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THE SECOND AMENDMENT: THE HIGHEST STAGE OF ORIGINALISM

JACK N. RAKOVE*

To someone who has observed the Second Amendment dispute from a distance—aware of the main lines of engagement, but not fully abreast of all the maneuvers—a sudden plunge into the struggle in the trenches can be a sobering experience, especially when one encounters the contingent who march under the banner of the self-proclaimed "standard model" which argues that the Amendment constitutionally protects a private, individual right to keep and bear arms.1 There is something about the joie de combat of the participants that unnerves the civilian observer. Assertions lacking qualifications are propounded with utmost fervor and conviction, as if a commander was hectoring his troops to smash the enemy line, bypassing any obstacle encountered en route; victory is repeatedly declared in self-congratulatory pronouncements even while the other side is pausing to reload. Searching for the evidentiary authority on which these assertions rest—that is, reading the footnotes—requires a bewildering chase through the relevant manuals and orderly books, the citations that student law review editors, the industrious sappers of the legal academy, insist must be provided, but which often turn out to be one secondary source supporting another with nary a document in sight. An occasional warrior comes into view, with a strange glint in his eye and a dramatic tale to tell.2 Turning the corner in a trench, one encounters odd combatants who seem to have

* Coe Professor of History and American Studies, and Professor of Political Science, Stanford University. I am grateful to Akhil Amar, Larry Kramer, and Robert Post for necessary qualifications and proper criticisms, and to Michael Bellesiles, a card-carrying member of the NRA, for general guidance.

1. Skeptical as I am of the view that this interpretation merits description as the standard model, I will henceforth refer to it as the individual right interpretation.

2. Thus one is somewhat surprised to find Akhil Amar, a well-known textualist, wondering whether, under a modern reading of the Second Amendment, "perhaps the people must be 'armed' with modems more than muskets, with access to the Internet more than to the shooting range," even though the use of these devices would seem to fall under the First Amendment's freedom of press, assembly, and petition. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 49 (1998). In the strange glint category, I would also be inclined to place Elaine Scarry, War and the Social Contract: Nuclear Policy, Distribution, and the Right to Bear Arms, 139 U. PA. L. REV. 1257 (1991).
enlisted on the wrong side; like politics sometimes, the Second Amendment makes strange bunkmates. And the dehumanization of the foe common in wartime carries over into scholarly expression, so that one combatant comes to be identified in rebuttal not by the name his loving parents gave him before sending him off to battle, but by the title of his essay: *Gun Crazy*.

In this charged atmosphere, odd misstatements of fact that one encounters appear only as distracting ricochets. Opening one standard statement of the individual right interpretation, one quickly learns that "[t]he American Revolution was sparked at Lexington and Concord, and in Virginia, by British attempts to disarm the individual and hence the militia." Most historians, however, have labored under the delusion that the Revolution arose from an unmanageable dispute over the right of Parliament to make laws "in all cases whatsoever" for the American colonies, and that the regulars who marched out the future Route 2 did not go door to door looking for weapons, but were instead intent on raiding a town where the Provincial Congress had concentrated whatever arms and munitions the colony was able to muster. But perhaps Stephen Halbrook only wants to prepare us for a more startling discovery: that "[b]efore the proposal of the Constitution, the newly independent colonies had existed in a state of nature with each other," which certainly would have been news to the members of the Continental Congress, the framers and ratifiers of the Articles of Confederation and Perpetual Union, and most Americans who thought that the Declaration of Independence was the work of the United States in Congress

3. See Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637 (1989). Those familiar with his other writings and teaching might indulge the suspicion that Levinson sees his essay less as an endorsement of the individual right interpretation on its merits, and more as a useful way to tweak the formal orthodoxies of contemporary law. In the realm of strange bedmates, one might also cite Leonard Levy, whose chapter on the Second Amendment in his recent synoptic book, *Origins of the Bill of Rights* (1999), endorses the individual right interpretation while dismissing the conclusions it supports as "anachronistic" as they relate to the militia and "feckless" in their invocation of the right of revolution. *Id.* at 149. Levy provides no footnotes, however, and his barebones bibliography of eleven books (only one published since 1990, and two since 1980) gives little guidance as to how he reached his conclusions, or why he simply ignores the opposing position represented in this Symposium.


6. *Id.* at 65.
assembled. The prolific Don Kates, Jr., reveals that James Monroe was actually a Federalist,7 though historians previously thought that he had opposed the Constitution; that Thomas Jefferson "played little part in this debate from the remote vantage point of his position as ambassador to France,"8 though the publication of his letter endorsing the addition of a bill of rights to the Constitution was a source of some concern, not to say anxiety, to his correspondent James Madison; and that New Hampshire, the ninth and decisive state to ratify the Constitution, was actually the first.9 Sometimes historical figures simply acquire new names or titles. Thus in one recent important essay, Albert Gallatin becomes a senator before he even was elected to Congress; Senator William Grayson of Virginia loses the second syllable of his last name even though his family never passed through Ellis Island; and Tench Coxe, the loyalist eventually turned Jeffersonian, becomes Trench, giving his pronouncements on firearms new authority.10 The individual right interpretation has also been a boon to the literary reputation of Richard Henry Lee, who is repeatedly restored to his wrongful place as the reputed author of the Letters from the Federal Farmer.11

While minor errors like these may have little bearing on the substantive arguments their authors go on to make, they do suggest that historical operations in the Second Amendment theater of combat are often mounted by campaigners not intimately familiar with the terrain. These are raiders who know what they are looking for, and having found it, they care little about collateral damage to the surrounding countryside that historians better know as context.12

7. See Don B. Kates, Jr., Handgun Prohibition and the Original Meaning of the Second Amendment, 82 MICH. L. REV. 204, 228 (1983).
8. Id. at 229.
9. See id. at 222.
12. To offer one trivial example: Individual right writers occasionally cite a letter by Fisher Ames, the Massachusetts Federalist congressman, as evidence that "Madison's colleagues clearly understood the proposal [his amendments of June 8, 1789] to be protective of individual rights." HALBROOK, supra note 5, at 76 (citation omitted). Halbrook quotes Ames in this way:
Like so many ventures in constitutional interpretation, Second Amendment studies are vulnerable to the dishonoring charge of "law office history"—that is, history made batman to the service of a favored cause—although in this case the existence of a state of ideological warfare may provide a better explanation of the expedients to which the protagonists resort.  

What better distinguishes the Second Amendment controversy from other disputes, however, is the degree to which the individual right interpretation of its meaning rests upon an explicit, robust commitment to the theory of originalism. Two statements culled from the preface to a leading work on the subject make the point clearly. "Yet if the Bill of Rights has any meaning at all, it must be based on the linguistic usage of those who wrote it," Stephen Halbrook notes. And again, in predicting some ultimate definitive review of existing precedent by the Supreme Court: "The highest court is bound not by judicial precedent but by the intent of the framers of the Constitution"—who embrace not only the authors of the Second Amendment but the Fourteenth as well.  

To be sure, full deployment of the individual right interpretation relies on another doctrine that some originalists are loath to endorse, for converting the Second Amendment into an effective shield against firearms regulations that would emanate primarily from state and local governments requires invoking the incorporation doctrine of the

"Mr. Madison has introduced his long expected amendments . . . . It contains a bill of rights . . . the right of the people to bear arms." Id. The letter, in fact, says nothing about whether or not the arms-bearing provision is to be understood as an individual right or a collective one. But what Halbrook omits is more revealing. The second ellipsis in the quotation is preceded by this comment:

This is the substance. There is too much of it. Oh! I had forgot, the right of the people to bear arms. Risum teneatis amici? [Hold your laughter, friends.] Upon the whole, it may do some good towards quieting men, who attend to sounds only, and may get the mover [Madison] some popularity, which he wishes.

Letter from Fisher Ames to Thomas Dwight (June 11, 1789), in 1 WORKS OF FISHER AMES—AS PUBLISHED BY SETH AMES 641, 642 (W.B. Allen ed., 1983). Allen errs in placing a question mark after "amici." The manuscript of this letter can be found in the Fisher Ames Papers at the Dedham Historical Society, Massachusetts; with the assistance of Charlene Bangs Bickford, Ken Bowling, and Chuck diGiacomantonio, I recently consulted a copy of this letter at the offices of the Documentary History of the First Federal Congress project at George Washington University. The real significance of this letter is that it confirms the deprecatory attitude that many, perhaps most, congressmen took toward Madison's project of securing amendments. I am grateful to my colleagues Brad Gregory and Philippe Buc for refining my crude sight translation from the Latin—but I hasten to add that was their only involvement in this Article.

13. Many of these claims are deftly skewered in GARRY WILLS, A NECESSARY EVIL: A HISTORY OF AMERICAN DISTRUST OF GOVERNMENT 112-22, 252-60 (1999).
14. HALBROOK, supra note 5, at x.
15. Id. at xi-xii.
Fourteenth Amendment.\textsuperscript{16} It would nevertheless be difficult to identify any other constitutional controversy in which originalist modes of analysis figure quite so prominently.

With apologies (not that any are called for) to Lenin, the Second Amendment thus represents the highest stage of originalism, because the advocates for its most expansive interpretation place their greatest reliance on arguments about its meaning to the framers and adopters of the Constitution and its earliest amendments. They do this, too, in order to counter the seemingly commonsense notion that would hold that this is the one clause of the Constitution for which conclusions drawn from consequentialist arguments should weigh most strongly. For at bottom, the case for the regulation of the sale, use, and possession of firearms rests on the simple conviction that the high number of casualties incurred annually by the deliberate and accidental use of firearms provides a sufficient, not to say compelling, justification for state action. It is doubtless important to establish as well that this regulation is made legitimate by a long history of prior legislation, judicial doctrines permitting such legislation, and a reading of the Constitution that says that the Second Amendment really was about supporting a militia that remained subject to the legislative regulation of Congress and the states, while the states were never divested of the fundamental responsibility for regulating "internal police" in the interest of public health and welfare.\textsuperscript{17} But it is reasonable to conclude that the most compelling arguments for regulation stem from the perception that this is one realm of human behavior where the concerns of the present have every right to supersede the obsolescent understandings of generations long past.

Yet originalism remains a legitimate mode of constitutional analysis, and even those who doubt its capacity and authority need to respect its claims. By the same token, however, avowed originalists can be held accountable for the suppositions on which they profess to act, the quality of the originalist analyses they offer, and the criticisms

\textsuperscript{16} In this Article, I do not address the distinct claims about the relation between the Fourteenth Amendment and the right to bear arms that might be made under the aegis either of the original meaning of the former, especially as it related to the plight of the African American freemen of the Reconstruction South, or the various theories of incorporation that lie at the heart of so much modern constitutional jurisprudence.

\textsuperscript{17} This is not to deny that there are serious consequentialist arguments to be made on the other side, typically emphasizing the deterrent value of firearms. But to reason whether the availability of firearms does more to promote violent crime and accidental mayhem, on the one hand, or to deter crime in the expectation that evildoers will always find ways to obtain weapons, on the other, is to reason on decidedly nonoriginalist grounds.
to which this theory of interpretation is vulnerable. It is far from a self-evident truth that originalism is the sole authoritative mode of constitutional interpretation, nor do many who dabble in originalist analyses always reflect on the logic of what they are doing. It is one thing to ransack the sources for a set of useful quotations, another to weigh their interpretative authority. Originalism is first and foremost a theory of law and constitutional interpretation, but its viability depends upon its approach to history and its use of historical evidence.

As a venture in originalism, the individual right interpretation depends upon two essential propositions, one concerned with the definition of militia, the other with its function. Where a plain-text reading of the Second Amendment in the light of the militia clause of Article I, Section 8 might suggest that the institutional character of the militia is subject to legislative definition by Congress, the individual right interpretation insists that the militia must be identified with the whole body of the people. In this view, the concept of the militia had a fixed and consensually accepted meaning in ordinary usage, so that it was essentially coterminous with the free adult male population physically capable of bearing arms; and if the language of the Constitution is not to be rendered completely plastic, modern interpretation has to preserve that meaning. Such a militia cannot be equated with our modern conception of the National Guard, which is only a latter-day incarnation of the so-called "select militia" that eighteenth-century republicans regarded as a surrogate of the dreaded standing army—an institution too closely tied to government to be counted upon as a defender of the people's liberties. This definition in turn illuminates the key functional argument on which the individual right interpretation also depends. This argument insists that the ultimate purpose of a general militia is to serve as a deterrent against the danger of tyranny, and that only a well-armed people, possessing privately held weapons, can serve as a countervailing latent force, discouraging would-be oppressors from executing their nefarious schemes. This interpretation cannot afford to limit the functions of the militia to those described in Article I,

Section 8, which clearly treat the militia as a public institution whose duties extend to the suppression of armed resistance against government; it must instead insist upon its pre-, extra-, and even anticonstitutional functions of resistance against tyranny to the point of revolution.

These complementary arguments are originalist for two reasons. First, the definition of the militia, on the crucial issue of membership, cannot be left to legislative determination, as the Militia Clause and the Necessary and Proper Clause might otherwise suggest. It instead depends on the common usage of the time, and this steers us past the four corners of the constitutional text into the political discourse of the eighteenth century. Second, the rationale for maintaining a broad definition of militia further depends upon the political understandings of that era, in particular the belief and expectation that an armed citizenry is a necessary deterrent against tyranny. A plain-text reading of the Constitution, which treats the militia as an institution for suppressing armed insurrection, and which nowhere endorses a right to revolution against republican government, would not by itself be conducive to that interpretation.

In assessing the merits of these originalist claims, it will also be useful to keep in mind three difficulties that color any attempt to provide an historically grounded account of the original meaning of the Second Amendment. First, notwithstanding all the evidence that individual right proponents profess to have adduced in support of their views, there are, in fact, only a handful of sources from the period of constitutional formation that bear directly on the questions that lie at the heart of our current controversies about the regulation of privately owned firearms. If Americans had indeed been concerned with the impact of the Constitution on this right, and addressed the subject directly, the proponents of the individual right theory would not have to recycle the same handful of references to the dissenters in the Pennsylvania Ratification Convention and the protests of several Massachusetts towns against their state’s proposed constitution, or to rip promising snippets of quotations from the texts and speeches in which they are embedded. Because the private

19. The Militia Clause grants Congress the power “[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.” U.S. CONST. art. I, § 8, cl. 15. The Necessary and Proper Clause empowers Congress “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers [mentioned in Article I, Section 8], and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” U.S. CONST. art. I, § 8, cl. 18.
ownership and use of weapons were not at issue in the late 1780s, we are compelled to draw inferences from observations that turn out, in most cases, to be concerned with the militia and its public functions, not with the individual ownership and use of firearms.20

Second, because eighteenth-century firearms were not nearly as threatening or lethal as those available today, we similarly cannot expect the discussants of the late 1780s to have cast their comments about keeping and bearing arms in the same terms that we would. Theirs was a rhetoric of public liberty, not public health; of the danger from standing armies, not that of casual strangers, embittered family members, violent youth gangs, freeway snipers, and careless weapons keepers. Guns were so difficult to fire in the eighteenth century that the very idea of being accidentally killed by one was itself hard to conceive. Indeed, anyone wanting either to murder his family or protect his home in the eighteenth century would have been better advised (and much more likely) to grab an axe or knife than to load, prime, and discharge a firearm. And even had guns been more effective as personal weapons, it is nearly inconceivable that eighteenth-century notions of the police power of state and local governments would have precluded their regulation in the name of some vague threat of tyranny. The American colonies and states were not a libertarian utopia; their traditions of governance permitted legislatures and institutions of local government to act vigorously in the pursuit of public health and safety.

Third, our reading of the Second Amendment is conditioned by the results of an era (or several eras) of modern rights-oriented jurisprudence which naturally assumes that bills of rights exist to create legally enforceable immunities against the coercive power of the state. Whether this efflorescence of rights talk and the litigation that accompanies it have been healthy developments for the American polity is a subject of ongoing debate;21 but the consequences for our conception of constitutional rights is clear. In the eighteenth century, however, bills of rights were often regarded as statements of principle, meant to inform and shape the political behavior of both officials and citizens; but whether they established

20. Anyone consulting the index to the respective volumes of The Documentary History of the Ratification of the Constitution will discover that there are only scattered entries under the heading “Arms, Right to Bear,” in contrast to the far more numerous entries under headings like “Army, Standing” and “Militia.”

legally enforceable claims was far from certain. Many clauses in the first eight amendments to the Constitution certainly aspired to have and eventually acquired that character, but the Second Amendment is arguably the one provision which partook most of the principle-enunciating attributes of the early state declarations of rights. Our quest to discover a perfect syntax and vocabulary for its twenty-seven words thus risks ascribing to a general statement of principle a measure of legal exactitude it was never conceived to carry.

Finally, it might be worth stating, in as precise a form as possible, the rival propositions upon which an evaluation of the originalist approach to the Second Amendment should, in my view, depend. In its most succinct form, the individual right interpretation equates the people whose right to arms the Amendment protects with the entire body of the citizenry, who are members of a general militia that exists, to some significant extent, independently of legislative provision. The purpose and function of that right rest, in part, on the individual's natural right of self-protection, but they depend more fundamentally on the value of preserving an armed citizenry as a deterrent to oppression, in the (latent) exercise of a natural right of resistance that would be abrogated if citizens lacked access to the arms required to challenge tyranny emanating from either national or state governments. These concerns were so deeply embedded in eighteenth-century American political culture as to trump the two countervailing propositions upon which the collective right interpretation in turn rests. First, the extant records of deliberation (as well as the plain text) of the Constitution strongly suggest that the only issue its adopters were consciously considering was the militia,

22. For further discussion, see AMAR, supra note 2, at 131-32; DONALD S. LUTZ, POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS 59-71 (1980); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 271-73 (1969). See also JACK N. RAKOVE, DECLARING RIGHTS: A BRIEF HISTORY WITH DOCUMENTS (1998), in which I attempt to trace the ambiguities in American thinking about the exact juridical authority and reach of declarations of rights.

23. It would be interesting to test this proposition against the historical record of how revolutions actually succeed, in the process differentiating revolutions in which the authority of an entrenched regime actually collapsed from civil wars in which two well-armed camps contended for victory against each other. Arguably the Russian Revolution of the spring of 1917 (but not the ensuing conflict following the October coup of the Bolsheviks) would illustrate the former case, the Chinese revolution of the 1940s the latter. Iran in 1979, though not an example Americans would feel partial to endorsing, makes an interesting case. The success of that revolution clearly did not depend on the mass of the population having countervailing armed forces to apply against and overturn the authority of the shah; rather, it succeeded because the mass of the population had come to reject his right to rule, and the bloody efforts of his armed forces to preserve the regime led only to the collapse of their own willingness and capacity to support the regime.
which would henceforth exist as an institution defined by law. No coherent intention or understanding of the existence and scope of a private, individual right to keep and bear arms could accordingly be derived, because that question did not present itself for public debate in the form in which we now know it. Second, and arguably more important, the attachment that some currents of eighteenth-century political thinking did place on the deterrent value of an armed citizenry should be counterposed to the orthodox understanding of the extent of the police powers of the state (or in the American case, the states), which authorized government to legislate broadly in pursuit of the public health and welfare. This belief was no less a matter of constitutional orthodoxy in the late eighteenth century than the general principle that standing armies posed a danger to liberty that might best be avoided by maintaining a well-regulated citizen militia, and it therefore casts the originalist dimensions of the Second Amendment debate in the most critical light. To ask whether contemporaries would have allowed the individual right interpretation of the Second Amendment to trump this orthodox conception of the regulatory police power of the states identifies, I believe, the true conundrum or desideratum. In effect, the individual right interpretation elevates the speculative danger of tyranny, rooted in potent historic memories of the turmoil of seventeenth-century England, above the observed costs and casualties that the modern cry for firearms regulation seeks to address. Conversely, the collective right interpretation inverts these concerns. It presumes that the manifest dangers of the present outweigh the memories of the past, and indeed that the living generation has a right to seek security against the wanton abuse of firearms, consistent with the principles that have long enabled states and localities to legislate on behalf of public health and welfare.

For the record, then, I believe that the current controversy over the meaning of the Second Amendment, if treated primarily as a problem of originalism, should be cast in these terms: Would the

24. In stating this point, I refer especially to William J. Novak, The People's Welfare: Law and Regulation in Nineteenth-Century America (1996), a work which is admittedly concerned with the post-Revolutionary era. Yet Novak's account is also fully consistent with the description of eighteenth-century political economy provided in such classic works as Oscar Handlin & Mary Flug Handlin, Commonwealth: A Study of the Role of Government in the American Economy: Massachusetts, 1774–1861 (1947). There is no reason to think that the Revolutionary era—whatever other changes it introduced in constitutional theory—engendered a shift in underlying understandings of the inherent police power of the states.
presumed preexisting equation of the militia with an armed mass of the citizenry, justified by the need to preserve a natural right of revolution, outweigh (1) the evidence that the principal concern of the late 1780s lay with allocating legislative power over the militia between national and state governments, and (2) the traditional understanding of the police power that the Tenth Amendment (truism that it may be) would have reserved to the states.

ORIGINALISM: SOME METHODOLOGICAL REFLECTIONS

All exercises in constitutional interpretation begin with a text, but originalism cannot be reduced to mere textualism. A merely textualist approach can stipulate that the word *people* has the same meaning in the Second Amendment as it has in the Fourth Amendment or the Petition and Assembly Clause of the First Amendment or the unenumerated rights and reserved powers of the Ninth and Tenth Amendments.25 This assumption, though not unreasonable, is itself an arbitrary one, for reasons that James Madison well explained in The Federalist No. 37 when he observed that "no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas."26 But, in any case, if the meaning of a disputed term could be determined simply by analyzing its usage within the four corners of the constitutional text, originalism in any substantive sense would be superfluous. Originalism begins where textualism alone fails. It assumes that the meaning of a provision cannot be ascertained by staring at it long enough or juxtaposing it with other relevant clauses, but must instead be derived from usage or elaborated in terms of some contemporary context of thought and debate, thus requiring the intrepid interpreter to initiate an inquiry into sources extrinsic to the text.

If we were dealing with the text of the original, unamended Constitution, we could bring four main sets of sources to bear on our interpretative quest. Two of these consist of the records of debate from the constitutional deliberations of the late 1780s: the journal and notes of debates from the Constitutional Convention of 1787, which

25. This is in fact a mantra encountered in most writings favoring the individual right interpretation. See Halbrook, supra note 5, at 83; Joyce Lee Malcolm, To Keep and Bear Arms: The Origins of an Anglo-American Right 162 (1994); Levinson, supra note 3, at 645.

offer the best evidence of the "original intentions" of the authorial framers; and the records of the ratification campaign that ensued, which illuminate the "original understanding(s)" of the public and the delegates in the state conventions. The two other sets of sources, necessarily defined more broadly, might be labeled contextual. One consists of the variety of inherited intellectual traditions, discourses, and languages that collectively constituted the underlying political grammar and conceptual vocabulary of debate. The second, rather more elusive category comprises what might be called the lessons of recent experience: issues and concerns, perceptions and preferences shaped in the crucible of revolution.\footnote{For further discussion, see RAKOVE, supra note 11, at 11-22, 27.}

This classification of the different categories of evidence relevant to originalist forays leads to two further observations. First, all originalist inquiries are necessarily historical in nature, and therefore should be conducted with some attention to the problems that historians encounter in weighing the uses and limits of different forms of evidence. Better to be conscious about the nature of the evidence, and its particular properties, than to lump all of its morsels into one hotch-potch of tasty quotations. Second, and rather more problematic, the task of distinguishing different forms of evidence exposes critical differences in the ways in which historians and legal analysts might evaluate the probative value of the sources. Historians attempting to divine the original meaning of the Constitution would prefer the intentions of the framers to the understandings of the ratifiers, because while the latter were merely giving or withholding their assent to the completed document, the former were making the actual decisions that gave it form and content. But the normative principles on which the robust form of originalism rests place greater weight on ratifier understanding and treat the framers' expressed intentions as probative only insofar as they illuminate what the ratifiers were also thinking.\footnote{For further discussion of this distinction between framer-intent and ratifier-understanding, see id. at 7-11; Charles A. Lofgren, The Original Understanding of Original Intent?, in INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT 117 (Jack N. Rakove ed., 1990).}  

Several additional qualifications deserve consideration when we turn our attention from the main text of the Constitution to the original meaning of its amendments. First, the conditions under which the First Congress assembled in the early spring of 1789 differed significantly from those governing the gathering of the
Constitutional Convention two years earlier. When the framers of the Constitution straggled into Philadelphia in May 1787, public discussion of their potential agenda of action remained diffuse and unfocused—which in turn explains why James Madison’s efforts to shape that agenda loom so large in understanding why the Convention took the course it did. Madison admittedly played something of the same role in forcing the First Congress to pursue “the nauseous project” of amendments, but the proposals he placed before the House of Representatives in his revealing speech of June 8, 1789 had been culled from the extensive corpus of amendments recommended by the state ratification conventions in response to the wide-ranging public discussion of the Constitution that began with its publication on September 19, 1787.²⁹

Second (and conversely), the amendments that Congress finally proposed to the states in August 1789 received nothing like the sustained public discussion that greeted the original Constitution. Scholars who have gone hunting for evidence of the reception of the Bill of Rights typically come back disappointed. There are scattered traces of popular responses to the substance of the amendments—including a few items relating to the Second Amendment³⁰—but in comparison to the mass of materials from the prior discussions, the pickings are slim.³¹

Third, it is important to note that the drafting of the amendments was controlled by Federalists who remained skeptical, like Madison himself, of the value or necessity of a national bill of rights. The concessions extracted from Federalists in closely contested states to join in recommending amendments to the consideration of Congress amounted to something less than a firm agreement. By the time

²⁹. Madison’s preparations for 1787 and 1789 are described in RAKOVE, supra note 11, at 42-56, 330-36. His seemingly disparaging comment about the project of amendments was made in a Letter to Richard Peters (Aug. 19, 1789), in 12 THE PAPERS OF JAMES MADISON 346-47 (Charles F. Hobson et al. eds., 1979). For his speech introducing the amendments, see James Madison, Speech Before the House of Representatives (June 8, 1789), in 12 THE PAPERS OF JAMES MADISON, supra, at 196-209. Madison culled the proposals from a pamphlet published in the fall of 1788, titled The Ratifications of the New Foederal Constitution, Together with the Amendments, Proposed by the Several States (1788). See 11 THE PAPERS OF JAMES MADISON, supra, at 300 n.2.

³⁰. Particularly a single sentence from an early essay by Tench Coxe, discussed further infra note 46. Halbrook tells us that this essay was “widely reprinted,” but his corroboratory note lists only two such printings. It is also a non sequitur to conclude that the absence of any evidence that any writer “disputed or contradicted Coxe’s analysis” means that it would have been generally accepted; silence can mean indifference as easily as approbation. HALBROOK, supra note 5, at 77, 224 n.152.

Congress assembled in the early spring of 1789, Federalists had emerged decisive victors in the first national elections, and the difficulty Madison encountered in convincing his colleagues to take up the issue suggests that few of them thought that prompt action on amendments was required to fulfill the ostensible bargain struck the year before. Madison, of course, felt otherwise. He had publicly committed himself to support amendments in the course of his difficult campaign against James Monroe for election to the House, and—Madison being Madison—he was the most likely member to undertake the initiative of actually drafting amendments. Equally important, Madison understood that prompt consideration of suitable amendments would be a fitting capstone to the entire ratification process, insofar as it would conciliate those moderate Antifederalists who sincerely if misguidedly believed that a constitution lacking a bill of rights was defective. But his motives in proposing his amendments, as his speech of June 8, 1789 makes clear, were far more political than jurisprudential, and the lack of enthusiasm that Congress showed for his "nauseous project" suggests that many of his colleagues remained skeptical about the value of the exercise. Conversely, to those Antifederalists who had managed to get elected to Congress, the cause of amendments had lost much of its luster. While still supportive of the general idea of rights-protecting amendments, they now knew that all the other substantive changes they desired lay well beyond the realm of political acceptance.

Understanding this aspect of the politics behind the Bill of Rights is critical to an originalist inquiry because it indicates that the final decisions about the scope and content of Madison's proposals were left not to those who were most ardent for the cause of amendments but to those who doubted that such amendments were even useful, much less necessary. Or to put the point more directly: Federalists did not cave in to their opponents' demands, or modify the Constitution to meet their substantive criticisms; nor, conversely, were Antifederalists in any position to impose their understandings on the party that emerged dominant from the first national elections. The claim that the best or most representative reading of the language of the amendments would conform to the understanding and concerns of the Constitution's original opponents is therefore highly problematic. Comments from across the entire political

32. For general discussion, see RAKOVE, supra note 11, at 330-36; Paul Finkelman, James Madison and the Bill of Rights: A Reluctant Paternity, 1990 SUP. CT. REV. 301.
spectrum remain relevant to capturing the range of meanings that Americans ascribed to the protections incorporated in the first ten amendments, but to claim that an ordinal Antifederalist understanding would be dispositive is simply wrong.33

Finally, the decision to frame the amendments as supplemental articles, rather than follow Madison's proposal to insert them directly into the original constitutional text, arguably had the effect of preserving a modicum of the juridical ambiguity that had previously made it difficult to ascertain the exact constitutional status of declarations of rights. Did such documents establish legally enforceable claims, or were they better construed as statements of principle, meant to guide officials in the exercise of their duties and to enable the people at large to monitor and judge the conduct of their rulers, by laying down standards whose violation would expose a deeper threat to liberty? A bill of rights, in this view, was more a political than a legal text. It was precisely because declarations of rights, of the kind that accompanied many of the early state constitutions, could so be read that Madison originally proposed to “interweave” his amendments with the text of the Constitution. Adopted in that way, they would act as explicit restrictions affecting particular institutions of government; their legal authority would become more precise and explicit, thereby enhancing the security afforded to rights. Conversely, framing the amendments as supplemental articles, Madison warned, would make it “difficult to ascertain to what parts of the instrument [the Constitution] the amendments particularly refer.”34 But that, of course, was exactly what Congress ultimately preferred to do. In taking that course, however, the majority arguably still shared the dominant conception of 1776 which viewed a bill of rights as a statement of principles affirming the existence of particular rights but not clearly delegating responsibility for their enforcement or protection to any institution.

One final consideration arguably differentiates originalist interpretations of the Bill of Rights from those relating to the main text of the Constitution. The latter is essentially a closely integrated bundle of provisions organizing institutions of government, defining their respective powers, and establishing rules for the appointment

33. One can only wonder whom David Williams means to identify when he speaks of “the Anti-Federalist framers of the Second Amendment.” David C. Williams, Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment, 101 YALE L.J. 551, 584 (1991).

and tenure of their members. Though concepts derived from English constitutional history exerted important lingering influences over these matters, it was the experience of American republican constitutionalism since 1776, coupled with the inherently federal structure of the Union and the divided sovereignty to which it led, that defined the parameters of deliberation and decision making at Philadelphia. On matters of practical constitutional design, Hobbes and Locke, potent political thinkers that they were, had little to teach Americans, and American constitutionalism was formed, in any case, in reaction against many facets of the eighteenth-century British constitution. But in the realm of rights, where the legacy of the common-law mind operated so powerfully, a stronger case can be made for some continuities in understanding between prior Anglo-American thinking and the formulations of the 1770s and 1780s. Particular rights had an independent history of their own, and Leonard Levy and other scholars have indeed demonstrated the possibility of tracing changing notions of the substance and content of particular rights in a way that pays close attention to existing (and evolving) legal doctrine. The right to bear arms is clearly susceptible to the same kind of examination. But we can never forget that it is a history—that is, a process of change over time—that we are tracing, and that the ways in which Americans conceived of and formulated rights were a product not just of what they had inherited but of what they had experienced. American “rights talk,” as Richard Primus has recently argued, is a contingent “social practice” that always reflects immediate political commitments and struggles.

All of these strictures about the practice of originalism may seem excessively fussy—to demand more precision and nuance than the subject really requires. Perhaps the original meaning of the Constitution, like pornography, is something we can just recognize as a matter of common sense. Of course James Madison and his colleagues never imagined that the Constitution could mean X [insert your least favorite interpretation of a particular provision or some other controversial doctrine]. But if originalism is to be taken seriously—and not simply invoked as a rhetorical club in the cause of legal or political argument—the analytical problems it poses require

35. Here I obviously rely on WOOD, supra note 22.
reflection; and the dispute over the meaning of the Second Amendment cannot be immune to that scrutiny.

TEXT

All constitutional inquiry begins with the authoritative text, which may be visually imagined as a scriptural statement surrounded by columns of commentaries that consist of evidence to be derived from the deliberations that produced the actual language, popular discussions during the ratification campaign, intellectual traditions, and what I have called lessons of experience. As everyone knows, the essential textualist controversy over the Second Amendment revolves around the relation, if any, between the formula ("A well regulated Militia being necessary to the security of a free State") and the operative statement that "the right of the people to keep and bear arms, shall not be infringed." Staring at the sentence or reading it aloud will not decide whether the preamble is superfluous or deeply informative of the end the right is meant to attain. Instead, a textual analysis can take at least these forms: correlating the meaning of "people" with other uses in the Constitution; doing the same for "Militia"; and asking what light the evolution of the specific textual formula finally adopted might shed on the intentions of its framers.37 Defenders of the individual right interpretation emphasize (as already noted) the harmony between the "people" of the Second Amendment and the putatively identical entity of the First, Fourth, Ninth, and Tenth Amendments.38 As we shall see, however, they are

37. This third mode of analysis arguably blurs the difference between mere textualism and originalism, for it requires a turn to legislative history (or its equivalent) in order to ascertain how the intentions of the document's framers were reflected in their final editorial decisions about the text. Given the absence of recorded congressional debate about the key changes in the text of the Second Amendment, however, it seems useful to treat these editorial revisions as a mode of primarily textual analysis, the more so when we have to infer intention from changes between drafts.

38. One does not have to read very far in the Constitution to learn that the House of Representatives will be "chosen... by the People of the several States," but that this people actually consists of a rather smaller set of "Electors," U.S. CONST. art. I, § 2, cl. 2, and that the definition of this subset of the whole people will be left to the state legislatures. Or again, Sanford Levinson suggests (in support of the usual linkage among all the uses of "people" in the Bill of Rights) that "it would approach the frivolous to read the assembly and petition clause as referring only to the right of state legislatures to meet and pass a remonstrance directed to Congress or the President against some governmental act." So it would. Levinson, supra note 3, at 645. But it is not frivolous to suggest that the single word people has different valences in different provisions of the Bill of Rights. The concept of a collective people embracing the entire corpus of private individuals seems strongest or most explicit in the Fourth Amendment's opening reference to "The right of the people to be secure in their persons." U.S. CONST. amend. IV. But the Petition and Assembly Clause of the First Amendment can be read as a
rather more reluctant to link the "militia" of the preamble to the institution provided for in Article I of the Constitution; here they prefer a preexisting definition not dependent on the specific provision made for its future organization.

What can we infer about the meaning of the Second Amendment, as finally approved, by tracing its textual evolution? The changes made as the Amendment worked its way through Congress support two main inferences. One concerns the omission of a significant qualifier evoking a particular definition of the militia; the other reveals a potentially important alteration in syntax.

As first introduced by Madison on June 8, the clause 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."39 Here Madison statement of a right held primarily not by individual rights-bearers, but rather by a community or a minority that has coalesced for purposes of political action. Interestingly, the legislative history of the petition half of the clause seems to imply a movement from an individual right to a collective one. The corresponding articles recommended by four of the state ratification conventions distinguish a collective right of the people to assemble for political purposes, on the one hand, and a personal right to petition for the redress of grievances. In the words of the New York resolution, "That the People have a right peaceably to assemble together to consult for their common good, or to instruct their Representatives; and that every person [freeman in the other versions] has a right to Petition or apply to the Legislature for redress of Grievances."
departed from the corresponding recommendation of the Virginia Ratification Convention (item seventeen in its proposed list of enumerated rights), and the formulation to which he was likely to be most sensitive. The Virginia resolution began: "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 . . . ." Both Madison's and the Virginia convention's versions arguably recognized two rights, not one: a right to bear arms, not explicitly tied to membership in the militia; and a right to enjoy the superior form of defense afforded by a well-regulated militia, which would obviate the need for the standing army that the original Virginia resolution had then denounced, though with a warning rather than a flat prohibition. Madison had omitted the clause defining the militia as "the body of the people," but he preserved the duality of rights. Moreover, his respective use of the semicolon and colon in this article suggested that the concept of a well-regulated militia served to justify the exclusion of the religiously scrupulous from military service, not the importance of the people keeping and bearing arms.

The committee of the House to which Madison's amendments were referred made two changes in his draft. First, it transposed the

supra note 25, at 162-63. Madison's version did neither. Malcolm also notes that "not one of the ninety-seven distinct amendments proposed by state ratifying conventions asked for a return of any control that had been allocated to the federal government over the militia." Id. at 163. One cannot be sure how narrowly Malcolm wants to define "return," but here is the text of the eleventh amendment proposed by the Virginia convention:

That each State respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whencesoever Congress shall omit or neglect to provide for the same. That the militia shall not be subject to martial law, except when in actual service in time of war, invasion or rebellion, and when not in the actual service of the United States, shall be subject only to such fines, penalties and punishments, as shall be directed or inflicted by the laws of its own State.


40. COMPLETE BILL OF RIGHTS, supra note 38, at 182.
41. "That standing armies in time of peace are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the Community will admit." Id. at 182-83. This wording, of course, illustrates the idea that a bill of rights could consist not of legally enforceable claims but rather of general principles for the guidance of officials and citizens.
42. The clause granting exemptions from militia service to religious objectors was derived from the nineteenth amendment recommended by the Virginia convention.

Whether Madison was thinking of two rights (arms-bearing distinguished from the security provided by the militia) is, however, far from certain. The use of "being" can still be read to imply that the militia clause modifies the arms-bearing one (semicolon be damned, so to speak); while if the militia clause serves as a preamble to the "religiously scrupulous" one, the use of the conjunction "but" would appear superfluous.

43. Malcolm errs in noting that Madison's proposed amendments were referred to a committee of three members (Madison, Roger Sherman, and John Vining). See MALCOLM,
syntax so that the Amendment took its eventual form, placing the reference to the militia first and replacing the semicolon separating the two members of the clause with a comma. Second, it offered a more specific definition of the militia. The clause now read: “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 bear arms.” This new definition of the militia was in turn eliminated in the Senate, where the Amendment received its final form. On September 4, the Senate first entertained, but rejected, a motion to add the elements of the Virginia recommendation that Madison had omitted. Five days later, it rejected a motion to insert “for the common defence” after “arms,” and then proceeded to replace “the best Security” with “necessary to the Security.” In its now final form, the Amendment went to the House, which accepted it without apparent objection.

None of this legislative history of the drafting of the Second Amendment conclusively resolves the vexed question that lies at the heart of the entire controversy: whether “the people” is best interpreted as the entire citizenry, as the individual right interpretation insists; or simply refers instead to whatever form a militia composed of soldiers who retain a significant measure of their civilian identity might take, as the collective right interpretation and prevailing law hold. Defenders of the individual right interpretation like to point to the outline for Madison’s speech of June 8, 1789, which contains a note seemingly stating that his proposed amendments “relate 1st. to private rights,” as evidence that Madison so regarded the right to bear arms. But that terse inscription stands alone, and is not explicitly linked to the right to bear arms; Madison’s sole reference to arms alludes to the parliamentary Bill of Rights of 1689, and there is no corresponding passage in the recorded version of his speech that develops this point. Nor does Madison’s proposed amendments “relate 1st. to private rights,” as evidence that Madison so regarded the right to bear arms.46 But that terse inscription stands alone, and is not explicitly linked to the right to bear arms; Madison’s sole reference to arms alludes to the parliamentary Bill of Rights of 1689, and there is no corresponding passage in the recorded version of his speech that develops this point.47 Nor does Madison’s proposed
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placement of this right in Article I, Section 9 conclusively demonstrate its fundamentally private nature, as individual right theorists like to contend, because the original version of the Petition and Assembly Clause would have immediately preceded it, and that clause, as previously noted, is also susceptible to a collective right interpretation. The controlling theme of Article I, Section 9 is neither the definition of individual rights nor restrictions on the powers of the states (the subject of Section 10), but limitations on the powers of Congress.48

The most striking defect in the textualist component of the individual right interpretation lies elsewhere, however—in the disparity in the ways in which the key words “people” and “militia”

1689 by a new heading: “Bills of Rights—useful—not essential.” Perhaps not surprisingly, Halbrook omits this intervening statement when he quotes Madison’s outline, without inserting the required ellipses. See H Albrook, supra note 5, at 76.

48. Nor, it might be added, does the individual right interpretation derive as much support as it claims from a recurring reference to the explanatory essay published by Tench Coxe ten days after Madison’s speech introducing the amendments. In this essay, Coxe glossed Madison’s proposal with the observation that “the people are confirmed by the next article in their right to keep and bear their private arms.” A Pennsylvanian (Tench Coxe), Remarks on the First Part of the Amendments to the Federal Constitution, PHILADELPHIA FED. GAZETTE, June 18, 1789, at 2 (emphasis added). At that point, however, Coxe could only have been commenting on the language and structure of Madison’s original proposal, which, as noted earlier, did imply that the right of the people to bear arms was distinct from their right to enjoy a well-regulated militia; the changes that produced the final text of the Amendment, linking the preamble to the arms-bearing clause more directly, were more than two months in the future. To say, as Glenn Reynolds and others writers repeatedly do, that “James Madison approved of Coxe’s construction of the Second Amendment,” is therefore incorrect on at least two grounds. Glenn Harlan Reynolds, A Critical Guide to the Second Amendment, 62 TENN. L. REV. 461, 468 n.29 (1995). First, the letter from which this seal of approval is extracted was written on June 24, again well in advance of the changes subsequently made by Congress. Second, Madison did not discuss the substance or merits of Coxe’s interpretation of particular rights. Here is his entire comment:

It is much to be wished that the discontented part of our fellow Citizens could be reconciled to the Government they have opposed, and by means as little as possible unacceptable to those who approve the Constitution in its present form. The amendments proposed in the H. of Reps. had this twofold object in view; besides the third one of avoiding all controvertible points which might endanger the assent of 2/3 of each branch of Congs. and 3/4 of the State Legislatures. How far the experiment may succeed in any of these respects is wholly uncertain. It will however be greatly favored by explanatory strictures of a healing tendency, and is therefore already indebted to the co-operation of your pen.

Letter from James Madison to Tench Coxe (June 24, 1789), in 12 THE PAPERS OF JAMES MADISON, supra note 29, at 257.

In fact, during the ratification campaign proper, Coxe had written other essays, which went to some length to emphasize the reserved legislative powers of the states, including the police powers associated with public health and welfare, and one would have to indulge some rather bold leaps of the historical imagination to infer that he had suddenly decided that recognition of an individual right to bear arms trumped the authority of the states in this respect. See especially his second essay written under the pen name “A Freeman,” PA. GAZETTE, Jan. 30, 1788, in 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, supra note 26, at 508.
are defined. However one gauges the relative authority of the two sections of the Second Amendment, a reading which assumes the primacy of text would insist that every word be given due weight; indeed, textualism, as practiced by someone like Akhil Amar, seems to presuppose that each word has been exquisitely chosen to fit a completely consistent constitutional vision. But in this case, textualist practice proves curiously inconsistent. “People” is routinely defined intratextually, by reference to its use in other amendments; but “militia” leaps beyond the proverbial four corners of the document, and is parsed in terms of a historically contingent definition of what the militia has been and must presumably evermore be.

Amar himself provides a case in point. Citing Kates, Amar first tells us that “when used without any qualifying adjective”—such as the notorious “select”—“the militia’ referred to all citizens capable of bearing arms,” making the “militia” of the dependent clause of the Amendment identical with the “people” of the main clause. The House would have made that equation explicit when it added the qualifying phrase “composed of the body of the people” to its draft; when the Senate “stylistically shortened” the clause by deleting that phrase, it presumably only restored that assumed definition.

49. AMAR, supra note 2, at 51.

50. Id. at 51-52. The argument for “stylistic shortening” seems to have two parts: one holding that the formula defining the militia as the people was unnecessary because redundant of common usage; the other suggesting that the insertion of this phrase would have rendered the Amendment a more awkward text, presumably by repetition of the phrase, “the people.” Amar has thus suggested that “[a] modern translation of the amendment might thus be: ‘An armed and militarily trained citizenry being conducive to freedom, the right of the electorate to organize itself militarily shall not be infringed.’” Akhil Reed Amar, Second Thoughts: What the Right to Bear Arms Really Means, NEW REPUBLIC, July 12, 1999, at 24, 24-25. How the electorate—presumably excluding the citizen soldiers of the National Guard—would in fact organize itself militarily is not explained, but the possibilities are endless. (Could drivers of sport utility vehicles, for example, spontaneously mobilize as an armored corps? Would Greens form up as mountain troops?) While we are playing the counter-textual game, we might also suggest that a Senate anxious to preserve the broad reading of the militia-as-people without risking redundancy could have written the Amendment this way: “A well regulated militia, composed of the body of the people, being necessary to the security of a free state, their right to keep and bear arms shall not be infringed.”

Malcolm similarly argues away the apparent significance of the changes in the text by explaining: “Doubtless congressmen felt no qualms about streamlining the language and omitting explanatory phrases because their constituents shared an understanding of the institutions and opinions behind it. But, in the long term, these understandings have vanished and brevity and elegance have been achieved at the cost of clarity.” MALCOLM, supra note 25, at 161; see also David C. Williams, The Militia Movement and Second Amendment Revolution: Conjuring with the People, 81 CORNELL L. REV. 879, 907 (1996) (agreeing that “that omission seems stylistic, not substantive”). Somehow, without really seeking to alter the meaning of the language, the framers of the Amendment kept tinkering with it, but the changes they imposed were immaterial because of a preexisting understanding of “the people”; yet somehow, too, a more “elegant” text actually disguised the meaning they intended to impart. But, of course,
how do we know that this senatorial editing was only stylistic and not substantive? Any effort to define “militia” intratextually must begin with Article I, Section 8, Clause 16, which treats the militia as an entity that Congress has the legislative responsibility for “organizing, arming, and disciplining.” The effect of the Senate’s editing was to leave the extent of the militia open to congressional discretion. It might well remain plausible to assume that Americans hoped and even expected that the militia would continue to resemble the body of the people, but any plain-text reading would suggest that Congress retained all the authority it needed to determine whether a select militia would or would not prove more desirable than a massed array of the whole male population. Rather than accept this strictly or merely textual reading of the relevant language, Amar has to reach beyond the text to suggest that “Anti-Federalist and republican ideology” offers the best clues to the fixed meaning of militia. The meaning of militia in the original Constitution now depends on its meaning in the Second Amendment, even though the final version of that Amendment eliminated the qualifying phrase that exponents of “Anti-Federalist and republican ideology” would have preferred. Unfortunately, there were only two Antifederalists in the Senate, both from Virginia, and it is simply counter-intuitive to suppose that they would have favored eliminating the qualifying phrase that their own state’s ratification convention had originally proposed.51

Federalists who were willing to assuage Antifederalist concerns only if doing so ran no risk of altering the substance of the powers granted to the national government would have had valid reasons to eliminate a phrase that could be interpreted as a restraint on the discretionary authority of Congress.

51. See AMAR, supra note 2, at 56. Amar further tells us that “jealousy and vigilance are at the heart of the amendment’s gloss on clause 16 [the Militia Clause of Article I, Section 8],” and that he has “emphasized republican ideology about militias and armies because that ideology was expressly written into the amendment’s preamble.” Id. Had that ideology really been “expressly written” into the preamble, we would expect to find the usual admonition against standing armies present; its absence, like the omission of the word “expressly” from the Tenth Amendment, reminds us that the spokesmen for the traditional “Anti-Federalist and republican ideology” were not in a position to dictate the content of the Bill of Rights. Amar’s interpretation thus seems to rely upon a politically doubtful reconstruction of what was actually transpiring. It is worth noting that the Senate did entertain a motion, almost certainly introduced by the two Virginia Antifederalists, Richard Henry Lee and William Grayson, to add to the Amendment further language, derived from the amendments proposed by the Virginia Ratification Convention, denouncing standing armies as “dangerous to Liberty,” urging their avoidance “as far as the circumstances and protection of the community will admit,” affirming civilian superiority over the military, and imposing a super-majoritarian requirement to raise a standing army in peacetime. COMPLETE BILL OF RIGHTS, supra note 38, at 173-74; see also the relevant Virginia resolutions, 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, supra note 39, at 1553-54. This motion, which was rejected, would have been a far more genuine expression of “Anti-Federalist and republican ideology” than the final language of the Amendment.
A textualist reading of the evolution of the Amendment could plausibly support at least these inferences. First, if Congress was intent on preserving the traditional image of the militia as the collective body of the people, as the individual right interpretation suggests, its elimination of the appropriate language to that effect is surprising. Congress had open to it the option of engraving a more expansive definition of the militia onto the Constitution; it rejected that option. Second, if the semicolon in Madison’s original resolution could be read as stating two distinct rights, not one, its replacement by a comma would seem to connect the two members of the Amendment more closely; that is, it would link the preamble and the right more intimately than had been the case before, and thereby tie the right of arms bearing to the institution of the militia. Third, if it is conceded that the reference to militia in the preamble to the Amendment has some relevance to its meaning—which of course a textualist must, because textualism presumes that every word is there with a purpose—then a textual approach requires us to ask how other provisions of the Constitution use the same term; and any reader of Article I, Section 8 would find it hard to deny that the text there considers the militia not as an unorganized mass of the citizenry but as an institution subject to close legislative regulation. Fourth, acceptance of language restricting the people’s right to bear arms to matters relating to the “common defence” would have had the effect of curtailing the capacity of the militia to be deployed for the other purposes assigned in Article I, Section 8: “to execute the Laws of the Union” and to “suppress Insurrections.” But Congress rejected that limitation, and the militia of the Second Amendment thus remained an entity to be mobilized to preserve, not subvert the Constitution. One might presumably argue that the militia could spontaneously mobilize to protect the Constitution against a government staging an anticonstitutional coup de main, coup de marche, or coup d’état, but nothing in the text of the Constitution supports that conception of its role.

Framers’ Intentions

One striking aspect of the standard statements of the individual right interpretation is how little attention its advocates pay to the debates of either the Constitutional Convention or the First
Congress.\textsuperscript{52} This is unsurprising. Although many concerns, assumptions, and beliefs are \textit{imputed} to the framers of both the Constitution and the Second Amendment, there is virtually nothing in the extant record of the \textit{in camera} debates of 1787 and 1789 that directly addresses the issues that lie at the core of our contemporary controversy. Neither at Philadelphia nor New York would it have occurred to anyone to ask whether adoption or amendment of the Constitution would diminish the capacity of state and local governments, in the exercise of their conventional police powers, to impose legislative restrictions on the use or ownership of firearms. That was not a concept that would have been easy to formulate in either 1787 or 1789. Had the Convention wished to do so, it might, in theory, have considered restricting the power of the state governments to limit the fundamental right of bearing arms and keeping in conjunction with the limitations on state authority found in Article I, Section 10 of the Constitution. But the framers had no plausible, much less compelling, reason even to ask whether there should be any change in the traditional legislative competence of the states.

Similarly, the structure of debate in 1789 did not oblige the members of the First Congress to consider the authority of the state legislatures to regulate private use and ownership of weapons. The entire thrust of that debate was directed to identifying powers of the national government requiring moderation in the interest of protecting the rights of either the people or the states. But any prospect that the adoption of amendments would be used to protect the people against \textit{both} the national government \textit{and} the states evaporated when the Senate rejected James Madison's favorite proposal to impose limitations on the states in the realms of freedom of speech, religion, and trial by jury.\textsuperscript{53} The entire debate over the Amendment in the House of Representatives is concerned with the propriety of exempting religiously scrupulous persons from the obligation to bear arms if summoned to do so—an issue completely irrelevant to the current controversy over gun control, yet strongly

\textsuperscript{52} The debate at Philadelphia is completely ignored, for example, in HALBROOK, \textit{supra} note 5, which adroitly skips from provisions in the state constitutions to the ratification debate without bothering to stop at Philadelphia. The Convention is similarly ignored in the leading article by Don B. Kates, Jr., \textit{Handgun Prohibition and the Original Meaning of the Second Amendment}, 82 \textit{Mich. L. Rev.} 204 (1983). There is a brief but rather garbled discussion in MALCOLM, \textit{supra} note 25, at 152-55.

supportive of the idea that the Amendment was indeed about the militia. Tenuous inferences about private rights may be drawn, perhaps, from remarks made by a handful of representatives, but none of these, again, confront the central issue directly.

Nevertheless, insofar as interpretation of the Second Amendment is intertwined with the question of the status of the militia under the Constitution, some guidance might be found in the relevant debates on that subject at the Constitutional Convention, principally the discussions of August 18 and 23, 1787. These debates bear directly on one of the central assumptions undergirding the individual right interpretation, which is that the word "militia" cannot be narrowly defined as a "select militia," which would itself be dangerous because it would be subject to the control of government, but must instead be read broadly to embrace the entire adult male population. In the most expansive reading, this militia forms independently and spontaneously; it does not owe its existence to state law; and it must therefore mean that "all of the people all of the time (not just when called for organized militia duty) have a right to keep arms."54 The clear implication must be that the militia (in this sense) has always existed, and will ever exist, as a popular institution that precedes, and is immune to, both state and national law; it is, in effect, a pre- and extraconstitutional body whose existence, even if

54. HALBROOK, supra note 5, at 8. Halbrook subsequently seems to describe the formation of militia units in response to the crisis of 1774–75 as a spontaneous popular development unconnected with structures of legal or political authority.

As the size and repressive character of the [British] standing army [in America] increased, many Americans began to arm and to organize themselves into independent militias. In 1774, George Mason and George Washington organized the Fairfax County Militia Association, which was not subject to the control of the royal governor and which in fact arose, in part, as a defense force against the regular militia.

Id. at 60. This regular militia was, however, apparently composed of equally patriotic Virginians who were not inclined to turn out in support of Governor Dunmore, because, as Halbrook notes two pages later, "the governor could not muster the regular Williamsburg militia against the 'Hanover independent militia company' led by Patrick Henry." Id. at 62. Or again: "for Mason a 'well regulated militia' consisted in the body of the people organizing themselves into independent companies, each member furnishing and keeping his own firearms, always ready to resist the standing army of a despotic state." Id. at 61. But in fact, while what Charles Royster called the "rage militaire" of this period clearly testified to the radical tenor of political sentiment, the formation and invigoration of militia units took place in response to, and under the guidance of, the provincial conventions that acted as the effective surrogate governments in nearly all the colonies after the summer of 1774. See CHARLES ROYSTER, A REVOLUTIONARY PEOPLE AT WAR: THE CONTINENTAL ARMY AND AMERICAN CHARACTER, 1775–1783, at 25 (1979). Thus when Mason and Washington formed "the Fairfax independent Company of Volunteers" in September 1774, these two members of the colony's governing elite were implementing a recommendation of the Virginia Provincial Convention; its independence was aimed against Governor Dunmore, the lawful commander of the militia, but not the Convention, which was effectively acting as the real governing body of the colony. See 1 THE PAPERS OF GEORGE MASON 210-11 & note (Robert A. Rutland ed., 1970).
latent, is not constrained by law. Otherwise it could be reduced to the
dreaded modern incarnation of a select militia: a National Guard
composed of weekend warriors whose two weeks plus twelve
weekends of annual training efface their apparent status as citizen-
soldiers.

Whatever else might be said of this problematic definition of the
militia, it does not comport with the actual discussion of the subject at
Philadelphia. For as Madison's notes of the debates conclusively
demonstrate, that entire discussion explicitly recognized that the
militia was to be the joint object of congressional and state legislation.
What was at issue was where the boundary between national and
state responsibilities would lie. Nothing that was said during the
principal discussions of August 18 and 23, 1787 supports the
contention that the militia would henceforth exist as a spontaneous
manifestation of the community at large.

In the draft constitution submitted by the committee of detail on
August 6, the sole clause relating to the militia would have authorized
the national legislature "[t]o call forth the aid of the militia, in order
to execute the laws of the Union, enforce treaties, suppress
insurrections, and repel invasions." When the Convention reached
this clause on August 18, George Mason "moved as an additional
power 'to make laws for the regulation and discipline of the Militia of
the several States reserving to the States the appointment of the
Officers,'" which Mason justified on the grounds of the value of
"uniformity."

His motion was challenged by the Connecticut
delegate Oliver Ellsworth, who offered a substitute motion requiring
the militia to "have the same arms & exercise and be under rules
established by the Genl Govt. when in actual service of the U. States
and when States neglect to provide regulations for militia, it shd. be
regulated & established" by Congress. Ellsworth argued that the
states should not be deprived of their authority over the militia
because they "would pine away to nothing after such a sacrifice of
power." By this, of course, he clearly meant that the state
governments would atrophy. That view was supported by John
Dickinson, who proposed a scheme whereby the national power to
discipline the militia would be limited to "one fourth part at a time,

55. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 182 (Max Farrand ed.,
1966).
56. Id. at 330.
57. Id. at 330-31.
58. Id. at 331.
which by rotation would discipline the whole Militia.” 59 Mason took 
this objection seriously enough to modify his original motion by 
inserting the phrase, “not exceeding one tenth part in any one year,” 
noting by way of introduction that this “suggested the idea of a select 
militia.” 60 But this amendment was in turn criticized by General 
Charles Pinckney, John Langdon, and Madison, all arguing that there 
were compelling reasons not to divide responsibility for the militia 
between the national government and the states. In response, 
Ellsworth dismissed “the idea of a select militia as impracticable.” 61 
After several further exchanges, the Convention referred both 
versions of Mason’s motion to a “grand Committee” (one delegate 
from each state) it had just appointed. 62

The committee’s recommendation, delivered three days later, 
was taken up on August 23. In revived form, the clause now read: 
“To make laws for organizing, arming & disciplining the Militia, and 
for governing such parts of them as may be employed in the service of 
the U.S. reserving to the States respectively, the appointment of the 
officers, and authority of training the militia according to the 
discipline prescribed.” 63 The ensuing debate is noteworthy in two 
respects. First, although three separate motions were introduced 
during this debate to modify the committee’s proposal—all in the 
interest of confining the authority vested in Congress while enhancing 
the authority reserved to the states—in the end, the Convention 
rejected all three, thereby preserving the original language. 64 Second, 
in the course of this debate, several delegates made remarks that offer 
revealing insight into the framers’ deeper understanding of militia-
related issues. When, for example, Rufus King, speaking for the 
committee, first explained that the national authority over “arming” 
the militia meant “specifying the kind size and caliber of arms,” 
Madison worried that this explanation “did not extend to furnishing 
arms”; and King thereupon explained “that arming meant not only to 
provide for uniformity of arms, but included authority to regulate the

59. Id.
60. Id. at 330-31. Madison’s notes make Mason’s reference to the select militia slightly 
ambiguous; the relevant passage reads: “Mr. Mason—had suggested the idea of a select militia.” 
This seems to be a response to Dickinson, but it is possible that Mason meant that he, too, had 
that idea originally in mind.
61. Id. at 332.
62. Id. at 333.
63. Id. at 384-85.
64. The three motions came respectively from Roger Sherman, Jonathan Dayton, and 
again from Ellsworth and Sherman; they can be found id. at 385-86.
modes of furnishing, either by the militia themselves, the State Governments, or the National Treasury." While the first of these alternatives suggests a private duty to obtain arms, as specified by legal regulations, the latter obviously envisioned either the states or the Union providing arms of their own lawful authority.

Whether any institution other than the national government could be relied upon to keep the militia armed and disciplined, however, was something that Madison and his colleague, Edmund Randolph, very much doubted. "The States neglect their Militia now," Madison observed, "and the more they are consolidated into one nation, the less each will rely on its own interior provisions for its safety & the less prepare its Militia for that purpose; in like manner as the Militia of a State would have been still more neglected...." Randolph endorsed this judgment a few minutes later, "observing that the Militia were every where neglected by the State Legislatures, the members of which courted popularity too much to enforce a proper discipline." So ardent was Madison for strong national supervision of the militia that he subsequently moved, without success, that the appointment of officers by the states should be confined to those "under the rank of General officers," but the main motion was ultimately approved without dissent.

Why is it necessary to call attention to this debate or, conversely, why do individual right writers say so little about it? Its significance would seem so obvious as to require no notice. But in the strange world of Second Amendment discourse, what is most obvious sometimes requires the greatest emphasis.

For the framers of the Constitution, whose usage does have some relevance to ascertaining the original intent underlying the document they wrote, the word militia could no longer be unthinkingly or automatically equated with the entire male population capable of bearing arms. That definition certainly remained one of the options from which they could choose, and some of their comments indicate that some delegates still thought of the state militia in just these terms. When Dickinson and Mason, for example, contemplated rotating portions of the militia under federal discipline, they were presumably imagining drawing on that larger pool. But that is not the

65. Id. at 385.
66. Id. at 387.
67. Id.
68. Id. at 388.
point. What matters is that the framers, clearly reasoning on the basis of hard-earned experience, saw the militia as an institution that would henceforth be regulated through a combination of national and state legislation firmly anchored in the text of the Constitution, rather than some preexisting, preconstitutional understanding. Wherever the exact balance between national and state responsibility would be struck, the militia would always be subject to legislative regulation. When the framers referred to the "states" in these debates, they were always alluding to their governments, not the people at large. The "authority of training the militia according to the discipline prescribed by Congress" that the Constitution reserved to the states was a power and responsibility of the state governments to implement national law. Americans were still entitled to believe that, as a matter of principle and policy, a militia "composed of the body of the people" offered the safest alternative to a standing army, tyranny, or any of a number of other evils, but that does not alter the fundamental delegation of legal authority to the new Congress that the framers understood they were proposing. The Militia Clause itself, buttressed by the Necessary and Proper Clause, empowered Congress, acting conjointly with the state legislatures, to decide what form the American militia would henceforth take.

None of this carried any threat to existing private rights of gun ownership, save, perhaps, in the eventuality that a crisis found the nation poorly armed and legislation was required, as it had been in the past, to bring firearms in all states of repair and disrepair out of private hands so that they could be returned to active and effective public service. But this history does call into question the idea, seemingly central to the individual right argument, that the very concept of the militia had an irrevocable, unalterable populist meaning immune to lawful revision by Congress and the state legislatures.

**RATIFIER UNDERSTANDING**

As is well known, Antifederalist criticisms of the Constitution emphasized the danger that American liberties would face from a consolidated national government that would not only possess both the purse and the sword but itself face the daunting task of executing its law across the broad and diverse expanses of an extended republic. Nor is there any mystery as to where the fear of standing armies originated: it was a legacy of the Radical or Real Whig tradition that
so shaped eighteenth-century American political ideology,\textsuperscript{69} and it could be well documented by familiar references to both the military rule which Cromwell had imposed on England in the 1650s and to the later efforts of James II to use an army increasingly officered by Irish Catholics as a domestic police force. Federalists answered the charge that the new Constitution would both permit and require government by a standing army in various ways. On prudential grounds, they argued from both experience and even a priori principles that national security would mean nothing if the new government was not fully empowered to raise regular military forces. Nor would these forces constitute a standing army in the rigorous sense of the term, because the two-year limit on appropriations meant that a fresh election of the people’s immediate representatives would provide an effective constitutional and political check.

Federalists tended to treat this charge with the same disdain that they dismissed many Antifederalist criticisms. Hamilton’s refutation of the standing army allegation in \textit{The Federalist No. 24}, for example, is a sustained sortie in sarcasm.\textsuperscript{70} So, too, is his dismissal in \textit{The Federalist No. 29} of the idea that it would be dangerous to rely upon a “select” militia—the same institution which proponents of the individual right interpretation insist Americans generally deemed to be nearly as threatening as a standing army. As far as Hamilton (framer, ratifier, and distinguished commentator on the Constitution, as well as leading member of its first cabinet) was concerned, the only good militia was a select militia. Indeed, Hamilton’s discussion in this essay, cast in the form of the advice he would give to a future Congress, nicely captures the tension in Federalist thinking between the received definition of the militia, on the one hand, and the institution the new government should regulate, on the other. Hamilton opens this passage by declaring that “The project of disciplining all the militia of the United States is as futile as it would be injurious, if it were capable of being carried into execution.”\textsuperscript{71} As

\begin{itemize}
  \item \textsuperscript{69} The \textit{locus classicus} of this interpretation is \textsc{Bernard Bailyn}, \textit{The Ideological Origins of the American Revolution} (enlarged ed. 1992) (1967). The relation between this ideology and American attitudes toward an armed citizenry was explored in two leading articles: Lawrence Delbert Cress, \textit{An Armed Community: The Origins and Meaning of the Right to Bear Arms}, 71 J. AM. HIST. 22 (1984), and Robert E. Shalhope, \textit{The Ideological Origins of the Second Amendment}, 69 J. AM. HIST. 599 (1982).
  \item \textsuperscript{70} \textit{THE FEDERALIST} NO. 24 (Alexander Hamilton).
  \item \textsuperscript{71} \textit{THE FEDERALIST} NO. 29 (Alexander Hamilton), \textit{in} 15 \textit{The Documentary History of the Ratification of the Constitution}, supra note 26, at 318, 320. As the editors note, this essay was originally No. 35 in the newspaper publication, but became No. 29 in the first bound edition, the M’Lean edition published in the spring of 1788. \textit{See id.} at 318.
\end{itemize}
used here, the phrase "all the militia" connotes the body of the people; but Hamilton immediately proceeds to explain why the inconvenience, cost, and sheer impracticality of training the entire population make it desirable to form "a select corps of moderate extent" who could provide the "well regulated militia" (a phrase Hamilton uses) that the mass of the citizenry could never constitute. A Hamiltonian gloss on the Second Amendment would presumably equate the people whose arms-bearing right must be protected with the militia that could be "well regulated" only if it was select.

To examine Federalist rhetoric on the militia is to enter a conceptual world where the attitudes and concerns that characterized their opponents' mode of thought no longer unthinkingly apply. Equally obviously, these differences also go far toward explaining why the members of the First Federal Congress felt compelled to include some provision—however vaguely worded—relating to the militia in their proposed amendments. Yet it is no less obvious that the ratification debates of 1787–88 did not directly implicate the critical issues at stake today—the extent of national and state authority to regulate the private use and ownership of firearms. Again, we are left to draw inferences from scattered remarks that were principally concerned with the respective powers of the national and state governments in the regulation of the militia.

There is one conspicuous exception to this judgment: the oft-quoted amendments published by the Antifederalist minority in the Pennsylvania Ratification Convention which met at Harrisburg in November 1787. Soundly outnumbered by a two-to-one ratio in the convention, this minority had struggled to have its concerns taken seriously by a Federalist majority anxious to promote the cause of ratification elsewhere by gaining a quick and unequivocal decision in favor of the Constitution. Federalists grudgingly listened to the amendments their antagonists wished to propose, but refused not only to consider them but even to allow them to be entered on the convention's journals, forcing the minority to publish their proposals in the form of a dissent. Two of the minority's fifteen proposed amendments bear on the arms and militia issues:

7. That the people have a right to bear arms for the defense of

72. *Id.* at 320.
73. It is worth noting that, in Hamilton's view, this select militia would still comprise "citizens" linked in fellow feeling not to the dragoons of the national army but to their "fellow citizens" in the states. *Id.*
74. RAKOVE, supra note 11, at 110-12, 116-18.
themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to and be governed by the civil power.

8. The inhabitants of the several states shall have liberty to fowl and hunt in seasonable times, on the lands they hold, and on all other lands in the United States not enclosed, and in like manner to fish in all navigable waters, and others not private property, without being restrained therein by any laws to be passed by the legislature of the United States. These statements appear to be by far the strongest affirmations of a belief in a private right to own and use arms, to be rendered immune to federal regulation; they also appear to be the only statements to frame and affirm the right in this way; and they therefore are vulnerable to the charge, among others, that these resolutions are the exceptions that prove a different rule.

A number of qualifications make the probative value of these resolutions doubtful. They were the work of a distinct minority within the Pennsylvania convention, and in the ensuing tests of strength in the first federal elections held a year later, Federalists swept the delegation that Pennsylvania sent to the new Congress. The resolutions say nothing at all (because there was no reason that they should do so) about the state's power to regulate ownership and use of firearms—a power that the state had in fact already exercised. While the resolutions articulate a fear of national power, they do not identify the provisions of the Constitution that threatened private rights of ownership, much less the fowling and hunting practices of residents of a state in which the federal government could have no valid title to any land. Nor did the minority members offer any further explanation of the source of their fear when they published their explanatory Address and Reasons of Dissent two weeks after the convention adjourned. Interestingly, that Address overlooked the

76. See the discussion in Saul Cornell, Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory, 16 CONST. COMMENTARY 221, 228-37 (1999).
77. The state's western boundary marked the easternmost boundary of the national domain created by the process of state cessions completed in 1784.
78. The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents, PA. PACKET AND DAILY ADVERTISER, Dec. 18, 1787,
right to bear arms when it turned to discussing the most important rights to be secured by "the emission of a BILL of RIGHTS." When the dissenters addressed the militia issue at the very close of their protest, they framed their challenge in terms not of private rights of ownership, but rather of the danger that Congress would abuse its power over the militia by subjecting its members to martial law, trampling on the rights of those "conscientiously scrupulous of bearing arms," and marching its members near and far in the cause of "riveting the chains of despotism on their fellow citizens, and on one another." Finally, it was exactly these resolutions that inspired the Federalist writer Noah Webster to jestingly propose a further "restriction:—'That Congress shall never restrain any inhabitant of America from eating and drinking, at seasonable times, or prevent his lying on his left side, in a long winter's night, or even on his back, when he is fatigued by lying on his right.'" Was this really the kind of right, Webster insinuated, deserving national constitutional protection?

Had Antifederalists elsewhere rallied around this early expression of the extent of the right to bear arms, our current debate would arguably not have to rely on far less direct or salient data. Instead, we are left to wrestle with the implications of statements that are far more concerned with the familiar juxtaposition of standing army and militia than with the nature, source, and extent of private rights or the limitations upon state legal regulation. Prominent among these more direct comments is a remark made by George Mason during the Virginia Ratification Convention, which advocates of the individual right interpretation often cite as a succinct endorsement of the equation permanently identifying the militia with the people. "[W]ho are the militia?" Mason asked on June 14, 1788. "They consist now of the whole people, except a few public officers."

One is not surprised that Mason's very next sentences disappear from the citations of writers like Kates and Halbrook:

79. Id. at 630-31.
80. Id. at 637-39.
82. 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, supra note 39, at 1312.
But I cannot say who will be the militia of the future day. If that paper on the table [the Constitution] gets no alteration, the militia of the future day may not consist of all classes, high and low, and rich and poor; but may be confined to the lower and middle classes of the people, granting exclusion to the higher classes of the people.  

As far as Mason was concerned, amendments which did not reach the power of Congress to regulate the militia would be unavailing, because the composition of the militia would be subject to legislative revision. Nor does this crucial point exhaust the importance of Mason's observation, because once his speech is firmly located in the context in which it was made, it supports conclusions rather at odds with the self-reaffirming pronouncements that individual right advocates customarily make.

When Mason spoke, he was not, of course, anticipating our controversy but participating in a debate of his own day; if we are to understand the force of his remarks, we have to know what was under discussion in that debate. Mason was speaking near the end of a two-day debate on the militia clauses of the Constitution (though here, as on other occasions at Richmond, the pyrotechnics of Patrick Henry occasionally led discussion to veer in strange directions). Given that both Federalists and Antifederalists discussed the conditions under which the militia could be disarmed, it might seem surprising that the scholarly literature has slighted this debate. But the surprise quickly dissipates when one understands the assumptions that united speakers from both sides.

When debate began on Saturday, June 14, the first point discussed was the role the militia might be asked to play in enforcing law and suppressing insurrections. In the midst of his lengthy first speech on this subject, which quickly reached the danger of a standing army, Mason warned about the danger that the militia might be abolished. Should the national government ever "attempt to harass and abuse the militia," Mason warned,

they may easily abolish them, and raise a standing army in their stead. There are various ways of destroying the militia. A standing army may be perpetually established in their stead. . . . The militia may be here destroyed by that method which has been practised in

83. Id. For truncated citations, see HALBROOK, supra note 5, at 74; Kates, supra note 7, at 216 n.51; Levinson, supra note 3, at 647.

84. One noteworthy exception is Carl T. Bogus, The Hidden History of the Second Amendment, 31 U.C. Davis L. Rev. 309 (1998), which uses this debate, however, primarily to stress the relation in Virginia between fears of slave insurrection and the militia question more generally.
other parts of the world before. That is, by rendering them useless, by disarming them. Under various pretences, 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, &c. . . . Should the national Government wish to render the militia useless, they may neglect them, and let them perish, in order to have a pretence of establishing a standing army. 85

Mason reminded the delegates that forty years earlier, just such a sinister scheme had been proposed by Governor Keith of Pennsylvania, "to disarm the people" in order to "enslave them," but not to "do it openly"—presumably by confiscating their weapons—"but to weaken them and let them sink gradually, by totally disusing and neglecting the militia." 86 Mason's wish, therefore, was to obtain "an express declaration, that the State Governments might arm and discipline" the militia should Congress fail to do so. 87 He further warned that the national government might destroy the militia by using its disciplinary power to make service in the militia so "odious to the people themselves . . . as to make them cry out, Give us a standing army." 88

Mason was answered by Madison, who argued that the power to arm the militia would in fact remain a "concurrent" one, shared between the national government and the states. National responsibility was essential, Madison suggested, because experience demonstrated "that while the power of arming and governing of the militia has been solely vested in the State Legislatures, they were neglected and rendered unfit for immediate service." 89 Madison's notion of concurrent powers in turn drew a strong rebuttal from Patrick Henry, who asserted that congressional power over the militia was exclusive, not concurrent. If it were really concurrent, Henry

86. Id. at 1271.
87. Id. For the identification of Keith, see id. at 1298 n.11.
88. Id. at 1272. Mason's general argument echoes one made by Luther Martin, the Maryland delegate who left the Constitutional Convention prior to adjournment and who subsequently opposed ratification. Martin complained that the Constitution would "enable the government totally to discard, render useless, and even disarm the militia, when it would remove them out of the way of opposing its ambitious views." Luther Martin, To the Citizens of Maryland, MD. J., March 18, 1788, in 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 419 (John P. Kaminski & Gaspare J. Saladino eds., 1986). The national government, he continued, has "the powers, by which only the militia can be organized and armed, and by the neglect of which they may be rendered utterly useless and insignificant, when it suits the ambitious purposes of government." Id.
89. 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, supra note 39, at 1273.
reasoned, the militia would wind up “doubly armed.” This would impose a double set of costs on the militia, Henry warned; yet he also reasoned from experience in terms that strongly echoed Madison. “Every one who is able may have a gun,” Henry observed. “But have we not learned by experience, that necessary as it is to have arms, and though our Assembly has, by a succession of laws for many years, endeavoured to have the militia completely armed, it is still far from being the case?” In his view, the proper remedy was to empower Congress to arm the militia only after “the States shall have refused or neglected to do it.”

Subsequent speakers returned to the question of determining how the militia had actually been armed in the past or might best be armed in the future. “But it is said, the militia are to be disarmed,” the Federalist delegate George Nicholas observed. “Will they be worse armed than they are now?” Madison was correct to argue for a concurrent power, Nicholas continued,

> For the power of arming them rested in the State Governments before, and although the power be given to the General Government, yet it is not given exclusively. For, in every instance, where the Constitution intends that the General Government shall exercise any power exclusively of the State Governments, words of exclusion are particularly inserted.

Following this speech, the debate took one of its periodic flights away from the specific clause ostensibly under discussion. When the militia came back into view some time later, Mason repeated his charge that Congress would use its disciplinary power to impose “such severities... on the militia, as would make them wish the use of militia to be utterly abolished; and assent to the establishment of a standing army.” But then Mason, too, veered off to other issues, even surviving a call to order to keep him on point.

> We should not be surprised that advocates of the individual right interpretation pay so little attention to these exchanges, because they demonstrate, first and foremost, that leading Federalists and Antifederalists alike assumed that the real problem was to determine

90. *Id.* at 1276.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 1280.
95. *Id.*
96. *Id.*
97. *Id.* at 1289.
which level of government should be responsible for making sure that
the militia was properly armed. George Mason's notion of how the
citizenry might be disarmed did not presuppose that federal agents
would come gently rapping on farmhouse doors, confiscating
weapons and leaving the people evermore unable to thwart the
tyrannical designs of their ambitious masters. Rather, the national
government would disarm the citizenry simply by failing to provide
them with the arms that in fact they rarely possessed or managed to
maintain. The preferred Antifederalist alternative was not to allow
citizens to acquire weapons on their own; it was rather to shift the
burden of supporting the militia to the state governments. But in
either case, the militia would clearly remain an institution created and
regulated by government. And its effectiveness would depend not on
a citizenry already well armed with their own weapons, but on the
capacity of government to provide and maintain weapons that the
people evidently lacked.

Had this debate been confined to this issue alone, it would
already suggest some serious deficiencies in the individual right
account. But the discussion which resumed on Monday, June 16, is
also revealing in another respect closely related to our modern
controversy. For now, with Henry palpably struggling to stick to his
subject, discussion turned to the role of the militia in suppressing
insurrection and the matter of concurrent national and state powers.
In Henry's curious view, seconded by William Grayson,98 that power
"was exclusively given to Congress. If it remained in the States it was
by implication."99 Habituated as they were to his distortions,
Federalist speakers found this point hard to swallow. John Marshall
even "asked if Gentlemen were serious" in these assertions, when
"the least attention" would demonstrate their errors.100 The state
governments had always possessed these powers, and nothing in the
Constitution deprived them of their original authority to use the
militia for their own purposes, except in those specified cases when

98. Id. at 1305-06.

99. Id. at 1304-05. Grayson went on to repeat the idea that Congress might be free to
"entirely neglect" arming the militia in particular states. Id. at 1306. This in turn led him to
distinguish the deprived situation of the militia in Scotland and Ireland from that in England,
which had "an excellent militia law . . . such as I wish to be established by the General
Government." And what did this mean in practice? "They have 30,000 select militia in
England," Grayson noted approvingly. Id. Of course, according to individual right advocates,
the idea of a select militia is exactly what Americans were supposed to revile. Unfortunately,
Grayson did not have the advantage of reading the contemporary "scholarly consensus" on this
point.

100. Id.
Congress could legally call the militia into federal service.\textsuperscript{101} State governments would have every right to call out their militia to suppress insurrections, whether emanating from the enslaved element of their populations (who would certainly have enjoyed a natural right to obtain arms for their self-preservation, but whose access to arms was carefully restricted by law) or any other source of disaffection. But again, what was at stake in this debate was the question of which level of government should be empowered to use the militia to suppress insurrections, not the specter that the Constitution would make it impossible for a privately armed people to rise up against either national or state oppressors. It was in this context that Mason asked whether a militia which consisted "now of the whole people" would preserve that character in the future.\textsuperscript{102} But here his express concern was not with the danger of the people disarmed, much less of federal confiscation of private weapons, but rather to exempt the militia from the "ignominious punishments and heavy fines" that he expected would be imposed by a Congress too "small, and inadequate" in number to have any "fellow-feeling for the people."\textsuperscript{103}

Locating Mason's remark in the context in which it was uttered, then, brings us into a world of assumptions very different from the selective and anachronistic ones that polemicists now choose to impose upon it. In this world, disarming the militia meant that the government would fail to supply its members with firearms they had little private reason to keep, not sending the lackeys of power out to haul in rusty fowling pieces that would probably not fire in any case, and which one would not bear into combat against better armed regular troops. In this world, every male citizen might well be eligible for militia service, but the militia was an institution legally created by government, not some pre- or extraconstitutional entity immune to legal regulation. In this world, what was under debate was not the need to protect a right to revolution but a debate about federalism—that is, a debate about the respective competence and authority of the national and state governments. And in this world, too, the suspicions that Antifederalists like Mason and Henry voiced only illustrated the deeper deficiencies in their case against the Constitution.

\textsuperscript{101} \textit{Id.} at 1306-07.
\textsuperscript{102} \textit{Id.} at 1312.
\textsuperscript{103} \textit{Id.}
One encounters similar misrepresentations of context in other treatments of leading statements from the ratification period. Among these, the most important is the use made of James Madison’s paean to the militia in *The Federalist No. 46.*104 Rare is the individual-right exposition which does not cite Madison’s prediction that any attempt by a standing army to impose tyranny “would be opposed [by] a militia amounting to near half a million of citizens with arms in their hands.”105 It was to “be doubted,” Madison continued, “whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops” as the national government could plausibly acquire.106 And then Madison went on to remind his readers of “the advantage of being armed, which the Americans possess over the people of almost every other nation,” and which stood them in sharp contrast to the monarchies of Europe, which “are afraid to trust the people with arms.”107

We should not be surprised to discover that these vintage snippets are often presented independently of the larger argument they are meant to support and indeed of the very sentences in which they are embedded. Madison’s purpose in this essay (and the preceding *Federalist No. 45*) was to compare the relative advantages that the national and state governments would enjoy in the zero-sum competition for power that Antifederalists believed the Constitution would launch, and which they further predicted would end in the consolidation of all real authority in the Union while the states withered away as effective jurisdictions of governance.108 Nowhere in these essays did Madison address, much less defend, the idea that the armed citizenry consisting of the body of the population would be called upon to resist the oppression emanating from the national and state governments in collusion. Instead, his concern throughout was to explain why the political affections and institutional resources that the state governments would command would render any real danger of the erosion of their authority unlikely—including the worst case scenario of military despotism that he then deemed improbable to the point of absurdity.109

105. *Id.* at 492.
106. *Id.*
107. *Id.* at 493.
108. As I have argued elsewhere, the fear of consolidation was the great controlling theme in Antifederalist polemics. See RAKOVE, supra note 11, at 148-49, 181-88.
109. It took a lot to get Madison to crank out a truly pungent phrase, but here he observed
The militia was one of those resources that would rally to the support of state government, as (surprise!) the sentences from which his most frequently quoted phrases are extracted (or wrenched) make clear. Thus the sentence in which the reference to half a million armed citizens appears continues: “officered by men chosen from among themselves, fighting for their common liberties”—which are presumably invested in the autonomy of their state governments—and most important, “united and conducted by governments possessing their affections and confidence,” the political ingredients that Madison understood would best determine the outcome of whatever rivalry existed between the two levels of American federalism.110 Similarly, the sentence distinguishing Americans from other peoples begins with the phrase “Besides the advantage of being armed,” and then concludes by noting

the existence of subordinate governments [that is, the states] 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 [that is, a unified nation-state, whether absolutist like France or parliamentary like Britain] can admit of.111

So, too, the thought that other peoples might be less tyrannized if they were possessed of arms is a prelude to a further comment on the advantages of federalism:

But were the people to possess the additional advantages of local governments chosen by themselves, who could collect the national will, and direct the national force; and of officers appointed out of the militia, by these governments and attached both to them and to the militia, it may be affirmed with the greatest assurance, that the throne of every tyranny in Europe would be speedily overturned, in spite of the legions which surround it.112

Nowhere does Madison treat the idea of an armed citizenry existing independently of any government as the best deterrent against despotism; rather, his argument throughout rests on the supposition that the militia is an institution of government, subject to its legal regulation, and the greater likelihood that the members of this militia will commit their affections and loyalty to repel any “projects of

that these descriptions of a tyranny imposed by military despotism were “more like the incoherent dreams of a delirious jealousy, or the misjudged exaggerations of a counterfeit zeal, than like the sober apprehensions of genuine patriotism.” THE FEDERALIST NO. 46, supra note 104, at 492.

110. Id.
111. Id. at 492-93.
112. Id. at 493.
ambition” that the national government might undertake to pursue the “downfall[] of the State Governments.”' 3 Tyranny in the compound republic of the United States would not take the form of a joint national-state assault on the liberties of the people. Rather, it would necessarily involve an effort by the national government to encroach upon the rights and powers of the states; and should this encroachment take place without the approval of the people’s representatives, the state governments would serve as the rallying point for resistance.

For a final example, consider the treatment of the militia question by the writer known as the Federal Farmer, usually identified in the current historical literature as Melancton Smith, the moderate Antifederalist who eventually cooperated in securing ratification by the New York convention in which Federalists were a distinct minority. In his eighteenth and final letter, the Farmer includes the Mason-like statement that “A militia, when properly formed, are in fact the people themselves, and render regular troops in a great measure unnecessary.” 1 Halbrook, though mistakenly identifying the Farmer with Richard Henry Lee, quotes at length from this essay, which includes an important discussion of the difference between a general militia composed of the body of the people and the select militia which might turn into a tool of power. 115 But again, the omissions are revealing. Like Madison in The Federalist No. 46, the Farmer poses the problem as one of allocating powers over the militia between two levels of government. His definition of the militia is preceded by this statement of the problem: “in a federal republic, where the people meet in distinct assemblies, many stipulations are necessary to keep a part from transgressing,

113. Id. at 492-93. For representative examples of partial quotations, see HALBROOK, supra note 5, at 67-68; Kates, supra note 7, at 228.


115. HALBROOK, supra note 5, at 70-72. Halbrook notes that “most of Lee’s proposals [that is, the Federal Farmer’s] . . . were subsequently adopted in the Bill of Rights, and some with almost identical wording,” but in fact the Letters from the Federal Farmer contain no such draft of a bill of rights. On the other hand, as a member of the Continental Congress reviewing the Constitution in late September 1787, Lee had in fact attempted to append a declaration of rights, but his articles contained no mention of the right to bear arms. The only relevant proposal in Lee’s draft amendments was a statement “[t]hat standing Armies in times of peace are dangerous to liberty, and ought not to be permitted unless assented to by two thirds of the Members composing each House of the legislature under the new constitution.” 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 239 (John P. Kaminski & Gaspare J. Saladino eds., 1981). On Lee’s efforts to secure amendments, see RAKOVE supra note 11, at 108-110.
which would be unnecessary checks against the whole met in one legislature, in one entire government."\textsuperscript{116} The issue, again, was a matter of allocating powers within a structure of federalism, not of defining private rights. Moreover, in discussing the advantages of a general militia over a select militia, the Farmer actually winds up arguing against the idea that the militia should consist of the entire population. His own idea, the Farmer writes, was that "the federal head may prescribe a general uniform plan, on which the respective states shall form and train the militia, appoint their officers and solely manage them, except when called into the service of the union."\textsuperscript{117} Such an "arrangement," he continues,

\begin{quote}
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, who often form the select corps of peace or ordinary establishments: by it, the militia are the people, immediately under the management of the state governments, but on a uniform federal plan . . . \textsuperscript{118}
\end{quote}

In this analysis, it turns out, there are two kinds of select militia, neither of which comprises the whole body of the people. A nationally organized select militia would likely draw upon the worst elements of society, the dregs who formed the feared regular troops of European monarchies; while a state-based select militia (here equated with "the people") would consist of the solid citizens, to the exclusion of the same untrustworthy elements who could not be counted upon to maintain the social order. And in both cases, the Federal Farmer constructs his argument within a matrix of federalism; he never posits the distinction between government (whether national or state) and population on which the individual right interpretation relies.

Beyond illustrating the propensity of individual right writers to truncate quotations mercilessly, the consideration of these debates and texts demonstrates that the discussions of 1787–88 were preoccupied with the question of the militia, and that this question was addressed almost exclusively under the rubric of federalism. Whether there was, or should be, a private, constitutionally sanctioned right to own and use firearms was simply not at issue. The rhetoric of ratification certainly included many statements from both sides on the advantages of a well regulated militia as a valuable

\textsuperscript{116} Letter from the Federal Farmer (Jan. 25, 1788), supra note 114, at 362.
\textsuperscript{117} Id. at 362-63.
\textsuperscript{118} Id. at 363.
alternative to a standing army, but such statements did not require either side to reach the question of the nature and extent of the private rights of ownership and use, much less the question of the power of the states to legislate should the use of firearms prove inimical to the health and welfare of society. No one on either side would have denied that individuals had a private legal right to the ownership of weapons, but the structure of debate neither encouraged nor required anyone to ask whether a constitutional right or duty linked to service in the militia could prevail over matters concerning the internal police of the states—a responsibility that would clearly fall under the reserved powers of the states soon to be recognized in the Tenth Amendment. Both Federalists and Antifederalists, however, did appear to agree on one crucial point: the militia was an institution subject to the legislative control of one level of government or another.

INTELLECTUAL LEGACIES

Once one grasps how little substantive support the individual right theory derives from the records of debate in 1787–89, it becomes easier to understand why its advocates spend so little time reconstructing these debates, but instead rely on that mode of originalist reasoning that emphasizes the influence of preexisting intellectual traditions. Because those debates did not directly or significantly address the question of whether the new government would be empowered to regulate private ownership of firearms, proponents of the individual right interpretation necessarily turn to those sources that can be read to suggest that a general belief in the liberty-securing advantages of private ownership was so deeply grounded in eighteenth-century Anglo-American political and legal culture as to undergird and inform all discussion of the question. As Joyce Malcolm suggests, the key clues to unlocking the meaning of the Second Amendment lie in “the English legacy,” as it was absorbed and expanded upon by the American colonists and revolutionaries. “The English model was constantly before the framers of the American Constitution,” Malcolm observes.119 The Americans faced daunting challenges, but

Happily, English strategies for prudent control of the sword were ready to hand. When delegates copied English policies the public was reassured. When they departed from them there was grave

119. MALCOLM, supra note 25, at 150.
concern, which was not allayed until the passage of the Second Amendment brought the American system more into line with English practice. Here, then, is the key to the meaning and intent of the much-misunderstood Second Amendment.\textsuperscript{120}

One is only left to wonder how Americans coped with the other departures from English practice that the Constitution embodied. Presumably Antifederalists would have been even more assured had the framers of the Constitution restored monarchy and created an American nobility.

There is, of course, nothing unique about this effort to locate the ideas, great and small, of American constitutionalism within larger intellectual contexts. An enormous literature describes the influence on American thinking of a host of traditions, ranging from knowledge of the writings of antiquity, in which all learned men were versed, to the latest discoveries of Newtonian physics and Lockean psychology, with ample room for any of a number of other political, religious, historical, economic, and even literary modes of thought. Yet even if we concede that different facets of American constitutionalism reflected one or more or all of these legacies, traditions, and discourses, the formidable task remains of explaining exactly how these background beliefs attained dispositive constitutional authority under the conditions of debate and decision prevailing between 1787 and 1791. It is one thing, after all, to say that a particular belief or opinion or attitude was part of the \textit{Zeitgeist}, but another matter entirely to assay its interpretative authority. Nor is this a problem unique in any way to the Second Amendment. It is in fact a fundamental problem in writing the intellectual history of the Constitution to know how to correlate the received wisdom that shaped the general parameters of political thinking with the particular decisions on numerous provisions that had to be taken as American constitutionalism embarked on its inventive, radically textual course. One can posit, for example, that Locke exerted a pervasive influence over American ideas about the right of resistance, education, and epistemology—but with the exception of the Religion Clause and the Just Compensation Clause, one would be hard pressed to fashion a Lockean interpretation of any provision of the Constitution. Montesquieu's theory of the separation of powers exerted enormous influence over American thinking, as evidenced by the formulaic restatement of the theory found in the early state constitutions and

\textsuperscript{120} \textit{Id.} at 151.
declarations of rights. Yet as any reader of The Federalist No. 47
knows, one can only understand the sense that Americans made of
this theory—either in 1776 or 1787—by reconstructing the varied
ways in which the framers of their constitutions tried to apply his
“doctrine” (if that is even the right term for it).121

Consider the problems that Malcolm encounters in the
concluding chapter of her recent book on the subject, which is
devoted primarily to examining the English background to American
practice. Taking Malcolm seriously requires an immediate sus-
pension of disbelief, for neither the language of the Bill of Rights of
1689 nor the doctrine of parliamentary supremacy readily supports
the idea that the subject’s right to have arms lay beyond the sphere of
legislative regulation.122 Malcolm suggests that the reported
popularity of William Blackstone’s Commentaries on the Laws of
England in the colonial market means that the colonists also accepted
(lock, stock, and barrel, so to speak) his passing comment on the
value of the “auxiliary right” of subjects having “arms for... defence.”123
But one cannot implicitly assume that Blackstone’s
general popularity made his position authoritative on every point; if it
had, the colonists would have had to fold their constitutional tents in
the face of Blackstone’s assertion of parliamentary supremacy.
Moreover, Blackstone’s own language can be read just as easily—
arguably more so—to support the power of legislative regulation.
The subjects’ right must be “suitable to their condition and degree,
and such as are allowed by law,” and it is further characterized as “a
public allowance, under due restrictions, of the natural right of
resistance and self-preservation.”124 Nothing in this language could
plausibly be read to establish a private right immune to legislative
regulation. Nor does the allusion to a natural right operate as a
similar prohibition. It was, after all, one of the great commonplaces
of eighteenth-century rights talk to observe that natural rights are
always modified by the terms of the social compact. Anglo-
Americans operated in a political and legal culture that was deeply

121. See THE FEDERALIST No. 47 (James Madison), in 15 THE DOCUMENTARY HISTORY
122. “Subjects which are Protestants may have Arms for their Defence suitable to their
Conditions and as allowed by Law.” DECLARATION OF RIGHTS art. 7 (1689). The Declaration
may be found in LOIS G. SCHWOERER, THE DECLARATION OF RIGHTS, 1689, at 295 (1981).
123. See MALCOLM, supra note 25, at 142-43 (citation omitted). Blackstone’s comments
may be found in 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: A
124. Id.
respectful of the natural right of property, but that did not prevent legislatures on both sides of the Atlantic from imposing taxes and other regulations of the rights of property in the normal exercise of their power.\footnote{See the useful summary of this point in \textsc{Forrest McDonald, Novus Ordo Secolorum: The Intellectual Origins of the Constitution} 10-36 (1985).}

Once Malcolm reaches American shores, the problematic nature of her argument becomes even more evident. Legislation requiring various groups of colonists (primarily in the seventeenth century) to carry arms does not establish the existence of a late-eighteenth-century right lying beyond legislative regulation; and in any case, a legislature that can require arms to be carried in the interest of intimidating slaves and Indians can also prohibit the same act in the name of public security.\footnote{See \textsc{Malcolm, supra} note 25, at 138-41.} Nor does repetition of the hackneyed point that the colonists freely shared an English fear of standing armies even begin to identify the limits on legislative regulation. Malcolm documents the claim that Americans “were also alert to the dangers of a ‘select militia”’ with a single, rather vague reference to a 1773 sermon.\footnote{Id. at 142.} Only one of the state declarations of rights (Pennsylvania) adopted in the early years of independence asserted a right to bear arms for self-defense, as well as the common defense;\footnote{See \textsc{5 The Founders’ Constitution} 7 (Philip B. Kurland & Ralph Lerner eds., 1987).} and only the Virginia declaration qualified its reference to the militia with the apposite phrase, “composed of the body of the people.”\footnote{Id. at 3.} Not to worry, however, Malcolm assures us. Even those states “which failed to mention a right to have arms for individual defence” must have intended to endorse a general militia.\footnote{\textsc{Malcolm, supra} note 25, at 148.} And how do we know this? “Because of their long-standing prejudice against a select militia as constituting a form of standing army liable to be skewed politically and dangerous to liberty, every state had created a general militia.”\footnote{Id. at 3.} Moreover, “the individual’s right to be armed, where not specifically mentioned, is unmistakably assumed.”\footnote{Id. at 142.} And how do we know this? Because the broad statement of the usual trinity of natural rights, including the right “of enjoying and defending life and liberty” or “obtaining happiness and safety” would be meaningless “if citizens
were deprived of the right to be armed."\(^{133}\)

This is less an argument from ample historical evidence than a faulty syllogism resting on questionable premises and circular reasoning. At crucial junctures in her argument—when one has to ask, just how was the English legacy translated into American practice—Malcolm resorts to such vaguely asserted forms of evidence as "long-standing prejudice," things that are "unmistakably assumed,"\(^{134}\) and the abiding influence of Blackstone’s statement about the danger of "oppression,"\(^{135}\) typically omitting his qualifications subjecting possession and use of arms to legal restriction.\(^{136}\) These are assertions rather than demonstrations; they establish only that such familiar themes as the fear of standing armies and the belief in a natural right of self-defense were part of the universe of political attitudes shared by eighteenth-century Americans. They do not explain, however, how much interpretative weight these preexisting "attitudes, prejudices, and policies"\(^{137}\) can bear when we try to determine what the adopters of the Second Amendment thought they were doing, much less why the principles so loosely stated there should trump either existing understandings of the legislative powers of the states or the relevant textual provisions of the federal Constitution.

What the individual right interpretation establishes, then, is something less than meets the eye. Did Americans in general believe or affirm the value of an armed citizenry? Of course they did, and in doing so, they freely invoked images made familiar by the common radical Whig reading of history. Was this belief part of the intellectual currency which shaped the general discussion of issues relating to the standing army, the militia, and the respective authority of the national and state governments? Of course it was. But did Federalists and Antifederalists agree about the relative importance of an armed citizenry in promoting the future welfare of the United States? Of course they did not. For Antifederalists, the appeal to the armed citizenry was meant as an alternative to the substantive provisions of the Constitution which threatened the creation of a standing army that would command obedience at the point of a

133. *Id.* at 149.
134. *Id.* at 148.
135. *Id.* at 145.
136. See BLACKSTONE, *supra* note 123, at 139, and accompanying text.
137. *Id.* at 162.
bayonet. For Federalists, by contrast, the presumed existence of an armed citizenry offered yet another reason to dismiss Antifederalist predictions of tyranny as so many phantasms of their opponents' overheated imaginations.

Yet even if one recognizes that this belief remained part of the political culture of the late 1780s, a critical problem persists: how would the legal authority of the states to regulate the use and ownership of firearms be affected or altered by a constitutional provision understood as a restriction on the authority of the national government? If the colonies and states had previously exercised jurisdiction in this area, as they demonstrably had, and if the logic of the Antifederalist position was to enhance the authority of the state governments vis-à-vis that of the new national government, what difference would the adoption of the Second Amendment make to the reserved powers of the states? A belief in the value of an armed citizenry is consistent with a view of the Second Amendment as an injunction to the federal government not to rely solely on its own army, but to continue to keep the militia well armed and disciplined. It could similarly be read as a reminder to the state governments of their responsibility not to depend solely on federal largesse (funded mandates, in effect) to perform their duty to maintain their militia, especially to counteract the danger of domestic insurrection. But there is no evidence that the generalized belief in the armed citizenry distilled in the Second Amendment was understood to be the equivalent of an Article I, Section 10 restriction on the legislative authority of the states.

LESSONS OF EXPERIENCE

This reliance on intellectual sources of American attitudes is the more striking when it is set against a final category of evidence that the individual right interpretation seems reluctant to embrace: the lessons learned by the experience of the Revolutionary War, or more generally, from the departures in constitutional thinking and practice to which the Revolution gave rise. Put simply, the individual right interpretation is an argument against change, and is in that sense

138. As Michael Bellesiles notes, perhaps the most important development in the battlefield use of firearms in the eighteenth century came when the Duke of Cumberland realized the advantage of affixing a socket bayonet to the end of a musket, enabling soldiers to fire (or receive) a single volley, and then charge the enemy to inflict more devastating casualties with the blade than they could ever attain with the ball. See MICHAEL A. BELLESILES, ARMING AMERICA: THE ORIGINS OF A NATIONAL GUN CULTURE 144-46 (2000).
fundamentally ahistorical. It assumes that a body of writings absorbed by Americans prior to 1776 was completely formative of how they thought after 1776; the principles ostensibly laid down in *Cato's Letters* and the other supposed sources remained determinative of American thinking through 1789 (and beyond). Nothing that intervened in the form of experience and experiment could alter or diminish the weight of that received authority. By contrast, the interpretation of the Second Amendment that anchors its meaning in the immediate debates of the late 1780s, and especially in the specific issue of the militia, presupposes that fundamental changes in American thinking had begun to develop since 1776. The rhetorical deference that Federalist writers sometimes paid to traditional concepts (like the value of an armed citizenry) could not disguise the self-consciously empirical and experimental qualities of mind that distinguished the proponents of constitutional reform from its antagonists. Antifederalists may have been men of little faith in the Constitution because they remained all too faithful to ideas that may have carried them into revolution in 1776, but which experience had since rendered problematic if not indeed obsolete. In this view, the debate over the militia cannot be explained merely by reference to Machiavelli, or Trenchard and Gordon, or Blackstone. Authority unconfirmed or actively challenged by events was no longer binding; it could only be weighed in the light of events and experience. Or to put the point more directly: Their ideas (like ours) were shaped not only by what they read, but also (and arguably more powerfully) by what they did or had done to them.

139. On this general point, compare BAILYN, supra note 69, with the classic essay by Cecelia M. Kenyon, *Men of Little Faith: The Anti-Federalists on the Nature of Representative Government*, 12 WM. & MARY Q. 3 (1955). See also RAKOVE, supra note 11, at 149-60. There is an extensive scholarly literature which seeks to differentiate Federalists and Antifederalists in terms of qualities of mind, attitudes toward change, and the capacity (we might now say) to think "outside the box" of received authority.

140. For an illustration of this point, consider this passing comment by Levinson, alluding to an observation made by the distinguished historian, Edmund Morgan: "Morgan argues, incidentally, that the armed yeomanry was neither effective as a fighting force nor particularly protective of popular liberty, but that is another matter. For our purposes, the ideological perceptions are surely more important than the 'reality' accompanying them." Levinson, supra note 3, at 648 n.54. It may well be true that all our constructions of reality (whose existence I, for one, do not doubt) are shaped by ideology, but what is at issue here is, I believe, a more fundamental problem that has deeper echoes in the historiography of the Revolutionary era more generally. No historian would deny that the legacy of radical Whig ideology was a major element in American political thinking, both in 1776 and in 1787. Yet by the latter date, experience (whose existence Levinson seems to posit as "reality") had called into question many of the propositions that were stock elements of that ideology; and the framers of the Constitution, as well as the Federalist majority who proposed the Second Amendment, represented that portion of the spectrum of American political thinking who were now less
Second Amendment within this context yields two major challenges to the individual right interpretation, one of which (the more familiar) can be labeled political, the other (and more recently explored) behavioral.

The political context, which is principally identified with the writings of the historians Lawrence Cress and Don Higginbotham,\(^{141}\) has already been implicated throughout this article. It suggests, quite simply, that the real object of debate in the late 1780s was the militia, and that thinking about the militia was now driven primarily by lessons derived from the crucible of revolutionary conflict. That the militia had served important functions in that war was not to be denied, and recent historical scholarship has confirmed the point.\(^{142}\) But to say that the militia had been useful was not to say that national defense could henceforth be allowed to rely upon it. Projects of militia reform were supported by the retired commander in chief, George Washington, and the new secretary of war, Henry Knox, in the mid-1780s, but they fell victim to the desuetude of the Continental Congress. The calling of the Constitutional Convention, however, gave Washington and other like-minded men a new opportunity to lay the necessary groundwork for the desired reforms, and the resulting provisions of the Constitution reflected their desire. Henceforth the militia would be an institution subject to substantial national regulation, with the state governments sharing concurrent responsibility for appointment of officers and the actual conduct of training, and concurrent power to use these units, when not called into national service, for their own lawful purposes (including, of course, the suppression of insurrections by disaffected citizens presumably exercising their natural right of revolution).

Nothing in the ensuing discussions of these proposals required or even encouraged either Federalists or Antifederalists to consider the matter of state or national regulation of the private ownership and use of firearms. It follows that no coherent intentions or understandings can be confidently ascribed to a problem that was never beholden to the received wisdom. That is, they were more inclined to test the ideological inheritance against the lessons of recent experience. Far from this being, in Levinson's words, "another matter," it lies at the heart of the question.


cogently formulated in its own right. Whether or not individuals had a right to own firearms free of regulation by the states was a matter of complete indifference in 1787–89.

The behavioral context is most clearly associated with the work of Michael Bellesiles, which will doubtless attract substantial notice and scrutiny. Probing beyond the hackneyed paean to American sharpshooting that occur both in the primary sources (some of them clearly contrived for European eyes)\textsuperscript{143} and in later writings, Bellesiles is evidently the first historian to examine the actual use of firearms in the colonial, Revolutionary, and post-Revolutionary eras.\textsuperscript{144} What he discovers, among other things, is that many, perhaps the majority of American households, did not possess firearms; that Americans imported virtually all of their firearms; that the weapons they had were likely to deteriorate rapidly, firearms being delicate mechanisms, prone to rust and disrepair; that gunsmiths were few, far between, and not especially skilled; that the militia were poorly armed and trained, their occasional drilling days an occasion for carousing rather than acquiring the military art; that Americans had little use for hunting, it being much more efficient to slaughter your favorite mammal grazing in the neighboring pasture or foraging in nearby woods than to take the time to track some attractive haunch of venison with a weapon that would be difficult to load, aim, and fire before the fleshy object of your desire went bounding off for greener pastures. (Trapping was much more efficient than hunting, and hunting was a leisure activity for the elite.)\textsuperscript{145} All of these considerations make plausible and explicable the concerns we have already noted in describing the Virginia ratification debate of mid-June 1788: that without a national government firmly committed to the support of the militia, the institution would wither away from inefficiency, indifference, and neglect (which is pretty much what happened in any case, for reasons both Federalists and Antifederalists readily foresaw). Americans of all political persuasions could pay rhetorical lip service to the value of an armed citizenry, because that

\begin{footnotes}
\item[143] One might express some skepticism about the accuracy of Jefferson's statement of 1778, when (in a letter to an Italian correspondent about music) he explained why he thought American casualties might be half those of the British army: "This difference is ascribed to our superiority in taking aim when we fire; every soldier in our army having been intimate with his gun from his infancy." Letter from Thomas Jefferson to Giovanni Fabbroni (June 8, 1778), in \textsc{Thomas Jefferson: Writings} 760, 760 (Merrill D. Peterson ed., 1984).
\item[145] See \textsc{Bellesiles, supra note 138, passim.}
\end{footnotes}
sentiment was embedded in the traditions that the individual right interpretation celebrates; but the reality was quite otherwise.146

Bellesiles's findings, coupled with the evidence that militia reform was indeed the object of debate, thus illustrate a fundamental problem that all originalist inquiries must address. Once we move beyond the immediate records of debate to reconstruct deeper assumptions and concerns upon which they rested, originalists need to assess the relative importance of two quite different sets of sources, one consisting of intellectual traditions that doubtless shaped a grammar of discussion, the other of a set of experiences that fashioned an agenda for action. The tension between these two ways of thinking would presumably operate at any period, but we have good reason to think that it was felt more acutely during the Revolutionary era, when Americans were deeply aware of the fundamental break that their experiment in republican constitutionalism was making with the received wisdom of the past. This claim appears repeatedly in Federalist literature—including, most notably, The Federalist—and it renders problematic the naive, not to say ahistorical claim that underlies the approach taken by Malcolm and other writers of the individual right school: that transposition of the English experience or the authority of received tradition fills in the silences in the evidentiary record. It may or it may not; but the argument cannot stand on assertion alone. It requires some comparison of received ideas and the lessons of experience; but one searches the individual right literature in vain for any sustained mention, much less discussion, of the immediate concerns on which Americans were acting. In their account, the prior conception of the militia rooted in tradition somehow trumps the newer notions that the experience of the Revolution made more urgent. That is an arguable conclusion, but if so, it must be argued—and historical argument requires weighing conflicting evidence, not accepting one source and discounting another.

A DECLARATORY RIGHT

Modern thinking about constitutional rights is powerfully and indelibly shaped by the legacy of the Fourteenth Amendment, the gradual development of the incorporation doctrine, the civil rights revolution of the 1950s and the 1960s, and the broader controversies

146. See id.
that followed the landmark, rights-enlarging decisions of the Warren and Burger Courts. The logic of the individual right interpretation of the Second Amendment is deeply indebted to these developments in three ways, two of which are fairly obvious, but the third rather more subtle and even deceptive.

First, the rights revolution established the protection of individual rights as the dominant paradigm governing our underlying conception of the problem of rights in general, for it is the "no person" who claims recognition under the Due Process and Equal Protection Clauses of the Fourteenth Amendment who has evolved into the image of the "lone rights-bearer" lamented by Mary Ann Glendon.147 It is the individual gun owner whose right is perceived to be the endangered object of legislative restriction.

Second, the incorporation doctrine makes the actions of state and local legislative bodies restricting the exercise of federally sanctioned rights subject to judicial review. Its incomplete application accordingly leads to the question: Why has the constitutional right seemingly affirmed by the Second Amendment not enjoyed the benefit of incorporation? Indeed, ending the exile of the Second Amendment to the district of unincorporated rights is as much the object of the individual right interpretation as insisting upon a particular account of the original understanding of 1787–91. It would do no good to demonstrate conclusively that the framers and ratifiers of those years really did regard a fundamental right to own weapons as a necessary security against the danger of tyranny, if one could not at the same time produce a compelling rationale for its incorporation today.

There is, however, a third legacy of incorporation that also shapes—or perhaps distorts—our historical understanding of the nature of the right that the Second Amendment asserts. Given the broad application of the incorporation doctrine to remedy injustice and secure relief in decision after landmark decision, it is only natural that we now regard the Bill of Rights as a set of legally enforceable claims and commands. If a right is asserted, there must be a remedy when its exercise is infringed, and a remedy requires recourse to law. To have a right without a legally efficacious remedy is arguably to have no right at all, and if that is so, it would seem rather naive and pointless to think of a bill of rights (any bill of rights) as a set of hollow principles. As invested as we are (legally) in the jurisprudence

147. See Glendon, supra note 21, at 47.
of the Bill of Rights and (culturally) in veneration of the wisdom of
the constitutional fathers, it is difficult to suggest that they could have
been so naive as to enumerate rights for which they did not intend
remedies.

Yet at the time when the Second Amendment was adopted, it
was still possible to conceive of statements of rights in quite different
terms, as assertions or confirmations of vital principles, rather than
the codification of legally enforceable restrictions or commands. The
state declarations of rights of 1776 were filled with statements of this
nature, and many of these statements—and arguably the bills of rights
in toto—lacked legal authority. A statement endorsing the principle
of rotation in office did not impose term limits on legislators; it simply
reminded voters that they would be well advised, from time to time,
to send the bumpkins back to the country. To be sure, it was
precisely because such statements had demonstrated their
"inefficacy" that Madison first dismissed bills of rights as so many
"parchment barriers," 148 and then proposed interweaving his
amendments in the most salient places in the Constitution, rather
than see them appended as supplemental articles. The movement
away from the norms of 1776 was also reflected in his congressional
colleagues' rejection of the formulaic restatement of natural rights
that Madison originally proposed as a sort of second preamble to the
Constitution, and which he revealingly classified as "a bill of rights," in
apparent contradistinction to his remaining, interwoven amend-
ments. 149 Any comparison of the amendments of 1787 with the state
declarations will reveal how far American thinking had moved since
1776.

Yet among all the provisions of the federal Bill of Rights, the
Second Amendment is the one that most clearly echoes the earlier
tradition. That is the most obvious explanation for the mysterious

148. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in JAMES MADISON:

149. See James Madison, Speech in Congress Proposing Constitutional Amendments (June
8, 1789), in JAMES MADISON: WRITINGS, supra note 148, at 437, 441, 444. In rejecting these
statements, Congress may have been acting on the same assumptions that Edmund Randolph
had voiced at the Constitutional Convention two years earlier, when, as a member of the
Committee of Detail, he noted that the national constitution need not come adorned with the
rhetorical floursishes that accompanied the state constitutions. Such a "display of theory,
howsoever proper in the first formation of state governments, is unfit here; since we are not
working on the natural rights of men not yet gathered into society, but upon those rights,
modified by society, and interwoven with what we call the rights of states." Edmund Randolph,
Draft Sketch of Constitution (July 26, 1787), in SUPPLEMENT TO MAX FARRAND'S THE
presence of the distinctive preamble that is the object of so much analysis, from the syntactical to the metaphysical. As Eugene Volokh has recently noted, the preamble is not quite so esoteric or exceptional a statement as it is often made to appear. Set in the larger context of Revolutionary-era pronouncements, it is almost "commonplace." But intent as Volokh is on parsing the relation of the preamble to the operative provision, he misses a more obvious point that better captures or represents the context in which the Second Amendment was formulated. What was still a commonplace was the idea that a declaration of rights could contain statements of republican principles as well as provisions confirming or specifying natural rights (freedom of conscience), political safeguards (freedom of speech, press, assembly, and petition), common law procedural rights (Fourth, Fifth, Sixth, and Eight Amendments), or superfluous remedies against idiosyncratic grievances (such as quartering of soldiers in peacetime).

Under this interpretation, the Second Amendment can be read as a simple, elegant, distilled version of the comparable statements found in the state declarations of rights and the amendments recommended by several ratification conventions. It affirmed the essential proposition—or commonplace—that liberty fared better when republican polities relied upon a militia of citizens soldiers for their defense, rather than risk the dire consequences of sustaining a permanent military establishment. It therefore served as a principled reminder to the federal government (or more particularly, Congress) to act to insure that the militia would indeed remain well organized, armed, and disciplined—not least by guaranteeing that arms be provided to state governments and citizen soldiers who might otherwise lack the resources and desire to obtain and maintain costly firearms prone to disrepair. The Second Amendment, however, also omitted more restrictive provisions that Antifederalists would have liked or expected to find there, because the dominant Federalist majority in Congress saw no need to make the text more explicit. There was no need, for example, to repeat the ritual mantra against standing armies, for Federalists had repeatedly insisted that the constitutional restriction of appropriations to two years meant that a true standing army—that is, a permanent military force existing independently of control by the people’s representatives—could

literally not be created. One can speculate, too, that the Senate
deleted the substantive phrase, "composed of the body of the
people," for sheer redundancy, in an act (Amar suggests) of "stylistic
shortening." But a Congress that wanted to affirm a general principle
without compromising its own capacity (or that of future Congresses)
to decide what form the militia should take would have had more
potent reasons to eliminate that phrase. By the same token, while the
Second Amendment generally endorsed the value of a well-regulated
militia, as a mere statement of principle it made no alteration of any
kind in the delegation and allocation of legislative authority in
Article I.

It goes almost without saying that the statement of a general
principle may fall well short of the provision of adequate remedies for
its infringement. But that deficiency would have mattered to the
framers of the Second Amendment only insofar as they believed that
the Constitution posed a real threat requiring a remedy. They lacked
any incentive to move beyond the vague generalities of the language
they finally adopted, and with good reason not to do so if greater
precision could be read as imposing a meaningful restriction on the
ability of Congress to develop whatever form of militia considerations
of national security seemed to require.

Yet the brevity and ambiguity of the Second Amendment may
illuminate a deeper problem with the very conception of a bill of
rights. We may be reluctant to admit it, but the task of reducing the
statement of a right to a concise textual formula, in the style of the
national Constitution, suggests that the concept of a right may be far
more difficult to cabin successfully than other kinds of statements we
expect to find in a constitutional text. Stating a theory of freedom of
speech or conscience, for example, is not quite equivalent to
specifying modes of election or terms of office or even the respective
powers of institutions. The very concept of a right remains a source
of philosophical perplexity, and so, on occasion, does the
identification of the rights bearer, including the keeper and bearer of
arms. Is that right a duty we owe to the state or a manifestation of a
natural right of resistance and self-protection? Is the individual who
can claim to exercise a right to protect his home the same individual
who forms part of the people mobilized in the militia? Does it make
sense to speak of an individual right to arms in the context of a right
of revolution, which must be a collective act of mass resistance if it is
not to devolve into an expression of anarcho-terrorism?151

In his letter discussing the problem of bills of rights as “parchment barriers,” Madison casually mentioned the problem that would arise if “a positive declaration of some of the most essential rights could not be obtained in the requisite latitude.”152 His particular example involved a right to which he was far more attached than the right to bear arms: freedom of conscience. Madison worried that this cherished right might have to be textually tailored more narrowly than it should be in principle if it was to acquire the requisite political support. But Madison’s concern with the difficulty of stating a right in a textually satisfactory way may illuminate a deeper problem. What textual formula, expressed in the succinct style that the American constitutional tradition initially favored, could possibly capture and distill the matrix of principles and concerns that underlie any conception of a right, while simultaneously identifying the rights bearer, the interest to be protected, and the point where that protection yields to legitimate demands for regulation? Given the circumstances of 1789, when we cannot be certain how seriously the framers of the Bill of Rights were taking their assignment, it takes a high degree of confidence in their desire to achieve “perspicuity” to conclude that the authors of the amendments were acting with as much textual exactitude as we seek to extract in our own labored readings of these twenty-seven words. Somewhere up there, one suspects, Fisher Ames might still be chuckling: “Oh! I had forgot, the right of the people to bear arms. Risum teneatis amici[].”153 Hold your laughter, friends!—except that the subject is too deadly serious for that.

151. The leading scholar working on this issue is David Williams, who has argued in various places that while the Second Amendment was framed to express or confirm a popular right of revolution, that right is now obsolete because no unitary people of the kind imagined by the theorists of the eighteenth century could ever again form. At the same time, Williams denies that the Amendment recognizes a constitutionally protected private right of self-defense. For Williams’s various expositions of his ideas, see David C. Williams, Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment, 101 YALE L.J. 551 (1991); David C. Williams, The Constitutional Right to “Conservative” Revolution, 32 HARV. C.R.-C.L. L. REV. 413 (1997); David C. Williams, The Militia Movement and Second Amendment Revolution: Conjuring with the People, 81 CORNELL L. REV. 879 (1996).

152. Letter from James Madison to Thomas Jefferson, supra note 148, at 420.

CONCLUSION

Beneath their huzzas of conquest delivered on a field supposedly cleared of beaten opponents, cowed into retreat by the exemplary scholarship of the victors, the proponents of the individual right interpretation betray the reason for the peculiar emphases and distortions that mark their writings. Had there been any reason for the constitutional disputants of the late 1780s to discuss, directly and consciously, the extent of private rights of the ownership and use of firearms, advocates of the individual right interpretation would certainly have filled their articles with the apposite remarks. They would not have had to pepper their quotations with the tell-tale ellipses that invite critical readers to check what has been omitted (as in the use made of The Federalist No. 46); or make preposterous claims that are easily refuted (such as James Madison's supposed endorsement of Tench Coxe's description of the right to bear arms as a private right); or suggest that the deletion of a substantive qualification of the nature of the militia ("composed of the body of the people") was an inconsequential exercise in editorial concision; or use one textual rule for defining people and another for militia. Had the framers and ratifiers of the Constitution really perceived the problem in terms of a private right detached from service in the public institution of the militia, we would know it, and the writings of Halbrook, Kates, Malcolm, and others would take a different form. For ceteris paribus, direct expressions of framers' intentions and ratifiers' understandings would always provide the best evidence of the original meaning of a disputed constitutional clause.

But the structure of the debates of the late 1780s did not conduce to pose the problem in the form that proponents of the individual right interpretation would prefer to exploit. As the records from the Constitutional Convention, the ensuing ratification campaign, and the debates in the First Congress of 1789 all demonstrate, the issue under discussion was always the militia, and that issue was posed primarily as a matter of defining the respective powers of two levels of government. It was the inertial condition of American federalism—the existence of states with some intractable measure of autonomy, including the militia, yet bound for collective security in a federal union coeval with their independence—that ineluctably gave the debate this form. This controlling circumstance, to be sure, did not prevent odd expressions of concern about the private ownership and use of weapons from being voiced, but it did prevent such concerns
from reaching the threshold required for focused discussion, much less becoming the true object of debate. Nor was there then any reason to think of the ownership and use of firearms as a problem of public health and welfare. Under conceptions prevailing then and even now, such concerns fell completely under the conventional police powers of the states, and nothing in the structure of debate between 1787 and 1789 invited inquiry into the effect the Constitution would have in this realm. The debate over a bill of rights, as everyone knows, was about limiting the powers of the proposed national government, not trenching further on the traditional police responsibilities of the states. Similarly, because firearms had little practical use in private life, and were hardly dangerous except in warfare, it is completely anachronistic to expect the disputants of the eighteenth century to have comprehended, much less addressed, the problem of firearms regulation in its modern form. For much the same reason, the framers and ratifiers of the Fifth Amendment did not consider the problem of wiretapping or more sophisticated forms of electronic surveillance; nor did they ask whether a Constitution that allowed the national government to raise land and naval forces would be embarrassed by the establishment of the United States Air Force.

Given these difficulties, it is not surprising that the individual right interpretation relies so much on the weight of received tradition, in the form of warnings about the danger of standing armies, the virtues of an armed citizenry, and what Joyce Malcolm disarmingly calls "long-standing prejudice" or things that are "unmistakably assumed." Sir William Blackstone never visited America, nor was he a member of the Constitutional Convention, but his works were widely read, so it naturally follows that his speculative claim that an armed people would be able "to restrain the violence of oppression" provides the proverbial smoking pistol to solve the mystery of the Second Amendment.

All that this emphasis on received wisdom can establish or confirm, however, is the familiar point that Americans feared standing armies and hoped that the maintenance of a well regulated militia would obviate the need for a substantial national military establishment. This was indeed, to borrow Malcolm's phrase, a long-standing prejudice, and it certainly left its mark on the grammar of

154. MALCOLM, supra note 25, at 148.
155. Id. at 163.
eighteenth-century republicanism. But the authority of such prior sentiments was exactly what the revolutionaries and constitutionalists of the 1770s and 1780s were prepared to, and did, challenge. Long-standing prejudice suggested that the British constitution was the embodiment of the best political science of the era, but Americans not only departed freely from its form and structure, they also invented a new definition of what a constitution itself was to replace the one they had inherited. The exercises of constitution-writing in 1776 and especially in 1787 were shaped within the crucible, the hothouse experience, of revolution and revolutionary war, and some of the lessons that experience taught bore directly on the subject at hand: the role and value of either the militia as an organized institution or of an armed citizenry whose private weapons proved to be inadequate in number, quality, and repair. Not surprisingly, the individual right interpretation passes in nearly complete silence over the obvious question: Were Americans in the late 1780s thinking about the militia in exactly the same unchanged terms as they had in 1776? Some of them admittedly were, but they were far more likely to be numbered among the losers in the constitutional debates of 1787–89 than the victors. And that is why we can fairly conclude that Madison had substantive reasons for omitting the phrase “composed of the body of the people” from his original draft of the amendment; why a Senate that included Rufus King, one of the committee members who framed the Militia Clause at the Constitutional Convention, would have deleted this phrase after the House had added it; and why a conference committee that included Madison for the House left that deletion unchallenged.

Finally, the complete omission from the individual right interpretation of any discussion of the police power of the states constitutes potentially its most telling flaw, while simultaneously exposing a deeper dilemma in its dependence on originalism. If we read the Constitution intratextually, how do we triangulate the echoes between the people of the Second and Ninth Amendments, on the one hand, and the reserved powers of the states under the Tenth Amendment, on the other? Like the Second Amendment, the Tenth Amendment takes the form of an ambiguously stated injunction which arguably adds little if anything to the positive content of the Constitution. Yet it is impossible to conceive how the Tenth Amendment could have excluded the traditional power of government to legislate broadly for public health and safety from the reserved powers of the states. It is precisely because this traditional
function was (and remains) so essential to our concept of governance that the individual right interpretation has to insist that the principal purpose of the Second Amendment is to provide a powerful deterrent against tyranny. Only by evoking that speculative threat to the republic itself can the individual right interpretation identify a danger more ominous than the actual costs annually incurred through the casual and deliberate use of firearms.

If, then, one wished to adjudicate the Second Amendment dispute on originalist grounds, it would not be enough to adduce a historically delimited meaning of the word *militia* and the existence of a right of resistance and revolution that would be rendered meaningless if the population were disarmed. One would also have to ask whether the adopters of the Second Amendment thought or understood that they were seriously restricting the normal police powers of the state in order to preserve that revolutionary option. Even putting aside the formidable problems that this Article has emphasized in the individual right interpreters’ use of originalist evidence, their arguments would still need to confront a completely different line of originalist argument—an anchored in the Tenth Amendment—that they have so far largely ignored. One originalist argument holds that the danger of tyranny still warrants a broad construction of the Second Amendment, and that the right to be armed must therefore vest in the population as a whole, because the modern militia (the National Guard) is already too closely tied to the potential source of despotism to act the part that Madison and others of his generation accorded to the state-based militia of their era. The other argument holds that the Constitution, amended or unamended, did not diminish the capacity of the states to legislate in pursuit of the public health and safety. What has changed over time is not our basic understanding of the responsibility of state governance in this respect, other shifts in the balance of state and federal activity notwithstanding, but rather our appreciation of the danger that casual use of firearms poses.

The true way, then, in which the Second Amendment problem (as an exercise in originalism) should be cast is this: If its adopters had the same evidence available to them that we possess today, would they place greater weight on the speculative danger of tyranny, rooted in their reconstruction of the history of early modern Europe and their fear of consolidated power? Or would they agree that pressing problems of the present warrant placing greater emphasis on the police powers of the states? Either position can be argued on
originalist grounds, but posing the problem in this way identifies a deeper irony in the larger debate. For at bottom, the individual right interpretation insists that fears rooted in the historical memories of the eighteenth century should still take priority over the judgments we are entitled to reach after two centuries of constitutional self-government.156 Those fears were certainly legitimate then, for the founders of American constitutionalism had good reason and historical evidence aplenty to wonder whether their experiment would work. That is what makes their leap of constitutional faith so compelling and their fears of standing armies and national despotism so understandable.

But is it true that the success of American constitutionalism two centuries and more later is due to the existence of a well-armed citizenry? We have been told that the decline of bowling leagues may be an index of the well-being of democratic civil society, but does it follow that the welfare of constitutional governance is directly correlated with the distribution of portable weapons, up to and including the automatic weapons that occasionally figure in schoolyard shootings?157 Somehow I have naively labored under the impression that the strength of our constitutional culture lies elsewhere, in the commitment of our citizenry to principles of representative government, equality, and (increasingly) tolerance; but

156. On this point, supporters of the individual right interpretation would argue that our own frame of reference should include the experience of totalitarian rule and genocide in countries like Nazi Germany, the Soviet Union, and other horror stories of the past century; and that is, of course, a telling argument. But so is the appropriate response: that none of these countries had developed a democratic or constitutional culture, or established institutions and conventions of republican government, supported and shared by citizens and ruling elites alike, across a period of some generations, while successfully acculturating immigrants whose own origins were often not rooted in similarly democratic cultures. See the discussion of this point in Reynolds, supra note 48, at 504-07, and sources cited therein.

157. I am not completely reassured by the explanation on this point offered by Glenn Harlan Reynolds:

Because one purpose of the right is to allow individuals to form up into militia units at a moment's notice, the kinds of weapons protected are those in general military use, or those that, though designed for civilians, are substantially equivalent to those military weapons. Because another purpose is the defense of the home, Standard Model writers also import common-law limitations on the right to arms, as they existed at the time of the framings. Under the common law, individuals had a right to keep and bear arms, but not such arms as were inherently a menace to neighbors, or that had an unavoidable tendency to terrify the community. Thus, weapons such as machine guns, howitzers, or nuclear weapons would not be permitted. Note however that the much-vilified "assault rifle" would be protected under this interpretation—not in spite of its military character, but because of it.

Id. at 479-80. In some ways, I think I would be more terrified of an AK-47 next door than a howitzer, on the assumption that whatever target the howitzer hit would be some miles distant, while a neighbor fending off a burglar with a full automatic burst could easily put an alarming number of rounds into my own little (and regrettably unfortified) castle.
after this disconcerting journey to the Second Amendment theater, my confidence has been shaken.