

QUESTIONING THE NECESSITY OF CONCEALED CARRY LAWS

*William J. Michael**

I. INTRODUCTION

The State of Ohio recently became the thirty-seventh state to pass some form of concealed carry legislation, under which persons may carry concealed firearms.¹ Given the Second Amendment to the United States Constitution, such legislation appears unnecessary since individuals have a constitutional right to carry firearms.²

WHOA! A *constitutional* right to carry firearms?³ Based on the Second Amendment's text, that is not at all clear.⁴ After all, as Nelson Lund has observed, the right guaranteed by the Second Amendment is not "self-evident[.]"⁵ In Sanford Levinson's words, "[n]o one has ever

* B.A. in Economics, The Ohio State University; J.D., The Ohio State University. Mr. Michael is a litigator with Calfee, Halter & Griswold LLP in Columbus, Ohio.

1. O.R.C. § 2923.125 (2004) (allowing persons to apply for a permit to carry a concealed weapon as of April 8, 2004). *See generally*, Clayton E. Cramer and David B. Kopel, "Shall Issue": *The New Wave of Concealed Handgun Permit Laws*, 62 TENN. L. REV. 679 (1995) (discussing different concealed carry laws). States' concealed carry laws vary in their scope and the types of processes through which persons must go to legally carry a firearm. *See* NRA-ILA, *Fact Sheet: Right to Carry 2004*, available at <http://www.nraila.org/Issues/FactSheets/Read.aspx?ID=18> (providing summary statistics of concealed carry laws by state: in two states, Vermont and Alaska, the right to carry a firearm is unrestricted; thirty-five states have laws under which the state *must* issue a permit if an applicant successfully completes the application process: Alabama, Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Mexico, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming; in nine states, the state *may* issue a permit: California, Delaware, Hawaii, Iowa, Massachusetts, Maryland, New Jersey, New York, and Rhode Island; in four states, a person may not carry a concealed weapon: Illinois, Kansas, Nebraska, and Wisconsin).

2. U.S. CONST., amend. II ("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.").

3. *Id.*

4. *Id.*

5. Nelson Lund, *The Second Amendment, Political Liberty and the Right to Self-*

described the Constitution as a marvel of clarity, and the Second Amendment is perhaps the worst drafted of all its provisions.”⁶ Michael Dorf has gone so far as to say that the Second Amendment “lacks a ‘plain meaning[.]’”⁷ Further, according to Kenneth Lasson,

the plain meaning of the Second Amendment should be clear to a reasonably literate reader of the English language—as it has been to the Supreme Court and virtually all other courts—which have concluded that the Amendment *does not* confer upon every citizen the right to own a firearm.⁸

Also, the Framers themselves did not intend for individuals to have a constitutional right to keep and bear arms.⁹ And, innumerable scholars who do this sort of thing for a living and, presumably, are good at it,¹⁰

Preservation, 39 ALA. L. REV. 103, 108 (1987). Some scholars that ultimately come down on the side of an individual right to keep and bear arms concede that “confusion as to [the Second Amendment’s] meaning might be inevitable.” David Harmer, *Second Amendment Symposium: Securing a Free State: Why the Second Amendment Matters*, 1998 BYU L. REV. 55, 64 (1998).

6. Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 643-44 (1989).

7. Michael C. Dorf, *Symposium on the Second Amendment: Fresh Looks: What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291, 295 (2000). Even if it had one, Dorf would not feel bound by it since, in his words, “contrary to conventional wisdom, constitutional doctrine typically trumps constitutional text. . . .” *Id.* Dorf is apparently not part of the “consensus” written about by Stephen F. Smith that holds text binding. Stephen F. Smith, *Activism as Restraint: Lessons from Criminal Procedure*, 80 TEX. L. REV. 1057, 1086 (2002) (noting “the broad consensus that the Constitution itself (and, in statutory cases, the legislation that becomes law) is binding on judges.”). See also H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 903 (1985) (“The Philadelphia framers’ primary expectation regarding constitutional interpretation was that the Constitution, like any other legal document, would be interpreted in accord with its express language.”). Such a consensus is not without justification, since the text is what is debated, voted on, and becomes law. See generally ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (1997); Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533 (1983); Randy Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999). Further, adherence to text is part of our legal tradition and was thought by the Framers to be of paramount importance. See William J. Michael, *The Original Understanding of Original Intent: A Textual Analysis*, 26 OHIO N. U. L. REV. 201, 204-06 (2000) and accompanying citations. Dorf himself concedes that “it is the text [of the Constitution] itself . . . that was enacted.” Dorf, *supra* at 302. If the text was enacted but is not binding, why have a written Constitution?

8. Kenneth Lasson, *Blunderbuss Scholarship: Perverting the Original Intent and Plain Meaning of the Second Amendment*, 32 U. BALT. L. REV. 127, 157 (2003) (emphasis added).

9. See Daniel A. Farber, *Disarmed by Time: The Second Amendment and the Failure of Originalism*, 76 CHI.-KENT L. REV. 167 (2000); Michael A. Bellesiles, *Gun Laws in Early America: The Regulation of Firearms Ownership, 1607-1794*, 16 LAW & HIST. REV. 567, 588 (1998); Paul Finkelman, “A Well Regulated Militia”: *The Second Amendment in Historical Perspective*, 76 CHI.-KENT L. REV. 195 (2000); Jack N. Rakove, *The Second Amendment: The Highest State of Originalism*, 76 CHI.-KENT L. REV. 103 (2000); David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588 (2000).

10. *But see* Glenn Harlan Reynolds and Don B. Kates, *The Second Amendment and States’*

have analyzed the Second Amendment and concluded that it does not guarantee an individual's right to keep and bear firearms.¹¹ One of the best scholars is so sure that the Second Amendment does not protect an individual's right to carry firearms that he only briefly analyzes it . . . in a single footnote!¹²

Then there is the courts' interpretation of the Second Amendment. As the United States Department of Justice has written, "the Supreme Court and eight United States Courts of Appeals have considered the scope of the Second Amendment and have uniformly rejected arguments that it extends firearms rights to individuals independent of the collective need to ensure a well-regulated militia."¹³ Even a former Chief Justice

Rights: A Thought Experiment, 36 WM. & MARY L. REV. 1737, 1765-68 (1995) (citations omitted) ("Although the states' right interpretation has obtained very little in the way of scholarly support in journals that require footnotes, it has been widely circulated in the popular press, even by respectable scholars who should (and, one suspects, do) know better."). Daniel Polsby has written that "[t]he 'collective rights' theory seems to have flowered in the 1960s or 70s as a prop in national political debates about gun control laws." Daniel D. Polsby, "Second Reading: Treating the Second Amendment as Normal Constitutional Law," REASON, Mar. 1996 at 32.

11. See, e.g., Dorf, *supra* note 7; Lasson, *supra* note 8; Carl T. Bogus, *Race, Riots, and Guns*, 66 S. CAL. L. REV. 1365 (1993); Lawrence D. Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. AM. HIST. 22 (1984); Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5 (1989); Peter B. Feller & Karl L. Gotting, *The Second Amendment: A Second Look*, 61 NW. U. L. REV. 46 (1966); Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57 (1995); Ralph J. Rohner, *The Right to Bear Arms: A Phenomenon of Constitutional History*, 16 CATH. U. L. REV. 53 (1966); Roy G. Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 HASTINGS CONST. L.Q. 961 (1975); Wendy Brown, Comment, *Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism: On Sanford Levinson's The Embarrassing Second Amendment*, 99 YALE L.J. 661 (1989); John C. Santee, Note, *The Right to Keep and Bear Arms*, 26 DRAKE L. REV. 423 (1977). These scholars believe, in the words of Don B. Kates, Jr., that the Second Amendment was adopted to "place the states' organized military forces beyond the federal government's power to disarm, guaranteeing that the states would always have sufficient force at their command to nullify federal impositions on their rights and to resist by arms if necessary." Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH L. REV. 204, 212 (1983). Such scholars have been described as "[s]tate's right theorists[.]" E.g., Kevin D. Szczepanski, Comment, *Searching for the Plain Meaning of the Second Amendment*, 44 BUFFALO L. REV. 197, 201 (1996).

12. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5.2, at 299 n.6 (2d ed. 1988).

13. Richard E. Gardiner, *The Second Amendment and the U.S. Courts of Appeals*, 29 N. KY. L. REV. 805, 805 (2002) (quoting Letter from Seth P. Waxman, Solicitor General, United States Department of Justice, to Robert D. Grace (Aug. 22, 2000)). Gardiner goes on to analyze the courts' decisions regarding the Second Amendment and concludes:

A review of not only the cases cited by the Justice Department, but other cases decided by the federal appellate courts, reveals that those cases simply do not establish, as the Justice Department unambiguously asserted, that the federal appellate courts have 'uniformly rejected arguments that it extends firearms rights to individuals independent of the collective need to ensure a well-regulated militia.'

Id. Notwithstanding the Justice Department's position or Gardiner's conclusion that it is wrong,

of the Supreme Court has opined, after he left the bench, that the Second Amendment does not guarantee an individual's right to keep and bear arms.¹⁴

Given this background, there is not even a constitutional right to *have* firearms, much less *carry* them.

Balderdash! In this article, I argue that the Second Amendment's text guarantees an individual's right (not a state's right or a "collective" right) to keep and bear firearms. Part I of this article contains that argument. If the text is binding—and I believe it is¹⁵—further analysis regarding whether the Second Amendment guarantees an individual's right to keep and bear arms is unnecessary. Nonetheless, the original meaning of the Second Amendment confirms my reading of the text, as I show in Part II of this article. In Part III of this article I go a step further and conclude that the scope of the individual right to keep and bear arms includes the right to carry concealed firearms.

II. THE SECOND AMENDMENT'S TEXT CREATES AN INDIVIDUAL RIGHT TO KEEP AND BEAR ARMS

"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."¹⁶ Whether this text guarantees an individual right to keep and bear arms can be determined through a series of questions. First, what is the right protected? The "right . . . to . . . keep and bear arms."¹⁷

Judge Sam R. Cummings, Northern District of Texas, did not agree with the Supreme Court or the eight appellate courts in the decision he wrote in *U.S. v. Emerson*, where, after analyzing the Second Amendment's text and history, he concluded that the Second Amendment *does* guarantee an individual's right to keep and bear arms. 46 F. Supp. 2d 598 (N.D. Tx. 1999), *rev'd*, 270 F.3d 203 (5th Cir. 2001).

14. Former Chief Justice Warren Burger, speech at a news conference introducing the Public Health and Safety Act of 1992 (June 26, 1992) (saying that the Second Amendment's first clause must be read, "because a well regulated Militia is necessary to the security of a free State, . . ."); *see also* Warren Burger, "The Right to Bear Arms," *PARADE MAGAZINE*, Jan. 14, 1990. Daniel D. Polsby has written that Chief Justice Burger is "a judge not famous then or now as a constitutional authority and whose 30-year judicial career had in any case included not a single Second Amendment decision." Daniel D. Polsby, "Second Reading: Treating the Second Amendment as Normal Constitutional Law," *REASON*, Mar. 1996 at 32. Robert J. Spitzer came to the same conclusion as the former Chief Justice, however, reiterating that the Second Amendment "must be read as though the word 'because' was the opening word." Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 *CHI.-KENT L. REV.* 349, 350 (2000).

15. See Michael, *supra* note 7; William J. Michael, *When Originalism Fails*, 25 *WHITTIER L. REV.* 497 (2004).

16. U.S. CONST., amend. II.

17. *Id.*

Second, whose right is it? It is “the right . . . of the people.”¹⁸ So the Amendment’s text reveals (without a great deal of difficulty, it would seem) *what* right is protected and *whose* right is protected.¹⁹ Although the meaning of “the people” has never been questioned in the First, Fourth, Ninth, or Tenth Amendments²⁰ (“the people” are individual persons), it has in the Second.²¹ Scholars and courts have asserted that the Second Amendment protects states’ rights, or “collective” rights, rather than individual rights.²²

But collective rights are antithetical to the “familiar notion of individual rights in the United States.”²³ “The very inclusion of the right to keep and bear arms in the Bill of Rights indicates that the framers of the Constitution considered it an individual right. After all, the Bill of Rights is not a bill of states’ rights, but the bill of the rights retained by the people.”²⁴ Further, since the amendments in the Bill of Rights were proposed and passed contemporaneously and, thus, should be read *in pari materia*,²⁵ the phrase “the people” in the Second Amendment

18. *Id.*

19. *Id.*

20. Levinson has written that the meaning of “the people” in the Tenth Amendment is “trickier” than the phrase’s meaning in other Amendments: “Concededly, it would be possible to read the Tenth Amendment as suggesting only an ultimate right of revolution by the collective people should the ‘states’ stray too far from their designated role of protecting the rights of the people. This flows directly from the social contract theory of the state.” Levinson, *supra* note 6, at 645. He goes on to point out, however, that “many of these rights are held by individuals.” *Id.* “Moreover, since the Tenth Amendment explicitly differentiates between states and the people in terms of retained rights, the Amendment likely reserves rights to both the states and individuals.” Szczepanski, *supra* note 11, at 219 (internal quotations and citations omitted).

21. See *supra* note 12 on scholars’ views, and the cases analyzed in Gardiner, *supra* note 13, for courts’ views. What jurisprudence there is on the Second Amendment seems to be anomalous, since “[u]nlike cases involving the other amendments, which usually focus on the *outer margins* of the rights they provide, the Second Amendment debate has not resolved the Amendment’s very purpose.” Szczepanski, *supra* note 11, at 197 (italics added). That is, courts and, often scholars, try to limit the Second Amendment’s reach rather than expand it, as in the case of other Amendments. See also Harmer, *supra* note 5, at 72 (In Larry Arnn’s view, if the Second Amendment were interpreted as broadly as the First, individuals would have the right to own nuclear weapons (citing Larry Arnn, “The Right of the People, Precepts” at 1 (Claremont Inst., Claremont, Cal.), June 26, 1997)). On the other hand, Lund has explained that one of the court decisions often cited to stand for the proposition that there is no individual right to keep and bear arms, *U.S. v. Miller*, 307 U.S. 174 (1939), actually held “that the Second Amendment protects an individual’s right to keep and bear arms and thus rejected the untenable collective right theory.” Lund, *supra* note 5, at 110.

22. *Id.*

23. Margaret Y.K. Woo, *Biology and Equality: Challenge for Feminism in the Socialist and Liberal State*, 42 EMORY L.J. 143, 183 (1993).

24. Harmer, *supra* note 5, at 60.

25. *Patton v. U.S.*, 281 U.S. 276, 298 (1930). See BLACK’S LAW DICTIONARY 794 (7TH ED. 1999) (“It is a canon of construction that statutes that are *in pari materia* may be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same

should be read to have the same meaning as it has in other amendments.²⁶ There is little doubt that “the people” in the First,²⁷ Fourth,²⁸ Ninth,²⁹ and Tenth Amendments³⁰ means individuals. Also, although many scholars have rejected the notion of an individual right to keep and bear arms, as mentioned earlier,³¹ recent scholarship analyzing the Amendment’s text and history has embraced it³²—even (seemingly) Laurence Tribe.³³

subject”).

26. See Harmer, *supra* note 5, at 60 (“The Second Amendment refers to ‘the right of the people to keep and bear arms’—just as the First Amendment refers to ‘the right of the people to peaceably assemble,’ and the Fourth Amendment refers to ‘the right of the people to be secure . . . against unreasonable searches and seizures.’”).

27. See Levinson, *supra* note 6, at 645; Trejo v. Shoben, 319 F.3d 878, 884 (7th Cir. 2003) (“The First Amendment protects an individual’s right to freedom of expression.”).

28. See Szczepanski, *supra* note 11, at 219; Pena-Borrero v. Estremada, 365 F.3d 7, 10 (1st Cir. 2004) (“The Fourth Amendment guarantees individuals the right to be secure in their persons . . . against unreasonable . . . seizures of the person.”) (internal quotations and citation omitted).

29. See Kates, *supra* note 11, at 218; Hearn v. Internal Revenue Agents, 623 F. Supp. 263, 268 (N.D. Tx. 1985) (“The purpose of the Ninth Amendment is to guarantee to individuals those rights inherent to citizenship in a democracy which are not specifically enumerated in the Bill of Rights.”) (citation omitted).

30. See Levinson, *supra* note 6, at 645; New York v. United States, 505 U.S. 144, 181 (1992) (“The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.”).

31. See *supra* note 12.

32. See, e.g., Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991); Randy E. Barnett, *Foreword: Guns, Militias, and Oklahoma City*, 62 TENN. L. REV. 443, 451 (1995); Kates, *supra* note 11, at 257, 267-68; Levinson, *supra* note 6; Jeremy Rabkin, *Constitutional Firepower: New Light on the Meaning of the Second Amendment*, 86 J. CRIM. L. & CRIMINOLOGY 231 (1995); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 466-71 (1995) (arguing that both the text of the Second Amendment and its historical underpinnings support an individual right to keep and bear arms); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1236-43 (1994); David E. Vandercy, *The History of the Second Amendment*, 28 VAL. U. L. REV. 1007 (1994); David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991); Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139 (1996); David I. Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 FORDHAM URB. L.J. 31 (1976); Richard E. Gardiner, *To Preserve Liberty—A Look at the Right to Keep and Bear Arms*, 10 N. KY. L. REV. 63 (1982); Lund, *supra* note 5; Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599 (1982).

33. See Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 3, 18-20 (2000). In an op-ed piece for the *New York Times* following the school shootings in Littleton, Colorado, Amar and Tribe hedged a bit, opining that reasonable and realistic gun controls pass constitutional muster. Laurence H. Tribe & Akhil Reed Amar, *Well-Regulated Militias, and More*, N.Y. TIMES, Oct. 28, 1999, at A31. Nonetheless, as

In determining the meaning of “the people” based on the text, there remains the question of the Second Amendment’s first clause—“A well regulated Militia, being necessary to the security of a free State”—and its impact, if any, on the meaning of “the people.”³⁴ Since, as described in the previous paragraph, the Bill of Rights is a list of individual rights that cannot be infringed, the conclusion must be that the clause is a description of *why* individuals have the right to keep and bear arms and, thus, has no impact on the meaning of “the people.”³⁵ Such a reading is internally consistent with the text of the other section of the Constitution with a preamble—Article I, Section 8, Clause 8. There, Congress is given the authority to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries[.]”³⁶ Congress’s authority (its “right,” if you will) is in the second clause, and the end to which its authority may be put (a description of why it has the “right”) is in the first clause.

Further, such a reading is consistent with the meaning of the other

Lasson recently explained, current scholarship supporting an individual right to keep and bear arms has been written by “a new wave of formerly ‘liberal’ scholars who have jumped on the current anti-gun-control bandwagon.” Lasson, *supra* note 8, at 129. Daniel Polsby once described the idea of an individual right to keep and bear arms as “horsedung.” Mike Royko, *Guns and the Constitution*, CHI. SUN-TIMES, March 20, 1981 (quoting Polsby as “describing this gun lover’s belief as ‘a lot of horsedung.’”). But after actually looking at the literature, Polsby commented that “[a]lmost all of the qualified historians and constitutional-law scholars who have studied the subject [concur]. The overwhelming weight of authority affirms that the Second Amendment establishes an *individual* right to bear arms, . . .” ATLANTIC MONTHLY, June 1994, at 13.

34. See Harmer, *supra* note 5. This is the clause that proponents of the states’ rights theory hang their hat on. See Szczepanski, *supra* note 11, at 197-98.

35. See Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 807 (1998) (breaking the Amendment’s clauses into “purpose” and “operative” clauses and arguing for the primacy of the “operative” clause—the right to keep and bear arms). Dorf has asserted that the first clause’s impact on the Second Amendment’s meaning “would seem so obvious as not to need justifying were it not for academic efforts to minimize its weight.” Dorf, *supra* note 7, at 301. Yet he appears to concede that the first clause states the purpose of the right to keep and bear arms. *Id.* The purpose of a right is a different issue than whose right it is. If anything, the Second Amendment, by stating its purpose and then going on to secure for *the people* the right to keep and bear arms, demonstrates that the “Militia” is “the people.” See Van Alstyne, *supra* note 32, at 1243-44 (explaining that the “guarantee of the right of the people to keep and bear arms [is] the predicate for the other provision,” and that by “relating these propositions within one amendment,” the Amendment “derives its definition of a well-regulated militia in just this way for a ‘free State’: The militia to be well-regulated is a militia to be drawn from just such people (i.e., people with a right to keep and bear arms) rather than from some other source (i.e., from people without rights to keep and bear arms).”) (emphasis omitted); Polsby, *supra* note 10, at 34 (“the Second Amendment does not say, ‘A well regulated militia, being necessary to the security of a free state, shall not be infringed.’”).

36. U.S. CONST. art. I, § 8, cl. 8.

amendments in the Bill of Rights, which guarantee rights to individuals, not states or a collection of individuals.³⁷ There is nothing in the Constitution's text to suggest that "Militia" modifies the meaning of "the people" such that the phrase means something different in the Second Amendment than it means in the First, Fourth, Ninth, or Tenth.³⁸ Too, this reading is consistent with the use of "Militia" in Article I, Section 8, Clauses 15 and 16. Those clauses empower Congress to "call[] forth the Militia to execute the laws of the Union, suppress Insurrections and repel Invasions[,]"³⁹ and to "provide for organizing, arming, and disciplining, the Militia. . . ."⁴⁰ Both clauses presuppose that the militia exists *before* being called to defend the country and, therefore, individuals do not become a militia only when employed in defense of the country in an organized, military sense. Contrary to Jack Rakove's assertion that "any reader of Article I, Section 8 would find it hard to deny that the text there considers the militia not as an unorganized mass of the citizenry but as an institution subject to close legislative regulation[,]"⁴¹ that is *exactly* what the text in Article I, Section 8, clause 16 considers the militia—why else would it give Congress the authority to organize and discipline it?

Additionally, since the power to maintain state militias is not delegated to the United States (obviously, they are *state* militias), that power is reserved to the states under the Tenth Amendment.⁴² Thus, if the Second Amendment were read to guarantee states the right to maintain an armed militia, it would be redundant of the rights reserved to the states under the Tenth Amendment. Such a reading should be rejected because, for nearly two hundred years, it has been recognized that every word in the Constitution should be given some effect.⁴³

There are, of course, additional textual issues surrounding the Second Amendment.⁴⁴ But as described above, the plain meaning of the

37. See *supra*, notes 24-33 and accompanying text.

38. As Justice Scalia has said, "It would . . . be strange to find in the midst of a catalog of the rights of *individuals* a provision securing to the states the right to maintain a designated 'Militia.'" (emphasis in original) Scalia, *supra* note 7, at 137 n. 13.

39. U.S. CONST. art. I, § 8, cl. 15.

40. U.S. CONST. art. I, § 8, cl. 16.

41. Rakove, *supra* note 9, at 126.

42. U.S. CONST., amend. X ("The powers not delegated to the United States . . . are reserved to the States. . .").

43. See, e.g., *Martin v. Hunter's Lessee*, 14 U.S. 304, 342 (1816) ("[U]nless the state courts could sustain jurisdiction in such cases, this clause of the sixth article would be without meaning or effect . . ."); see also *Colautti v. Franklin*, 439 U.S. 379, 392 (1979) (rejecting the construction of a statute that would render a clause redundant or superfluous).

44. For example, what does "to keep and bear" mean? What "arms" may be kept and borne?

Second Amendment's text guarantees an individual right to keep and bear arms.

III. THE SECOND AMENDMENT'S ORIGINAL INTENT SUPPORTS THE INDIVIDUAL RIGHT TO KEEP AND BEAR ARMS

Debate over the Second Amendment's text reveals that it was

The discussion of these questions is *infra* Part IV. Another question not directly related to the Second Amendment's meaning is whether it has been incorporated through the Fourteenth Amendment to protect against *state* infringement of the right to keep and bear arms. Lasson points to "the court's" clear understanding that the Constitution in no way limits states from enacting and imposing their own restrictive gun legislation." Lasson, *supra* note 8, at 129; *see, e.g.*, *United States v. Cruikshank*, 92 U.S. 542 (1875); *Presser v. Illinois*, 116 U.S. 252 (1886); *Quilici v. Village of Morton Grove*, 532 F. Supp. 1169 (N.D. Ill. 1981), *aff'd*, 695 F.2d 261 (7th Cir. 1982). He also asserts that "nowhere in the Constitution are states limited from" passing gun-control legislation. Lasson, *supra* note 8, at 130. Perhaps rejecting the incorporation doctrine outright, Justice Scalia has said that the Amendment "is no limitation upon arms control by the states." Scalia, *supra* note 7, at 137 n. 13. Harmer has conceded that the "federal courts have never exercised the authority Congress gave them under the Fourteenth Amendment to apply the Second Amendment to the states." Harmer, *supra* note 5, at 74. Other scholars have concluded that the Second Amendment has been incorporated. *See, e.g.*, STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* 109-23 (Independent Inst. 1994); Kates, *supra* note 11, at 252-57; Van Alstyne, *supra* note 32, at 1241-44. Further, there is not inconsiderable evidence that the Fourteenth Amendment was meant to incorporate the Second Amendment. *See* Van Alstyne, *supra* note 32, at 1252; Stephen P. Halbrook, *Congress Interprets the Second Amendment: Declarations by a Co-Equal Branch on the Individual Right to Keep and Bear Arms*, 62 TENN. L. REV. 597, 598-99 (1995). The extent to which the Second Amendment was incorporated is more a debate over the incorporation doctrine itself than the Second Amendment. Either the doctrine is legitimate and founded in the Constitution, or it is simply a judicial construct without constitutional foundation. If the former, *all* individual rights secured by the Constitution are incorporated. Otherwise, the doctrine immediately falls into the latter category since judges could pick and choose which rights are "important" enough to incorporate. The Fourteenth Amendment's plain meaning and history strongly suggest that constitutional rights are incorporated through the Privileges and Immunities Clause. *See generally*, AKHIL AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 166-69 (Yale Univ. Press 1998); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1264-66 (1992). *See also* Chase J. Sanders, *Ninth Life: An Interpretive Theory of the Ninth Amendment*, 69 IND. L.J. 759, 777 (1994) (citing MICHAEL K. CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (Duke Univ. Press 1986) and Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863 (1986)); Laurence H. Tribe, *Contrasting Constitutional Visions: Of Real and Unreal Differences*, 22 HARV. C.R.-C.L. L. REV. 95, 102 (1987) (stating that the substantive due process decisions "might better have been cast in terms of 'privileges' or 'immunities' of national citizenship" under the Privileges and Immunities Clause of the Fourteenth Amendment); Michael Conant, *Antimonopoly Tradition Under the Ninth and Fourteenth Amendments: Slaughter-House Cases Re-Examined*, 31 EMORY L.J. 785, 819 (1982) ("These privileges and immunities of citizens of the United States are found in the original Constitution, in the Bill of Rights, and in English constitutional protections of 1791 preserved by the Ninth Amendment."); Thomas K. Landry, *Unenumerated Federal Rights: Avenues for Application Against the States*, 44 U. FLA. L. REV. 219, 223 (1992) ("The Privileges or Immunities Clause would provide a simple and direct textual basis for application of the Bill of Rights to the states.").

meant to protect an individual's right to keep and bear arms. Madison's original version of the Amendment, which he proposed to put in Article I, Section 9,⁴⁵ read: "The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person."⁴⁶ The House committee to which Madison's amendments were referred changed the clauses' order, putting the Militia Clause first, and added "composed of the body of the people" after "militia."⁴⁷ The Senate eliminated "composed of the body of the people" from the Amendment and rejected a motion to add "for the common defense" after "to keep and bear arms."⁴⁸

Madison's outline for a speech regarding his proposed amendments indicates that he thought the amendments "relate [first] to private rights."⁴⁹ His proposal to put the Second Amendment in Article I, Section 9 further supports the conclusion that Madison viewed the right to bear arms as an individual right, since that Section is one of the few in the original Constitution that protects individual rights.⁵⁰ That the

45. See 5 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 186-87 (1905); Lund, *supra* note 5, at 107 n. 9 ("... Madison planned to insert it ... into article I § 9, which is the principal 'individual rights' section of the original Constitution.").

46. THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 169 (Neil H. Cogan ed., 1997).

47. *Id.* at 170.

48. *Id.* at 174-76.

49. Notes for Speech in Congress [ca. June 8, 1789], in 12 THE PAPERS OF JAMES MADISON 193 (Charles F. Hobson & Robert A. Rutland, eds., 1979). Rakove discounts the importance of this note since it is a "terse inscription [that] stands alone, and is not explicitly linked to the right to bear arms; ..." Rakove, *supra* note 9, at 122. Whether Madison's note is terse and stands alone or not is irrelevant to determining if it reveals anything about the Bill of Rights' original meaning. The Constitution is a rather terse document, after all, and we do not hold that against it. And it should come as no surprise that Madison's note is not explicitly linked to the Second Amendment because, as suggested herein, there is little doubt that all the amendments making up the Bill of Rights were meant to protect private rights. See *supra* notes 24-33 and accompanying text. The Second Amendment was nothing special and, therefore, Madison had no need to "explicitly" link his comment to the right to bear arms. Notably, John Adams opposed "arms in the hands of citizens, to be used at individual discretion, *except* in private self-defense, ..." 6 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 197 (Charles F. Adams ed., 1851) (emphasis added).

50. For example, Article I, Section 9 prohibits bills of attainder and ex post facto laws and protects the habeas corpus privilege. U.S. CONST. art. I § 9. It has been said that Madison's proposal regarding where to locate a right to keep and bear arms does not "conclusively demonstrate its fundamentally private nature. ..." Rakove, *supra* note 9, at 123. This point is absolutely right, but it is less compelling when it is acknowledged that few, if any, believe that Madison's proposal (or, for that matter, any *single* aspect of constitutional history) *conclusively* demonstrates anything. The point of inquiring into constitutional history to find the text's original meaning is not usually to

Senate eliminated “composed of the body of the people” after “militia” suggests there was no need for that language because a “militia” is necessarily “composed of the body of the people.”⁵¹ Also, that the Senate rejected a motion to add “for the common defense” after “arms” suggests the framers did not want to narrow an individual’s right to keep and bear arms only to those situations where the individual was providing for the common defense.⁵²

The context in which the Founders and Congress debated the Constitution and the Bill of Rights also reveals that the Second Amendment was meant to protect an individual’s right to keep and bear arms. The Founders were skeptical of standing armies⁵³ and conscious of a government’s potential to become tyrannical.⁵⁴ They believed that

find any single bit of information that conclusively demonstrates a provision’s meaning. Rather, the inquiry must often focus on the import of the totality of the constitutional history. *See, e.g.,* Levinson *supra* note 6, at 645-650.

51. When debating the Constitution, George Mason asked: “Who are the militia? They consist now of the whole people, . . .” JONATHAN ELLIOT, 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 425 (2d ed. 1937). Richard Henry Lee referred to a “militia, when properly formed, [as] in fact the people themselves.” RICHARD HENRY LEE, OBSERVATIONS LEADING TO A FAIR EXAMINATION OF THE SYSTEM OF GOVERNMENT PROPOSED BY THE LATE CONVENTION, IN LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN 123 (Walter H. Bennett ed., 1978). Madison wrote that the militia would be composed of “. . . citizens with arms[.]” THE FEDERALIST NO. 46 (James Madison). Halbrook has explained:

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.

Stephen Halbrook, *To Keep and Bear Their Private Arms: The Adoption of the Second Amendment, 1787-1791*, 10 N. KY. L. REV. 13-39 (1982). On this issue, *see generally* JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* (Harvard University Press, 1994); Kates, *supra* note 11, at 216-17; Anthony J. Dennis, *Clearing the Smoke from the Right to Bear Arms and the Second Amendment*, 29 AKRON L. REV. 57, 77 n. 91 (1995) (arguing that militias refer to virtually all adult male citizens and not to “select militias” analogous to standing armies). Rakove has, appropriately, asked: “But how do we know that this senatorial editing was only stylistic and not substantive?” Rakove, *supra* note 9, at 124-25. Without the forgoing history and textual analysis described herein, the Senate’s deletion might be evidence that the Second Amendment’s drafters did not intend to include the people generally within the meaning of militia as used in the Second Amendment. *Id.*

52. *See supra* note 51.

53. *See, e.g.,* THE FEDERALIST NO. 29. (Alexander Hamilton). In fact, one of the complaints against King George III, stated in the Declaration of Independence, was the King’s maintenance of standing armies. THE DECLARATION OF INDEPENDENCE para. 3 (U.S. 1776) (“He has kept among us, in times of peace, Standing Armies without the Consent of our legislatures.”).

54. *See, e.g.,* THE FEDERALIST NOS. 12, 28 (Alexander Hamilton), NO. 19 (Alexander Hamilton and James Madison), NOS. 39, 46, 48 (James Madison).

an armed citizenry would protect against both.⁵⁵ Further, many people in the late eighteenth century believed they had an individual right to

55. See, e.g., THE FEDERALIST NO. 28 (Alexander Hamilton) (“the great body of the people . . . are in a situation . . . to take measures for their own defence . . .”); THE FEDERALIST NO. 46 (James Madison) (“citizens with arms in their hands” protect against government infringement; Americans possess “the advantage of being armed[.]”); Elliot, *supra* note 51, at 97 (Theodore Sedgwick declared that it is

a chimerical idea to suppose that a country like this could ever be enslaved Is it possible . . . that an army could be raised for the purpose of enslaving themselves or their brethren? or, if raised whether they could subdue a nation of freemen, who know how to prize liberty and who have arms in their hands?)

NOAH WEBSTER, AN EXAMINATION INTO THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION (1787), *reprinted in* PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, at 56 (Paul L. Ford ed., 1971) (1888))

Before a standing army can rule the people must be disarmed; as they are in almost every kingdom in 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.

See also 3 J. STORY, COMMENTARIES sec. 1890, p. 746 (1833)

The right of the citizens to keep and bear arms has justly been considered as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.

See generally Malcolm, *supra* note 51, at 176 (discussing the movement to continue the right to individually bear arms in England after the Reform Act). Dorf has rejected the use of Federalist No. 46 to support an individual right to bear arms, stating that “the armed resistance Madison contemplates in The Federalist No. 46 quite clearly occurs under the official aegis of the states—not by self styled patriots. The founding generation’s conception of armed resistance . . . is probably best understood in federalism terms, . . .” Dorf, *supra* note 7, at 311-12. But as Volokh has pointed out, a right to bear arms appeared in state constitutions of the founding era, where it would have nothing to do with federalism. Volokh, *supra* note 35, at 810-12. Further, Madison seems to distinguish between state governments and the people, writing that “State Governments, *with the people on their side*,” would repel danger. THE FEDERALIST NO. 46 (James Madison) (emphasis added). This suggests that state governments, as used in Federalist No. 46, have an existence separate from “the people,” since the people would be at state governments’ side. *Id.* Also, Madison explains that “citizens with arms in their hands” would be “united and conducted by [state] Governments . . .” *Id.* Thus, to repel danger, armed citizens would come to state governments to be “united and conducted”—but *they were already armed when they came.* *Id.* Dorf acknowledges Madison’s assumption that “the people” would have arms, but dismisses the assumption as “inaccurate” since, according to the authority he cites, not many Americans of the time had guns. Dorf, *supra* note 7, at 312. Dorf may be wrong about this. See, e.g., Staples v. U.S., 511 U.S. 600, 610 (1994) (“[T]here is a long tradition of widespread lawful gun ownership by private individuals in this country.”); Harmer, *supra* note 5, at 85 (“Arms were obviously necessary for self-defense in frontier America, where government-provided law enforcement did not exist.”). Whether the people were *in fact* armed is less important in analyzing the Second Amendment—and Federalist No. 46—than whether they had the *right* to be armed. Dorf recognizes as much (albeit in another context, Akhil Amar’s assumption of universality of militia service) later in his article. Dorf, *supra* note 7, at 313 (“[It] could be argued this false assumption reflected founding-era ideology, and it is that ideology—rather than the facts as they were—that underlies the Second Amendment.”).

keep and bear arms. Blackstone, influential on law generally and the law in the colonies specifically, wrote of the people's right "of having arms for their defense."⁵⁶ On the eve of the Constitutional Convention, self-styled patriots objected to what they saw as acts of tyranny by Massachusetts and took up arms during Shay's Rebellion. Three years after the Second Amendment's adoption, self-styled patriots took up arms against the perceived tyranny of the federal government in what became known as the Whiskey Rebellion. These rebellions, though warded off by the government, demonstrate that the people of the eighteenth century believed—consistent with the Founders' beliefs⁵⁷—that they had a right to bear arms against tyrannical government.⁵⁸ Additionally, to the extent that "[i]n the eighteenth century the primary responsibility of the militia was not public defense but internal security[,]"⁵⁹ and before "the emergence of the police, ordinary citizens would bring what arms they had in response to a 'hue and cry' or when serving on a posse comitatus[,]"⁶⁰ this once again shows that "ordinary citizens" were armed and were expected to bear arms for reasons of security.⁶¹

Polsby once asserted that "no ambiguity at all surrounds the attitude of the constitutional generation concerning 'the right of the people to keep and bear arms.'"⁶² "To put the matter bluntly, the Founders of the United States were what we would nowadays call gun nuts."⁶³ Whether

56. 1 WILLIAM BLACKSTONE, COMMENTARIES 139.

57. See *supra* notes 54-55.

58. Dorf and Lasson seem to suggest that, because these rebellions were shut down by the government, there was no popular recognition of an individual right to keep and bear arms. Dorf, *supra* note 7, at 320; Lasson, *supra* note 8, at 156. The contrary conclusion suggested here seems more consistent with the Founders' belief in individuals' right to rebel against government tyranny. See *supra* notes 54-55. Also, the government's move to protect itself during Shay's Rebellion and the Whiskey Rebellion is not inconsistent with an individual right to keep and bear arms or the Founders' belief in the right to bear arms in the face of government tyranny. The Government has the right to protect itself. See, e.g., U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."). See also *United States v. Bowman*, 260 U.S. 94, 94 (1922); *U.S. v. Ramsey*, 431 U.S. 606, 616 (1977) (government has "longstanding right . . . to protect itself by stopping and examining persons and property crossing into this country. . .").

59. Bellesiles, *supra* note 9, at 581.

60. Dorf, *supra* note 7, at 322-23 (quotations in original).

61. See *Id.* at 323 ("On a narrowly originalist reading, this fact serves to highlight that arms possession by members of the militia was not a strictly military function in the sense of responding to external threats; it included protecting one's self and one's neighbors from all manner of threats.").

62. Polsby, *supra* note 10, at 34.

63. *Id.*

they were or not, the historical record surrounding the debate over the Second Amendment's text and the context in which the Founders and Congress debated the Constitution and the Bill of Rights reveals that the Second Amendment was meant to protect an individual's right to keep and bear arms.

IV. THE INDIVIDUAL RIGHT TO KEEP AND BEAR ARMS INCLUDES THE RIGHT TO CARRY CONCEALED FIREARMS

As described above, the Second Amendment's text and original meaning demonstrate that the Amendment protects an individual's right to keep and bear arms. But what is the scope of that right? What does "to keep and bear arms" mean? What "arms" may be kept and borne?

Szczepanski has concluded that the "exact scope of the individual right is not self-evident, and is not expressly defined in the Constitution."⁶⁴ This may explain why scholars on all sides of the Second Amendment debate immediately (or nearly so) analyze the historical record to divine the original meaning of the phrase "to keep and bear arms."⁶⁵ A more rigorous textual analysis of the phrase indicates that the Second Amendment protects an individual's right to carry concealed weapons.

The Amendment protects two distinct types of conduct—keeping arms and bearing arms.⁶⁶ To "keep" arms must be something different than to "bear" arms due to the disjunctive "and." The meaning of one is, therefore, partly a function of the meaning of the other. "Keep" implicates passive, custodial possession—particularly read in conjunction with "bear," which implicates more active conduct. An example may be: "I keep my important documents in the black file cabinet." To "keep" arms, therefore, suggests having passive, custodial possession of them, as in keeping them in the house.

64. Szczepanski, *supra* note 11, at 203.

65. *See, e.g., Id.* at 220-23 (analyzing historical record and concluding that the Second Amendment is a limited right to keep and bear arms); Lasson, *supra* note 8, at 137-38 (analyzing historical record and concluding that the Second Amendment does not protect an individual's right to keep and bear arms). *But see* Harmer, *supra* note 5, at 74 (regarding determining what arms might be kept and borne under the Second Amendment, proposing that "[p]erhaps the best test would be a simple two-part query based on the Second Amendment's plain text.>").

66. *See* *Oliver v. Oliver*, 149 S.W.2d 540, 542 (Ky. App. Ct. 1941) ("In its conjunctive sense it is used to conjoin a word with a word, a clause with a clause, or sentence with a sentence, expressing the relation of addition or connection, and signifying that something is to follow in addition to that which precedes.") (quotations and citation omitted). Dorf, however, has written that "'keep and bear' appears to have been understood as a unitary phrase, like 'cruel and unusual' or 'necessary and proper.'" Dorf, *supra* note 7, at 317.

“Bear,” as just stated, implicates more active conduct than “keep.” Since to “keep” arms must be something different than to “bear” arms, and “keep” implicates passive, custodial possession, “bear” suggests active, exhibitory use of arms; something more than custodial possession. Examples may be: “He came bearing gifts” or “She bears a resemblance to my aunt.” To “bear” arms, therefore, suggests active, exhibitory use of arms.⁶⁷

Reading “keep” and “bear” together, then, indicates that the right “to keep and bear arms” protects passive, custodial possession of arms and the active, exhibitory use of arms.⁶⁸ The latter extends to carrying a concealed weapon.⁶⁹

V. CONCLUSION

Judge Cummings pointed out in *United States v. Emerson* that “[p]rotecting freedom of speech, the rights of criminal defendants, or

67. Lasson claims that “[a] person in the pursuit of game or target shooting might carry his rifle, yet it would never be said that he had borne arms.” Lasson, *supra* note 8, at 137. Someone better tell Mr. Webster. WEBSTER’S NEW WORLD COLLEGE DICTIONARY (Random House, Inc. 3d ed. 1991) at p. 121 (definition of “bear” includes “to carry; bring.”). Also, today we may not say “I called my congressperson to petition for a redress of grievances,” but we know what it means.

68. This reading may conflict with what some scholars have found to be the original meaning of “to keep and bear arms.” Kates has explained that “contemporary statutory usage shows eighteenth-century writers using ‘bear’ only in reference to militiamen carrying their arms when mustered to duty” and, therefore, if the Framers had used only “to bear,” the Second Amendment would “protect the carrying of arms outside the home only in the course of militia service.” Kates, *supra* note 11, at 219. Thus, he concludes that an individual’s right to keep and bear arms is encompassed by “keep,” rather than “bear.” *Id.* at 220. The conflict may, in one sense, be of little substance since the result is the same—the Second Amendment protects an individual’s right to keep and bear arms. On the other hand, Kates’ reading of the Second Amendment may not support a constitutional right to carry concealed weapons. Dorf too points out that “the phrase ‘bear arms’ was most commonly used in a military setting, . . .” Dorf, *supra* note 7, at 303. Yet he concedes that “[t]his is not to say that people do not use the phrase to refer to individual firearm possession—they do.” *Id.* He is right. The Pennsylvania Constitution of 1776 provided that “[t]he people have a right to bear arms for the defense of themselves and the State.” PENN. CONST. of 1776, § 8, in 8 WILLIAM FINLEY SWINDLER, SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 279 (1979). This use of “bear” agrees completely with the use suggested here.

69. See Szczepanski, *supra* note 11, at 222 (“The phrase ‘keep and bear’ in the Second Amendment refers to the individual right not only to possess (‘keep’) arms, but also to carry and use (‘bear’) such arms.”) (emphasis in original). Although some believe it a “logical conclusion” that reading the Second Amendment to protect an individual’s right to keep and bear arms would mean that individuals may keep and bear missiles or tanks or nuclear weapons, such a conclusion is anything but logical. See Michael T. O’Donnell, Note, *The Second Amendment: A Study of Recent Trends*, 25 U. RICH. L. REV. 501, 503-04 (1991) (regarding the logical conclusion). By the Second Amendment’s text, only arms that can be kept and borne are protected. See Harmer, *supra* note 5, at 74; Kates, *supra* note 11, at 220 n. 62 (“Because what is being guaranteed is an individual right to keep and bear arms, the arms could only be borne if the ordinary individual could conveniently lift and transport them about with his body.”); Reynolds, *supra* note 32, at 478-80.

any other part of the Bill of Rights has significant costs—criminals going free, oppressed groups having to hear viciously racist speech and so on—consequences which we take for granted in defending the Bill of Rights.”⁷⁰ Protecting rights under the Second Amendment is no different.⁷¹ Scholarship on the Second Amendment, unfortunately, often devolves into questioning authors’ motives and debate over the notion of a living constitution versus adhering to original intent.⁷² The former reveals a lack of substantive foundation for denying the existence of an individual right to keep and bear arms; the latter is not about the Second Amendment’s meaning, but the proper role of courts in our democracy.⁷³

As outlined in this article, the Second Amendment’s text and intent supports an individual right to keep and bear arms. The Amendment’s text supports a *constitutional* right to carry concealed weapons. But like any other right, the right to keep and bear arms is not absolute.⁷⁴

70. *Emerson*, 46 F. Supp. 2d at 609. Judge Cummings also went on to ask, “why do we not apply such consequentialist criteria to each and every part of the Bill of Rights?” *Id.* at 609. In response, Lasson says, “we do[,]” citing to the “separate but equal” doctrine and asserting that it was abandoned because found it was “unworkable.” Lasson, *supra* note 8, at 146. One could conclude that Lasson has a rather pessimistic view, since many (including myself) would argue that the “separate but equal” doctrine was abandoned not because it was “unworkable,” but because it was *unconstitutional*.

71. See Lasson, *supra* note 8, at 127-28 (information regarding gun violence).

72. See, e.g., *Id.* at 129 (advocating the “long-accepted principle” that the Constitution was “designed to be an evolving document” that is “supposed to change with the times”); Herz *supra* note 11, at 67:

The ultimate question must be, what do the words of the text mean in our time. For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. The gun lobby’s broad-individual-right view falls apart in our time. The passage of two centuries has brought wholesale changes in the composition of the well-regulated militia, and in the role of firearms in American society.

Dorf, *supra* note 7, at 292-93 (“Original understanding is not the sole, nor even the principal, measure of a constitutional interpretation’s correctness.”). Such critiques reveal a weakness in the argument of those opposed to gun ownership—if the text and history of the Second Amendment supported their position, they would not resort to the living constitution argument.

73. Another argument to limit the right to keep and bear arms is that “[v]irtually every other consumer product in the country is regulated as well. Handguns are the most notable and lethal exception.” See, e.g., Lasson, *supra* note 8, at 164. The response to this argument is simple: there is no other “consumer product” that is protected by the United States Constitution.

74. See, e.g., Gardiner, *supra* note 13, at 818 (“[It] is a truism to say that there is no absolute right to possess firearms.”); Lasson, *supra* note 8, at 132 (explaining that “following ratification, the states continued to pass new laws that closely monitored gun ownership.”); Erwin N. Griswold, *Phantom Second Amendment ‘Rights’*, WASHINGTON POST, Nov. 4, 1990, at C7 (“[T]hat the Second Amendment poses no barrier to strong gun laws is perhaps the most well-established proposition in American constitutional law.”); Szczepanski, *supra* note 11, at 223 (“no right in the federal Bill of Rights is absolute.”). See also *Virginia v. Black*, 538 U.S. 343, 358 (2003) (“The protections afforded by the First Amendment, however, are not absolute, and we have long recognized that the

Nonetheless, concealed carry statutes appear to presuppose that individuals cannot carry concealed weapons but for the statutes. As described herein, such a presupposition may be inconsistent with the Second Amendment's text. If it is, concealed carry statutes should be viewed as regulation of the preexisting, constitutional right to carry concealed weapons and, accordingly, should be subject to judicial scrutiny with the same level of vigor as any other statute regulating a constitutional right.