"DON'T KNOW MUCH ABOUT HISTORY" THE CURRENT CRISIS IN SECOND AMENDMENT SCHOLARSHIP

by Saul Cornell[*]

I. INTRODUCTION

Second Amendment scholarship is in the midst of a crisis. The two dominant interpretations of the Second Amendment, the individual rights and collective rights models, no longer seem capable of accounting for the complexity of the historical evidence about the meaning of the right to bear arms.[1] To explain the historical meaning of the Second Amendment a new more sophisticated paradigm is required.[2] Before sketching what a new paradigm for the Second Amendment might resemble, it is worth taking some time to explore how we arrived at the current crisis.[3]

Sanford Levinson's provocative think piece *The Embarrassing Second Amendment*, inaugurated a new era in Second Amendment scholarship.[4] Prior to Levinson's entry into the debate, Second Amendment scholarship was a marginal topic among serious legal academics.[5] Writing about the Second Amendment before Levinson was dominated by activists, not scholars.[6] In the two decades since Levinson's article first appeared, the subject of the Second Amendment has attracted considerable attention within the legal academy, with law reviews from Akron to Yale rushing to publish scholarship on this once neglected topic.[7] Much, but certainly not all, of this literature supported the individual rights point

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[1] *See generally* SAUL CORNELL ED., WHOSE RIGHT TO BEAR ARMS DID THE SECOND AMENDMENT PROTECT? (2000) (introducing historical studies related to the Second Amendment's origin and meaning).

[2] *Id.*

[3] Second Amendment scholarship is a classic example of Thomas Kuhn's theory of paradigm change. *See generally* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962) (explaining the historical evolution of science in terms of shifting models or paradigms).

[4] *See* Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989). For an excellent overview of the twists and turns in recent Second Amendment scholarship, see Carl T. Bogus, *The History and Politics of Second Amendment Scholarship*, 76 CHI.-KENT L. REV. 3 (2000).

[5] *See* Andrew McClurg, *The Rhetoric of Gun Control*, 42 AM. U.L. REV. 53, 61 (1992).

[6] The two most influential activist authors were STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED (1984) and Don B. Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983).

[7] *See* Anthony J. Dennis, *Clearing Smoke from the Right to Bear Arms and the Second Amendment*, 29 AKRON L. REV. 57 (1995); Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 YALE L.J. 995 (1995).

of view. [8] Most of this scholarship, however, was cast in the model of law office history with a strongly originalist bent.[9] Proponents of the new individual rights view of the Second Amendment managed to create an illusion of consensus within the academy and proclaimed their view the new "Standard Model of the Second Amendment." [10] Having anointed themselves victors, the supporters of this approach went even further, declaring that no serious scholar could continue to accept the collective rights point of view.[11] Thus, Nelson Lund claimed, "At least as an intellectual matter, the debate about the states' rights versus individual right interpretations seems now over."[12] In reality there is considerable division within the legal academy about how to understand the Second Amendment.[13]

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[8] According to Robert Spitzer, between 1912 and 1959 there were 11 articles published in law journals all supporting the militia interpretation. Between 1959 and 1989 there were 36 articles favoring the militia interpretation and 30 articles supporting the individual rights view. Individual rights scholarship overtook collective rights scholarship in the decade after Levinson's pivotal article. If one applies a one scholar one vote rule, the difference between the two camps evaporates. Together Halbrook and Kates account for at least dozen articles in this period. *See* Robert J. Spitzer, *Lost and Found: Researching the Second Amendment,* 76 CHI.-KENT L. REV. 349 (2000).

[9] The literature challenging originalism is enormous. For a particularly forceful statement, see Mark Tushnet, *Interdisciplinary Legal Scholarship: The Case of History in Law,* 71 CHI.-KENT L. REV. 914 (1996). As Tushnet notes, "there are of course standard objections to originalism, the most potent of which is that it is, quite literally, irrational." *Id.* at 914. For discussions of the problems with Second Amendment originalism, see Michael C. Dorf, *What Does the Second Amendment Mean Today,* 76 CHI.-KENT L. REV. 291 (2000) and Daniel Farber, *Disarmed by Time: The Second Amendment and the Failure of Originalism,* 76 CHI.-KENT L. REV. 167 (2000). A detailed philosophical discussion of originalism may be found in KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999), which provides little historical guidance on this issue of how one should weight different intents. For a useful sampling of other writings on this topic, see JACK N. RAKOVE, INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT (1990). For a critique of law office history, see Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair,* SUP. CT. REV. 119 (1965). On originalism as a form of "forensic history," see John P. Reid, *Law and History,* 27 LOY. L.A. L. REV. 193 (1993). On the need for legal scholarship to remain current with historical scholarship, see Martin S. Flaherty, *History Lite in Modern American Constitutionalism,* 95 COLUM. L. REV. 523 (1995). On the notion of standards for Orginalists, see H. Jefferson Powell, *Rules for Originalists,* 73 VA. L. REV. 659 (1987).

[10] On the term Standard Model, see Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment,* 62 TENN. L. REV. 461, 463 (1995).

[11] For other exaggerated claims about consensus, see Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment,* 45 EMORY L.J. 1139, 1141 (1996); *see also* Joyce Lee Malcolm, *The Second Amendment: Symposium,* 10 SETON HALL CONST. L.J. 829, 876 (2000).

[12] Nelson Lund, *Outsider Voices on Guns and the Constitution,* 17 CONST. COMT. 701, 708 (2000).

[13] In addition to the essays of Dorf and Farber cited above, one would include the following other examples of writing opposing the Standard Model: Carl T. Bogus, *The Hidden History of the Second Amendment,* 31 U.C. DAVIS L. REV. 309 (1998); Stephen J. Heyman, *Natural Rights and the Second Amendment,* 76 CHI.-KENT L. REV. 237 (2000); H. Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate,* 76 CHI.-KENT L. REV. 403 (2000). If one also includes the 52 signatories to the Historians and Lawyers amicus brief in *U.S. v. Emerson,* the notion of a consensus seems even more problematic. Among the prominent legal scholars who signed the brief were: Bruce Ackerman, Jack Balkin, Erwin Chemerinsky, Norman Dorsen, and Frank Michaelman. Among the historians signing the brief were: Joyce

Much of the recent scholarship on the Second Amendment has attacked the Standard Model and defended the collective rights interpretation.[14] Even within the ranks of supporters of the individual rights view there now appears to be a serious division between ideologues who have refused to engage recent scholarship challenging their views and those scholars who have responded to recent writing in a thoughtful manner, recasting the individual rights interpretation in ways more compatible with recent historical scholarship.[15]

Although there are historians and lawyers on both sides of this issue, there is a clear disciplinary division in the debate. Although a number of legal scholars have been won over to the individual rights view, most early American historians reject this interpretation.[16] Perhaps the most vociferous critic of the new scholarship is Robert Shalhope, a scholar whose work is often cited by proponents of the Standard Model.[17] In Shalhope's view the writers associated with the Standard Model have distorted the past to suit their policy goals.[18] Standard Modelers, Shalhope observed, "displayed little if any interest in the political culture that spawned the Second Amendment; those that did displayed an appalling ignorance of this intellectual climate. The result was, of course, an incredibly anachronistic presentation of the Second Amendment."[19] While Shalhope's most recent writing on the Second Amendment continues to argue that the Amendment was an individual right, he argues that such a right was far more limited in nature than the expansive right championed by Standard Modelers.[20]

The stakes in the current debate over the meaning of the Second Amendment extend far beyond the halls of the academy.[21] Although the collective rights view enshrined in *United States. v. Miller* continues to be the controlling precedent, the recent decision in *United States. v. Emerson* demonstrates the importance of academic scholarship on the Second Amendment.[22] Although judges are usually shy about using law review literature

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Appleby, Edward Countryman, Hendrik Hartog, Stanley Katz, and Michael Zuckerman.

[14] *See id.*

[15] The dogmatic responses of Malcolm and Lund share little with the measured and thoughtful revisions of the individual rights theory in other recent work. *Compare* Robert E. Shalhope, *To Keep and Bear Arms in the Early Republic,* 16 CONST. COMT. 269 (1999) *and* Sanford Levinson, *Historians and the Second Amendment,* (Paper presented at the University of Arizona Law School Conference, "Guns, Crime, and Punishment in America" on Jan. 26 and 27, 2001). For a summary of Levinson's argument, see Bernard E. Harcourt, *Guns, Crime, and Punishment in America,* ARIZ. L. REV. 43 (2001); Calvin R. Massey, *Guns, Extremists, and the Constitution,* 57 WASH. & LEE L. REV. 1095 (2000).

[16] See Bogus, *supra* note 4.

[17] *See* Shalhope, *supra* note 15.

[18] *Id.* at 281.

[19] *Id.*

[20] *Id.*

[21] *See* United States v. Emerson, 270 F.3d 203 (5th Cir. 2001).

[22] The controlling case for interpreting the Second Amendment remains United States v. Miller, 307 U.S. 174 (1939), which has generally been interpreted to endorse the view that the Amendment only protects the right of the militia to bear arms. For efforts to reinterpret *Miller* by individual rights theorists, see Eugene Volokh, et al., *The Second Amendment as a Teaching Tool in*

as the primary basis for rendering their decisions, *Emerson* is a sobering reminder of the potential for legal scholarship to influence the course of public policy and jurisprudence.[23] In the view of Judge Alex Kosinski, that decision was based "almost exclusively" on law review articles.[24] While Judge Cummings' reliance on problematic law office history was bad enough, the Appeals Court decision in *Emerson* represented an even more disturbing lack of historical sophistication.[25] Two of the judges held that the Second Amendment protected an individual right, but concluded that the federal gun law prohibiting individuals under a domestic violence restraining order from being in possession of a firearm was not a violation of Emerson's Second Amendment rights.[26] Had the judges made such an argument in philosophical terms, their decision would have been novel, but entirely logical. Rather than follow this more honest path, the judges cloaked their decision in a set of historical arguments that more closely resembled an alternative history science fiction fantasy than an accurate rendering of the past.[27] The majority decision of the Appeals Court made little use of the academic law review literature and instead quoted extensively from a remarkable text supplied to the court by the Second Amendment Foundation, *The Origin of the Second Amendment*, a self-published collection of primary sources from the Founding era culled together by a park ranger and gun enthusiast from Michigan.[28]

Before offering some insight into what a new paradigm for the Second Amendment might resemble, it is important to expose some of the historical errors that have by dint of frequent repetition come to be regarded as historical truth in this contentious debate.[29]

Constitutional Law Classes, 48 J. LEGAL EDUC. 591 (1998). For a critique of Volokh, see Dorf, *supra* note 10, at 297-99.

[23] *See* United States v. Emerson, 270 F.3d 203 (5th Cir. 2001).

[24] United States v. Emerson, 46 F. Supp.2d 598 (N.D. Tex. 1999). The relationship between recent scholarship and the *Emerson* decision is discussed in Judge Alex Kosinski's, *Who Gives a Hoot About Legal Scholarship*, 37 HOUS. L. REV. 295 (2000).

[25] *See* United States v. Emerson, 270 F.3d 203 (5th Cir. 2001).

[26] *Id.*

[27] For a useful introduction to the genre of alternative history science fiction, see Karen Hellekson, *Toward a Taxonomy of the Alternate History Genre*, 41 EXTRAPOLATION 248 (2000).

[28] *See* DAVID E. YOUNG, THE ORIGIN HISTORY OF THE SECOND AMENDMENT (1991). For a remarkable Interview with the author, see Michael V. Palletier, *Origins of the Second Amendment*, at http://www.keepandbeararms.com/information/XCIBViewItem.asp?ID'2722.com (last visited June 5, 2002). While checking the references in footnote 2 on page 226 of Young I found multiple errors which suggests that the court erred in treating this work as an authoritative scholarly edition. The standard reference work for scholarly editing is MARY-JO KLINE, A GUIDE TO DOCUMENTARY EDITING (1998).

[29] *See* Saul Cornell, *Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 CONST. COMT. 221 (1999); *see also* Jack N. Rakove, *Highest State of Originalism*, 76 CHI.-KENT L. REV. 103 (2000).

II. STANDARD MODEL, STANDARD ERRORS "A RIGHT OF THE PEOPLE"

The first problematic assertion of the Standard Model is that the phrase "right of the people" was synonymous with individual rights in the Founding era.[30] This view is concisely stated by Glenn Harlan Reynolds, who argues that "The text's support is seen as straightforward: the language used, after all, is 'right of the people,' a term that appears in other parts of the Bill of Rights that are universally interpreted as protecting individual rights. Thus, any argument that the right protected is not one enforceable by individuals is undermined by the text."[31] Had Reynolds taken the time to immerse himself in the constitutional texts and language of the period, he would have encountered many examples in which the phrase "right of the people" did not mean an individual right. Consider the language of the Pennsylvania Constitution which asserts "the people of this state have the sole, exclusive, and inherent right of governing and regulating the internal police of the same."[32] Here is one obvious example of how the phrase "right of the people" was used to protect a collective, not individual, right. Additional evidence for such a reading of the phrase "right of the people" may be found in the work of Richard Primus and Jack Rakove.[33] Primus correctly observes that the Founding generation held that "some rights were held to belong to 'the people as a collective body rather than to people as individuals.'"[34]

Reynolds is not the only gun rights advocate to approach the phrase "right of the people" in an anachronistic fashion.[35] The prolific gun rights advocate Don Kates adopts a similar ahistorical reading of the Bill of Rights.[36] According to Kates, the claim that the phrase "right of the people" does not mean an individual right requires that the "following set of propositions must be accepted: (1) when the first Congress drafted the Bill of Rights it used 'right of the people' in the first amendment to denote a right of individuals (assembly); (2) then, some sixteen words later, it used the same phrase in the second amendment to denote a right belonging exclusively to the states."[37] Upon closer historical examination even this apparent truism appears to be false. "Assembly," Primus

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[30] *See, e.g.*, Roger I. Roots, *The Approaching Death of the Collective Rights Theory of the Second Amendment*, 39 DUQ. L. REV. 71, 73 (2000).
[31] Reynolds, *supra* note 10.
[32] PA. CONST. of 1776, Declaration of the Rights of the Inhabitants of the Commonwealth or State of Pennsylvania, § III.
[33] *See* RICHARD A. PRIMUS, The AMERICAN LANGUAGE OF RIGHTS 86-87 (1999); *see also* Rakove, *supra* note 29.
[34] *See* PRIMUS, *supra* note 33, at 86-87.
[35] *See* Sanford Levinson, *Is the Second Amendment Finally Becoming Recognized as Part of the Constitution? Voices from the Courts*, 1998 BYU L. REV. 127 (1998) *and* Don B. Kates, Jr., *Handgun Prohibitions and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 218 (1983).
[36] Kates, *supra* note 35, at 218.
[37] *Id.*

reminds us, is an "activity of the people plural."[38] Similarly, the right to keep and bear arms was a right of the people in their collective capacity.[39]

Individual rights theorists are probably correct to stress that the traditional formulation of the collective rights argument as a right of the states is misleading.[40] A right of the people is not identical to a right of the states.[41] A more accurate way to paraphrase the right protected by the original Second Amendment might be to describe it as a right of the people acting through their state governments to form well-regulated militias.

III. "A WELL REGULATED MILITIA"

Glenn Reynolds asserts that a well-regulated militia was "one that was well-trained and equipped; not one that was 'well-regulated' in the modern sense of being subjected to numerous government prohibitions and restrictions."[42] Reynolds' claim about the meaning of this disputed term also rests on a false universalism and mythical consensus that never existed in the Founding era. To find evidence contradicting his assertion, one need only examine the relevant clause of the Articles of Confederation: "Every State shall always keep up a well-regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition and camp equipage."[43] Contrary to Reynolds' claim, well-regulated and disciplined were not always synonymous.[44] Nelson Lund shares Reynolds' mistaken view about the meaning of the term "well-regulated."[45] Thus, Lund writes that this term "does not imply heavy regulation, or more regulation. When one thinks about it, one should easily recognize what would have been much more immediately apparent to any eighteenth-century reader: that something can only be well-regulated when it is not overly regulated or inappropriately regulated."[46] Here again, Lund has smuggled in a false notion of consensus that few serious historians of the Founding era would accept.[47] It is interesting that Lund would

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[38] PRIMUS, *supra* note 33.

[39] *See* PRIMUS, *supra* note 33. Akhil Amar compares the militia right in the Founding era to the jury, another collective incarnation of the people, in THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION, 48 (1998).

[40] *See* Levinson, *supra* note 35 *and* Kates, *supra* note 35.

[41] On this point, the explicit argument of the text and the implicit understandings of Federalists and Anti-federalists may have diverged.

[42] Reynolds, *supra* note 10, at 474.

[43] ARTICLES OF CONFEDERATION, *at* http://www.yale.edu/lawweb/avalon/artconf.htm (last visited June 5, 2002).

[44] *Cf.* Reynolds, *supra* note 10.

[45] *See* Nelson Lund, *The Ends of Second Amendment Jurisprudence: Firearms Disabilities and Domestic Violence Restraining Orders*, 4 TEX. REV. OF L. & POL. 157 (1999).

[46] *Id.*

[47] For a useful overview of recent historical scholarship on the Revolutionary era that stresses ideological diversity, see LINDA K. KERBER, *The Revolutionary Generation: Ideology, Politics, and*

invoke the notion of how a typical 18th century reader would have understood this phrase. The subject of reconstructing the distinctive patterns of eighteenth century readers has attracted considerable scholarly attention from serious historians and literary scholars.[48] Unfortunately, Lund has not immersed himself in recent scholarship in either history or literary studies. His facile and anachronistic reading ignores the important insights to be gained from the innovative body of scholarship on early American reading practices.[49] Instead, Lund simply reads his own ideological preferences into the Second Amendment, conflating the ideas of today's Federalist Society, with the ideology of the Federalists who crafted the Second Amendment in the first Congress.[50]

Another problem with the simplistic formulation of the concept of regulation favored by Reynolds and Lund is that it does not explain how discipline could be achieved without extensive regulation.[51] Had either scholar taken the time to explore the laws governing the militia, they would have realized that government enjoyed a wide latitude to legislate on matters relating to arms.[52] Government had a right to inspect weapons in one's home or alternatively to require individuals to turn in their government issued weapons for inspection at government arsenals.[53] Indeed, Lund has articulated an amusing Goldilocks's principle regarding the meaning of the term "well-regulated."[54] According to Lund, the Founders intended this phrase to mean not over-regulated, not under-regulated, but just the right amount of regulation.[55] Such a claim is hard to reconcile with Hamilton's discussion of the militia in Federalist #29: "To acquire the degree of perfection which would entitle them to the character of a well-regulated militia, would be a real grievance to the people."[56] Hamilton went on to note that given popular aversion to the rigors of military discipline, the Federal government would be well advised to abandon the general militia and instead form a select militia.[57] Essentially, Hamilton did not think it possible to have too much regulation.[58] The danger posed by overly severe military

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Culture in the Early Republic, in THE NEW AMERICAN HISTORY (Eric Foner ed., 1997).

[48] For an overview of recent historical work on reader response and its relevance to constitutional history, see SAUL CORNELL, THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA 1788-1828 (1999).

[49] *Id.*

[50] *See* Lund, *supra* note 45; *see also* http://www.fed-soc.org/Publications/journalistsguide/mediaguide.htm# (last visited June 5, 2002). For a discussion of the Federalist Society, see Chris Mooney, *Losers: Bush's Ally, the Federalist Society, Resurrects the Views of the Vanquished in the Constitutional Debate -- the Anti-Federalists* (April 25, 2001) at http://www.prospect.org/webfeatures/2001/04/mooney-c-04-25.html (last visited June 25, 2001).

[51] *See* Reynolds, *supra* note 10, *and* Lund, *supra* note 45.

[52] *See* THE PERPETUAL LAWS OF THE COMMONWEALTH OF MASSACHUSETTS 240 (1789), and THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION VOL II (1976) *microform* Supp. pp. 1361-1373

[53] *Id.*

[54] *See* Lund, *supra* note 45.

[55] *Id.*

[56] THE FEDERALIST 184 (Jacob E. Cook ed., 1961).

[57] *Id.*

[58] *Id.*

discipline was not something most Federalists feared, but rather was a concern of the Anti-Federalists.[59] This fear was captured by an Old Whig who warned that, "They can subject all the militia to strict military laws, and punish the disobedient with death, or otherwise, as they shall think right: by which they can march the militia back and forward from one end of the continent to the other, at their discretion; these powers, if they should ever fall into bad hands, may be abused to the worst purposes."[60]

Another meaning of "well-regulated" that neither Reynolds nor Lund pays much attention to is suggested by the actions of the insurgents in Shays's rebellion who called themselves Regulators.[61] Although the rogue militia units that supported Shays believed themselves to be regulated, they shared little with the well-regulated militia that the Founders idealized.[62] A careful exegesis of the historical meanings attached to the term "well-regulated" suggests that the Standard Model's efforts to define it exclusively in terms of a mild form of military discipline rests on a highly selective reading of the evidence.[63]

IV. CONGRESSIONAL DEBATES AND COUNTER-FACTUAL SPECULATIONS

Substantial attention has been devoted to the changes that Madison's original language regarding the right to bear arms underwent in Congress.[64] The Standard Model's treatment of this evidence is also marred by a selective use of evidence and questionable anachronistic readings of texts. Madison's original suggestion that the right to bear arms be placed in the body of the Constitution in Article I, Section 9 has been invoked by several supporters of the Standard Model as definitive proof of the individual rights character of this right.[65] In the view of Glenn Reynolds, "If he had thought the Second Amendment would alter the military and/or militia provisions of the Constitution he would have interlineated it in Article I, Section 8, near or after clauses 15 and 16. Instead, he planned to insert the right to arms with freedom of religion, the press and other personal rights in Section 9 following the rights against bills of attainder and ex post facto laws."[66] This view is endorsed by L.A. Powe, who asserts that this decision is clear proof that Madison understood this provision to be an individual right.[67] "If the collective rights theory were correct," Powe asserts, "then

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[59] *See* 2 HERBERT J. STORING, THE COMPLETE ANTI-FEDERALIST 36 (1981).
[60] *Id.*
[61] *See* Reynolds, *supra* note 10, *and* Lund, *supra* note 45.
[62] *See* ROBERT GROSS, IN DEBT TO SHAYS: THE BICENTENNIAL OF AN AGRARIAN REBELLION (1993).
[63] *Id.*
[64] *See* Reynolds, *supra* note 10, at 467-71.
[65] *Id.* at 473.
[66] *Id.*
[67] *See* L.A. Powe, *Guns, Words and Constitutional Interpretation*, 38 WM. & MARY L. REV. 1311, 1338-39 (1997). The notion that Madison's original intent might trump that of the final form of the amendment that emerged out of the give and take of the debate in the First Congress is one of the strangest elements of the Standard Model's variant on originalism.

Madison should have placed his 'Second Amendment' either in Article I Section 8, with the militia clauses, or in Article IV, Section 4, the Guarantee Clause."[68] Once again supporters of the Standard Model fail to adequately contextualize the text they quote. Madison's decision to place the right to bear arms in Article I, Section 9, followed the common practice in virtually all of the individual state constitutions of separating the statement of the right to bear arms from the organization of the militia.[69] The original placement of the right to bear arms does little to clarify whether he thought this was an individual or a collective right. Supporters of the Standard Model have ignored a much more important piece of evidence about how Madison understood the connection between the right to bear arms and other fundamental rights. Madison originally proposed an amendment that read: "No State shall infringe the right of trial by Jury in criminal cases, nor the rights of conscience, nor the freedom of speech, or of the press."[70] It is important to recall that in 1788-89 Madison viewed the individual states, not the federal government, as the greatest threat to liberty. [71] In a letter to Jefferson describing his views about the efficacy of a written bill of rights, Madison reminded Jefferson that "repeated violations of these parchment barriers have been committed by overbearing majorities in every State."[72] "There is," Madison warned, "more danger for those powers being abused by the State Governments than by the Government of the United States."[73] If Madison's primary concern was protecting an individual right to bear arms, then the right should have been listed as one of those fundamental rights that the states could not violate. Given the penchant of Standard Modelers to pose counter-factual questions, one wonders why they have not asked this one. Such a fear, it is worth noting, was not an abstract concern.[74] States such as Pennsylvania had disarmed their citizens during the Confederation period.[75] If Madison were concerned about an individual right to bear arms similar in nature to freedom of the press, then one must ponder why he omitted such a right from his proposal. Once again, the use of counter-factual speculation by Standard Modelers only cuts in one direction–in support of an individual right.

It is important for scholars to acknowledge the limits of the documentary record available to us. This fact casts doubt on Nelson Lund's claims about congressional intent in revising Madison's original language.

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[68] *Id.*

[69] Virginia Declaration of Rights, Massachusetts, and Pennsylvania Constitutions are all available at the Yale Law School's Avalon project, http://www.yale.com (last visited June 5, 2002).

[70] Charles F. Hobson, *The Negative on State Laws: James Madison, the Constitution, and the Crisis of Republican Government,* 36 WM. & MARY Q. 215, 234 (1979).

[71] For Madison's thinking about the Bill of Rights, see Paul Finkelman, *James Madison and the Bill of Rights,* SUP. CT. REV. 301 (1990); Jack N. Rakove, *The Madisonian Moment,* 55 U. CHI. L. REV. 473 (1988); Jack N. Rakove, *The Madisonian Theory of Rights,* WM. & MARY L. REV. 245 (1990).

[72] THE MIND OF THE FOUNDERS: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON, 157 (Marvin Meyers ed., 1981).

[73] *Id.* at 173.

[74] *See* Cornell, *supra* note 29.

[75] *Id.*

> All the major changes made during the congressional process increased the clarity with which the Second Amendment protects an individual right, not a right of the states to maintain military organizations. The conscientious objector clause was dropped. The reference to a "well armed militia" was eliminated. The description of the militia as an entity "composed of the body of the people" was omitted. Each of these phrases could have suggested that the right to keep and bear arms was somehow restricted to the context of military service. Although Madison meant to imply no such thing, the fact that each of these potentially misleading phrases was deliberately removed from the text confirms that Congress knew exactly what it was doing when it proposed for ratification the unambiguous text that is now part of the Constitution.[76]

While Congress may have known exactly what it was doing, it is impossible for Lund or any other modern scholar to make a similar claim. Records for the Senate's deliberations do not exist. Unless Lund has conducted a seance or studied past life regression with actress Shirley McLaine, his claims are speculative at best. Upon closer examination his interpretation is worse than speculative; it is profoundly ahistorical. Lund assumes that the First Congress shared with modern scholarship a dichotomous view of the meaning of the right to bear arms, as either an individual right or a collective right.[77] Rather than prove this claim, Lund simply assumes it to be true. Such an argument is entirely circular. Consider the deletion of the phrase describing the militia as "composed of the body of the people." Individual rights theorists argue that the deletion of this phrase was merely stylistic.[78] Everyone assumed that such a militia would be drawn from the entire population.[79] An alternative and more plausible reading has been suggested by Jack Rakove, who has argued that this change actually strengthened the power of Congress to define who the militia would be in the future.[80] A similar counter-factual sleight of hand is evident in the following comments by Joyce Lee Malcolm: "Had the right to be armed an exclusively, or even primarily, collective aspect Senators would have approved the amendment to add 'for the common defense.' Congress had the opportunity to incorporate into the language of the amendment the meanings the collectivist school has tried so hard to read into it."[81] It is not collective rights theorists, but Malcolm, who has read back contemporary concerns into the eighteenth century texts. Nor is it surprising that Malcolm, a specialist on 17th century English history, would fail to adequately situate this debate within its late 18th century

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[76] Lund, *supra* note 45, at 181-82.
[77] *Id.*
[78] *See* Malcolm, *supra* note 11.
[79] *Id.*
[80] *See* Rakove, *supra* note 29.
[81] Malcolm, *supra* note 11.

American context.[82] A much more plausible reading of this change is suggested by the work of Don Higginbotham, the leading military historian of the Revolutionary era.[83] Higginbotham demonstrates convincingly that the main issue for both Federalists and Anti-Federalists in the Second Amendment debate was not individual rights, but federalism.[84] It was the allocation of military power in the new republic that was at the core of the debate over the militia.[85] To declare that the militia was to be used for the common defense would have troubled Virginia Anti-Federalists who would have wanted to preserve the ability of their state to use the militia to put down rebellion, a particularly troubling prospect to southerners fearful of the danger posed by the threat of slave insurrections.[86]

Lund's claims about the significance of the Congressional debate over the conscientious objector provision also distorts the historical record by wrenching the debate out of context.[87] Rather than support the Standard Model's contention that Congress sought to clarify the individual rights nature of the text, the deletion of the conscientious objector clause suggests just the opposite.[88] Gerry objected to the way in which the clause about conscientious objection status might allow the new government to disarm the militia of the states: "I am apprehensive, sir, that this clause would give an opportunity to the people in power to destroy the constitution itself. They can declare who are those religiously scrupulous, and prevent them from bearing arms."[89] Although Gerry might have used this occasion to express concern that an individual right to own guns was in danger, he showed no interest in this issue.[90] His concern was focused squarely on the threat to the militia.[91] "Whenever government means to invade the rights and liberties of the people, they always attempt to destroy the militia."[92] Rather than support the Standard Model's claim, Gerry's exclusive focus on the potential of the conscientious objector clause to be used to destroy the militia provides strong evidence that the primary issue under consideration was the militia.[93] Given the Standard Modelers' fondness for counter factual

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[82] *See* JOYCE LEE MALCOLM, THE ENGLISH PEOPLE AND THE CROWN'S CAUSE, *1642-1646,* (1977) (unpublished Ph. D. dissertation, Brandeis University). While Malcolm often derides supporters of the collective rights view for their ties to gun control, she has been less than forthcoming about her own connections to the NRA. *See,* e.g., JOYCE LEE MALCOLM, DISARMED: THE LOSS OF THE RIGHT TO BEAR ARMS IN RESTORATION ENGLAND (1981). Malcolm's work was republished by the NRA Institute for Legislative Action.

[83] *See* Don Higginbotham, *The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship,* 55 WM. & MARY Q. 39 (1998).

[84] *Id.*

[85] *See* Bogus, *supra* note 13, at 407.

[86] *Id.* at 357.

[87] *See* Lund, *supra* note 45.

[88] Heyman, *supra* note 13, at 275.

[89] CREATING THE BILL OF RIGHTS 182 (Charlene Bickford et al., eds., 1991).

[90] *See* H. Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate,* 76 CHI.-KENT L. REV. 403, 501 (2000).

[91] *Id.*

[92] *Id.*

[93] *Id.*

questions, one wonders why they did not pose the following one: why didn't Gerry make at least passing mention of the potential for the conscientious objector exclusion to provide a pretext to deprive individuals of a right to own weapons for personal defense? [94] Appealing as counter-factual speculations may be, they are notoriously difficult to evaluate and provide an exceedingly weak foundation for constitutional arguments.[95] Jefferson Powell's wise caution that "Arguments from silence are unreliable and often completely ahistorical," has been violated repeatedly by supporters of the Standard Model. [96] In most cases we simply do not know why an author opted to make one claim and not another.[97] At the very minimum, one would expect those choosing to dabble in counter-factual speculation to do so in an even-handed and balanced fashion.[98] Had supporters of the Standard Model approached their subject with greater scholarly rigor, they might have posed at least some of the sorts of counter-factual questions that point toward the collective rights understanding of the Amendment.[99] In every instance Standard Modelers have used counter-factual speculation to cloak the obvious fact that there are relatively few examples of anyone discussing the right to bear arms as an individual right in the 18th century.[100]

V. "PRIVATE ARMS"

Another favorite text of Standard Modelers is a hastily assembled newspaper essay defending the Bill of Rights prepared by Federalist Tench Coxe.[101] The gun rights advocate Stephen Halbrook claims that Coxe's essay was widely reprinted and, moreover, he argues that a search of the literature of the time reveals that no writer disputed or contradicted Coxe's analysis.[102] Actually, if one scans Halbrook's notes, it appears that Coxe's essay appeared a total of three times.[103] In 1790 there were 84 newspapers in America, which means that Coxe's essay was ignored by more than 95% of the press.[104] It is hard to see how this sort of evidence could prove that Coxe's essay was representative of widely held views or that it reached a particularly wide audience. Nor can one infer much from the fact that no one bothered to refute Coxe. The absence of a

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[94] *See* CREATING THE BILL OF RIGHTS, *supra* note 89, at 182.
[95] *See* Powell, *supra* note 9, at 671.
[96] *Id.*
[97] *Id.* at 672.
[98] *Id.*
[99] *See* CREATING THE BILL OF RIGHTS, *supra* note 89, at 182.
[100] *See* Dorf, *supra* note 9.
[101] *See* Stephen P. Halbrook & David B. Kopel, *Tench Coxe and the Right to Keep and Bear Arms 1787-1823*, 7 WM. & MARY BILL RTS. J. 347 (1999).
[102] *Id.*
[103] *Id.*
[104] Information on early American newspapers can be found in THE ATLAS OF EARLY AMERICAN HISTORY (Lester Cappon ed., 1978).

rebuttal might just as easily signify indifference as acceptance. The most reasonable conclusion to draw is that Coxe's essay was simply not very influential.[105] Additional support for the idea that this essay was not intended to be a definitive commentary on the meaning of the Bill of Rights is provided by a letter Coxe wrote to Madison describing his effort.[106] In a letter to Madison, Coxe described his effort in the following way: "I have therefore taken an hour from my present engagement" and "thrown together a few remarks upon the first part of the Resolutions."[107] Given Coxe's own description of his remarks as "thrown together," it is difficult to understand the importance that has been assigned to them by Standard Modelers.[108] In his essay Coxe does affirm "the right of the people to keep and bear their private arms."[109] While it is possible to read this statement as an expression of an individual rights point of view, Coxe's invocation of the right of the people within the context of resisting tyranny is more plausibly read as a reiteration of the necessity of a citizen militia composed of the sturdy yeomanry than it is of some sort of expansive individual right comparable to freedom of speech.[110] Eighteenth century members of the militia were expected, and in many instances, required, to provide their own weapons.[111] Individual ownership of weapons within the context of militia service is not the same thing as an individual right to own weapons for personal defense.[112] Still, individual rights theorists and some revisionist statements of the collective rights thesis have correctly drawn attention to the fact that the Founders expected that a large segment of the population would bear arms as part of the militia.[113] Of course, as Carl Bogus and others have argued, the text of the Constitution gives Congress the power to decide who is part of the well-regulated militia protected by the Second Amendment.[114] Ultimately it is up to Congress to decide who may bear arms as part of the well-regulated militia.

When Coxe's remarks are set within the context of his general discussion

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[105] Joyce Lee Malcolm also mistakenly interprets the absence of a rebuttal as a sign of broad acceptance. *See* Malcolm, *supra* note 11.

[106] *See* CREATING THE BILL OF RIGHTS, *supra* note 89.

[107] *Id.* at 252-53.

[108] Coxe's essay is central to the arguments of Halbrook and Kopel, *supra* note 101, *and* Kates, *supra* note 6, at 224.

[109] *Id.*

[110] *See* Williams, *infra* note 114.

[111] *See* Chuck Dougherty, *The Minutemen, the National Guard and the Private Militia Movement: Will the Real Militia Please Stand Up?*, 28 J. MARSHALL L. REV. 959, 963 (1995).

[112] For a critique of the Standard Model's reading of Coxe's statement, see GARRY WILLS, A NECESSARY EVIL: A HISTORY OF AMERICAN DISTRUST OF GOVERNMENT 214-15, 257 (1999).

[113] *See, e.g.*, David Yassky, *Symposium: The Second Amendment, Panelist*, 10 SETON HALL CONST. L. J. 821, 822 (2000).

[114] *See* Bogus, *supra* note 4. The revisionist view of the collective rights view, described by individual rights theorists as the sophisticated version (which presumably exists in contrast to an unsophisticated version–although I am unaware of anyone claiming to be a supporter of the unsophisticated collective rights view), is best represented by David C. Williams, *Civic Republicanism and the Citizen Militia*, 101 YALE L.J. 551 (1991), *and* David C. Williams, *The Unitary Second Amendment*, 73 N.Y.U. L. REV. 822 (1998). The power of Congress to decide the composition of the militia is discussed in Bogus, *supra* note 13.

of the Bill of Rights, the individual rights gloss of his text seems even more problematic. A careful reading of Coxe's essay reveals an understanding of the Bill of Rights that is far more republican than liberal in spirit. Coxe explicitly described "the republican spirit" of Madison's draft of the Bill of Rights.[115] While defending "the creed of liberty," Coxe underscored that government existed to pursue the public good.[116] Interestingly, in discussing the core freedoms that would eventually constitute the First Amendment, Coxe chose to describe them as "political rights," not individual or personal rights.[117] Although Coxe's republican language is not incompatible with liberal ideas about individual rights, it certainly does not bear the weight placed upon it by supporters of the Standard Model.[118]

IV. A RIGHT TO BEAR QUILLS, OR KILL BEARS: THE CURIOUS CASE OF PENNSYLVANIA

One of the most remarkable features of recent writing about the Second Amendment is the degree to which supporters of the individual rights view have drawn on evidence from Pennsylvania to support their claims.[119] When properly contextualized, the texts most often cited to prove the existence of an expansive individual right actually demonstrate quite the opposite: the example of Pennsylvania provides proof of an expansive conception of the right of the state to regulate and limit access to firearms.[120] Shortly after adopting their state constitution, which affirmed that "the people have a right to bear arms for the defense of themselves and the state," Pennsylvanians passed a series of Test Acts which imposed severe penalties on citizens who refused to take an oath of allegiance to the state.[121] Individuals who refused to take the oath were disarmed.[122]

The Pennsylvania Constitution did affirm, "That every member of society hath a right to be protected in the enjoyment of liberty and property, and therefore is bound to contribute his proportion toward the expense of protection,

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[115] Tench Coxe, A PENNSYLVANIAN, New York Packet, June 23, 1789.
[116] *Id.*
[117] *Id.*
[118] [Tench Coxe] *A Pennsylvanian*, "Remarks on the First Part of the Amendments . . ." New York Packet, June 23, 1789. Robert Shalhope, *supra* note 15, wisely cautions against the dangers of over-stating the corporate nature of republicanism. By contrast, the Standard Model's reading of Coxe over-emphasizes the liberal individualist character of this text.
[119] Among the essays that draw heavily on Pennsylvania to support the individual rights view are: David T. Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J.L. & POL'Y 1 (1987); Reynolds, *supra* note 10, at 63; Thomas Macafee & Michael J. Quinlan, *Bringing Forward the Right to Keep and Bear Arms*, 75 N.C. L. REV. 781 (1997), *and* Nelson Lund, *The Past and Future of the Individuals Right to Bear Arms*, 31 GA. L. REV. 1 (1997).
[120] *See* Cornell, *supra* note 29, at 246.
[121] *Id.* at 228.
[122] For information on the Test Act, *see* Cornell, *supra* note 29, at 246.

and yield his personal service when necessary, or an equivalent thereto."[123] The text then goes on to declare that "nor can any man who is consciously scrupulous of bearing arms, be justly compelled thereto, if he will pay such equivalent, nor are the people bound by any laws, but such as they have in like manner assented to, for their common good."[124] While such a view might seem illogical to modern gun rights advocates, it makes perfect sense given the limited view of self defense under 18th century law.[125] It is important to recall that in the eighteenth-century the notion of self defense did not entitle citizens to use deadly force against attackers in most cases.[126] One was required to retreat to the wall before one might kill an attacker. Standard Model scholarship has smuggled a modern conception of the right of self defense, further obscuring the original meaning of the right to bear arms.[127]

The Pennsylvanians who drafted the Test Act did not accept similar limits on freedom of press or freedom of religion.[128] While there was a broad consensus that prior restraint of the press was unacceptable, prior restraints on gun ownership, including large scale disarmament of parts of the civilian population, presented no constitutional problem to Pennsylvanians.[129] The Constitutionalist party that framed the Pennsylvania constitution and passed the Test Act accepted that the state could disarm peaceful citizens when the good of the community required such action.[130] Such actions were compatible with the notion of self defense expressed in the state constitution.[131] Contrary to the claims of Standard Modelers, Pennsylvania's Constitutionalists recognized a fundamental difference between guns and words.[132] Prior restraints on gun ownership were not unconstitutional.[133]

It is interesting to note that the Test Acts stripped citizens of the right to sit on juries.[134] As historian Douglas Arnold noted, the act was also more than a war time emergency measure, but rather an effort by Pennsylvania's Constitutionalist party to restrictively define citizenship to those capable of displaying the requisite virtue.[135] In the case of Pennsylvania, the right to bear arms was neither an individual right nor a collective right in the sense with which

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[123] PA. CONSTITUTION of 1776, Declaration of the Rights of the Inhabitants of the Commonwealth or State of Pennsylvania § III.
[124] *Id.*
[125] *See* RICHARD MAXWELL BROWN, NO DUTY TO RETREAT: VIOLENCE AND VALUES IN AMERICAN HISTORY AND SOCIETY (1991).
[126] *Id.* at 3-5.
[127] For a discussion of this, see Heyman, *supra* note 13.
[128] *See* Cornell, *supra* note 29, at 230.
[129] *Id.* It is important to distinguish between political speech and other forms of speech. Pennsylvanians accorded political speech enormous latitude while restricting other forms of speech such as artistic speech in ways that might include forms of prior restraint.
[130] For more on the political struggle over the Test Acts, see DOUGLAS M. ARNOLD, A REPUBLICAN REVOLUTION: IDEOLOGY AND POLITICS IN PENNSYLVANIA 1776-1790 (1989).
[131] *Compare* BROWN, *supra* note 125, *with* ARNOLD, *supra* note 130.
[132] *See* Cornell, *supra* note 29, at 229.
[133] *Id.*
[134] *See* ARNOLD, *supra* note 130, at 108.
[135] *Id.*

these terms are most often used in modern constitutional debate over the meaning of the Second Amendment.[136] It would be more accurate to describe it as a civic right, one that was limited to those members of the polity who were deemed capable of exercising it in a virtuous manner. Freedom of religion or freedom of the press were genuinely rights of individuals and were treated differently than were civic rights such as militia service, or the right to sit on juries.[137] The Test Acts stripped citizens of certain civic rights, but did not deprive them of fundamental individual rights.[138] Pennsylvania Anti-Federalists, the group who supported the Test Acts, accepted a level of gun regulation that far exceeds anything modern gun control groups have advocated.[139] The actions of Pennsylvania Anti-Federalists serve as an important reminder about the dangers of treating the Founding generation as though they were modern civil libertarians or the forebearers of today's gun rights activists.[140] It also provides an additional cautionary reminder for those who would endorse a narrow originalist approach to constitutional interpretation.[141] Although the irony would not be appreciated by many modern gun rights advocates, the proposals of modern gun control advocates, registration, mandatory safety training, and bans on specific classes of weapons pale in comparison to the large scale efforts to disarm the civilian population endorsed by Pennsylvanians.[142] Indeed, the comprehensive hand gun bans advocated by the most ardent gun control activists seem tame by comparison, since they would not prohibit most long guns.[143] Nor would such proposals require a political litmus to own weapons, something which Pennsylvanians accepted as a legitimate exercise of the state's police powers.[144] The history of gun laws enacted by the Founding generation offers important insights into how the right to bear arms was understood at the time the Second Amendment was ratified.[145] The notion that guns could not be extensively regulated turns out to be a modern myth, one that has been aggressively spread by supporters of the Standard Model.[146] Thus, Robert Cottrol confidently declares that "for much of American History there were few regulations concerning firearms ownership."[147] Such a view is contradicted by the work of William Novak who has convincingly demonstrated that state and local governments used their police powers extensively to regulate the storage of arms

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[136] For a modern discussion claiming that both the individual right and collective right approaches are inadequate, see David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588 (2000).
[137] *See* Arnold, *supra* note 130.
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *See* JOSH SUGARMAN, EVERY HANDGUN IS AIMED AT YOU: THE CASE FOR BANNING HANDGUNS (2001).
[144] *Id.*
[145] *See* Cornell, *supra* note 29, at 229.
[146] Robert Cottrol, *Second Amendment*, in THE OXFORD COMPANION TO THE SUPREME COURT 763 (Kermit Hall ed., 1992).
[147] *Id.*

and gunpowder.[148] The laws enacted by individual state governments regulating gun ownership and storage, including compulsory militia musters, and periodic gun censuses, make the comparison with other individual rights such as freedom of conscience or freedom of the press seem far fetched.[149] Government not only regulated guns and ammunition; it kept close tabs on who had guns and the condition of those weapons.[150] The state also retained the right to compel citizens to submit to formal arms training and exclude individuals and groups from service in the militia when individuals or groups were viewed as a threat to society.[151]

Standard Modelers have often invoked Pennsylvania's Anti-Federalist Minority to prove that the right to bear arms was intended to be an individual right.[152] In a foundational text for the Standard Model, gun rights proponent Don Kates declares that "the individual right nature of the Pennsylvania right to arms proposal is unmistakable."[153] The relevant amendment proposed by Pennsylvanians reads as follows:

> That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purposes of killing game; and no law should be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to and be governed by the civil powers.[154]

This provision has also been used to prove that the phrase "bear arms" did not have an exclusively military connotation.[155] In the view of Nelson Lund, "Contrary to a popular misconception, the military connotations frequently associated with the term 'bear arms' do not mean that the term invariably implies a military context. This was made perfectly clear in one of the earliest proposals for a bill of rights, which was drafted by the Anti-Federalist minority at the Pennsylvania ratifying convention."[156] The "popular misconception" Professor Lund alludes to is Garry Wills's discussion of the military connotation of the term "bear arms."[157] Rather than survey 18th century legal usage in a systematic

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[148] *See* WILLIAM J. NOVAK, THE PEOPLE'S WELFARE 57 (1996).
[149] *Id.* On the regulation of the militia, see MARK PITCAVAGE, AN EQUITABLE BURDEN: THE DECLINE OF THE STATE MILITIAS, 1783-1858 (Ph.D. dissertation, Ohio State University, 1995).
[150] *Id.*
[151] *See* Cornell, *supra* note 29, at 230.
[152] *See, e.g.*, Kates, *supra* note 6, at 222.
[153] *Id.*
[154] SAMUEL BRYAN, *The Address and Reasons of Dissent of the Minority, in* THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 623-24 (Merrill Jensen ed., 1976).
[155] *See* Lund, *supra* note 45, at 168-69.
[156] *Id.*
[157] *See* Garry Wills, *To Keep and Bear Arms,* N.Y. Rev. of Books (Sept. 21, 1995) (book review).

fashion, Lund's argument relies on the isolated example of the Dissent of the Minority.[158] The use of phrase in this document, which as Wills notes was hastily assembled, hardly challenges the notion that standard usage carried with it a clear military meaning.[159]

The Dissent of the Minority does present a different challenge to the collective rights thesis.[160] At least in Pennsylvania, there appears to have been a recognition of a right to hunt.[161] Recognizing this type of individual right does not mean that the right was understood to be somehow comparable to the right of free speech.[162] The provision affirming a right to hunt proposed in the Dissent acknowledged that this right might be limited as to time and place.[163] Hunting was obviously subject to extensive regulation, including some types of prior restraints, restrictions that would never have been permissible for speech.[164]

Another problem with the Standard Model is the claim that the term defense of "themselves" was synonymous with an individual right.[165] It is important to recall that there were no organized police forces in eighteenth-century America and that the militia was often called on to serve as an agent of law enforcement.[166] The Test Act empowered the militia to disarm citizens who refused to take the loyalty oath.[167] Thus, in addition to serving as a military force, the militia in Pennsylvania also functioned as a police force.[168] Given this fact, it is far from obvious that the meaning of the phrase "defense of themselves" should be interpreted as a statement of individual rights.[169]

The affirmation of the right to hunt, a provision not emulated by any other state ratification convention, does suggest a nonmilitary context for the right to keep arms.[170] The Dissent of the Minority fused two separate rights protected by their state constitution—a right to bear arms and a right to hunt bears.[171] Neither right was an expansive individual right comparable to freedom of conscience or freedom of the press.[172] Wills may be correct that the conjunction of these two different rights was accidental, a product of haste and

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See also Lund, *supra* note 45. Lund also confuses the phrase bear a gun with bearing arms.

[158] *See* Lund, *supra* note 45.

[159] According to legal scholar David Yassky, congressional documents from the Founding era use this term in a military context on thirty other occasions. Supporters of the opposing view that bearing arms did not have a military meaning have only adduced the one example of the Dissent of the Minority to prove their case that the term did not have an exclusively military connotation. *See* Yassky, *supra* note 136. For a similar conclusion, see Dorf, *supra* note 9, at 315.

[160] *See* Yassky, *supra* note 136.

[161] *See* Cornell, *supra* note 29.

[162] *See* Cornell, *supra* note 29, at 229.

[163] *Id.*

[164] *See* Cornell, *supra* note 29, at 230.

[165] *See* Wills, *supra* note 157, at 66.

[166] *See* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 67-68 (1993).

[167] *Id.* at 253.

[168] *Id.*

[169] *See* Cornell, *supra* note 29.

[170] *See* ARNOLD, *supra* note 130, at 109.

[171] *See* Cornell, *supra* note 29, at 230.

[172] *Id.*

poor drafting.[173] Still, once published, this mistake established the possibility of re-conceptualizing the meaning of bearing arms, a process that did occur slowly over the subsequent decades.[174]

V. FROM BEARING ARMS TO HUNTING BEARS: THE CHANGING MEANING OF THE RIGHT TO BEAR ARMS

"For the historian," the eminent scholar Herbert Butterfield noted, "the only absolute is change." [175] Writing about the Second Amendment has presented a static image of the Amendment.[176] The notion that the Second Amendment, in contrast to virtually every other feature of American constitutional life, remained fixed and unchanging over the course of American history seems patently absurd.[177] Yet, this is precisely how legal scholarship on the Second Amendment has portrayed the meaning of the right to bear arms.[178] There is considerable evidence that this was not the case.[179] Within two decades of the adoption of the Second Amendment, the meaning of the right to bear arms underwent some remarkable changes in state constitutional law.[180]

Contrary to the myth of an unchanging constitutional right, a profound transformation in the history of the right to bear arms occurred in the early Jacksonian era when several state constitutions abandoned the distinctive eighteenth-century language protecting "the right of the people to keep and bear arms in defense of themselves," and adopted the more unambiguously individual right, that "every citizen has a right to bear arms, in defense of himself and the

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[173] *See* Wills, *supra* note 157.

[174] *See* Cornell, *infra* note 175, at 675-78.

[175] HERBERT BUTTERFIED, THE WHIG INTERPRETATION OF HISTORY 58 (1951).

[176] Two exceptions to this pattern are worth noting. Akhil Amar argues that the 14th Amendment transformed the meaning of the Second Amendment. *See* Amar, *supra* note 39. Amar's approach to Reconstruction, "refined incorporation," has been challenged by a number of scholars. *See* Daniel J. Hulsebosch, *Civics 2000,* 97 MICH. L. REV. 1520, 1546 (1999); Bret Boyce, *Originalism and the Fourteenth Amendment,* 33 WAKE FOREST L. REV. 909 (1998) *and* Jack N. Rakove, *Two Foxes in the Forest of History,* 11 YALE J.L. & HUMAN. 191 (1999). For a different, less monolithic reading of the meaning of the 14th Amendment, see WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT (1998). Another model of the evolution of the Second Amendment is explored by David Yassky, *The Second Amendment,* 99 MICH. L. REV. 588 (2000). Yassky follows Amar's Yale colleague Bruce Ackerman. *See* BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998). He highlights the transformation wrought by the New Deal on the Second Amendment. Yassky's analysis is open to many of the criticisms made of Ackerman's work. *See* Richard A. Posner, *Past Dependency and Pragmatism,* 67 U. CHI. L. REV. 573, 596 (2000), *and* Larry Kramer, *What's a Constitution for Anyway?,* 46 CASE W. RES. L. REV. 885 (1996). Neither Amar nor Yassky devotes much attention to the important changes in the interpretation of the right to bear arms in the early Republic.

[177] *Id.*

[178] *See* Kates, *supra* note 6, at 222.

[179] *See* Yassky, *supra* note 176.

[180] See discussion below at pages 676-677.

State."[181] The shift in constitutional discourse evidenced in state constitutions written after the War of 1812 is profound.[182] Consider the following state constitutional provisions pertaining to the right to keep and bear arms enacted between 1776 and 1820:

> 1776 Virginia: That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state; that Standing Armies, in time of peace, should be avoided, as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power.
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> 1780 Massachusetts: The people have a right to keep and to bear arms for the common defence. And as, in time of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it.
>
> 1792 Kentucky: That the right of the citizens to bear arms in defense of themselves and the State shall not be questioned.
>
> 1817 Mississippi: Every citizen has a right to bear arms, in defence of himself and the State.
>
> 1819 Maine: Every citizen has a right to keep and bear arms for the common defence; and this right shall never be questioned.
>
> 1820 Missouri: That the people have the right peaceably to assemble for their common good, and to apply to those vested with the powers of government for redress of grievances by petition or remonstrance; and that their right to bear arms in defence of themselves and of the State cannot be questioned.[183]

There was no uniform pattern of constitutional change across America in the period between 1776 and 1820.[184] While the 1817 Mississippi state constitutional convention adopted a more liberal individualistic language, the Maine and Missouri Constitutions chose the older, more republican, formulation which clearly persisted well into the nineteenth century.[185] The Missouri

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[181] Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 794 (1998).

[182] For an argument that the War of 1812 marked a watershed in the evolution of the transition from republicanism to liberalism, *see* STEVEN WATTS, THE REPUBLIC REBORN: WAR AND THE MAKING OF LIBERAL AMERICA 1790-1820 (1987). The literature on the debates over the relative importance of republican and liberal ideas in American life is enormous.

[183] For a complete list of state provisions on the right to bear arms, see Eugene Volokh, *State Constitutional Right to Keep and Bear Arms Provisions, at* http://www.law.ucla.edu/faculty/volokh/2amteach/sources.htm (last visited June 5, 2002).

[184] *See id.*

[185] *Id.*

Constitution is fascinating because it asserted that the right to assemble was designed to promote the common good, an explicitly republican formulation, and it directly juxtaposed the right of assembly with the right to keep and bear arms.[186]

The clear change in the language of state constitution provisions regarding the right to bear arms eluded the Fifth Circuit Court's majority opinion in *Emerson*.[187] The court's confusion over the facts and basic chronology of the history of the right to bear arms is embarrassing:

> However, there are numerous instances of the phrase "bear arms" being used to describe a civilian's carrying of arms. Early constitutional provisions or declarations of rights in at least some ten different states speak of the right of the "people" [or "citizen" or "citizens"] "to bear arms in defense of themselves [or "himself"] and the state," or equivalent words, thus indisputably reflecting that under common usage "bear arms" was in no sense restricted to bearing arms in military service.[188]

Actually, there is almost no evidence from the 18th century to prove that the phrase "bear arms" was used in a non-military context. The only example to actually support the Court's claim, the Dissent of the Minority, hardly supports the individual rights interpretation advanced by the Court.[189] The majority opinion of the Fifth Circuit conflated the language used by the 18th century with the new language adopted in the 19th century.[190] It is difficult to know if the Fifth Circuit's decision is based on profound ignorance of history, or on deliberate misrepresentation motivated by the judges' ideological preferences. In either case, the decision in *Emerson* represents a new nadir in the use and abuse of history by federal courts.

The meaning of the right to bear arms under state constitution law clearly changed during the first few decades of the nineteenth century, and this change itself provides one of the most serious challenges to both the individual and collective rights paradigms.[191] Individual rights supporters conveniently elide this change, while supporters of the collective rights view simply ignore the change all together.[192] Appreciating the changing meaning of the right to bear arms is an important first step toward fashioning a new paradigm for understanding the Second Amendment.[193]

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[186] *Id.*
[187] *See* United States v. Emerson, 270 F.3d 203 (5th Cir. 2001).
[188] *Id.*
[189] *Id.*
[190] *Id.*
[191] *See* Massey, *supra* note 15.
[192] For a static and somewhat anachronistic discussion of state constitutional provisions on the right to bear arms, see Eugene Volokh, *supra* note 183. The important shift between the Eighteenth and Nineteenth century in the language of state constitutional provisions regarding the right to bear arms is elided in Massey, *supra* note 15. This error was reproduced in the decision of the U.S. Court of Appeals for the Fifth Circuit in *Emerson*, 270 F.3d 203 (5th Cir. 2001).
[193] *Id.*

VI. NEITHER INDIVIDUAL NOR COLLECTIVE: A NEW PARADIGM FOR THE SECOND AMENDMENT

In another foundational text for the Standard Model, activist Stephen Halbrook sets up a sharp dichotomy between a collective/states rights interpretation and the individual rights view:

> In recent years it has been suggested that the Second Amendment protects the 'collective' right of states to maintain militias, while it does not protect the right of 'the people' to keep and bear arms. If anyone entertained this notion in the period during which the Constitution and Bill of Rights were debated and ratified, it remains one of the most closely guarded secrets of the eighteenth century, for no known writing surviving from the period between 1787 and 1791 states such a thesis.[194]

It is difficult to reconcile this claim with the early American historian Don Higginbotham's assertion that "if people believed passionately in gun ownership as an individual right, they rarely said so."[195] Higginbotham concludes that such claims amount to little more than a handful of references.[196] How can these two contradictory claims be reconciled? It is important to look closely at Halbrook's language, which sets modern legal terminology, collective rights, against the eighteenth-century terminology, "rights of the people."[197] Halbrook's argument rests on a serious anachronism. The right to bear arms was usually defined as a right of the people during the Founding era.[198] The key question for historians is how that term should be translated into modern parlance. Was such a right an individual right, a collective right, or something in between? The time has probably come to abandon both the collective and individual rights models and create a new translation for this phrase that more accurately captures the dominant understanding (or understandings) of this term during the Founding generation.[199]

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[194] Halbrook, *supra* note 6, at 83. A similar claim has been repeated by Halbrook in an essay he co-authored, *see* Halbrook and Kopel, *supra* note 101.

[195] Don Higginbotham, *The Second Amendment in Historical Context*, 16 CONST. COMMENTARY 263, 265 (1999). The few examples from the 18th century that suggest a more individualistic reading are largely drawn from texts such as failed amendments or pamphlets and newspaper essays by dissenting groups such as Pennsylvania's Anti-Federalist Minority. On this point, see Rakove, *supra* note 29. While completely dismissing such voices seems problematic, it seems even more questionable to take them as dispositive.

[196] *See id.*

[197] *Compare* Halbrook, *supra* note 6, at 83, *with* Higginbotham, *supra* note 195, at 265.

[198] *See* Halbrook, *supra* note 6, at 83.

[199] The notion of translation has become a hot topic in constitutional interpretation. *See* Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365 (1997); *see also* Steven G. Calabresi, *The Tradition of the Written Constitution: A Comment on Professor Lessig's Theory of Translation*, 65 FORDHAM L. REV. 1435 (1997), *and* Sanford Levinson, *Translation: Who Needs it?*, 65 FORDHAM L. REV. 1457 (1997). My use of the term here is slightly different. Translation here is not normative, but hermeneutic. Before we decide if it is the job of judges to translate the text of

Perhaps the most accurate way to describe the dominant understanding of the right to bear arms in the Founding era is as a civic right.[200] Such a right was not something that all persons could claim, but was limited to those members of the polity who were deemed capable of exercising it in a virtuous manner.[201] Freedom of religion, freedom of the press, trial by jury were genuinely rights belonging to individuals and were treated differently than were civic rights such as militia service, or the right to sit on juries.[202] The distinction between an individual right and a civic right is important and has been obscured by recent scholarship.[203] The important differences between these two types of rights is evident in the Pennsylvania Test Acts which stripped citizens of certain civic rights, such as the right to bear arms or sit on juries, but did not deprive them of fundamental individual rights such as the right of freedom of conscience or the right to publish their sentiments on public matters.[204]

A useful model for approaching the constitutional thought of the Founding Era has been elaborated by the political scientist Rogers M. Smith, who has identified three different conceptions of citizenship and rights in the Founding era.[205] According to Smith, three discursive traditions dominated early American constitutional thought.[206] A liberal individualist idea that each person enjoyed basic rights existed along side a republican conception of citizenship that held that only those capable of displaying the requisite civic virtue were entitled to the full panoply of rights.[207] Finally, Smith argues that the Founding generation also held an ascriptive theory of citizenship that restricted the full enjoyment of rights to persons based on race, gender, and in some cases, ethnic identity.[208] The Second Amendment owed far more to the republican and ascriptive understanding of rights than it did to a liberal individualistic conception of rights which was relatively weak at the Founding.[209] Of course, gun rights advocates might reasonably claim that, given that the dominant trend in modern American constitutional law is toward a more liberal and less republican and ascriptive conception of rights, we should rethink the issue of gun rights in terms of the modern rights revolution wrought in the last few decades.[210] Arguing that we ought to reinterpret the Second Amendment in more

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the Constitution, we have to have a reasonable translation. To understand the meaning of 18th century terms we must find a language to describe them that does not distort their meaning. The phrase "right of the people" fits neither our notion of an individual right nor our idea of a collective right. In this sense the term civic right is preferable as an approximation of what the 18th century meant by a right of the people.

[200] *See* discussion *infra* p. 680.

[201] *Id.*

[202] *See* ARNOLD, *supra* note 130.

[203] For a discussion of the Test Acts, see Cornell, *supra* note 29, at 229.

[204] *Id.*

[205] *See* ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY (1997).

[206] *Id.* at 2-3.

[207] *Id.* at 36.

[208] *Id.* at 153.

[209] *Id.* at 147-49.

[210] *Id.*

libertarian terms is quite different than insisting that such a meaning was always part of the Second Amendment. Rather than argue in the historically naive originalist terms that have dominated writing about the Second Amendment, it would be more intellectually and politically honest to argue that it is time to include gun owners among the groups whose rights have been expanded in the wake of the rights revolution.[211]

Although gun rights advocates have sought to wrap themselves in the Second Amendment, the original understanding of the Second Amendment is actually inimical to much that they hold dear.[212] Ironically, a restoration of the original meaning of the Second Amendment might be their worst nightmare.[213] Consider the evidence from Pennsylvania whose state constitution and Anti-Federalists writings are among the most frequently cited texts by Standard Modelers.[214] The Anti-Federalists who authored the Dissent of the Minority and supported the Test Acts accepted a level of gun regulation that far exceeds anything modern gun control groups have advocated.[215]

VII. CONCLUSION

The notion that the right to bear arms is a civic, not an individual right, suggests that courts need to find a new set of analytical tools to evaluate gun laws. The notion of strict scrutiny makes little sense for a civic right. Exactly what sort of laws and what standards of constitutional scrutiny would be appropriate for a civic right ought to serve as a spur to some creative constitutional theorizing. Viewing the Second Amendment as a civic right would not give the state a completely unfettered hand in enacting any gun law it wants. One might argue that under such a conception the nightmare scenario so often conjured up by gun rights advocates would be averted; complete unilateral domestic disarmament would be beyond the power of government. Perhaps if robbed of the potent rhetoric that casts every effort at gun control as the first step in a nefarious gun grabbing prohibitionist agenda, more effective legislation could be enacted. Treating guns like words, as some Standard Modelers suggest, makes little constitutional sense. While some modern law professors have trouble telling the difference between guns and words, the same was not the case for the Founders. Appreciating the wisdom of the Founders in this regard need not mean we ought to slavishly follow their example as part of some ahistorical and static orginalist vision of the Constitution. To find a constitutional solution to the problem posed by guns in our society, we will need to move beyond the legacy bequeathed to us by the Founders who inhabited a world far different from our own.

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[211] Of course, the rights revolution is not without critics. *See* MARY ANN GLENDON, RIGHTS TALK (1991).
[212] *See* Cornell *supra* note 29.
[213] *Id.*
[214] *See* Cornell, *supra* note 29, at 229.
[215] *See* ARNOLD, *supra* note 130.

Converts to the gun rights cause have invoked the authority of the sixties band The Monkees, proclaiming "I'm A Believer" and accepting the truth of the Standard Model's individual rights view of the Second Amendment.[216] A better musical choice and a more accurate description of recent scholarship is provided by Sam Cooke's old standard, "Wonderful World." Unfortunately, Second Amendment scholars "Don't Know Much About History."

In his influential and provocative article, *The Embarrassing Second Amendment*, Sanford Levinson took legal scholars to task for ignoring the topic of the Second Amendment.[217] Since the publication of Levinson's essay, there has been an explosion of interest in this once neglected part of the Bill of Rights.[218] If there is a cause for embarrassment now it is not from neglect, but rather from the opposite-- too much scholarship with too little historical grounding.[219] The historical foundation for much of this new scholarship rests not on solid and well researched history, but rather on little more than the intellectual equivalent of smoke and mirrors.[220] The creation of a Standard Model was an artifact of the idiosyncratic structure of legal publication, not a reflection of genuine consensus among scholars knowledgeable about the history of the Second Amendment.[221] No similar consensus existed among historians working in the period and it is noteworthy that all of the experts in early American history who have entered this debate, even the one historian most closely associated with an individual rights view of the amendment, have attacked the Standard Model.[222] One can hope that a new, more sophisticated and historically grounded interpretation of the Second Amendment may emerge as this debate moves forward.

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[216] *See* Powe, *supra* note 67, at 1401.
[217] *See* Levinson, *supra* note 4, at 639.
[218] *See* Spitzer *supra* note 8.
[219] *See* Cornell, *supra* note 29.
[220] *Id.* This charge would also include the work of Michael A. Bellesiles whose book ARMING AMERICA: THE ORIGINS OF NATIONAL GUN CULTURE (2000) has been effectively discredited. For a discussion of the flaws in ARMING AMERICA see *Historians and Guns*, 59 WM & MARY Q. 203, 203-240 (2002).
[221] On this point, see Spitzer, *supra* note 8.
[222] *See* Shalhope, *supra* note 15. For additional evidence of historical opposition to the Standard Model, see the discussion in *supra* note 13.