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David T. Hardy

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**A WELL-REGULATED MILITIA: THE FOUNDING FATHERS
AND THE ORIGIN OF GUN CONTROL IN AMERICA**
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David T. Hardy*

"Every thing of a controvertible nature," James Madison noted regarding his proposed Bill of Rights, "was studiously avoided."¹ We may wonder what he would think of the 217 years of controversy that followed.

For most provisions of the Bill of Rights, the controversies have focused upon their boundaries and limitations. What is an "unreasonable search," a "compelled" self-incrimination, an "establishment" of religion? In the case of the Second Amendment² the dispute is far more fundamental, going to the very question of whether it has any meaningful existence. Here, the conflict has been one between variants of two viewpoints:

- (1) the "individual rights" view,³ which has two variants:
 - (a) The "standard model," which sees the Second Amendment as guaranteeing a personal right on par with other Bill of Rights protections;
 - (b) What I have termed the "hybrid" view, which sees it as guaranteeing an individual right but limited to private bearing of arms suited for military or militia use;⁴ and
- (2) the "collective rights" view which likewise has two variants:
 - (a) The traditional "collective rights" approach, which sees the amendment as protecting only a state interest in an organized militia, i.e., National Guard units;⁵ and

[†] Associate Professor of History, Ohio State University.

* J.D., University of Arizona, 1975.

¹ Letter from James Madison to Thomas Jefferson (June 30, 1789), in 12 THE PAPERS OF JAMES MADISON 272 (Charles F. Hobson & Robert A. Rutland eds., 1979).

² "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. The amendment's text is also found in variations with one or two commas. David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL'Y 559, 560 n.8 (1986).

³ *Id.* at 560.

⁴ *Id.* at 618. This derives from state decisions of the nineteenth century, largely involving bans on weapons other than firearms such as the Bowie knife and brass knuckles. *See, e.g.*, *Fife v. State*, 31 Ark. 455, 460 (1876); *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 186–87 (1871); *English v. State*, 35 Tex. 473, 476–77 (1872).

⁵ The Ninth Circuit has carried this view to its logical consequence, holding that no

- (b) What the Fifth Circuit has termed the “sophisticated” collective rights approach, which sees it as protecting individual activity but only if directly linked to organized militia missions.⁶

As the first view treats the Second Amendment as a meaningful restriction on legislative action, while the second treats it as fundamentally meaningless,⁷ the conflict is absolute.

The history of the understanding of the American right to arms has followed an unusual course in which the advantage swayed back and forth between the two schools of thought. At its outset, the existence of an individual right was taken for granted by courts,⁸ commentators,⁹ and the general public¹⁰ throughout the eighteenth and nineteenth centuries. The collective rights view was first enunciated, by a state court, in 1905.¹¹ In 1939, the United States Supreme Court declined to accept that approach in *United States v. Miller*;¹² soon thereafter, however, two Circuits read *Miller* either as endorsing the collective rights approach¹³ or as setting only a threshold test

individual has standing to assert a Second Amendment violation because it is a right of states only. *Hickman v. Block*, 81 F.3d 98, 103 (9th Cir. 1996), *cert. denied*, 519 U.S. 912 (1996).

⁶ *United States v. Emerson*, 270 F.3d 203, 219, 226 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002).

⁷ See Glenn Harlan Reynolds & Don B. Kates, *The Second Amendment and States' Rights: A Thought Experiment*, 36 WM. & MARY L. REV. 1737, 1739 (1995).

⁸ See *Scott v. Sanford* (Dred Scott), 60 U.S. 393, 420 (1856), *superceded on other grounds by constitutional amendment*, U.S. CONST. amends. XIII & XIV; *State v. Reid*, 1 Ala. 612, 616–17 (1840); *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90, 92 (1822). See generally *infra* text accompanying notes 246–60.

⁹ See *infra* notes 188–232 and accompanying text.

¹⁰ For the most exhaustive discussion of the public perception over this period, see David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1397–408, 1435–43, 1468–505.

¹¹ *City of Salina v. Blaksley*, 83 P. 619, 620–21 (Kan. 1905). An early mention of the approach occurred in a concurrence in *State v. Buzzard*, 4 Ark. 18, 30–32 (1842) (Dickinson, J., concurring).

¹² 307 U.S. 174 (1939). The firearm at issue in *Miller* was a shotgun with a barrel less than eighteen inches long. *Id.* at 175. After noting that the right to arms must be construed with a view to the militia purpose (with the militia described in colonial terms as the armed community), the Court declined to take judicial notice that such a firearm was suitable for militia use, and remanded. *Id.* at 178, 183. This places *Miller* in the hybrid individual rights camp: an individual may assert the right, but it does not cover weapons suited for brawls rather than militia use. See *United States v. Emerson*, 270 F.3d 203, 224–26 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002). The collective rights approach was briefed by the government, as its primary position, but was not adopted by the Court. Brannon P. Denning, *Can the Simple Cite Be Trusted?: Lower Court Interpretations of United States v. Miller and the Second Amendment*, 26 CUMB. L. REV. 961, 974–75 (1996).

¹³ See *United States v. Tot*, 131 F.2d 261, 266 (3d Cir. 1942), *rev'd on other grounds*,

that permitted them to go farther and accept such an approach.¹⁴ Most of the remaining circuits followed,¹⁵ and this reading of *Miller* became a matter of “received wisdom” to the point in which some decisions suggest the authors had not bothered to read *Miller* before interpreting it.¹⁶

Even as late as the early 1960s, Supreme Court justices and an article selected by the American Bar Foundation as the winner of its constitutional law essay competition were willing to acknowledge the essentially individual nature of the right protected by the Second Amendment, but that changed by the end of the 1960s. . . .

It is fair to say that by the 1970s the collective or states’ rights theory had won the day with most jurists and legal and lay commentators who opined on the issue. . . . Throughout the 1970s and 1980s, expressed opinion on the part of the elite bar, the bench, and the legal academy was firmly on the side of those who denied the existence of an individual right to arms.¹⁷

The tide was, however, changing once again. When first I published on the subject in 1974,¹⁸ there were but a few scholarly treatments in print and none of any particular depth.¹⁹ Over the next decade, scholarship in the field expanded, largely as a result of the efforts of Stephen Halbrook, the late David Caplan, and Joyce Malcolm.²⁰

319 U.S. 463 (1943).

¹⁴ See *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942), *cert. denied*, 319 U.S. 770 (1943).

¹⁵ See, e.g., *Quilici v. Vill. of Morton Grove*, 695 F.2d 261, 270 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976), *cert. denied*, 426 U.S. 948 (1976); *United States v. Johnson*, 497 F.2d 548, 550 (4th Cir. 1974).

¹⁶ A conspicuous example is *Hickman v. Block* in which the Ninth Circuit, in purporting to apply *Miller*, describes *Miller* as having been convicted and the Supreme Court as having upheld the conviction. 81 F.3d 98, 101 (9th Cir. 1996). In fact, *Miller* had secured a dismissal of his indictment, and the Supreme Court reversed and remanded. *Miller*, 307 U.S. at 177, 183.

¹⁷ Eugene Volokh et al., *The Second Amendment as Teaching Tool in Constitutional Law Classes*, 48 J. LEGAL EDUC. 591, 606–07 (1998).

¹⁸ David T. Hardy & John Stompoly, *Of Arms and the Law*, 51 CHI.-KENT L. REV. 62 (1974).

¹⁹ See John Levin, *The Right to Bear Arms: The Development of the American Experience*, 48 CHI.-KENT L. REV. 148 (1971); Robert A. Sprecher, *The Lost Amendment*, 51 A.B.A. J. 554 (1965); Jonathan A. Weiss, *A Reply to Advocates of Gun-Control Law*, 52 J. URB. L. 577 (1974).

²⁰ See, e.g., David I. Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 FORDHAM URB. L.J. 31 (1976); Stephen P. Halbrook, *To Keep and Bear Their Private Arms: The Adoption of the Second Amendment, 1787–1791*, 10 N. KY. L. REV. 13 (1982); Joyce Lee Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*,

In 1983, Don Kates published a lengthy breakthrough article in the *Michigan Law Review*.²¹ Thereafter, scholarly treatment of the individual rights approach grew exponentially.²² By the 1990s, the individual rights approach had the endorsement of the major names in constitutional law—William Van Alstyne,²³ Sanford Levinson,²⁴ Akhil Amar,²⁵ Leonard Levy,²⁶ and Laurence Tribe.²⁷

It is probably not too much to say that by the 1990s the collective rights view had become intellectually untenable. While judicial acceptance of this trend was still largely withheld, the Fifth Circuit, in *United States v. Emerson*,²⁸ and later, the D.C. Circuit, in *Parker v. District of Columbia*,²⁹ did take the individual rights approach, creating a deep split among the circuits that stands to this day.³⁰

Now into the fray comes Professor Saul Cornell's book, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* (AWRM).³¹ AWRM rejects the collective rights view, but it also rejects a broad

10 HASTINGS CONST. L.Q. 285 (1983).

²¹ Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983).

²² See, e.g., STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* (2d ed. 1994); JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* (1994); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991); Nicholas J. Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment*, 24 RUTGERS L.J. 1 (1992); Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103 (1987); Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 YALE L.J. 995 (1995) (reviewing MALCOLM, *supra*); David B. Kopel, *It Isn't About Duck Hunting: The British Origins of the Right to Arms*, 93 MICH. L. REV. 1333 (1995) (reviewing MALCOLM, *supra*).

²³ William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236 (1994).

²⁴ Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

²⁵ AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 50–55, 216–18, 264–66 (1998).

²⁶ LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 133–49 (1999).

²⁷ 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 897 (3d ed. 2000).

²⁸ 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002); *accord* United States v. Darrington, 351 F.3d 632 (5th Cir. 2003), *cert. denied*, 541 U.S. 1080 (2004); United States v. Henry, 288 F.3d 657 (5th Cir. 2002), *cert. denied*, 537 U.S. 902 (2002).

²⁹ 478 F.3d 370 (D.C. Cir. 2007).

³⁰ See *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002), *cert. denied*, 540 U.S. 1046 (2003). The Ninth Circuit is itself divided on the issue. See *Nordyke v. King*, 364 F.3d 1025 (9th Cir. 2004) (denying rehearing en banc with dissents), *cert. denied*, 843 U.S. 820 (2004); *Silveira v. Lockyer*, 328 F.3d 567 (9th Cir. 2003) (denying rehearing en banc over four dissents); *accord* United States v. Hale, 978 F.2d 1016, 1021 (8th Cir. 1992) (Beam, J., concurring), *cert. denied*, 507 U.S. 997 (1993).

³¹ SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE*

reading of the individual rights approach.³² It advocates what it terms a “civic rights” approach, emphasizing the militia-relatedness of the individual right to arms, and it distinguishes this form of individual right from an individual right to arms based on individual self-defense—which, it asserts, evolved out of abolitionist writings of the 1840s and 1850s.³³

AWRM seems uncertain as to the practical ramifications that would follow acceptance of its view. At one point it argues that because militia duties were subject to regulation, so would be any right to arms: “the original civic conception of the Second Amendment emphasizes that there can be no right to bear arms without extensive regulation.”³⁴ Elsewhere, *AWRM* phrases its conclusion in what are virtually collective-right (or perhaps hybrid-individual right) terms—the purpose of the Second Amendment was to guarantee that “citizens would be able to keep and bear those arms needed to . . . participate in a well-regulated militia.”³⁵

Professor Cornell’s work is, it must be said, an excellent read, and it contains some interesting revelations that have escaped earlier authors—not all limited to the right to arms *per se*. A prominent example is its treatment of the evolution of the American legal standard for self-defense, shifting from the common law standard of actual necessity to ward off lethal attack, to the present standard of reasonable *belief* of that necessity.³⁶ Another interesting revelation takes the form of a detailed outline of the Grant administration’s legal tactics when it set out to prosecute the Ku Klux Klan under the Fourteenth Amendment and the Enforcement Act—the Grant administration thought prosecutions of local officials for disarmaments of blacks were sure winners.³⁷ Yet another gem involves discovering and documenting the role a 1915 Harvard Law Review article played in promoting the collective rights view, lifting it from its origins in a 1905 Kansas case³⁸ into a doctrine that found broader judicial

ORIGINS OF GUN CONTROL IN AMERICA (2006).

³² *Id.* at 1–3.

³³ *Id.* at 2, 152.

³⁴ *Id.* at 213.

³⁵ *Id.* at 2.

³⁶ *Id.* at 110–17. How juries applied the law is a different question. One study of medieval verdicts suggests that juries found self-defense if there was any conceivable ground for it and quite often when there was none. Thomas A. Green, *The Jury and the English Law of Homicide, 1200–1600*, 74 MICH. L. REV. 413, 427, 429–30 (1976). In some periods, as much as fifty-nine percent of homicide prosecutions ended in self-defense rulings. *Id.* at 430. The common law also recognized a broad privilege to use deadly force against criminal intruders, whether or not they posed a threat. See David I. Caplan & Sue Wimmershoff-Caplan, *Post-modernism and the Model Penal Code v. the Fourth, Fifth, and Fourteenth Amendments—and the Castle Privacy Doctrine in the Twenty-First Century*, 73 UMKC L. REV. 1073, 1082, 1084–86 (2005).

³⁷ CORNELL, *supra* note 31, at 179–86.

³⁸ *City of Salina v. Blacksley*, 83 P. 619 (Kan. 1905).

acceptance.³⁹ Not to mention *AWRM*'s discussion of post-Civil War efforts to create black militias,⁴⁰ which has received scant attention in recent decades.⁴¹

As legal history, however, *AWRM* has a shortcoming, and it goes to its core. *AWRM* does not prove its thesis because it gives only a partial, selective, and often unreliable account of the development of the American right to arms. As will be detailed *infra*, early Americans agreed that they had a right to arms, but in discussing that right, gave different understandings of its purposes and value. Many saw it as enabling a fundamental natural right of self-defense,⁴² some saw it as enabling a militia system,⁴³ and some saw it as ensuring an armed citizenry that—whether enrolled in militia units or not—would serve as a counterbalance to government abuses.⁴⁴ The relative balance of these views follows a timeline. Prior to the Revolution, natural rights and self-defense overwhelmingly dominated the conversation.⁴⁵ From 1775 to the framing of the Constitution, when conflict and state-building were the issues of the day, natural rights, militia, and armed people were all in play.⁴⁶ By the framing of the Bill of Rights and in the following decades, natural right and self-defense returned to dominance.⁴⁷

AWRM portrays this historical background as uni-dimensional. It sets out with its conclusion: almost all early Americans before saw the right as militia-centric⁴⁸—at least until the abolitionists came upon the scene—and then is forced to make the historical evidence fit.

Often it is a hard fit. At one point, the reader is informed that “Pennsylvania in its Declaration of Rights . . . affirmed that ‘the people have a right to bear arms for the defense of themselves and the state,’” and on the next page assured that “[n]one of the early state constitutions adopted language protecting an individual right to keep or carry arms for personal self-defense.”⁴⁹ References to the right as derived from a natural right of self-defense are simply omitted when they are in irreconcilable conflict with the desired conclusion, and they are recast when the conflict seems explicable. In the process, *AWRM* too often pushes the historical record, down

³⁹ CORNELL, *supra* note 31, at 198–203.

⁴⁰ *Id.* at 175–78.

⁴¹ For earlier treatment of the subject, see PETER CAMEJO, *RACISM, REVOLUTION, REACTION, 1861–1877* (1976); OTIS A. SINGLETARY, *NEGRO MILITIA AND RECONSTRUCTION* (Greenwood Press 1984) (1957).

⁴² *See infra* Part I.A.

⁴³ *See infra* notes 112–15 and accompanying text.

⁴⁴ *See infra* notes 126–31 and accompanying text.

⁴⁵ *See infra* Part I.A.

⁴⁶ *See infra* Part I.B–C.

⁴⁷ *See infra* Part II.

⁴⁸ *See* CORNELL, *supra* note 31, at x–xi.

⁴⁹ *Id.* at 16, 17.

to making an authority militia-centric by omitting what he said about the Second Amendment and substituting what he said about Article I's Militia Clauses.⁵⁰

Before detailing *AWRM*'s difficulties, I would renew an observation I have previously made: there is really no basis for assuming the Second Amendment had a single objective, that it must have been meant to protect the militia as a system *or* to protect an individual right to arms.⁵¹ It has two clauses, after all. Is it likely that the First Congress, when it cut Madison's proposal for the amendment from forty-six to twenty-four words,⁵² would have left in a ten or a fourteen-word redundancy? Would it even have retained a preface, given that it struck Madison's preface to freedom of the press,⁵³ unless the prefatory and the substantial clauses were seen as independent provisos?

Indeed, an inquiry into the language chosen for arms/militia guarantees over the period 1776 to 1787 shows that the choice originally *was* seen as either/or, with Classical Republican drafters, strongly focused on creating a stable republic, memorializing the militia, and proto-Jeffersonians, more concerned with individual rights, guaranteeing individual rights to arms.⁵⁴ Only in the Virginia ratifying convention of 1788 did the two groups unite and agree to recognize *both* the importance of the militia *and* the right of the people to arms.⁵⁵ It is thus critical to recognize that evidence showing *some* Framers spoke of any one purpose is not proof that no other purpose was intended.

In this aspect, both individual rights and collective rights scholars have been both partially mistaken and partially correct. To make their cases, each has been driven to assume that the Framers who spoke of the other view were simply being imprecise or inarticulate. Neither considered the possibility that when Virginia praised the militia,⁵⁶ and Pennsylvania guaranteed "a right to bear arms for defense of [one]self and the State,"⁵⁷ each meant exactly what they said: they were speaking of somewhat different things.

AWRM marks a break away from the simple "collective rights only" and "individual rights only" dichotomy. At the same time, it tends to fall into a variation of it, advocating what we might term a "civic right only" view and overlooking the fact that many Framers and their contemporaries *did* view the right to arms as related to personal self-defense.

⁵⁰ See *infra* notes 197–206 and accompanying text.

⁵¹ David T. Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J.L. & POL. 1 (1987).

⁵² *Id.* at 3 n.5.

⁵³ *Id.* at 59 n.261.

⁵⁴ See *id.* at 33–43.

⁵⁵ *Id.* at 52.

⁵⁶ *Id.* at 34.

⁵⁷ *Id.* at 38.

Moreover, a closer look at the historical evidence indicates that even “civic right” Framers are divisible into two classes. The first indeed looked to the *militia system* as a guarantee of freedom. The second spoke of *general armament of the people* as the primary guarantee.⁵⁸ *AWRM*, in delineating its concept of a civic right to arms, conflates the two. It defines “civic right” in terms of the first, militia-centric viewpoint.⁵⁹ But in arguing for this conclusion, it includes evidence relating to the latter view. Noah Webster wrote that “[b]efore a standing army can rule, the people must be disarmed; as they are in almost every kingdom in Europe” and that the proposed Constitution was no peril to liberty since “the whole body of the people are armed.”⁶⁰ *AWRM* assures us he meant this as praise of the militia system.⁶¹ But Webster never mentioned the militia system in his pamphlet—his references were to widespread private arms ownership.

The difference is a material one. Part of *AWRM*’s argument is that if the right to arms is purely militia-related, then fairly extensive government controls would be permissible.⁶² If, on the other hand, the Framers saw the right as guaranteeing that an armed populace would keep the government in check, we might turn a much more skeptical eye toward assertions of governmental power. The distinction between the militia-centric viewpoint, and one valuing an armed people, thus goes to the very heart of *AWRM*’s practical utility as a legal history.

These are aspects of a more fundamental problem in *AWRM*’s analysis. Dive bomber pilots long ago discovered the dangers of “target fixation” in which the pilot became so focused upon his target that he noticed nothing else—including the approaching ground. *AWRM* displays an analogous fixation. It seems at times as if *AWRM* began with a dogmatic belief that any intelligent Framer must have “civic right only” in mind; thus any writings which seem to vary from this either (a) had

⁵⁸ Joyce Lee Malcolm, *That Every Man Be Armed: The Evolution of a Constitutional Right*, 54 GEO. WASH. L. REV. 452, 455 (1986) (book review) (“The Second Amendment reflects traditional English attitudes toward these three distinct, but intertwined, issues: the right of the individual to protect his life, the challenge to government of an armed citizenry, and the preference for a militia over a standing army.”).

⁵⁹ See, e.g., CORNELL, *supra* note 31, at 14 (“This ancient right was not exercised by individuals acting unilaterally or in isolation, but rather required that citizens act together in concert as part of a well-regulated militia.”); *id.* at 41 (claiming that the dominant early model of right “tied the exercise of this right to participation in the militia”). But see *id.* at 2 (“The original understanding [was] a civic right that guaranteed that citizens would be able to keep and bear those arms needed to meet their legal obligation to participate in a well-regulated militia.”). The first two formulations approach the collective right theory; the third greatly resembles the hybrid individual right view.

⁶⁰ NOAH WEBSTER, AN EXAMINATION INTO THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION PROPOSED BY THE LATE CONVENTION HELD AT PHILADELPHIA 43 (Phila., Prichard & Hall 1787).

⁶¹ CORNELL, *supra* note 31, at 47.

⁶² *Id.* at 212–13.

civic right in mind but neglected to mention it or (b) can be disregarded because the author was a dunce who failed to grasp what he should have been saying.

Thus when Massachusetts in 1780 guaranteed a right to keep and bear arms “for the common defense,” *AWRM* sees this as a critical development, “linking the right to keep arms with the obligation to bear them for the common defense.”⁶³ Yet when the First U.S. Senate *voted down* a similar addition to the Second Amendment,⁶⁴ *AWRM* sees it as a matter of little consequence.⁶⁵

The Pennsylvania minority at its ratifying convention demanded a guarantee of a very broad right to arms, that “the people have a right to bear arms for the defence of themselves and their own State or the United States, or for the purpose of killing game.”⁶⁶ *AWRM* sees the inclusion of hunting as the product of “slapdash draftsman-ship.”⁶⁷ Yet when the New Hampshire ratifiers called for a guarantee that “Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion,”⁶⁸ *AWRM* treats the omission of hunting as proof the convention must have been thinking of arms for militia purposes only: “[h]ad New Hampshire sought such a personal right, the state could have easily followed the model provided by the Pennsylvania Dissent and included a provision on hunting.”⁶⁹ At times we are left to wonder what an eighteenth century American could have written, said, or done that *AWRM* would not read as support of a “civic right only” approach.⁷⁰

At other points *AWRM* dons blinders when it encounters evidence of non-militia intent. Previous authors have noted four great legal commentators of the eighteenth and nineteenth centuries who discussed the American right to arms: St. George Tucker, William Rawle, Joseph Story, and Thomas Cooley.⁷¹ Tucker and Rawle discussed the right to arms as purely individual;⁷² Cooley saw it as militia-related but repudiated the claim that it had any limitation to militia duty.⁷³ Only Story discussed the right to arms purely as militia-related.⁷⁴

⁶³ *Id.* at 24.

⁶⁴ JOURNAL OF THE FIRST SESSION OF THE SENATE 77 (Gales & Seaton 1820) (1789) [hereinafter *SENATE JOURNAL*].

⁶⁵ CORNELL, *supra* note 31, at 62.

⁶⁶ PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787–1788, at 462 (John Bach McMaster & Frederick D. Stone eds., 1888).

⁶⁷ CORNELL, *supra* note 31, at 51–52.

⁶⁸ 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 761 (1971).

⁶⁹ CORNELL, *supra* note 31, at 59.

⁷⁰ As it is, there is one thing *no eighteenth-century American* did, and it is the only measure that would clearly prove *AWRM*’s “civic right only” theme. None said anything approaching “this right to arms is intended for militia purposes *alone*.”

⁷¹ See, e.g., HALBROOK, *supra* note 22, at 89–93, 169; DAVID T. HARDY, ORIGINS AND DEVELOPMENT OF THE SECOND AMENDMENT 80–85 (1986); Kopel, *supra* note 10, at 1372–79, 1384–97, 1461–66.

⁷² See discussion *infra* Part II.A.1–2.

⁷³ See discussion *infra* Part II.A.4.

⁷⁴ See discussion *infra* Part II.A.3.

This presents a serious problem for *AWRM*'s thesis, and to deal with it *AWRM* becomes quite disingenuous. It omits Rawle and Cooley entirely. It praises Tucker but inexplicably omits his discussion of the Second Amendment and quotes only from his discussion of Article I's Militia Clauses,⁷⁵ which predictably dealt with the militia.⁷⁶

Part I of this Review will examine *AWRM*'s treatment of the right to arms under the Second Amendment, which exhibits a tendency to stress militia-related writings, to play down other evidence, and to overlook subtle differences in the treatment of rights to arms. Part II will examine its treatment of the commentators and caselaw in the early Republic in which it shows more serious flaws, down to omitting data which is inconsistent with its thesis, and describing as the majority view a position that was in fact only accepted by a single court. Part III will examine *AWRM*'s analysis of the Fourteenth Amendment, and Part IV will analyze the role of *AWRM*'s thesis on constitutional interpretation and on public policy.

I. *AWRM*'S TREATMENT OF THE BACKGROUND OF THE SECOND AMENDMENT

A. *A Problem of Missing Context*

Most of *AWRM*'s treatment of the early period of American law overlaps efforts of prior authors, particularly Stephen Halbrook, Don Kates, and David Kopel.⁷⁷ At this point in time, duplication is almost inevitable: after thirty years of industrious digging, there are few nuggets left to be found and, as noted above, when they remain, *AWRM* does find them. Before examining its treatment of sources from that period, however, it is worthwhile to note the lack of an important context.

AWRM's focus is upon the development of the American right to arms, and it almost entirely omits treatment of the prior development of a British right to arms. The rights-consciousness of early America grew, of course, from the seed of British concepts, particularly those of the Whig theorists.⁷⁸ In 1789, Americans did not invent from thin air the ideas of freedom of the press, freedom from general warrants, rights to a jury trial, or a right to arms.

As Joyce Malcolm has extensively documented,⁷⁹ the British right to arms arose out of a popular reaction to arms confiscations by the Stuart monarchs and was enshrined in the 1688 Declaration of Rights, which recognized among the "auntient and indubitable Rights" of Britons that "the Subjects which are Protestants may have

⁷⁵ U.S. CONST. art I, § 8, cls. 15–16.

⁷⁶ See *infra* notes 188–206 and accompanying text.

⁷⁷ At first glance, I thought *AWRM* had made a major discovery: James Madison had used "bear arms" in drafting a bill regulating hunting, i.e., in a non-military context. CORNELL, *supra* note 31, at 29. But Stephen Halbrook had found this too. See HALBROOK, *supra* note 22, at 223 n.145.

⁷⁸ CORNELL, *supra* note 31, at 28–34; Hardy, *supra* note 2, at 584–87.

⁷⁹ See MALCOLM, *supra* note 22.

Arms for their Defence suitable to their Conditions and as allowed by Law.”⁸⁰ The Parliamentary debates on the Declaration show members complaining of seizures of private arms, by militia officials, under the 1662 Militia Act⁸¹ and that the House of Lords struck “for the common defense” from the end of the provision.⁸² The English right, as recognized in the Declaration, had no militia orientation—if anything, it had an *anti-militia* slant, denouncing the acts of militia leaders, which had been authorized under militia statutes. Indeed, one British military historian has complained, “[t]he revised wording suggested only that it was lawful to keep a blunderbuss to repel burglars.”⁸³

Blackstone’s authoritative treatment of English law cited the Declaration and classed its right to arms as an auxiliary right⁸⁴ that protected the subject against a day when the failure of legal protections made either resistance, or self-defense, essential—in short, as a broad principle of self-defense, with no reference to militia service:

The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence, suitable to their condition and degree, and such as are allowed by law. Which is also declared by the same statute and is indeed a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.⁸⁵

In this, Blackstone harkens back to Thomas Hobbes, who had made the right of self-defense the *one* inalienable right, precisely because the subject had submitted to the sovereign in exchange for protection against private violence: the subject could not bargain away the one thing he had received in the exchange.⁸⁶

⁸⁰ Declaration of Rights, 1688, 1 W. & M., c. 2 (Eng.).

⁸¹ Hardy, *supra* note 2, at 582–83. The 1662 Act authorized any Lord Lieutenant of the militia, or any two of his deputies, to disarm anyone they “judge[d] dangerous to the Peace of the Kingdome.” Militia Act, 1662, 14 Car. 2, c. 3, § 8 (Eng.).

⁸² Hardy, *supra* note 2, at 582–83.

⁸³ J.R. WESTERN, *MONARCHY AND REVOLUTION: THE ENGLISH STATE IN THE 1680S*, at 339 (1972).

⁸⁴ WILLIAM BLACKSTONE, 1 *COMMENTARIES ON THE LAWS OF ENGLAND* 139 (Univ. Chi. Press, photo. reprinted 1979) (1765). Blackstone considered the absolute rights of Englishmen to be personal security, personal liberty, and private property. *Id.* at 125. These were backed by “auxiliary subordinate rights of the subject, which serve principally as barriers to protect and maintain inviolate the three great and primary rights.” *Id.* at 136. The auxiliary rights were the powers given Parliament, the limitations on the royal prerogative, the right to seek judicial remedy, the right to petition, and the right to arms. *Id.* at 136–39.

⁸⁵ *Id.* at 139 (citations omitted).

⁸⁶ THOMAS HOBBS, *THE LEVIATHAN* 68 (Prometheus Books 1988) (1651). Blackstone, in turn, wrote that “[f]or whatever is done by a man, to save either life or member, is looked

AWRM virtually omits the English experience, devoting but three sentences to the Declaration⁸⁷—and at that, quoting the relevant sentence only in part⁸⁸—before assuring the reader that early Bostonians put a militia gloss upon the right to arms by noting it was well-suited for defense of the community.⁸⁹ Of Blackstone, we are told little more than that he must have thought the Declaration of Rights and self-defense were distinct, since he writes of self-defense separately (which is neither correct—he discusses the *right* of self defense in the same chapter as the right to arms—nor dispositive—he discusses the legal elements of self-defense elsewhere, but he does the same with the importance of the militia⁹⁰) and that, since Blackstone also treated the right to petition as an auxiliary right, both rights must be “essentially political.”⁹¹ Blackstone’s reference to “self-preservation” as the purpose of the right goes by the wayside.

In short, the Anglo-American concept of the right saw it as related to self-defense, which in turn had two aspects: individual self-defense against criminals and collective self-defense against a tyrannical government. Both were outgrowths of a fundamental right to self-defense,⁹² and both were, to Blackstone, defenses against “oppression.”⁹³ By focusing only upon the American experience, *AWRM* overlooks its underpinnings as an auxiliary of self-defense.

upon as done upon the highest necessity and compulsion.” 1 BLACKSTONE, *supra* note 84, at 126.

⁸⁷ CORNELL, *supra* note 31, at 12.

⁸⁸ *Id.* *AWRM* states that early colonists believed they had a right to “have arms for their defenses,” based on the Declaration. *Id.* It then quotes the Declaration proviso as “the subjects being Protestant may have arms for their defense,” omitting the “suitable to their conditions” proviso, which emphasizes the personal nature of the right. *Id.* It then quotes Sam Adams’s discussion of Blackstone. *Id.* at 14.

As I point out in Part I.B *infra*, Adams’s discussion *sounds* as if it refers to political resistance, but it actually referred to individual defense against street criminals who happened to be enlisted in the British army.

⁸⁹ CORNELL, *supra* note 31, at 12–14.

⁹⁰ Blackstone extensively discusses *self-defense* as one of the principle “absolute rights.” 1 BLACKSTONE, *supra* note 84, at 19–26. Indeed it is the first aspect of personal security, which in turn is the first right discussed. *Id.* at 125. Later he discusses the *right to arms* as an “auxiliary right,” one of those meant to safeguard the absolute rights. *Id.* at 139. He discusses the *militia* in Volume I, *id.* at 397–405, and *self-defense as a criminal defense* in Volume IV, chapter 14., 4 BLACKSTONE, *supra* note 84, at 183–88.

⁹¹ CORNELL, *supra* note 31, at 15. We may note that this implies the right of association is also “essentially political.”

⁹² See Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENT. 87 (1992).

⁹³ 4 BLACKSTONE, *supra* note 84, at 218 (“[A]ll kinds of crimes of a public nature, all disturbances of the peace, *all oppressions*, and other misdemeanors whatsoever . . . may be indicted” (emphasis added)).

A more careful attention to Blackstone and to the British legal authorities might have prevented some errors from creeping into *AWRM*. We are told, for instance, that “[u]nder British law one could not travel armed, and the mere possession of arms likely to provoke a public panic was also punishable.”⁹⁴ In fact, while there had been a 1328 statute forbidding riding while armed,⁹⁵ it appears to have been universally ignored. When James II prosecuted a political enemy for taking weapons into a church in 1687, the King’s Bench acquitted him, noting “a general connivance to gentlemen to ride armed for their security,”⁹⁶ and adding that the law was only meant to forbid going armed with intent “to terrify the King’s subjects.”⁹⁷ Along the same lines, the power of authorities to disarm those involved in an “affray” is treated in *AWRM* as if it were broad power, with the note that a hunting party would not “under most circumstances” constitute an affray.⁹⁸ A reference to Blackstone would have shown that an affray was “the fighting of two or more persons in some public place, to the terror of his majesty’s subjects,” distinguished from ordinary assault by the causing of public terror, and from riot by the small number of individuals involved.⁹⁹

B. AWRM’s Treatment of American Revolutionary Thought

If the English right to arms had two aspects, self-defense against criminals and collective resistance against tyranny, it is not surprising that in the period surrounding the American Revolution, the focus of political writers and speakers was largely upon the second aspect.¹⁰⁰ General Gage had raided militia supplies at Concord, and Governor Dunmore had seized the gunpowder at Williamsburg to prevent organized resistance—not in hopes of freeing colonial burglars from occupational hazards.¹⁰¹ Anti-Federalists during the ratification debates would have been laughed down if they had argued Congress might use its new-found powers to protect street criminals,¹⁰²

⁹⁴ CORNELL, *supra* note 31, at 30.

⁹⁵ Statute of Northampton, 1328, 2 Edw. 3, c. 3 (Eng.).

⁹⁶ *R v. Knight*, (1687) 90 Eng. Rep. 330 (K.B.). “Connivance” today means something along the lines of conspiracy. At the time, it retained its Latin meaning, literally “to wink at.”

⁹⁷ *Sir John Knight’s Case*, (1686) 87 Eng. Rep. 75, 76 (K.B.). The career and prosecution of the irascible Sir John Knight is documented in MALCOLM, *supra* note 22, at 104–05. In a time of deep religious divisions, Knight was a uniter: he managed to annoy both Catholics and Protestants.

⁹⁸ CORNELL, *supra* note 31, at 30.

⁹⁹ 4 BLACKSTONE, *supra* note 84, at 145.

¹⁰⁰ See *infra* note 301 and accompanying text.

¹⁰¹ See generally HALBROOK, *supra* note 22, at 60–61 (noting 1774 orders to British commanders to disarm colonists); MALCOLM, *supra* note 22, at 145–46.

¹⁰² Indeed, given the nature of commerce at the time, it would have been hard to formulate an argument that the Constitution gave Congress a power to regulate arms making and possession. Muskets were made by local gunsmiths and blacksmiths, and *Wickard v. Filburn*, 317 U.S. 111 (1942), was far in the future. The Militia Clauses, however, gave Congress the power

but they could make headway with complaints about powers given Congress over the militia.¹⁰³ *AWRM* makes much of the comparative silence of political speakers as to self-defense against criminals, but viewed in historical context this remains an understandable omission, not a repudiation.

Nor are the historical actors entirely silent on that topic, and here *AWRM* seems to play down or recast their words to make them fit a "civic rights only" mold.

1. The Early Colonists' Public Writings

Sam Adams and his fellow Bostonian writers, *AWRM* states, viewed the right to arms as a civic, militia affair.¹⁰⁴ Of Adams's invocation of Blackstone, we are told, "[t]his ancient right [of resistance and self-preservation] was not exercised by individuals acting unilaterally or in isolation, but rather required that citizens act together in concert as part of a well-regulated militia."¹⁰⁵

The historical context of Adams's writings is more complex. It must be understood that eighteenth century recruiting practices were directed at finding, not a few good men, but a lot of bad ones, and jails were a good source of recruits.¹⁰⁶

In 1768, several thousand British troops were dispatched to Boston, where they were quartered among the population.¹⁰⁷ The city essentially experienced a stunning increase in its population of street criminals; brawls, robberies, and rapes became a frequent occurrence.¹⁰⁸ A British officer's diary reflects the state of affairs:

[H]eard of some robberies committed in the Country, most probably by some of the Deserters, who will do more harm than good, as nothing but Rascals go off; serve the Yankys right for enticing them away.

....

to prescribe militia organization, arms, and drill, and to call the militia out for specified purposes. See U.S. CONST. art. I, § 8, cls. 15–16.

¹⁰³ See U.S. CONST. art. I, § 8, cls. 15–16,; *id.* art. II, § 2.

¹⁰⁴ CORNELL, *supra* note 31, at 14.

¹⁰⁵ *Id.*

¹⁰⁶ British regiments assigned to the colonies were particularly bad in this regard. The duty was unattractive and promotion potential limited, so the colonies got the worst men and officers: "[t]heir ranks were filled with deserters and criminals." THEODORE ROPP, *WAR IN THE MODERN WORLD* 65 (1981). One colonist described the soldiers as "a dissolute sett of Men" sent to "deprave the manners of the People." JOHN SHY, *TOWARD LEXINGTON: THE ROLE OF THE BRITISH ARMY IN THE COMING OF THE AMERICAN REVOLUTION* 142 (1965).

¹⁰⁷ HALBROOK, *supra* note 22, at 58.

¹⁰⁸ William S. Fields & David T. Hardy, *The Third Amendment and the Issue of the Maintenance of Standing Armies: A Legal History*, 35 AM. J. LEGAL HIST. 393, 416–17 (1991).

Nothing remarkable but the drunkenness among the Soldiers, which is now got to a very great pitch; owing to the cheapness of the liquor

. . . .

Last night there was a Riot in King Street in consequence of an Officer having been insulted by the Watchmen, which has frequently happen'd, as those people suppose from their employment that they may do it with impunity; the contrary, however, they experienc'd last night: . . . several Officers drew their Swords and . . . one of the Watch lost a Nose, another a Thumb, besides many others by the points of Swords¹⁰⁹

Viewed in its entirety, Adams's 1769 article is referring to defense, not against the official acts of the redcoats, but against their off-duty street criminality:

Instances of the licentious and outrageous behavior of the *military conservators* of the peace still multiply upon us, some of which are of such a nature, and have been carried to so great lengths, as must serve fully to evince that a late vote of this town, calling upon the inhabitants to provide themselves with arms for their defence, was a measure as *prudent* as it was *legal*; such violences are always to be apprehended from military troops, when quartered in the body of a populous city; but more especially so, when they are led to believe that they are *become necessary to awe a spirit of rebellion*, injuriously said to be existing therein. It is a natural right which the people have reserved to themselves, confirmed by the Bill of Rights, to keep arms for their own defence; and as Mr. Blackstone observes, it is to be made use of when the sanctions of society and law are found insufficient to restrain the violence of oppression.¹¹⁰

As if to underscore Adams's point, the next day's issue of the newspaper reported that two women had been attacked by soldiers and that a postrider had been assaulted by a pair of officers.¹¹¹ *AWRM* thus errs by treating Adams's invocations of Blackstone as militia-related. Put in context, Adams is not in 1768 calling upon Bostonians to

¹⁰⁹ *A British Officer in Boston in 1775*, ATLANTIC MONTHLY, Apr. 1877, at 393–96, available at http://memory.loc.gov/ammem/ndlpcoop/moahtml/title/lists/atla_V39I234.html (under “A British Officer in Boston in 1775,” click on “view page images” hyperlink). The scanned text is unreliable; one must resort to the images.

¹¹⁰ BOSTON UNDER MILITARY RULE (1768–1769) AS REVEALED IN A JOURNAL OF THE TIMES 79 (Oliver Morton Dickerson ed., 1936); see also HALBROOK, *supra* note 22, at 58.

¹¹¹ Fields & Hardy, *supra* note 108, at 417.

rise up in political rebellion against the redcoats, but rather he was justifying their taking up arms in self-defense against street criminals who happened to be off-duty soldiers.

2. The Early State Declarations of Rights

a. Virginia, 1776

The first part of the Second Amendment derives from an abbreviated form of Virginia's 1776 Declaration of Rights, which stated: "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."¹¹²

This clearly fits a "civic right" or militia-centric approach, and it is not surprising that *AWRM* extensively discusses this proviso. *AWRM* also notes that Thomas Jefferson unsuccessfully proposed an individual right—"[n]o freeman shall ever be debarred the use of arms"—which he later revised by adding, or at least considered adding, "within his own lands or tenaments."¹¹³ *AWRM* treats the addition as a significant retreat, "effectively eliminating the right to carry arms."¹¹⁴ An equally likely explanation is that the Virginia gentry were constantly trying to stop poaching of game on their own domains, and "use" of arms on others' land would have protected illegal hunting.¹¹⁵

But let us break away from "collective right only," "individual right only," and "civic right only" approaches for a moment. What is most significant of the Virginia Declaration and of Jefferson's failed proposal is that, taken together, they illustrate that *some* early statesmen sought a guarantee of a broad individual right; whereas, *others* sought to protect the militia as an institution. In the gentry-dominated politics of revolutionary Virginia, the latter prevailed, and their product would later become the model for half, but only half, of the Second Amendment. The model for the other half was not long delayed.

b. Pennsylvania, 1776

The second half of the amendment derives from a different political act by, in a literal sense, radically different political actors. Pennsylvania's consent to independence had been secured by a dramatic political purge of the pro-British merchant

¹¹² VA. CONST. of 1776, § 13, *reprinted in* 7 FEDERAL AND STATE CONSTITUTIONS 3814 (Francis Thorpe ed., 1909).

¹¹³ 1 THE PAPERS OF THOMAS JEFFERSON 344, 353 (Julian P. Boyd ed., 1950). The phrase is bracketed, making it unclear whether Jefferson originally included it, then debated taking it out, or later debated its inclusion.

¹¹⁴ CORNELL, *supra* note 31, at 20.

¹¹⁵ For Washington's efforts against poaching, see 37 THE WRITINGS OF GEORGE WASHINGTON 194–95 (John C. Fitzpatrick ed., 1940).

class and the anti-war Quakers.¹¹⁶ The political context thus differed greatly from that of Virginia: Pennsylvania's merchant gentry had been overthrown.

Pennsylvania adopted a Declaration of Rights which John Adams described as "taken almost verbatim from that of Virginia."¹¹⁷ "Almost" is an important qualifier, since the Pennsylvanians made two relevant changes. First, they *deleted* the Virginia praise of the militia, and *substituted* an individual right to arms: "[t]hat the people have a right to bear arms for the defence of themselves and the state."¹¹⁸

Second, they underscored the change by inserting a preamble. The first section of the Virginia Declaration of Rights, essentially a preamble, mentioned the retention of certain rights—enjoyment of life, liberty, and property, and the pursuit of "happiness and safety."¹¹⁹ To the list the Pennsylvanians added "enjoying and defending life and liberty, acquiring, possessing and protecting property."¹²⁰ "Defending life" and "protecting property" have clearly individual, non-militia connotations.

The combination of section one and a right to arms for self-defense would seem fairly convincing evidence that the Pennsylvania delegates were concerned with personal use of arms, specifically for self-defense. If they had been concerned solely with the militia, they could have retained the Virginia language, as they did with other rights.

AWRM, however, does its best to explain how the Pennsylvanians really were thinking about the militia, not about self-defense, even as they wrote about self-defense and clipped out reference to the militia.

AWRM notes that thirteen years before, Pennsylvania had experienced the Paxton Boy's Uprising, in which a group of frontiersmen massacred a score of Conestoga Indians.¹²¹ *AWRM* points out that one pamphlet defending their actions referred to the lack of a militia law and used wording that "anticipated the language eventually included by Pennsylvanians in their Declaration of Rights."¹²² *AWRM* concludes that the Pennsylvanians must have meant to safeguard the militia as an institution when they used the same term: "[t]he language eventually incorporated into the Pennsylvania Declaration of Rights reflected this bitter struggle over public safety, and had little to do with public concern over an individual right to keep arms for self-protection."¹²³

¹¹⁶ Hardy, *supra* note 51, at 36–38.

¹¹⁷ John Adams, Diary Entry (June 23, 1779), in *DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS* 391 (L.H. Butterfield ed., 1964).

¹¹⁸ PA. CONST. of 1776, § 13, *reprinted in* 5 *FEDERAL AND STATE CONSTITUTIONS*, *supra* note 112, at 3083.

¹¹⁹ VA. CONST. of 1776, § 1, *reprinted in* 7 *FEDERAL AND STATE CONSTITUTIONS*, *supra* note 112, at 3813.

¹²⁰ PA. CONST. of 1776, § 1, *reprinted in* 5 *FEDERAL AND STATE CONSTITUTIONS*, *supra* note 112, at 3082.

¹²¹ CORNELL, *supra* note 31, at 21.

¹²² *Id.*

¹²³ *Id.* at 22.

An examination of the pamphlet does little to suggest that its authors' language was appropriated by the Pennsylvania delegates. The relevant part complains of the indifference of the state legislature:

When we applied to the Government for Relief, the far greater part of the Assembly were Quakers, some of whom made light of our Sufferings and plead Conscience, so that they could neither take Arms in Defense of themselves or their Country, nor form a Militia Law to oblige the Inhabitants to arms, nor even grant the King any money to enable his loyal Subjects in the Province to reduce the common Enemy.¹²⁴

The occurrence of "Defense of themselves or their County" in the midst of a rather obscure¹²⁵ 1764 discussion of Quaker beliefs is not much evidence that the 1776 convention's "the people have a right to bear arms for the defence of themselves and the state" was based on borrowed language or that the 1776 authors had the Paxton Boys in mind when they wrote. Moreover, the pamphleteer draws a distinction between the Quakers not taking up arms themselves, their failure to enact a militia law, and—in a part omitted by *AWRM*—their refusal to send money to help the frontiersmen defend themselves. The complaint is that they would neither take up arms voluntarily, form a mandatory militia, nor help individuals defend themselves in the absence of a mandatory militia system.

c. Massachusetts, 1780

The Massachusetts Declaration of Rights was based on the Pennsylvania model, with two changes. First, it added "keep" arms, to the right to "bear" them, and second it added "for the common defence" at the end: "[t]he people have a right to keep and bear arms for the common defence."¹²⁶ The first addition broadened the right; the second restricted it. The restriction is consistent with its principal drafter's fear of mob rule.¹²⁷

¹²⁴ *The Apology of the Paxton Volunteers*, in *THE PAXTON PAPERS* 187 (John R. Dunbar ed., 1957) [hereinafter *Apology*]. *AWRM* quotes the passage but omits "nor even grant the King any money to enable his loyal Subjects in the Province to reduce the common Enemy." CORNELL, *supra* note 31, at 21.

¹²⁵ The modern editor notes that his copy was found in the Historical Society of Pennsylvania, with worn and water-damaged pages. *Apology*, *supra* note 124, at 185 n.1. The frequent misspellings (down to "Pinnsylvania") seem suggestive it was not a product of a skilled Philadelphia press.

¹²⁶ MASS. CONST. of 1780, pt. I, art. XVII, reprinted in 3 *FEDERAL AND STATE CONSTITUTIONS*, *supra* note 112, at 1892.

¹²⁷ John Adams would later write that "[t]o suppose arms in the hands of citizens, to be

AWRM notes that the “for the common defence” language met opposition in town assemblies, where fears were expressed that it might allow enactment of laws requiring public storage of arms but that these protests did not lead to a change in the language.¹²⁸ Again, this suggests that there was no single conception of the right to arms at the time. The Massachusetts drafters may have had a militia-centric view of the right, but the town assemblies had a broader view. The difference is all the more important since the First Senate, nine years later, considered a motion to insert “for the common defence” in the Second Amendment—and voted it down.¹²⁹

In its conclusion for this segment, *AWRM* again drifts toward an all too narrow “single purpose only” view of the right to arms. We are told that the “civic conception” of the right to arms, related to militia service, was the “dominant model” of the period.¹³⁰ This is probably not inaccurate: the Virginia model is quite civic, the Pennsylvania model is quite individual, and the Massachusetts model is somewhere in between but tending more toward the civic concept. The civic concept would have a modest advantage. A more complete comparison would show the vote-count swaying back and forth over this period.¹³¹ But the critical consideration is that different groups of Americans were taking two different approaches, and decades later the First Congress would have to satisfy two constituencies.

C. AWRM’s Treatment of the Constitution and the Ratifying Debates

Following the end of the Revolution, it became apparent that the Articles of Confederation conferred too little power upon the national establishment, and the Continental Congress authorized a convention to draft amendments to the Articles.¹³² When the convention decided instead to propose an entirely new constitution, members of the state conventions called to ratify the proposal quickly divided into what

used at individual discretion, except in private self-defence, or by partial orders of towns, counties, or districts of a state, is to demolish every constitution.” 6 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 197 (Charles Francis Adams ed., Books for Libraries Press 1969) (1850–1856). It is noteworthy that even Adams listed both self-defense and militia functions as proper objects of the right to arms.

¹²⁸ CORNELL, *supra* note 31, at 24–25.

¹²⁹ See *infra* note 174 and accompanying text.

¹³⁰ CORNELL, *supra* note 31, at 41.

¹³¹ Which view had the numerical superiority would depend upon the year chosen for the comparison. Maryland (1776) followed the Virginia model, North Carolina (1776) tracked the Massachusetts one, while the Pennsylvania model was followed in Vermont (1777), Kentucky (1792), Indiana (1816), Mississippi (1817), and Connecticut (1818). See generally Stephen P. Halbrook, *The Right to Bear Arms in the First State Bills of Rights: Pennsylvania, North Carolina, Vermont, and Massachusetts*, 10 VT. L. REV. 255 (1985); Kopel, *supra* note 10, at 1407.

¹³² See CORNELL, *supra* note 31, at 40–41.

would later become known as the Federalist and Anti-Federalist camps.¹³³ The first ratifications were obtained before the Anti-Federalists could muster much support, but opposition organized quickly thereafter.¹³⁴

The Anti-Federalists soon found a winning argument in the document's lack of a bill of rights. Some went beyond mere criticism and advanced their own proposals for such an addition, thus leaving us with rather specific ideas of what each person or body desired.¹³⁵ *The great majority of these appear focused on an individual right to arms for individual purposes, with the remainder invoking both individual rights and civic purposes.*¹³⁶ *No proposal from this period gave protection of the militia as the sole purpose of a right to arms, and the majority did not even mention the militia.*¹³⁷

Here *AWRM* seems to give emphasis to the proposals that can be recast to at least be consistent with a civic or militia concept, and to omit, or play down, those in which such recasting would be hopeless. We will take these in chronological order.

Samuel Adams, Massachusetts. Adams unsuccessfully proposed a bill of rights that included "that the said Constitution be never construed to authorize Congress to infringe the just liberty of the press, or the rights of conscience; or to prevent the people of the United States, who are peaceable citizens, from keeping their own arms," an individual reference.¹³⁸ This would seem a clear indication that *certain* Anti-Federalists were pressing for an individual right, for individual purposes. Although acknowledging Adams as a prominent Anti-Federalist author,¹³⁹ *AWRM* makes no mention of his proposal.

The Pennsylvania Minority Report. In Pennsylvania, Anti-Federalists formed a large minority of the delegates and proposed a right to arms. After the convention ratified without a bill of rights, the minority issued a report on their demands, which was circulated in other States.¹⁴⁰ The Pennsylvania minority demanded:

[t]hat the people have a right to bear arms for the defence of 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

¹³³ See *id.* at 41–50.

¹³⁴ See *id.* at 41–44.

¹³⁵ See *id.* at 45.

¹³⁶ See *id.* at 46–50.

¹³⁷ See *id.* at 46–65.

¹³⁸ DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS HELD IN THE YEAR 1788, at 86 (1856). The journal of the convention shows Adams's proposal losing on a voice vote, *id.* at 87, while the summary of the debates shows him withdrawing it, *id.* at 266. The compilers of the record acknowledged that it had errors due to their inexperience and difficulty in hearing the proceedings. See *id.* at xi.

¹³⁹ CORNELL, *supra* note 31, at 45.

¹⁴⁰ See Hardy, *supra* note 51, at 44–45.

people or any of them unless for crimes committed, or real danger of public injury from individuals.¹⁴¹

The Pennsylvania minority report is as clear a statement of individual right for individual purposes as could be imagined, and it stands as a powerful objection to a “civic right only” approach to the right to arms. *AWRM* acknowledges the Pennsylvania proposal but treats it as inconsequential: it showed “slapdash draftsmanship,” no other proposals used “bear arms” in relation to nonmilitary usages,¹⁴² and the Federalists did not respond to the relevant passages.¹⁴³ But a critique of the Minority’s drafting skill is not a disproof that a growing number of Anti-Federalists—over a third of the convention—wanted to see a guarantee of an individual right for individual purposes and that a “civic rights only” explanation is inadequate.

The New Hampshire Majority. New Hampshire gave the Constitution the ninth ratification it needed before it bound the States already signatory to it. In this convention the proponents of a bill of rights achieved a majority, and Federalists found they could live with such a proposal—so long as it was not a condition of ratification. Its ratification thus has a certain unique importance. The New Hampshire convention called for a guarantee that “Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion,”¹⁴⁴ again a clearly individual right—down to an exception for individuals in rebellion—this time demanded by a majority of a ratifying convention.

AWRM omits the New Hampshire proposal from its discussion of the ratifying convention’s proposals, then mentions it, in passing, while discussing Madison’s later drafting of the Bill of Rights.¹⁴⁵ There, *AWRM* assures us that since New Hampshire did not mention hunting, “the primary concern was federalism, not a right to protect the use of guns for private purposes.”¹⁴⁶ Apparently, any Framer or convention which did not mention a constitutional right to hunt is to be classed as a proponent of the “civic rights only” approach. One is left wondering what is unclear about “Congress shall never disarm any Citizen except such as are or have been in Actual Rebellion.”¹⁴⁷

¹⁴¹ PENNSYLVANIA AND THE FEDERAL CONSTITUTION, *supra* note 66, at 462.

¹⁴² Although *AWRM* acknowledges, earlier, that James Madison himself did so. CORNELL, *supra* note 31, at 29; *see also* United States v. Emerson, 270 F.3d 203, 231 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002).

¹⁴³ CORNELL, *supra* note 31, at 52. Yet *AWRM* itself acknowledges that Federalists were not responding to the lack of a bill of rights at this point simply because they were winning; the response came when their cause appeared to be bogging down in Virginia and New York. *Id.* at 49.

¹⁴⁴ 2 SCHWARTZ, *supra* note 68, at 761.

¹⁴⁵ CORNELL, *supra* note 31, at 59.

¹⁴⁶ *Id.*

¹⁴⁷ 2 SCHWARTZ, *supra* note 68, at 761.

Virginia. Virginia's convention followed the New Hampshire approach and ratified with a request for a bill of rights. When it came to the issue of arms, the drafters made a conceptual breakthrough. There was no need to choose between satisfying those who wanted to secure the militia and those who wanted to guarantee an individual right to arms: they could placate both. Going back to the state declarations of rights, the Virginians: (1) began with the Pennsylvania/Massachusetts State constitutions' declaration of a "right of the people," (2) retained Massachusetts's addition of a right to keep arms but *deleted* its "common defense" limitation, then (3) attached their own Declaration of Rights referring to the importance of a well regulated militia. In so doing, they recognized both the militia concept and the individual rights concept, and in the broadest terms used to date for each: "[t]hat 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."¹⁴⁸

The Virginia language stands as a prominent reminder that *some* Americans wanted an individual right for individual purposes, while *others* wanted a protection of the militia as a system; drafters of a bill of rights had to satisfy two schools of thought. George Mason's speech to the convention shows that he was reaching out to *both* groups, suggesting that neglect of the militia was a means to a worse end, disarmament of the people:

Forty years ago, when the resolution of enslaving America was formed in Great-Britain, the British parliament was advised by an artful man, who was governor of Pennsylvania, to disarm the people—that it was the best and most effectual way to enslave them—but that they should not do it openly; but to weaken them and let them sink gradually, by totally disusing and neglecting the militia.¹⁴⁹

Paradoxically, while extensively discussing the debates in the Virginia Convention,¹⁵⁰ *AWRM* does not quote or paraphrase the language that resulted. We are simply assured that "all of the provisions suggested by the Virginia Convention focused on the militia."¹⁵¹

New York. The New York debates on ratification provide our fullest written record relating to arms and the militia. This was in good part because, as *AWRM* notes,¹⁵² the Federalists realized they were now at a disadvantage and were forced to counterattack.

¹⁴⁸ *Id.* at 842.

¹⁴⁹ DAVID ROBERTSON, *DEBATES AND OTHER PROCEEDINGS OF THE CONVENTION OF VIRGINIA* 270 (2d ed. 1805).

¹⁵⁰ CORNELL, *supra* note 31, at 53–54.

¹⁵¹ *Id.* at 55.

¹⁵² *Id.* at 49.

The most noteworthy defense was, of course, the Federalist Papers, and *AWRM* rightly gives these extensive treatment, albeit one with emphasis on a civic right understanding. Hamilton, in Federalist 29, indeed criticizes reliance upon the general militia which, he contends, could never be sufficiently trained.¹⁵³ “Little more can reasonably be aimed at with respect to the people at large than to have them properly armed and equipped . . .”¹⁵⁴ How much insight this gives us into the right to arms is doubtful. Hamilton’s purpose was to demonstrate that a standing army was necessary and the militia insufficient, rather than to flesh out a right to arms or to laud the militia.

The same cannot be said of James Madison’s Federalist 46. Madison indeed discusses the right to arms in a civic context, although a careful reading shows he recognizes a distinction between civic in the sense of an organized militia and civic in the sense of an armed populace.¹⁵⁵

Madison calculated that the new republic could not afford an army of more than 30,000 men, who would be counterbalanced by 500,000 militiamen.¹⁵⁶ He speaks in terms of an organized, state-officered militia system.¹⁵⁷ Then, however, he depicts the underlying safeguard as involving widespread civilian armament, improved and made more powerful by organization of a militia: “[b]esides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached and by which the militia officers are appointed, forms a barrier against the enterprises of ambition.”¹⁵⁸

Madison later returns to the theme, pointing out that despite their armies European monarchs “are afraid to trust the people with arms.”¹⁵⁹ It is clear that “the people with arms” relates to widespread civilian arms ownership because Madison continues on to suggest that in the American context the militia system and state governments make this even more effective:

And it is not certain that with this aid alone they would not be able to shake off their yokes. But were the people to possess the additional advantages of local governments chosen by themselves . . . 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.¹⁶⁰

¹⁵³ THE FEDERALIST NO. 29 (Alexander Hamilton).

¹⁵⁴ *Id.* at 210 (Issac Kramnick ed., 1987).

¹⁵⁵ *Id.* NO. 46, at 300–02 (James Madison).

¹⁵⁶ *Id.* at 301.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* (emphasis added).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 301–02.

Madison, in short, is describing a "civic purpose" but one with a dual basis: tyranny might be prevented by an armed populace, but a militia organization will render the protection ironclad.¹⁶¹ *AWRM* mentions this duality but in the end assembles it into a single concept: "[t]he existence of a well-armed population organized into state militias guaranteed that American would never succumb to tyranny."¹⁶²

The Federalist Papers were not the only component of the written debates. Noah Webster, the future lexicographer, had earlier contributed his *Examination into the Leading Principles of the Federal Constitution*. *AWRM* fairly quotes the relevant passage:

Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom of Europe. The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any band of regular troops that can be, on any pretence, raised in the United States.¹⁶³

AWRM then, however, interprets this as militia-related: "[i]t was precisely because the militia was such a central institution in American life that Americans had little to fear from a standing army."¹⁶⁴ Webster, however, said nothing of the militia system; his references are to the universal armament of the American population.

In short, throughout the ratification period, discussions of a right to arms took the form either of (a) references to a purely individual right or its equivalent, a mandate that Congress never disarm ordinary individuals or (b) references both to the importance of individual arms ownership and importance of the militia. *AWRM* omits most of the first and recasts the second into pure militia-centric references.

D. AWRM's Treatment of the Drafting and Congressional Passage of the Bill of Rights

AWRM quotes Madison's proposal as introduced in the First Congress: "[t]he 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."¹⁶⁵ *AWRM* then notes that the First House reversed the order of the arms

¹⁶¹ *Id.*

¹⁶² CORNELL, *supra* note 31, at 50.

¹⁶³ CORNELL, *supra* note 31, at 47 (quoting Webster but leaving out the last twenty-two words); WEBSTER, *supra* note 60, at 43.

¹⁶⁴ CORNELL, *supra* note 31, at 47.

¹⁶⁵ *Id.* at 60.

and Militia Clauses.¹⁶⁶ This, *AWRM* contends, “had enormous constitutional significance,”¹⁶⁷ since the Militia Clause was now a preface to the right to arms, and hence the right to arms must be construed in light of it.¹⁶⁸

One might equally well make the opposite argument: the right to arms was now the substantive guarantee and recognition of the militia merely an explanatory preface. A better understanding—given that the First House trimmed out Madison’s other prefatory clauses¹⁶⁹—is that, as in the First Amendment, each clause had independent significance. If the Virginians, Madison, or the First Congress were concerned *only* about the militia, they would have stopped with “[a] well regulated militia [is] necessary to the security of a free state.”

Of the actual proceedings in the First Congress, we have sparse records. There are reports of the House debates, but these were compiled, decades later, from newspaper reports of the proceedings.¹⁷⁰ The First Senate met in executive session but kept a journal of motions and votes.¹⁷¹ *AWRM* correctly notes that reports of the House debates deal largely with Elbridge Gerry’s concerns about the militia and conscientious objection, which seem to have been laughed off by the remainder of the House.¹⁷² We do have Madison’s notes for his speech introducing the proposal, which suggests that he saw it as paralleling the English Declaration of Rights and its individual guarantee—the notes, in a section devoted to the inadequacies of the 1689 Declaration show “arms to Protts.,” presumably meaning that it was inadequate because it guaranteed only Protestant subjects the right to arms.¹⁷³ *AWRM* makes no mention of Madison’s notes.

In the First Senate, the Journal *does* show a *significant* legislative decision. A motion was made to add “for the common defence” to the right to arms and voted down.¹⁷⁴ *AWRM* makes much of the Massachusetts decision to *include* this language: It “forged a tight link between [arms bearing and militia service]. A single

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ Freedom of the press lost his explanation that it was “one of the great bulwarks of liberty,” and the future Ninth Amendment lost the explanation that the express guarantees had been inserted “either as actual limitations of such powers, or as inserted merely for greater caution.” 1 ANNALS OF CONG. 451–52 (Joseph Gales & William Seaton eds., 1789). Prefatory and explanatory clauses were frequently used in bill of rights of the period. See Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793–94 (1998).

¹⁷⁰ 2 SCHWARTZ, *supra* note 68, at 984.

¹⁷¹ Hardy, *supra* note 2, at 611 n.253.

¹⁷² CORNELL, *supra* note 31, at 61. Gerry’s concern that the provision for conscientious objectors might lead to citizens avoiding militia duty was met with the rejoinder that “Mr. Jackson did not expect that the people of the United States would turn Quaker or Moravian.” 1 ANNALS OF CONG., *supra* note 169, at 779.

¹⁷³ See Hardy, *supra* note 2, at 608.

¹⁷⁴ SENATE JOURNAL, *supra* note 64, at 77.

constitutional principle emerged, linking the right to keep arms with the obligation to bear them for the common defense."¹⁷⁵ The Senate's *rejection* of the same proposal would, by *AWRM*'s logic, suggest that the First Congress meant to ensure that the two were *not* linked.

AWRM attempts to explain away the Senate vote, but the explanation approaches the incomprehensible: if inserted into the amendment, it "might have provided unscrupulous leaders with a pretext for prohibiting the militia from defending the states or localities from internal or external threats."¹⁷⁶ *AWRM* makes no attempt to demonstrate that anyone, then or at anytime prior to the publication of *AWRM*, saw the language as posing that threat. The insertion of identical text in the Massachusetts Bill of Rights had engendered controversy—but not on this theme, rather on the belief that it might give the government the power to control private arms.¹⁷⁷ Once again, a very large shoehorn is used to make individual rights evidence fit the civic rights only constraint.¹⁷⁸

Finally, we have the one contemporary explanation of the meaning of the Second Amendment, an explanation available both to Madison and to the First Congress, and for which Madison thanked the author.¹⁷⁹ Federalist writer Tench Coxe, a friend of Madison, published in the *Federal Gazette* and *Philadelphia Evening Post* a clause-by-clause explanation of Madison's draft.¹⁸⁰ He treated the right to arms as an individual right: since governments and armies might be tempted to abuse power, "the people are confirmed by the next article in their right to keep and bear *their private arms*."¹⁸¹

Coxe's article is difficult to reconcile with *AWRM*'s approach, so the book attempts to minimize it. It was "slapdash,"¹⁸² citing Coxe's self-deprecating remark that he had dashed it off and not referencing his comment that "I have given them

¹⁷⁵ CORNELL, *supra* note 31, at 24.

¹⁷⁶ *Id.* at 62. After much reflection, I believe the argument being made is that "common defense" might be read to be common to the entire United States. If so, the question is why no such objection was raised to the Massachusetts Declaration and, indeed, why no contemporary—indeed, no one prior to the publication of *AWRM*—made such an objection to "for the common defence" language in any constitution.

¹⁷⁷ HALBROOK, *supra* note 22, at 64–65.

¹⁷⁸ In yet another paradox, *AWRM* cites a proposal the Senate *rejected*—a ban on standing armies in time of peace—as proof that the Senate was focused upon protecting the militia system. CORNELL, *supra* note 31, at 51.

¹⁷⁹ HALBROOK, *supra* note 22, at 76–77.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 76 (emphasis added).

¹⁸² CORNELL, *supra* note 31, at 63. Coxe had earlier written an answer to the Pennsylvania Minority, in which he praised the militia system. *AWRM* treats this earlier writing as authoritative and proof that Coxe did not think arms use for individual purposes was a serious issue. *Id.* at 52–53, 63. When Coxe speaks of arms bearing for the militia, he is treated as an authority; when he speaks of arms bearing for self-defense he is marginalized.

a very careful perusal.”¹⁸³ It was “not widely reprinted.”¹⁸⁴ That Madison wrote back to say “I find [it] in the Gazettes here,”¹⁸⁵ i.e., in New York, where the First Congress was meeting, should settle the sufficiency of its impact, even without Stephen Halbrook’s discovery that it was also reprinted in Boston.¹⁸⁶ It “prompted no commentary by contemporaries,” proving it was insignificant—or that it was taken as indisputable.¹⁸⁷ Coxe deserves better. His article has a unique relevance to original understanding: it analyzed the Bill of Rights clause-by-clause, is known to have been reprinted in the three of the four largest American cities, and has Madison himself attesting that it was well-known to the First Congress. It is hard to see why *AWRM* seeks to dismiss his work.

II. *AWRM*’S COVERAGE OF POST-RATIFICATION TREATMENT OF THE RIGHT TO ARMS

Early American thought on the right to arms comes largely from two sources: legal commentaries and caselaw. Most of these sources indicate that the right to arms was viewed as an individual right for individual purposes or as an individual right both supporting the militia institution and also for individual purposes such as self defense. *AWRM* here downplays the majority view or revises it in rather dubious fashion.

A. *Early American Legal Commentators*

In the period after the framing, several prominent legal scholars published texts that were authoritative in their time and which discuss the Second Amendment at varying lengths. *AWRM* tends to emphasize those which placed emphasis on the militia, or organized resistance as a deterrent to tyranny, and to omit or play down those which emphasized individual self-defense. We will take these treatises in chronological order.

¹⁸³ Letter from Tench Coxe to James Madison (June 18, 1789), in 12 PAPERS OF JAMES MADISON, *supra* note 1, at 239.

¹⁸⁴ CORNELL, *supra* note 31, at 63.

¹⁸⁵ Letter from James Madison to Tench Coxe (June 24, 1789), in 12 PAPERS OF JAMES MADISON, *supra* note 1, at 257.

¹⁸⁶ HALBROOK, *supra* note 22, at 223 n.152. No one has, to my knowledge, undertaken a study of the article’s coverage in *all* early newspapers, but its having made the press in Boston, New York, and Philadelphia is certainly suggestive that it was widely covered. It appears to have been the only section-by-section analysis of the Bill of Rights printed in the contemporary press.

¹⁸⁷ CORNELL, *supra* note 31, at 63.

1. St. George Tucker's *Blackstone*.

St. George Tucker was a law professor at the College of William and Mary, later appointed to the Virginia Supreme Court by Thomas Jefferson and to its federal district bench by James Madison.¹⁸⁸ His brother served in the First Senate, and his closest friend served in the First House.¹⁸⁹

In 1803, he published the first American edition of *Blackstone's Commentaries*,¹⁹⁰ which remained for a quarter of a century the treatise most frequently cited by the United States Supreme Court.¹⁹¹

Tucker's *Blackstone* poses quite a problem for a "civic rights only" theory of the Second Amendment, which Tucker lists as the Fourth Amendment.¹⁹² Tucker cites Blackstone's listing of the fifth auxiliary right, "of having arms for their defence suitable to their condition and degree, and such as are allowed by law," and drops a footnote on the American equivalent: "The right of the people to keep and bear arms shall not be infringed. Amendments to C.U.S. Art. 4, and this without any qualification as to their condition or degree, as is the case in the British government."¹⁹³ This plainly tied the Second Amendment to the English right to arms, which was seen as linked to self-defense rather than to militia functions and stresses that the American right is broader than the English one.¹⁹⁴ Then, in his appendix on American law, Tucker elaborates:

The right of self defence is the first law of nature: in most governments it has been the study of rulers to confine this right within the narrowest limits possible. Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction. In England, the people have been disarmed, generally, under the specious pretext of preserving the game: a never failing lure to bring over the landed aristocracy to support any measure True it is, their bill of rights seems at first view to counteract this policy: but the right of bearing arms is confined to protestants, and the words

¹⁸⁸ Hardy, *supra* note 2, at 611; Kopel, *supra* note 10, at 1371.

¹⁸⁹ Hardy, *supra* note 2, at 612.

¹⁹⁰ ST. GEORGE TUCKER, *BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA* (Lawbook Exch. 1996) (1803).

¹⁹¹ W. HAMILTON BRYSON, *LEGAL EDUCATION IN VIRGINIA 1779-1979*, at 682 (1982).

¹⁹² The First Congress had passed twelve, not ten, amendments to the states, which failed to ratify the first two. It was common in the early Republic to number the amendments as they were passed by Congress, with what we today know as the Second Amendment being treated as the fourth. In 1803, it was still possible that the first two might yet be ratified.

¹⁹³ 1 TUCKER, *supra* note 190, at 145 & n.40.

¹⁹⁴ See *supra* notes 83-84 and accompanying text.

suitable to their condition and degree, have been interpreted to authorise the prohibition of keeping a gun or other engine for the destruction of game, to any farmer, or inferior tradesman, or other person not qualified to kill game.¹⁹⁵

Tucker's footnote suggests an "individual right for individual purposes" view, and his appendix suggests an "individual right both for individual and for civic purposes" approach, with the former predominating; the latter also makes clear that, whatever the source of the right, Tucker repudiates laws that prohibit some citizens from "keeping" guns.

A decade ago, David Kopel noted that "*none* of the anti-individual [rights] writers even admit Tucker's existence, let alone attempt to address the meaning of the most important law book of the Early Republic."¹⁹⁶ How *AWRM* rises to the challenge is thus of exceptional interest.

AWRM's treatment of Tucker is peculiar, to say the least. *AWRM* begins by acknowledging Tucker's importance and citing his unpublished lecture notes, which—unlike his *Blackstone*—often mention the militia.¹⁹⁷ Nearly thirty pages later, it returns to Tucker in a section entitled "An American Blackstone Ponders the Second Amendment."¹⁹⁸ Here it refers to his *Blackstone*, acknowledging that "Tucker dealt with the Second Amendment in several places in his monumental treatise."¹⁹⁹ *AWRM* informs us that these included a "denunciation of Federalist use of volunteer militias," an interpretation of the Second Amendment as "a strong affirmation of states' rights," an argument for judicial enforcement of the Second Amendment, and a relation of his "fears about potential federal disarmament of the militia."²⁰⁰

The treatment was a bit astonishing; as noted above, Tucker's *Blackstone* deals with an individual right rising out of the right of self-defense. *AWRM* had not a word on this. A glance at the endnotes showed that the citations are from Tucker's *A View of the Constitution*,²⁰¹ a set of essays that were appended as a supplement to his great treatise.²⁰² An examination of *A View of the Constitution* uncovered several serious deficiencies in *AWRM*'s treatment of that work.

¹⁹⁵ 1 TUCKER, *supra* note 190, app. at 300. Tucker was incorrect as to the prohibition on arms ownership by those not entitled to hunt. This had been repealed in the wake of the Declaration of Rights. MALCOLM, *supra* note 22, at 126–27. The error is understandable: even English jurists of the time complained that the hunting statutes were incomprehensible. Hardy, *supra* note 2, at 613 n.263.

¹⁹⁶ Kopel, *supra* note 10, at 1378.

¹⁹⁷ CORNELL, *supra* note 31, at 73–74, 234 nn.1–2.

¹⁹⁸ *Id.* at 102.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 102–03.

²⁰¹ *See id.* at 240 nn.50–52.

²⁰² ST. GEORGE TUCKER, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES WITH SELECTED WRITINGS* (1803).

First, Tucker is here attempting a survey of both the Constitution and the Bill of Rights. The militia references cited by *AWRM* come in Tucker's discussion of the Constitution's Militia Clause.²⁰³ It is hardly surprising that in discussing the Militia Clause, Tucker discusses the militia.

Second, in his *A View of the Constitution*, Tucker *does* have a section on the Second Amendment. Here, Tucker repeats the individualistic treatment given the right in his *Blackstone Commentaries*, and adds that the right is the very palladium of liberty.²⁰⁴ *AWRM* entirely omits this, the most relevant, passage.

Third, *AWRM* cites Tucker as allowing for judicial enforcement of the right, as a challenge to "the Federalist theory of loose construction of the Constitution."²⁰⁵ This is correct, but Tucker's words clearly tie in an individual view of the right to arms:

[i]f, for example, a law be passed by congress, prohibiting the free exercise of religion, according to the dictates, or persuasions of a man's own conscience; or abridging the freedom of speech, or of the press; or the right of the people to assemble peaceably, or to keep and bear arms; it would, in any of these cases, be the province of the judiciary to pronounce whether any such act were constitutional, or not; and if not, to acquit the accused from any penalty which might be annexed to the breach of such unconstitutional act.²⁰⁶

AWRM's conversion of the clearly individualist Tucker into a militia-focused commentator requires omitting everything he said about the Second Amendment and substituting what he said about Article I's Militia Clauses. This is sleight of hand, not a fair reading of authority.

2. William Rawle's *A View of the Constitution*

In 1825, William Rawle published his *A View of the Constitution*.²⁰⁷ Like Tucker, Rawle would have had an exceptional insight into the original understanding of the Bill of Rights since he sat in the Pennsylvania legislature when it ratified the amendments.²⁰⁸ His book was widely used as a constitutional law teaching tool in early American law schools.²⁰⁹

²⁰³ CORNELL, *supra* note 31, at 214–16; TUCKER, *supra* note 202.

²⁰⁴ TUCKER, *supra* note 202, at 238–39 (repeating the text from the Appendix in his *BLACKSTONE COMMENTARIES*).

²⁰⁵ CORNELL, *supra* note 31, at 103.

²⁰⁶ TUCKER, *supra* note 202, at 293.

²⁰⁷ WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* (2d ed. 1829) (1825).

²⁰⁸ ELIZABETH KELLEY BAUER, *COMMENTARIES ON THE CONSTITUTION 1790–1860*, at 61 (Lawbook Exch. 1999).

²⁰⁹ DAVID BROWN, *EULOGIUM UPON WILLIAM RAWLE* 38 (1837).

Also like Tucker, Rawle poses a major barrier to a “civic rights only” approach. His text made clear that he saw the militia portion and the right to arms portion of the Second Amendment as independent legal mandates.²¹⁰ He first discussed the importance of the militia, while conceding that regular troops were often more valuable, and then he treated the individual right to arms as a separate, related restriction on governmental power:

The corollary, from the first position, is, that *the right of the people to keep and bear arms shall not be infringed*.

The prohibition is general. No clause in the Constitution could by any rule of construction be conceived to give to congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretence by a state legislature. But if in any blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both.²¹¹

It is simply impossible to make Rawle fit a “civic rights only” box, unless it is one very large container. *AWRM* simply omits any mention of Rawle’s work.²¹² It is hard to justify the omission. Rawle was not only a respected constitutional authority, he was the only early commentator who actually voted to ratify the Bill of Rights.

3. Justice Story’s *Commentaries on the Constitution*

In 1833, Justice Joseph Story published his *Commentaries on the Constitution of the United States*.²¹³ Story did discuss the right to arms in terms of organized resistance to government oppression, informing his readers that tyrants seek their goals “by disarming the people, and making it an offence to keep arms, and by substituting a regular army in the stead of a resort to the militia.”²¹⁴ Story’s discussion fits

²¹⁰ RAWLE, *supra* note 207, at 125–26.

²¹¹ *Id.* The idea of appealing to a Federal Bill of Rights provision in a case brought under state law may seem strange to our eyes. But in the natural rights theory that prevailed at that time, written guarantees were memorials of a right, and a guarantee as against one government could easily be seen at least as evidence that the right existed as to the other. In fact, the Second Amendment was later invoked, by a state court, to strike down a state law. *Nunn v. State*, 1 Ga. 243 (1846).

²¹² Rawle himself, however, is mentioned as prosecuting attorney in the Whiskey Act Rebellion cases. CORNELL, *supra* note 31, at 97.

²¹³ JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* (Carolina Academic Press 1987) (1833) [hereinafter STORY, *COMMENTARIES*].

²¹⁴ JOSEPH STORY, *A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES* 264 (Lawbook Exch. 1999) (1865); *see also* STORY, *COMMENTARIES*, *supra* note 213, at 708–09.

“civic rights,” if not necessarily “militia-centric only.”²¹⁵ Story is accordingly given treatment in *AWRM*.²¹⁶

4. Thomas Cooley’s *General Principles of Constitutional Law*

Thomas Cooley was the most renowned American legal authority of his age.²¹⁷ Cooley became the first Dean of the University of Michigan Law School, and later sat on the Michigan Supreme Court; Roscoe Pound named him as among the top ten American judges of all time, and one scholar considers him “the most influential legal author of the late nineteenth and early twentieth centuries.”²¹⁸

His book, *The General Principles of Constitutional Law*²¹⁹ was released in 1880. Cooley treated the Second Amendment as an individual right.²²⁰ Indeed, Cooley went further and pointed out that if the right to arms were limited to militia-related arms possession, then the guarantee would be meaningless.²²¹ The very government that it was meant to check—and that could control the definition of the militia—would be in a position to define its boundaries and negate any checks upon itself, defeating the Framers’ intent.²²²

It may be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent. The militia, as has been elsewhere explained, consists of those persons who, under the law, are liable to the performance of military duty, and are officered and enrolled for service when called upon. But . . . if the right were limited to those enrolled, the purpose of this guaranty might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms, and they need no permission or regulation of law for the purpose.²²³

²¹⁵ Story does not make clear whether he regards criminalizing arms possession and substituting a standing army to be independent or dependent acts of tyranny.

²¹⁶ CORNELL, *supra* note 31, at 151–52, 159.

²¹⁷ Kopel, *supra* note 10, at 1461–62.

²¹⁸ *Id.*

²¹⁹ THOMAS M. COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* (Boston, Little, Brown & Co. 1880).

²²⁰ *Id.* at 271.

²²¹ *Id.*

²²² *Id.*

²²³ THOMAS M. COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE*

This interpretation may or may not be consistent with a “civic purpose only” understanding, depending upon how “civic purpose” is defined. If “civic purpose” is seen as including “widespread civilian armament [that] will deter tyranny,” Cooley would fit the mold. If it is defined as “the right to bear arms existing only as linked to the militia,” Cooley’s text is a sharp repudiation of the view: as he points out, if that were the case, the very government which is to be deterred would have the power to eliminate the deterrence. *AWRM* makes no mention of Cooley’s work.

5. Benjamin Oliver’s *The Rights of an American Citizen*

AWRM brings in another, and rather obscure,²²⁴ commentator. So far as can be seen, Benjamin Oliver published some early texts on business law and business forms. In 1832, he authored *The Rights of an American Citizen: With a Commentary on State Rights, and on the Constitution and Policy of the United States*.²²⁵

AWRM discusses Oliver’s position that the militia portion of the amendment was its true purpose, adding:

Indeed, Oliver declared that the original understanding of the right to bear arms was “intended to apply to the right of the people to bear arms for such purposes only.” Oliver conceded that this original understanding was slowly being challenged by the new view that saw this right in more individualistic terms²²⁶

Oliver does take, rather, a “collective rights” view, but his conclusions are more tentative—he used the qualifier “probably”—than *AWRM* suggests.²²⁷ Moreover, his concession that there was a rival interpretation gives no suggestion that it was a *newly evolved* view:

The provision of the constitution, declaring the right of the people to keep and bear arms, &c. was probably intended to apply to the right of the people to bear arms for such purposes only, and not to prevent congress or the legislatures of the different states from

UNITED STATES OF AMERICA 298 (Andrew C. McLaughlin ed., Boston, Little, Brown & Co., 3d ed. 1898).

²²⁴ *AWRM* describes Oliver’s commentary as “influential,” but it gives no citation or evidence of this influence. CORNELL, *supra* note 31, at 152. The only other reference I can find to him comes in Kopel, *supra* note 10, at 1399.

²²⁵ BENJAMIN L. OLIVER, *THE RIGHTS OF AN AMERICAN CITIZEN: WITH A COMMENTARY ON STATE RIGHTS, AND ON THE CONSTITUTION AND POLICY OF THE UNITED STATES* (Books for Libraries Press 1970) (1832).

²²⁶ CORNELL, *supra* note 31, at 152.

²²⁷ OLIVER, *supra* note 225, at 177.

enacting laws to prevent the citizens from always going armed.
A different construction however has been given to it.²²⁸

To be sure, if we are assessing original understanding, a contemporary non-academic commentator is entitled to consideration. On the other hand, one might wonder why *AWRM* includes the almost-unknown Oliver, while completely omitting Rawle and Cooley.

AWRM also does not take account of other popular writers who departed from a militia-related understanding. Chief among these would be Joel Barlow, Revolutionary War veteran, who authored *Advice to the Privileged Orders, in the Several States of Europe*.²²⁹ Barlow stood out as a renaissance man in a time when such men were common: a clergyman and theologian, a popular poet, a successful diplomat, and an American whose political writings were debated on the floor of Parliament.²³⁰

Barlow boasted of American laws “not only *permitting* every man to arm, but *obliging* him to arm,” which draws a line between the individual right and the militia duty.²³¹ He postulated the equality of men, and from this deduced, first, that they must form “an equal representative government” and second, “[t]hat the people will be universally armed: they will assume those weapons for security, which the art of war has invented for destruction.”²³²

In summary, *AWRM*’s treatment of early constitutional commentators falls far short of expectations. Of the four legal giants, two are completely omitted, and a third’s opinions are unfairly recast to leave out everything he said about the Second Amendment and substitute for them his discussion of the Militia Clauses of Article I.

B. *AWRM*’s Treatment of Early American Caselaw

There was fairly extensive treatment of the right to arms in early American caselaw. Antebellum cases mostly focused upon bans on carrying concealed weapons and later cases upon bans of weapons other than firearms, such as brass knuckles, Bowie knives, and “Arkansas toothpicks,” or small pistols. The results broke down into four classes.

²²⁸ *Id.* Oliver gives no footnotes or other references.

²²⁹ JOEL BARLOW, *ADVICE TO THE PRIVILEGED ORDERS, IN THE SEVERAL STATES OF EUROPE RESULTING FROM THE NECESSITY AND PROPRIETY OF A GENERAL REVOLUTION IN THE PRINCIPLE OF GOVERNMENT* pt.1 (New York, Childs & Swaine 1792).

²³⁰ See generally JAMES WOODRESS, *A YANKEE’S ODYSSEY: THE LIFE OF JOEL BARLOW* (1958).

²³¹ BARLOW, *supra* note 229, at 24.

²³² *Id.* at 69–70. For an exceptionally thorough account of the lesser commentators of the early nineteenth century, see Kopel, *supra* note 10, at 1397–408.

- (1) Arms restrictions—even concealed weapons bans—are unconstitutional, since arms bearing is an individual right and the legislature may not restrict any aspect of such a right. Illustrative are *Bliss v. Commonwealth*²³³ and *Nunn v. State*.²³⁴ These clearly recognize an individual right to arms.
- (2) Concealed weapons bans are constitutional as a manner of time, place, and manner restriction since, *while arms bearing is an individual right*, these laws restrict only one manner of exercising it. Here we have *State v. Chandler*²³⁵ and *State v. Reid*.²³⁶ These cases also recognize an individual right to arms.
- (3) Bans on carrying, but not ownership of, non-military type weapons are constitutional, since the term “bear arms” has a military connotation and thus pertains to military-type arms.

*Aymette v. State*²³⁷ is the exemplar here, with the Tennessee court noting that the state guarantee was of a right to keep and bear arms for the common defense, in order for the people, as a body, “to protect the public liberty, to keep in awe those who are in power, and to maintain the supremacy of the laws and the constitution.”²³⁸ Thus the court concluded that the right was applicable only to arms “usually employed in civilized warfare.”²³⁹

In a followup case, *Andrews v. State*,²⁴⁰ the Tennessee court refined the test, holding that keeping of arms was an individual right, and only bearing of them was subject to limitation, and then expansively reading “keep” to cover almost all ordinary use.²⁴¹ “Bearing arms for the common defense

²³³ 12 Ky. (2 Litt.) 90 (1822) (striking a concealed weapons ban).

²³⁴ 1 Ga. 243, 251 (1846) (striking a handgun ban and noting that “[t]he right of the whole people, . . . and not militia only, to keep and bear *arms* of every description, and not *such* merely as are used by the *militia*, shall not be *infringed*”).

²³⁵ 5 La. Ann. 489, 490 (1850) (“It interfered with no man’s right to carry arms (to use its words) ‘in full open view,’ which places men upon an equality. This is the right guaranteed by the Constitution of the United States . . .”).

²³⁶ 1 Ala. 612, 619 (1840) (upholding the ban on concealed carry but adding that “the Legislature cannot inhibit the citizen from bearing arms openly, because it authorizes him to bear them for the purposes of defending himself and the State, and it is only when carried openly, that they can be efficiently used for defence”).

²³⁷ 21 Tenn. (2 Hum.) 154 (1840).

²³⁸ *Id.* at 158.

²³⁹ *Id.*

²⁴⁰ 50 Tenn. (3 Heisk.) 165 (1871).

²⁴¹ *Id.* at 178–79. See generally Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 500–04 (1995) (discussing *Aymette* and *Andrews*).

may well be held to be a political right, . . . but the right to keep them, with all that is implied fairly as an incident to this right, is a private individual right, guaranteed to the citizen, not the soldier."²⁴²

These cases recognize an individual right to keep arms and an individual right to carry military-style arms.

- (4) In contrast, a variation of the "civic rights" view was found in *State v. Buzzard*,²⁴³ in which the three justices of the Arkansas Supreme Court split three ways,²⁴⁴ with the lead opinion taking the view that the ban was a reasonable regulation and adding that the right to bear arms "for the[] common defense" meant only that the government might not impose regulations that interfered with the ability to resist tyranny, which a ban on concealed carry did not.²⁴⁵

Approaches (1) and (2) are inconsistent with a "civic right" understanding; both treat the right to arms as a purely individual matter. Approach (3) is only marginally consistent with "civic right," in the sense that the arms protected must be suitable for militia use, although their owner need have no militia purpose at the time; it is what I have entitled the hybrid individual right. Approach (4) is consistent with "civic right," at least in a broad sense. A government may regulate weapons, so long as the regulation does not resist the capacity of the people to resist tyranny.

AWRM is quite selective in discussing this caselaw. We will examine each of the four classes and how they are treated in the text.

- (1) Arms restrictions are unconstitutional: *Bliss*²⁴⁶ and *Nunn*.²⁴⁷ *AWRM* mentions only *Bliss*,²⁴⁸ with most of the discussion centering upon the legislature's angry reaction to the decision.
- (2) Concealed carry limits are constitutional—there is an individual right to carry arms, but one mode of carrying may be

²⁴² *Andrews*, 50 Tenn. (3 Heisk.) at 182.

²⁴³ 4 Ark. 18 (1842).

²⁴⁴ The statute forbade bearing a pistol, knife, or sword cane concealed; the state constitution guaranteed a right to arms "for the[] common defense." *Id.* at 27. Chief Justice Ringo upheld the concealed weapons ban as a reasonable regulation of the right since it did not, directly or indirectly, "impair or render inefficient the means provided by the Constitution for the defense of the State." *Id.* Justice Dickinson, concurring, gave the first judicial endorsement of a collective right view. *Id.* at 30–32 (Dickinson, J.). Justice Lacy, dissenting, rejected the collective rights approach and the reasonable regulation claim. *Id.* at 35–37 (Lacy, J.).

²⁴⁵ *Id.* at 27.

²⁴⁶ *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90 (1822).

²⁴⁷ *Nunn v. State*, 1 Ga. 243 (1846).

²⁴⁸ CORNELL, *supra* note 31, at 144–45.

restricted: *Chandler*²⁴⁹ and *Reid*.²⁵⁰ *AWRM* does not mention these cases.

- (3) Carrying of arms may be restricted, so long as they are not of military or militia type: *Aymette*²⁵¹ and *Andrews*.²⁵² Here, *AWRM* discusses *Aymette* but not *Andrews*, which greatly narrowed the scope of that ruling, nor does it discuss the fact that the rule was limited to carrying, and not possessing, of arms—"bearing" arms was seen as having military/civic reference but not "keeping" them.²⁵³
- (4) Concealed weapons bans are constitutional because concealed carry has nothing to do with the capability of resisting tyranny: *Buzzard*.²⁵⁴ *AWRM* discusses the lead opinion.²⁵⁵

AWRM then informs us, without citation, that most courts of the period rejected an individual view of the right to arms.²⁵⁶ That would have come as news to the *Bliss*, *Nunn*, *Chandler*, *Reid*, and *Andrews* courts. A standard that only pertained in Arkansas—to the extent one opinion of a court split 1–1–1 can be considered a standard—is treated as the majority state rule.

The most interesting, authoritative, and appalling decision from this period relating to the right to arms is relegated to an endnote in *AWRM*, for no apparent reason other than that it would sink *AWRM*'s desired conclusion. *Scott v. Sanford*²⁵⁷ deserves a fuller consideration. In *Dred Scott*, the United States Supreme Court held that (1) the Missouri Compromise was unconstitutional, since slaves were property and might be taken anywhere and (2) the Court lacked jurisdiction, since free blacks were not citizens and hence there was no diversity of citizenship.²⁵⁸

In the course of arguing the lack of jurisdiction, Chief Justice Taney noted that many states had slave codes regulating conduct of free blacks, and he reasoned that many of the states that ratified the Constitution would not have done so if they had thought free blacks would, under it, acquire the rights of citizens.²⁵⁹ Then he listed those rights:

²⁴⁹ *State v. Chandler*, 5 La. Ann. 489 (1850).

²⁵⁰ *State v. Reid*, 1 Ala. 612 (1840).

²⁵¹ *Aymette v. State*, 21 Tenn. (2 Hum.) 154 (1840).

²⁵² *Andrews v. State*, 50 Tenn. (3 Heisk.) 165 (1871).

²⁵³ CORNELL, *supra* note 31, at 146.

²⁵⁴ *State v. Buzzard*, 4 Ark. 18 (1842).

²⁵⁵ CORNELL, *supra* note 31, at 147.

²⁵⁶ *Id.* at 146.

²⁵⁷ 60 U.S. (19 How.) 393 (1856).

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 416.

For if [free Blacks] were so received, and entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws and from the police regulations which [the states] considered to be necessary for their own safety. It would give to persons of the negro race, who were recognised as citizens in any one State of the Union, the right to enter every other State whenever they pleased, . . . and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went.²⁶⁰

The equating of keeping and carrying arms “wherever they went” with the right to bear arms is flatly impossible to reconcile with a “civic rights only” viewpoint. *AWRM*’s endnote discussion²⁶¹ argues the statement was *dicta*—it is an alternate holding, and as one going to subject-matter jurisdiction, perhaps entitled to a certain primacy—and that in referring to “keep and carry” Taney could not have meant the Second Amendment, which refers to “keep and bear” arms.

AWRM does have a point here. The problem is that this point destroys its thesis. It must be understood that the Court at this point is *not* summarizing federal Bill of Rights guarantees. It is arguing that under Article IV, section 2,²⁶² if free blacks were citizens then when they traveled to a slave state, the state would have to accord them the rights of its own citizens, including the right to arms. Thus Taney uses “keep and carry arms” as a summary of right to bear arms provisions and not just as a specific descriptor of the Second Amendment.

The opinion thus inflicts serious damage on *AWRM*’s thesis. It indicates that the Court viewed *all* right-to-arms clauses of the time as covering individual carry, for individual purposes, anywhere—“to keep and carry arms wherever they went,”²⁶³ in the words of the Court.

AWRM does discuss the Supreme Court’s ruling in *Houston v. Moore*,²⁶⁴ a pre-emption decision relating to a militia courtmartial. A delinquent Pennsylvania militiaman had been fined by a state militia court-martial, acting pursuant to a state law that incorporated federal militia statutes.²⁶⁵ The defendant argued that congressional militia enactments pre-empted the field.²⁶⁶

²⁶⁰ *Id.* at 416–17.

²⁶¹ CORNELL, *supra* note 31, at 247–48 n.24.

²⁶² U.S. CONST. art. IV, § 2 (requiring a state to accord citizens of other states all privileges and immunities accorded its own citizens).

²⁶³ *Scott*, 60 U.S. (19 How.) at 417.

²⁶⁴ 18 U.S. (5 Wheat.) 1 (1820).

²⁶⁵ *Id.* at 2–3.

²⁶⁶ *Id.* at 3–4.

The majority opinion marked the first appearance of “conflict pre-emption” in Supreme Court caselaw, with the majority holding that the state law was permissible since it conflicted with no federal enactment.²⁶⁷ Justice Story dissented, essentially arguing that Congress had entirely occupied the field of militia regulation, leaving the states without even the power to enforce federal laws on the subject.²⁶⁸ Story then quoted the Second Amendment with the diffident remark that it “may not, perhaps, be thought to have any important bearing on this point,” but that if it did, it confirmed his analysis.²⁶⁹

What is most remarkable about *Houston* is what the Court did *not* say. The key issue was what power states retained over the militia, with the majority allowing they had merely the power to enforce federal laws, and the dissent denying even that. Yet the majority entirely passed over the Second Amendment, and even Justice Story’s dissent felt it was of doubtful relevance. If American jurists of 1820 had any conception that the Second Amendment restricted the federal militia powers, one might have expected it to be at the core of the decision.

AWRM treats Story’s dissent as a “reiteration of the civic conception of the Second Amendment, a right of citizens to keep and bear arms in a well-regulated militia.”²⁷⁰ But it is hardly surprising that a case arising out of a militia court-martial should give rise to language about the militia. It is hard to see how a “right” of any type, civic or otherwise, was involved in the case. The militiaman was not exercising a right: he was being prosecuted for failing to carry out his duties!

C. A Summary of AWRM’s Treatment of the Second Amendment

An examination of the entire historical record suggests that Americans held differing views of the purpose of the right to arms. Some indeed spoke of it as a political/civic matter, tied to the militia system. Others saw it as an individual/civic matter, with private arms ownership deterring tyranny. Others viewed it as serving an individual need, an ancillary to a fundamental right of self-defense. Quite a few viewed it as serving multiple purposes. A full understanding of all purposes is necessary since the First Congress had to placate citizens concerned with each, which is the obvious explanation of why the Second Amendment does not stop with “being necessary to the security of a free State.”²⁷¹

²⁶⁷ *Id.* at 29–32. The authoritative treatment of *Houston* and other militia pre-emption cases is J. Norman Heath, *Exposing the Second Amendment: Federal Preemption of State Militia Legislation*, 79 U. DET. MERCY L. REV. 39 (2001).

²⁶⁸ *Houston*, 18 U.S. (5 Wheat.) at 53 (Story, J., dissenting).

²⁶⁹ *Id.* at 52–53.

²⁷⁰ CORNELL, *supra* note 31, at 135.

²⁷¹ U.S. CONST. amend. II.

Abolitionist writers did, as *AWRM* notes, make prominent use of an individual right for individual purposes.²⁷² But they were not inventing the argument. They were building upon a framework dating back to 1688 and to Blackstone, if not further,²⁷³ which had been well developed before abolitionism became an issue.

AWRM's treatment of the framing period can fairly be called one-sided; it emphasizes references to the militia, while references to a purely individual right are either omitted or reinterpreted in ways that do great violence to their meaning. Its treatment of the right to arms in the Early Republic suffers from more serious flaws, to the point of being completely unreliable. Of the four great commentators of the period, it entirely omits two, and it completely mischaracterizes a third.²⁷⁴ It omits the majority of early caselaw on the right to arms, and it creates the impression that a minority view—actually that of only one judge on one court—was the near-universal understanding.²⁷⁵

One would not know from reading *AWRM* that the “individual right for individual purposes” position was taken by three of the four early constitutional commentators, by a great majority of state courts, and by the United States Supreme Court. The text manages to inflate what was a minority position into an illusory majority status by omitting or recasting all the contrary evidence.

III. *AWRM*'S TREATMENT OF THE FOURTEENTH AMENDMENT

The question of whether the Fourteenth Amendment's Privileges and Immunities Clause was intended to incorporate the federal Bill of Rights, *inter alia*, has been extensively explored by Akhil Amar²⁷⁶ and Michael Kent Curtis,²⁷⁷ whether it was meant to incorporate the Second Amendment has been explored by Stephen Halbrook,²⁷⁸ Robert Cottrol, and Ray Diamond.²⁷⁹ All these commentators have pointed to frequent references in Congress—in particular, by the amendment's sponsors, Senator Jacob Howard and Representative John A. Bingham—to the former Confederate states' Black Codes, which forbade arms ownership by black citizens, and to how these (1) violated the rights of individuals to keep and bear arms or (2) would be ruled out by the proposed Fourteenth Amendment.

²⁷² CORNELL, *supra* note 31, at 152–55.

²⁷³ See David B. Kopel, *The Catholic Second Amendment*, 29 HAMLINE L. REV. 520 (2006); David B. Kopel, *The Religious Roots of the American Revolution and the Right to Keep and Bear Arms*, 17 J. FIREARMS & PUB. POL'Y 167 (2005).

²⁷⁴ See *supra* notes 188–232 and accompanying text.

²⁷⁵ See *supra* notes 233–70 and accompanying text.

²⁷⁶ AMAR, *supra* note 25, at 137, 215–30.

²⁷⁷ MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986). For a dissenting view, see RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977).

²⁷⁸ HALBROOK, *supra* note 22, at 170–78.

²⁷⁹ Cottrol & Diamond, *The Second Amendment*, *supra* note 22.

AWRM contends that the notion of an individual right to arms for individual self-defense arose from antebellum abolitionist thought,²⁸⁰ and it accepts that the sponsors of the Fourteenth Amendment were prominent abolitionists.²⁸¹ Even if one were skeptical of a purely individual right based on the Second Amendment, one might expect *AWRM* to find such a right in the Fourteenth Amendment.

AWRM instead begins by noting that some legislators spoke of the Fourteenth Amendment as promoting equality rather than in terms of incorporating the Bill of Rights.²⁸² Because the amendment also contains the Equal Protection of the Law Clause,²⁸³ the fact that some supporters stressed equality while others stressed incorporation is not dispositive.

AWRM then adds that “sorting out what the state legislatures and the vast majority of Americans thought about the meaning of the Fourteenth Amendment is more difficult” and invokes stump speeches from the 1866 election, which it contends stressed considerations of equality.²⁸⁴ As noted above, a stress upon the Equal Protection Clause hardly disproves an intent to incorporate under the Privileges and Immunities Clause. Moreover, Professor Curtis’s research found extensive references to the Fourteenth Amendment as intended to incorporate the Bill of Rights in contemporary newspapers, speeches, and most vitally, in the state legislative debates on ratification.²⁸⁵ These are of far greater weight in determining constitutional purpose than are electoral speeches.

AWRM treats at length the appalling decision of *United States v. Cruikshank*,²⁸⁶ which dismissed a prosecution for having broken up a meeting of blacks, disarming them, and then killing over a hundred of them.²⁸⁷ The Court held that none of these activities were barred by the Fourteenth Amendment’s Privileges and Immunities Clause or by its enforcing legislation, since rights to peaceable assembly, to arms, and to life were not “privileges and immunities” of United States citizenship.²⁸⁸ *AWRM* believes that it finds in the decision the beginning of the “collective right” view because the Court said that the right of “bearing arms for lawful purposes” was not a right created by the Second Amendment.²⁸⁹ From this, *AWRM* deduces that the

²⁸⁰ CORNELL, *supra* note 31, at 152–53. As demonstrated *supra* in note 273 and accompanying text, the abolitionists were not actually inventing an individual right for individual purposes; they were building upon a widely accepted approach that dated back to English law.

²⁸¹ CORNELL, *supra* note 31, at 172–73.

²⁸² *Id.* at 174.

²⁸³ U.S. CONST. amend. XIV, § 1.

²⁸⁴ CORNELL, *supra* note 31, at 173–74.

²⁸⁵ CURTIS, *supra* note 277, at 131–53.

²⁸⁶ 92 U.S. 542 (1876). For *AWRM*’s discussion of the case, see CORNELL, *supra* note 31, at 190–97.

²⁸⁷ *Cruikshank*, 92 U.S. at 559.

²⁸⁸ *Id.* at 557–59.

²⁸⁹ *Id.* at 553; CORNELL, *supra* note 31, at 195, 198–99.

opinion held that “[t]he purpose of the amendment was to guard the state militias against the danger of federal disarmament.”²⁹⁰

This is a misunderstanding of *Cruikshank*—but then, *Cruikshank* is an easily misunderstood opinion. The ruling must be read against the background of *The Slaughter-House Cases*,²⁹¹ whose reasoning was essentially: (1) the Fourteenth Amendment refers to privileges and immunities of citizens of the United States, (2) it must thus be read—very restrictively—to cover only rights that were *created* by the U.S. Constitution, and (3) it thus does not cover preexisting “natural” rights that the Constitution or Bill of Rights *guaranteed* but did not *create*.²⁹² Thus the *Cruikshank* Court wrote off the right to assemble because “[t]he right was not created by the [First A]mendment.”²⁹³ It did the same for the Second Amendment, noting that arms bearing for lawful purposes “is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence.”²⁹⁴

Cruikshank, in short, had nothing to do with a collective right approach. If anything, it suggests that the Court viewed individual arms bearing as a natural right, albeit one therefore not enforceable under the Fourteenth Amendment!

AWRM’s treatment of the Fourteenth Amendment thus tracks its treatment of the Second Amendment. In each case, the fact that certain Framers on certain occasions spoke of one aspect of a right is regarded as evidence that they, and others, had no additional understanding of it and its purpose.

IV. LOGICAL CONSEQUENCES OF A CIVIC RIGHT ONLY APPROACH

AWRM is a historical work, and as such it need not consider the further legal question: assuming *arguendo* that a “civic right only” theory were proven, in the sense that the relevant historical record referred only to a civic militia-centric conception of the right, leaving other purposes to silence, what effect would this have on interpretation of the right to arms?

A. Interpretative Methodology

As Professor Levinson has observed, the Second Amendment at times seems to exist in some manner of interpretative alternate universe, in which those who defend an expansive reading of the First, Fourth, Fifth, and other amendments tend to prefer the narrowest possible reading of the Second, and vice versa.²⁹⁵ It thus may be interesting to visit other attempts to narrow rights in light of what were alleged to be their expressed purposes.

²⁹⁰ CORNELL, *supra* note 31, at 195.

²⁹¹ 83 U.S. (16 Wall.) 36 (1873).

²⁹² *Id.*

²⁹³ *Cruikshank*, 92 U.S. at 552.

²⁹⁴ *Id.* at 553.

²⁹⁵ Levinson, *supra* note 24, at 638–39, 645.

Edwin Meese, Attorney General under the Reagan administration, made such an effort by arguing that First Amendment freedom from establishment arose in the context of preventing one church from achieving legal supremacy over others, and hence the amendment should not prevent governmental preferences to all churches as a group.²⁹⁶ For this, he was taken to task by Professor Levy.²⁹⁷

A more condign fate befell Judge Robert Bork after he argued that “[c]onstitutional protection should be accorded only to speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic.”²⁹⁸

AWRM’s application illustrates the different forms of originalism. Originalism began as “original intent”—what did the Framers intend?²⁹⁹ It has evolved into “original understanding”—what did Americans understand they were ratifying?³⁰⁰ Professor Balkin has distinguished a third form of originalism, which he terms “original application”—would the Framers or their contemporaries have upheld or stricken the law in question—and which he feels should not bind the modern interpreter.³⁰¹

AWRM tends toward a different and quite restrictive form, which we might entitle “original problem resolution”—a right should be construed as extending only to cover those specific problems that the Framers experienced or foresaw.

The problem with this approach is that it would narrowly define our rights in terms of the problems which Americans felt were worthy of commentary in 1787–1791. Most of these indeed dealt with the risks of political tyranny: Americans of the time felt that they had just escaped one tyrant and feared they might be creating another.³⁰² The proposed Constitution gave Congress power to regulate the militia. It was thus

²⁹⁶ LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 92 (1986).

²⁹⁷ *Id. passim*.

²⁹⁸ Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 20 (1971).

²⁹⁹ See Philip C. Kissau, *Triangulating Constitutional Theory: Power, Time, and Everyman*, 53 *BUFF. L. REV.* 269, 301–02 (2005).

³⁰⁰ See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 *LOY. L. REV.* 611 (1999); Ilya Somin, “Active Liberty” and Judicial Power: What Should Courts Do to Promote Democracy?, 100 *NW. U. L. REV.* 1827 (2006) (reviewing STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005)). Professor Levinson, who is not an originalist, has come up with a striking example of the difference. The decision of the Fourth Congress to enact the Alien and Sedition Acts could be taken as proof of an original intent to allow punishment of the press under certain circumstances, but the resulting demolition of the Federalist Party by American voters is suggestive that their understanding differed from this intent.

³⁰¹ See Posting of Jack M. Balkin to Balkinization, <http://balkin.blogspot.com/2005/06/original-meaning-and-original.html> (June 23, 2005, 16:06 EST).

³⁰² See *THE FEDERALIST* NOS. 48, 51 (James Madison).

only natural that Anti-Federalist critics would frequently invoke the right to arms in a militia context. We cannot know what a given Framers thought but only what he wrote, and political advocacy is driven by problems of the day rather than broad principles.

Indeed, it would not be difficult to use this approach as did Attorney General Meese or Judge Bork, to narrow the First Amendment beyond what its text or spirit permits. Any interpretative methodology that can be used to constrain the Second Amendment can as easily be employed to constrain the First. A brief effort, based on Professor Curtis's excellent history,³⁰³ follows:

- (1) Freedom of expression, like the right to arms, comes into American thought via the English Whig movement,³⁰⁴ although it lacks the common law underpinnings of the right to arms. In fact, throughout the common law period, dissent was largely equated to treason, and until 1694, publishers of books on politics or religion had to obtain a license for each work.³⁰⁵
- (2) Most framing-era discussions of freedom of speech and press related to protection of political speech and the risk of a return of press licensing for political tracts.³⁰⁶ The dominant First Amendment concern over that period was whether the new government would suppress political expression as a means of achieving tyranny.³⁰⁷
- (3) Therefore, if we apply *AWRM*'s methodology here, freedom of expression should extend no further than protection of political speech, and perhaps even there only so far as prevention of prior restraint. Indeed, here we have further evidence in the form of the 1798 Sedition Act, in which an early Congress criminalized criticism of itself or the President and which early courts upheld as involving neither press licensing nor prior restraint.³⁰⁸

³⁰³ MICHAEL KENT CURTIS, *FREE SPEECH: "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY* (2000).

³⁰⁴ *Id.* at 36–40.

³⁰⁵ *Id.* at 29, 44.

³⁰⁶ See, e.g., THE ORIGIN OF THE SECOND AMENDMENT: A DOCUMENTARY HISTORY OF THE BILL OF RIGHTS 34, 52, 58, 86 (David E. Young ed., 2d ed. 1995).

³⁰⁷ CURTIS, *supra* note 303, at 433–36.

³⁰⁸ *Id.* at 4, 77–78. The courts' view was that there might be freedom of speech but not necessarily freedom after speech. *Id.* We might make an interesting comparison to the Militia Act of 1792, ch. 33, 1 Stat. 271, in which Congress *commanded* all able-bodied adult white males to own firearms and ammunition.

The actual outcome illustrates the error of this approach. While framing-period Americans had spoken of freedom of expression largely in a political and prior-restraint context, when the right was challenged by the Sedition Act, they spoke more broadly—and acted more broadly—essentially destroying the Federalist Party.³⁰⁹ From about 1800 onward, the unconstitutionality of measures such as the Sedition Act became universally accepted.³¹⁰ It was not that Americans had changed their mind: it was that they had had less reason to record and express the full breadth of their feelings on the matter in 1787–1789. And, perhaps, they had thought “Congress shall make no law”³¹¹ was both sufficient and unambiguous.

B. Policy Implications

AWRM’s main policy impact comes in its argument that a “civic purpose only” individual right would be consistent with a wide variety of firearm regulations.

It points out that the colonies and early states had a variety of regulations, although these were largely aimed at limited time, place, and manner restrictions—carrying concealed weapons—or aimed at individuals seen as dangerous or outside the political vale—Indians, slaves, those in Pennsylvania who refused to swear an oath of allegiance during the Revolution.³¹² The latter can hardly be invoked to demonstrate an understanding of the scope of rights; the same Pennsylvania authorities who disarmed those who refused to sign an oath also arrested them without probable cause, searched their residences under general warrants, and seized their political papers.³¹³ What is done to wartime outsiders—and those refusing the oath who were seen as enemies in an “us or them” situation³¹⁴—rarely reflects sound rights-consciousness.

AWRM includes a Boston statute forbidding placing loaded guns within a house or building—although on examination that appears to have been a manner of early fire code and, amusingly, also requires unloading of cannons and mortars before they were taken indoors.³¹⁵ Eighteenth century firefighting apparently had some unusual risks.

³⁰⁹ CURTIS, *supra* note 303, at 5.

³¹⁰ *See id.*

³¹¹ U.S. CONST. amend. I.

³¹² CORNELL, *supra* note 31, at 28–29.

³¹³ CURTIS, *supra* note 303, at 47.

³¹⁴ *See* SANFORD LEVINSON, CONSTITUTIONAL FAITH 101 (1988). As Washington put it, oaths would “distinguish friends from foes.” *Id.* at 100.

³¹⁵ CORNELL, *supra* note 31, at 28. For analysis of the ordinance, see Clayton E. Cramer, *Gun Safety Regulation in Early America*, SHOTGUN NEWS, Nov. 1, 2004, at 18, available at <http://www.claytoncramer.com/popularmagazines.htm> (follow “Gun Safety Regulation” hyperlink). Muskets are uncommonly difficult to unload—an attachment must be screwed onto the ramrod, twisted into the lead ball by sheer force, and the ball then drawn out. Many Bostonians must have been leaving theirs loaded—and apparently, their private artillery caches as well—which was making fire fighting more interesting than it needed to be.

I have noted the key difficulty in defining the “civic right” approach, in that it tends to conflate two different concepts: (1) tyranny will be impeded by a militia system and (2) tyranny will be impeded by widespread arms ownership.³¹⁶ We will examine the practical aspects of each separately.

1. Practical Results of “Tyranny will be impeded by the militia”

We start with the assumption that the Second Amendment was meant solely to ensure existence of a militia that could deter or impede a tyrannical government.

In application, this approach would—if it were to make any sense—follow the outline laid out a century ago by Judge Cooley,³¹⁷ viz. that there is an individual right, meant to buttress the militia, but not limited to its enrolled members—since the government may define who is in the militia, and thus the right would have no value against abusive government if so limited. To argue that the result is that only militia activities are covered is to lapse into the collective right approach, which *AWRM* repudiates.³¹⁸

If we take this definition, the civic right concept in practice resembles the “hybrid” individual right, recognized in *Aymette v. State*.³¹⁹ Presumably, a legislature can outlaw weapons that have no militia/military function. It can proscribe brass knuckles and billy clubs because militia functions do not contemplate bludgeoning tyrants, insurrectionaries, or criminals. Conversely, outlawing machine guns, assault rifles, .50 caliber rifles, and the like would involve infringement of the right’s very core.

A government could likely restrict concealed carry because concealment has no particular link to political resistance, but it could not restrict open carry or use. It could not forbid ownership of handguns because one of the traditional purposes of the militia is law enforcement—“to execute the Laws of the Union.”³²⁰ Indeed, law enforcement was probably the most frequent use of the militia, its wartime use being limited to the War of 1812 and minor roles in a few campaigns of the Civil War.³²¹ The first national “calling out” of the militia was for law enforcement—suppressing the Whiskey Act Rebellion of 1793³²²—and the most recent state “calling out” for the

³¹⁶ See *supra* notes 58–59 and accompanying text.

³¹⁷ See *supra* note 223 and accompanying text.

³¹⁸ CORNELL, *supra* note 31, at 6, 212–14.

³¹⁹ 21 Tenn. (2 Hum.) 154 (1840); see also *supra* notes 237–42 and accompanying text.

³²⁰ U.S. CONST. art. I, § 8, cl. 15.

³²¹ Militia forces were used extensively in the War of 1812. MICHAEL D. DOUBLER, *CIVILIAN IN PEACE, SOLDIER IN WAR: THE ARMY NATIONAL GUARD 1636–2000*, at 82–85 (2003). After the debacle at First Bull Run, other armies quickly made their regular troops reenlist for three years. *Id.* at 101, 103.

³²² *George Washington’s Proclamation Calling Out the Militia to Occupy the Western Counties of Pennsylvania*, CLAYPOOLE’S DAILY ADVERTISER, Aug. 11, 1794, available at <http://www.earlyamerica.com/earlyamerica/milestones/whiskey>.

same purpose—suppressing a 1920 lynch mob that was comprised, paradoxically, of National Guardsmen.³²³

The one construction that is indefensible under this view would be “the right to arms only covers members of a *well-regulated* militia.” This is indefensible for the reason given by Judge Cooley: only the government can create a well-regulated militia, and hence a right limited to such a group would be of no value as a check upon government.

2. Practical Results of “Tyranny will be impeded by an armed people”

If we take the second definition, then the core of the individual “civic right” concept appears to be that individual persons have the right to keep and bear arms for the purpose of—to take the words from *Aymette v. State*—“to keep in awe those who are in power.”³²⁴ Just what legislation would pass this constitutional standard?

Certainly not the ban on civilian ownership of post-1986 machine guns.³²⁵ Those “in power” have millions of these at their disposal. And certainly not proposals for bans on “assault weapons,” their semiautomatic brethren. The civic rights only view might, like the hybrid right view, permit banning a weapon because it was too innocuous but not because it was too powerful.

Firearm permit systems? The concept of making a check upon governmental abuses contingent upon obtaining a governmental permit does seem of dubious utility, and it is unlikely to have been within the contemplation of the Framers.

Registration? This might be questionable. There is little to be said for registration alone as a crime fighting tool,³²⁶ but handing the government a convenient list of which citizen owns which firearms would certainly undermine any purpose of deterring tyranny.

AWRM argues that some measures might pass muster—safe storage requirements, perhaps a modest tax on guns,³²⁷ or mandatory liability insurance, although

³²³ *Mob's Rail on Jail is Broken Up by Troops*, CLEV. ADVOC., Oct. 9, 1920, available at <http://armsandthelaw.com/archives/militia/index.php> (Apr. 6, 2005, 11:16 EST) (“The jailer refused to give up the prisoner and members of the State militia from Johnson City dispersed the mob.”).

³²⁴ 21 Tenn. (1 Hum.) at 158.

³²⁵ 18 U.S.C. § 922(o) (2000).

³²⁶ If there has been a crime solved by registration records, the author has not, in thirty years of research, encountered it. An offender is unlikely to leave his gun with the victim or to permit the victim to write down its serial number.

³²⁷ CORNELL, *supra* note 31, at 216–17. As to the tax, the Supreme Court has rejected application of special taxes to news media. *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575 (1983). The same rationale would seemingly apply here: if a government is to be checked by freedom of speech and arms, it cannot hold the power to burden either, at will, with special taxes. There is the additional incongruity of basing a right on a citizen's duty to serve the community and state and then taxing him when he makes ready to fulfill the duty.

one might wonder what could be covered.³²⁸ But on all major firearms issues, it would seem that the “civic rights” approach would yield at least as broad a right as would a purely individual right self-defense formulation.

CONCLUSION

The Framers and their contemporaries universally endorsed a right to arms, but various Framers saw the right as serving various purposes. Some stressed the militia system, some stressed the value of an armed people, some stressed self-defense and many cited a combination of these. *A Well-Regulated Militia* does an excellent job of outlining the first, but it omits evidence of the latter considerations or is forced to try to reinterpret the considerable body of evidence that is inconsistent with its thesis. It provides new insights into the American law of self-defense and other aspects of American history, but it falls very short when it comes to analysis of early caselaw and of the Fourteenth Amendment.

A Well-Regulated Militia does illustrate how the right to arms is an excellent tool for teaching constitutional law.³²⁹ Most other constitutional provisions have devolved, if we may dare say so, into a matter of reading a succession of cases—or alternately, cramming the *Law in a Nutshell* series.³³⁰ Exploring the right to arms requires consideration of historical materials, interpretative methodologies, varieties of originalism, Fourteenth Amendment interpretation, and policy considerations. In the case of the right to arms, we can see early nineteenth century courts grappling over issues such as time, place, and manner restrictions that courts would not face, in any other constitutional context, for another century. It is an ongoing dialogue, with room for new additions. *AWRM* is the latest addition—the first in perhaps twenty years—to this debate.

³²⁸ Homeowners' insurance would already cover most accidents; insurers would be unwilling to cover intentional torts, and courts have rejected suits based on misuse by thieves. See *Romero v. Nat'l Rifle Ass'n of Am.*, 749 F.2d 77 (D.C. Cir. 1984); *Rhodes v. R.G. Indus.*, 325 S.E.2d 465, 468 (Ga. Ct. App. 1984). See generally RESTATEMENT SECOND OF TORTS § 315 (1965) (“There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another.”).

³²⁹ See Volokh et al., *supra* note 17, at 591–94.

³³⁰ See, e.g., JEROME A. BARRON & C. THOMAS DIENES, CONSTITUTIONAL LAW IN A NUTSHELL (6th ed. 2005).