highly significant that of the several great entitlements enunciated in the first eight Amendments, no other is hedged by a *conditional* or explanatory clause.”⁵³ Elsewhere they claim: “We have a *clear and unequivocal* expression of the linguistic context of the primary right in the introductory phrase that accompanies it.”⁵⁴

Obviously this is wishful hyperbole. If the right to arms had explicitly been made conditional on participation in the militia we would not be having this

⁵²Need cites

⁵³ Uviller and Merkin, at 23 (emphasis added). See also *id* at 35 (“[H]istorical developments have altered a vital *condition* for the articulated right to keep and bear arms.” [emphasis added]).

⁵⁴ *Id* at 149 (emphasis added).

debate. The authors claims that the Second Amendment “guaranteed the right to keep and bear arms *in the militia*”⁵⁵ but the last three qualifying words simply do not appear there or elsewhere.

At one point Uviller and Merckell go so far as to claim: “Had the two statements—regarding the importance of a militia and the right to arms—not been joined in this manner, it might have been possible to argue that even if the first declaration ceases to be true, the second is undiminished.” Yet none of the precursors of the Second Amendment—including Madison’s proposal to Congress—are worded in the grammatical fashion that the authors find so significant. This does not prevent them, with equal ardor, from insisting that these formulations too “expressly linked”⁵⁶ the right to arms to militia service.

The founders were quite capable of qualifying an individual right as they did in the Fifth Amendment when they specified a individual right not to be prosecuted without an indictment by the grand jury “except in cases arising in the land or naval suit, or in the militia, *when in actual service* in time of War or public danger. . . .”⁵⁷ In other words, unlike the Second Amendment, the Fifth Amendment right to an indictment *is* expressly conditioned on active militia service. And as already noted the Senate rejected the proposal that would have expressly limited the exercise of the right “for the common defense.”

Professor Eugene Volokh has chronicled that prefacing constitutional rights with affirmations of purposes was quite common in state constitutions of the day.⁵⁸ For example, the New Hampshire Constitution of 1783 reads: “The Liberty of the press is essential to the security of freedom in a State; it ought, therefore, to be inviolably preserved.”⁵⁹ Lest any weight be placed on the use of a semi-colon, the nearly identical passage from the Massachusetts Constitution of

⁵⁵ Id at 114.

⁵⁶Id at 83 (referring to the proposal by North Carolina ratification convention).

⁵⁷U.S. Const. Amend. V.

⁵⁸Eugene Volokh, *The Commonplace Second Amendment*, 73 NYUL Rev. 793 (1998). In his article, Professor Volokh explains why these clauses “shed some light on the interpretation of the Second Amendment:

1. They show that the Second Amendment should be seen as fairly commonplace, rather than strikingly odd.
2. They rebut the claim that a right expires when courts conclude that the justification given for the right is no longer valid or is no longer served by the right.
3. They show that operative clauses are often both broader and narrower than their justification clauses, thus casting doubt on the argument that the right exists only when (in the courts' judgment) it furthers the goals identified in the justification clause. 8
4. They point to how the two clauses might be read together, without disregarding either.

Id. at ____.

⁵⁹Cogan, at 94.

1780 reads: The Liberty of the press is essential to the security of freedom in a State, it ought not, therefore, to be restrained in this Commonwealth.”⁶⁰

The authors’ note this but dismiss this evidence on the sole grounds that “the Second Amendment remains unique among the federal Bill of Rights.”⁶¹ But this misses the significance of Professor Volokh’s evidence for the original public meaning of the Second Amendment. For these state constitutional rights provisions show that “to eighteenth century ears” (in their phrase) such language was not uncommon and, so far as we know, was not elsewhere interpreted to limit or condition the right that followed. Their denials notwithstanding, this evidence does indeed bear on the original public meaning of the Second Amendment.

None of this is to suggest that the authors’ purely textualist analysis is absurd. To the contrary, it is the most plausible argument the gun-rights opponents have going. But neither is it compelling. It is at least equally if not more likely that the right was not made expressly conditioned on the preface because it was not conditioned. It is precisely when plausible doubts are raised about the proper interpretation of text that evidence of original public meaning becomes important. As we have seen, ample evidence exists to suggest that the right to keep and bear arms existed apart from active service in a militia for the common defense and reasonable members of the public would so have read it.

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

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

The right to keep and bear arms, whatever its proper scope, like the rest of the Bill of Rights, was originally a constraint only on federal power, not that of states. This structural feature of the original Constitution was fundamentally altered by the enactment of the Fourteenth Amendment that dictates that “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”⁶² The question arises whether the right to bear arms was among these privileges or immunities.

The authors vehemently deny this possibility for two reasons. First because the right to arms was not specifically mentioned. Of course *no* particular right is specified as a privilege or immunity so this objection would wipe the clause from the Constitution entirely. Understanding the original meaning of this

⁶⁰Id.

⁶¹ Uviller and Merkin, at 24.

⁶²U.S. Const. Amend. XIV.

term requires evidence of public meaning. Unfortunately, the authors rely for their evidence solely on the highly unreliable work of Raoul Berger. While Berger never made up evidence, as was done by historian Michael Bellesiles,⁶³ one must always take Berger's claims with a very large pinch of salt, while carefully checking the sources.

Even more surprising, the authors seem to be unaware of the pathbreaking work of Michael Curtis, especially his influential book (also published by Duke), *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights*.⁶⁴ Though not every scholar has been completely persuaded by Curtis's refutation of Berger's thesis, his conclusions have been widely accepted and have reshaped the current debate over the original meaning of the Fourteenth Amendment. While I will not summarize his argument or evidence here, Curtis has shown that the primary purpose of the Privileges or Immunities Clause was to reverse *Barron v. Baltimore* and extend federal protection against state violations of the rights contained in the Bill of Rights—especially including the right to keep and bear arms—and others besides. The lack of any awareness of his work, and the paucity of their own sources, severely undermines the authors' confident assertions about the Fourteenth Amendment.

Even if Uviller and Merkel were correct about the founding, by 1868, the individual right to arms was certainly not a militia conditioned one, especially as free blacks and southern Republicans suffered abuses the hands of white militiamen. As Chief Justice Taney's 1856 opinion reflects, the right to bear arms was the right "to keep and carry arms" wherever one goes. Though Michael Curtis is no gun rights advocate himself, he cites repeated references to the right to keep and bear arms as among these protected.⁶⁵ For example, the Freedman's Bureau Act of 1866, approved by a supermajority of Congress over a Presidential veto, provided that

the right . . . to have full and equal benefit of all laws and proceedings concerning *personal liberty, personal security*, and the acquisition, enjoyment, and disposition of estate, real and personal, *including the constitutional right to keep and bear arms*, shall be secured to and enjoyed by all citizens of such State

⁶³Though their book appeared long after the disgraced Michael Bellesiles's scholarship began to be discredited, they repeatedly cite and discuss his work with favor, even emphasizing at one point his receipt of the now-revoked Bancroft Prize. See Uviller & Merkin, at 292 n.54. Though in the same footnote, they acknowledge some of Bellesiles' now-vindicated critics, they discount the significance of their contrary findings.

⁶⁴Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (1986).

⁶⁵See *id.* at 52, 53, 56, 72, 88, 104, 111, 112, 138, 140-41, 164, 167, 178-79, 187, 203, 217, and 238 (discussing references to the right to arms in the context of the drafting and ratifying the Fourteenth Amendment).

or district without regard to race or color or previous condition of slavery.⁶⁶

Thus the protection of the individual non-militia-conditioned right to arms for personal security was no secret privilege or immunity of citizenship in 1866.

Is the Right to Arms Subject to Reasonable Regulation?

Uviller and Merkel repeatedly assert that finding the right to arms to be an individual right unconditioned on the existence of the militia is a radical claim because such a right would not be subject to reasonable regulation. Thus they refer to the individual rights position as entailing an “unbridled right,”⁶⁷ an “absolute right,”⁶⁸ “an individual entitlement immune from government curtailment,”⁶⁹ an “unfettered general license to carry weapons,”⁷⁰ an “unrestricted right to weapons,”⁷¹ “individual license” that would “prohibits any interference”⁷² with a right that would be “immune to government restriction and regulation,”⁷³ and “free of any government control of arms.”⁷⁴

Despite this repeated rhetoric, they know better. In a footnote referring to Laurence Tribe, Akhil Amar, and William Van Alstyne, the authors acknowledge that:

Preeminently, three of the most respected members of the orthodox legal academy to embrace an individual rights reading of the Second Amendment emphasize that this right—like the other individual rights protected in the first eight amendments—should be subject to reasonable regulation.⁷⁵

Disturbingly, they fail to mention that *all* academic individual rights scholars hold

⁶⁶14 Stat. 176-77 (1866) (emphasis added).

⁶⁷Uviller & Merkel, at 9.

⁶⁸Id at 11.

⁶⁹Id at 37.

⁷⁰Id at 54.

⁷¹Id at 83.

⁷²Id at 169.

⁷³Id at 1.

⁷⁴Id at 197.

⁷⁵Id at 245 n.4

this position.⁷⁶

This is evidenced by a 1993 advertisement taken out in major journals by “Academics For the Second Amendment,” jointly signed by most individual rights scholars. The text of this advertisement appears in an article cited by Uviller and Merkel earlier in the same footnote that concedes the reasonableness of Tribe, Amar, and Van Alstyne.⁷⁷ In this article, which Uviller and Merkel find important enough to criticize elsewhere in their text,⁷⁸ the following sentence of the advertisement is italicized: “Of course, *the right to bear arms is no more ‘absolute’ than is the right to speak, to publish, or to assemble.*”⁷⁹ The advertisement, however, is merely evidence that all individual rights scholars of the Second Amendment have taken this view. For this reason, Uviller and Merkel fail to produce a single example of any individual rights scholar who contends within otherwise.

One suspects they omit this fact about other individual rights scholars—who they never call “scholars” much less “respected”—so they can repeatedly belittle them as “advocates,”⁸⁰ or a “dedicated band of individual rights advocates,”⁸¹ or “a growing entourage of individualist interpreters of the Second Amendment.”⁸² Indeed, when mentioning historian Professor Joyce Malcolm, whose book *To Keep and Bear Arms: The Origins of an Anglo-American Right* was published by Harvard University Press, they go so far as to mention that Bentley College where she teaches is “an undergraduate business school in Massachusetts.”⁸³ Though individual rights scholars have come to expect such cheap shots from their academic opponents, it still disappoints.

So here is the position held by individual rights scholars that Uviller and Merkel fail to meet: The fact that the Second Amendment protects an individual right means only that the government must establish the necessity and propriety of its regulations as it must do when adopting time, place, and manner restrictions

⁷⁶See e.g., Don B. Kates, *The Second Amendment: A Dialogue*, 49 *L. & Contemp. Probs.* 143, 145-46 (1986) (“[R]easonable gun controls are no more foreclosed by the second amendment than is reasonable regulation of speech by the first amendment.”).

⁷⁷*Id.* at 244 n.4 (citing Randy Barnett and Don Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 *Emory L. Rev.* 1139 (1996)).

⁷⁸*Id.* at 30.

⁷⁹Barnett & Kates, at 1189 (quoting *An Open Letter on the Second Amendment* that appeared in the *New Republic*, Mar. 15, 1993).

⁸⁰Uviller & Merkel, at 246 n.9.

⁸¹*Id.* at 38.

⁸²*Id.* at 53.

⁸³*Id.* at 246 n. 9.

on the freedom of speech. And the right bars the complete prohibition and confiscation of all private firearms suitable for self defense, a goal so radical that most gun control enthusiasts deny they favor it.⁸⁴ In other words, properly construed, an individual rights reading of the Second Amendment prevents rather than proposes a radical policy measure—as evidenced by the fact that on three occasions Congress passed statutes expressly recognizing the Amendment as protecting an individual right.⁸⁵

Is the Militia Gone?

After their assertion that the right to bear arms is conditioned on the continued existence of the militia, Uviller and Merkel's next most important claim is that, because the militia has been abolished, the condition for the exercise of the right no longer exists:

[W]ith no contemporary descendent to inherit the Framers' concept of a republican militia, the incidental right of citizens to bear and keep the arms necessary to the life of the militia has atrophied; it has simply fallen silent in the midst of the tumultuous debate on the issue in today's world.⁸⁶

Here then is how they define the term "militia":

As we have recounted—and as all scholars agree—the founding generations of Americans conceived of a militia as a group composed of all free white males between the eighteen and forty-five (except for the conscientious objectors and others entitled to an exemption), responding willingly, as needed, for the common defense, at the call of local authority, and above all as a viable alternative to the feared standing army.⁸⁷

Now it is possible to quibble a bit with this definition. At the end, for example, it seems to build into the definition of militia that it must be a "viable alternative" to a standing army suggesting that if it is not then it is not truly a "militia." If by "viable alternative" they have in mind something like an

⁸⁴Often disingenuously. See Barnett & Kates, pp. 1254-59 (describing the prohibitionist agenda of the gun control movement.).

⁸⁵In addition to the Freedman's Bureau Act of 1866 cited above, see the Property Requisition Act of 1941, Ch. 445, 55 Stat. 742 (1941) ("nothing in this act shall be construed "to impair or infringe in any manner the right of any individual to keep and bear arms"), and The Firearms Owners' Protection Act, §1(b), 100 Stat. 449 (1986) ("The Congress finds that the rights of citizens . . . to keep and bear arms under the second amendment to the United States Constitution [and other rights] . . . require additional legislation to correct existing firearms statutes and government policies."). See Stephen P. Halbrook, Congress Interprets the Second Amendment: Declarations by a Co-Equal Branch on the Individual Right to Keep and Bear Arms, 62 Tenn. L. Rev. 597 (1995).

⁸⁶Uviller & Merkel, at 228.

⁸⁷Id at 157.

“effective substitute,” they cannot mean this seriously, however, for it runs afoul of the Constitution itself which affirms *both* the existence of the militia *and* the power to create a standing army.

With that caveat to one side, are they right to claim, as they do repeatedly and at considerable length, that the militia no longer exists—“that there is no contemporary, evolved, descendent of the eighteenth-century “militia” on today’s landscape”?⁸⁸ It turns out that, according to the current laws of the United States as enacted by Congress, they are wrong. Section 311 of US Code Title 10, is entitled, “Militia: composition and classes” reads in its entirety as follows:

(a) The militia of the United States consists of all able-bodied males at least 17 years of age and, except as provided in section 313 of title 32, under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are members of the National Guard.

(b) The classes of the militia are —

(1) the organized militia, which consists of the National Guard and the Naval Militia; and

(2) the unorganized militia, which consists of the members of the militia who are not members of the National Guard or the Naval Militia.⁸⁹

According to current federal law, then, the militia continues to exist.

What do the authors say about this statute? Actually, they fail to mention it.⁹⁰ Though they note the distinction adopted by statute in 1903 between the “active militia” and “an unorganized militia (the nonenrolled male population between eighteen and forty-five),”⁹¹ they twice repeat a claim taken from a 1940’s law review article that in 1933 “Congress made the National Guard part of the regular army during peace as well as wartime . . . and erased the word ‘militia’ from the War Department charts, changing the name of the supervisory agency to

⁸⁸Id at 157.

⁸⁹How similar this provision is that the proposal by Henry Knox which, the author’s note, “proposed to retain the militia-of-the-whole theory, but to divide it up into three corps according to age—an advanced corps aged 18-20, a main corps aged 21-45, and a reserve corps aged 46-59” with only the advanced corps receiving six weeks of training per year. Id at 71.

⁹⁰Without noting its continued existence in federal law, they do connect the “common militia” of the Founders with” the unorganized militia”:

In contrast to the National Guard, the unorganized militia—the shadow of the common militia so extolled by the framers of the Second Amendment—has not been funded by Congress since at least 1903.

Id at 142.

⁹¹Id at 134.

National Guard Bureau.”⁹² This claim, though not actually false (so far as I know), is certainly misleading in its suggestion that the class of militia defined by statute in 1903 as “unorganized militia” no longer exists as a matter of federal law.

The authors might respond that this is not the “republican” militia they and the founders had in mind, which must be trained and drilled. But the federal government retains the power to train and discipline the militia if it chooses.⁹³ What it cannot do—if we are to take the preface to the Second Amendment seriously—or at least it has not done, is abolish the militia altogether rather than to leave it unorganized. The authors often acknowledge that the original militia is not the select militia of the national guard, but instead is what they repeatedly call the “militia-of-the-whole.” This militia-of-the-whole still exists, though Congress has neglected to organize it well.

The authors go on at great length about the obsolescence of this body-of-the-whole militia. They devote chapters to its early ineffectiveness, for example, in stopping the British invasion of Washington in 1812, colorfully noting that the British soldiers consumed the dinner at the White House that had been prepared for President Madison and his wife. As for today’s militia, they write:

In the years since World War II, the role of a mass reserve in assuring national security has seriously diminished in consideration of the technical complexity of equipment and tasks required of a thoroughly professional modern army, and because nuclear deterrence has made a mass war drawing on all the personnel reserve of the country unlikely. The need for a whole nation in arms has—in all likelihood, permanently—disappeared.⁹⁴

“Indeed,” they confidently assert, “it would be difficult to conceive of any institution less necessary to the security of the fifty free states at the beginning of the new millennium than the vanished common militia.”⁹⁵

On September 11th 2001, however, the United States came under aerial attack by planes piloted by foreign nationals. Two planes struck the World Trade Center destroying it and, with it, thousands of innocent civilians inside. Another struck the Pentagon killing hundreds of member of the armed forces. You may have heard about this unprovoked attack on the United States. It made all the papers.

If so you also know that a fourth plane, United Flight 93, was heading for

⁹²Id at 33. See also id at 137 (“lawmakers ‘eliminated the word ‘militia’ from the War Department organization by changing the name of the supervisory agency to National Guard Bureau.”).

⁹³See U.S. Const. Art. I, §8 (granting Congress the power “to provide for organizing, arming, and disciplining the Militia. . . .”)

⁹⁴Id at 142. See also id at 34 (“The need for a whole nation in arms has—in all likelihood permanently—disappeared.”).

⁹⁵Id at 143.

the nation's capital. Its likely target was the White House. It was stopped from reaching its target, but not by the Army, Navy, or even the Air Force. Nor was it stopped by the armed constabulary of the District of Columbia. After all, these official personnel cannot be everywhere the nation is threatened. No, unlike 1812, this time the White House was saved from possible destruction by the heroics of members of the unorganized militia who, after learning of the attacks by other planes on their cell phones, gave their lives to protect the capital from a second successful attack in the same morning. Notwithstanding the opinion of Richard Uviller and William Merkel, we may just need them again one day and in circumstances where it would be better if they were armed. Fortunately, the right of the people to keep and bear arms remains enshrined in the Constitution by the Second Amendment.