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COMMENT

THE *CRUIKSHANK* REDEMPTION: THE ENDURING RATIONALE FOR EXCLUDING THE SECOND AMENDMENT FROM THE COURT'S MODERN INCORPORATION DOCTRINE

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I. INTRODUCTION

Prior to 2001, any ostensible controversy[1] over the interpretation of the Second Amendment was largely confined to law review articles and horta-

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[1] Recent federal cases tend to underscore the embryonic nature of the academic controversy surrounding the interpretation of the Second Amendment and the growing endorsement of the "individual right" approach. *See* Printz v. United States, 521 U.S. 898, 938 n.2 (1997) (Thomas, J., concurring) (observing that a "growing body of scholarly commentary indicates that the 'right to keep and bear arms' is, as the Amendment's text suggests, a personal right"); Nordyke v. King, 319 F.3d 1185, 1191 (9th Cir. 2003) (opining that the "'individual rights view' . . . has enjoyed recent widespread academic endorsement"); Silveira v. Lockeyer, 312 F.3d 1052, 1060 (9th Cir. 2003) (noting that the debate over the Second Amendment "has gained intensity over the last several years"); United States v. Emerson, 270 F.3d 203, 220 (5th Cir. 2001) ("The individual rights view has enjoyed considerable academic endorsement, especially in the last two decades."); *see also* OFFICE OF LEGAL COUNSEL, DEP'T OF JUSTICE, WHETHER THE SECOND AMENDMENT SECURES AN INDIVIDUAL RIGHT, *available at* www.usdoj.gov/olc/ secondamendment2.htm (2004) [hereinafter OLC MEMORANDUM] (observing that "the burgeoning scholarly literature on the Second Amendment in the past two decades has explored the meaning of the Second Amendment in great detail," and that the "preponderance of modern scholarship appears to support the individual-right view").

tory pronouncements by public officials. The Second Amendment reads, "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."[2] In underscoring the importance of its prefatory clause, which recognized the primacy of the militias as the guarantors of state sovereignty, the Court observed in 1939 that the "obvious purpose"[3] of the Second Amendment was "to assure the continuation and render possible the effectiveness of such forces [the Militia]."[4] The Court held that the Second Amendment "must be interpreted and applied with that end in view."[5] Since its decision in *United States v. Miller*, however, the Court has neither endorsed the appropriate interpretive approach nor expounded on the precise nature of the right conferred under the Second Amendment.[6]

Various scholars and jurists have proposed different interpretive approaches as lodestars for determining the constitutionality of federal firearms statutes. The "collective right" approach posits that the right to keep and bear arms under the Second Amendment protects the right of States to organize and arm well-regulated militias.[7] The "limited individual right"

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[2] U.S. CONST. amend. II. There is little redeeming value to the actual language of the Second Amendment. It is difficult to support any interpretive approach of the Second Amendment based solely on its text. *See* Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 643-44 (1989) (observing that "no one has ever described the Constitution as a marvel of clarity, and the Second Amendment is perhaps one of the worst drafted of all its provisions"). *But see Emerson*, 270 F.3d at 259 ("Given the political dynamic of the day, the wording of the Second Amendment is exactly what would have been expected. The Federalists had no qualms with recognizing the individual right of all Americans to keep and bear arms."). *Emerson*, however, represented the first time a federal appellate court embraced the "individual right" interpretation of the Second Amendment. Had the language of the Second Amendment been eminently understandable, it seems likely that at least one federal court would have placed its imprimatur on the Fifth Circuit's sentiment prior to *Emerson*, which was decided 210 years after the ratification of the Constitution.

[3] United States v. Miller, 307 U.S. 174, 177 (1939)

[4] *Id.* The full sentence reads, "With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made."

[5] *Id.*

[6] The Court has, however, indirectly addressed several issues surrounding the meaning of the Second Amendment. *See Printz*, 521 U.S. at 938 n.2 (Thomas, J., concurring) (noting that "a growing body of scholarly commentary indicates that the 'right to keep and bear arms' is, as the Amendment's text suggests, a personal right"); United States v. Verdugo-Urquidez, 494 U.S. 259, 261 (1990) (observing that the phrase "the people" ought to be construed in the same way throughout the Constitution and the Bill of Rights to encompass a broad class of persons); Lewis v. United States, 445 U.S. 55, 65 n.8 (1980) (citing *Miller* for the proposition that the Second Amendment does not guarantee a right to keep and bear arms that does not have a reasonable relationship to the preservation and efficiency of a well-regulated militia).

[7] *See, e.g.*, Silveira v. Lockeyer, 312 F.3d 1052 (9th Cir. 2003).

(or "sophisticated collective right") approach embraces the proposition that the right to keep and bear arms under the Second Amendment inures to individuals only to the extent that they actively participate as members of a functional and well-regulated militia.[8] The "individual right" approach argues that the right to keep and bear arms belongs to individuals, irrespective of their active participation in a functional and well-regulated militia.[9] Until 2001, every federal appellate court presented with a Second Amendment challenge embraced either the "collective right" approach[10] or the "sophisticated collective right" approach.[11]

Recent developments, however, have catapulted the individual right approach to the forefront of the Second Amendment debate. First, on October 16, 2001, the Fifth Circuit issued its much anticipated decision in *United States v. Emerson*,[12] dismissing a Second Amendment challenge to a federal statute that prohibited individuals under domestic protective orders from owning or possessing firearms. In dicta, however, the Fifth Circuit observed that the Second Amendment does indeed confer an individual right to keep and bear arms, marking the first time a federal appellate court endorsed the individual right approach.[13]

Shortly thereafter, Attorney General John Ashcroft, in a memorandum to all U.S. Attorneys, opined that *Emerson* "generally reflect[s] the correct understanding of the Second Amendment."[14] In May 2002, Ashcroft officially reversed the Department of Justice's (DOJ) longstanding policy concerning the Second Amendment's meaning, announcing that the:

> current position of the United States . . . is that the Second Amendment more broadly protects the rights of individuals, including persons who are not members of any militia or engaged in active military service or training, to possess and bear their own firearms, subject to reasonable restrictions designed to prevent . . . criminal misuse.[15]

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[8] *See, e.g.*, United States v. Wright, 117 F.3d 1265 (11th Cir. 1997).

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

[10] *See* Love v. Pepersack, 47 F.3d 120 (4th Cir. 1995); United States v. Warin, 530 F.2d 103 (6th Cir. 1976); Gillespie v. City of Indianapolis, 185 F.3d 693 (7th Cir. 1999); Hickman v. Block, 81 F.3d 98 (9th Cir. 1996).

[11] *See* United States v. Wright, 117 F.3d 1265 (11th Cir. 1997); United States v. Rybar, 103 F.3d 273 (3d Cir. 1996); United States v. Hale, 978 F.2d 1016 (8th Cir. 1992); United States v. Oakes, 564 F.2d 384 (10th Cir. 1977); Cases v. United States, 121 F.2d 916 (1st Cir. 1942).

[12] 270 F.3d 203 (5th Cir. 2001).

[13] *Id.* The Second Circuit and the D.C. Circuit are the only circuits that have yet to take a definitive position on the correct interpretive approach under the Second Amendment.

[14] John Ashcroft, Memorandum to all United States' Attorneys (Nov. 9, 2001), *available at* http://www.usdoj.gov/ag/readingroom/emerson.htm.

[15] Brief for the United States in Opposition to Petition for Certiorari at 21-22 n.3, Emerson v. United States (Feb. 28, 2002) (No. 01-8780).

Jurisprudential developments in 2003 and 2004 have only intensified the controversy surrounding the Second Amendment's meaning and its prospect for incorporation against the states. On January 27, 2003, in upholding California's Assault Weapons Control Act against a Second Amendment challenge, the Ninth Circuit explicitly disavowed *Emerson*, reaffirming its interpretation of the Second Amendment as a "collective right" to keep and bear arms.[16] Then, on February 16, 2003, the Ninth Circuit upheld an Alameda County (California) ordinance prohibiting the possession of firearms on its property; the ban effectively prohibited the sponsorship of gun shows on the County's property.[17] The court, however, upheld the ordinance solely on *stare decisis* grounds, noting that "if we were writing on a blank slate, we may be inclined to follow the approach of the Fifth Circuit in *Emerson*."[18] In a special concurrence, Judge Ronald Gould suggested that a thorough examination of the Second Amendment's place in the Court's modern incorporation doctrine was long overdue, observing that the "maintenance of an armed citizenry might be argued to be implicit in the concept of ordered liberty and protected by the Due Process Clause of the Fourteenth Amendment."[19] On December 2, 2003, the Court denied certiorari in *Silveira*, refusing to reconsider the implications of its holding in *Miller*.[20]

Additionally, on two separate occasions in 2004, the United States District Court for the District of Columbia upheld Washington, D.C.'s restrictive handgun ordinance against Second Amendment challenges by individuals who wished to possess firearms for personal protection.[21] Finally, on August 24, 2004, the Department of Justice's Office of Legal Counsel issued a memorandum endorsing the individual right approach, affirming

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[16] *See* Silveira v. Lockeyer, 312 F.3d 1052 (9th Cir. 2003); *accord* Hickman v. Block, 81 F.3d 98 (9th Cir. 1996).

[17] *See* Nordyke v. King, 319 F. 3d 1185 (9th Cir. 2003).

[18] *Id.* at 1191.

[19] *Id.* at 1193 n.3 (Gould, J., concurring).

[20] Silveira v. Lockeyer, 312 F.3d 1052 (9th Cir. 2003), *cert. denied*, 540 U.S. 1046 (2003).

[21] *See* Parker v. District of Columbia, 311 F. Supp. 2d 103 (D.D.C. 2004); Seegars v. Ashcroft, 297 F. Supp. 2d 201 (D.D.C. 2004). *Seegars* was particularly unique in that the district court addressed the issue of whether the Second Amendment applied to the District of Columbia, which is neither under the complete authority of the federal government, nor under the authority of a State or a political subdivision of a State. The judge in *Seegars* concluded that the Second Amendment does not apply to the District of Columbia. The D.C. Circuit affirmed the district court's holding in *Seegars*, but concluded that the litigants lacked standing to challenge the constitutionality of the statute. *See* Seegars v. Gonzales, 396 F.3d 1248 (D.C. Cir. 2005).

then-General Ashcroft's sentiment concerning the nature of the guarantee conferred by the Second Amendment.[22]

The nature of the right conferred by the Second Amendment is inextricably intertwined with the issue of its incorporation against the states.[23] If the right is either collective or limited to individuals engaged in active militia service on behalf of a state, the Second Amendment would become operative at the state level only if the State itself sought to disarm its own militia (or, in the modern era, its particular branch of the National Guard). If the Second Amendment, however, confers a broad *individual* right that becomes operative irrespective of whether an individual is an active participant in the state militia, the scope of the protection is indubitably broader, implicating the State's actions to the extent that it infringes upon the individual right.[24]

The constitutional muster of firearms regulations, both at the federal and *state* level, could be imperiled if the Court placed its imprimatur on the proposition that the Second Amendment confers a broad individual right. In most instances where a constitutional right enjoys textual support, the Court's endorsement of the right as uniquely individual is both a necessary and sufficient condition for its incorporation. Unless the Court determined that the right conferred by the Second Amendment is wholly distinguishable from other constitutional rights already incorporated against state ac-

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[22] *See* OLC MEMORANDUM, *supra* note 1.

[23] *See* Jack Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103, 156 (2000):

> Indeed, ending the exile of the Second Amendment to the district of unincorporated rights is as much the object of the individual right interpretation as insisting upon a particular account of the original understanding of 1787-1791. It would do no good to demonstrate conclusively that the framers and ratifiers of those years really did regard a fundamental right to own weapons as a necessary security against the danger of tyranny, if one could not at the same time produce a compelling rationale for its incorporation today.

[24] Indeed, the District Court in *Emerson* implied as much when, in summarizing the views of various adherents to the individual right approach, it opined that the Second Amendment "protects an individual right inherent in the concept of ordered liberty." United States v. Emerson, 46 F. Supp. 2d 598, 600 (N.D. Tex. 1999). The conclusion reached by the *Emerson* court at the trial level was cloaked in the language employed by the Court in cases where various constitutional rights have been incorporated against the States. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (noting that the Fourteenth Amendment's Due Process Clause protects liberties that are "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty not justice would exist if they were sacrificed") (internal quotations and citations omitted); Palko v. Connecticut, 302 U.S. 319, 325 (1937) (observing that those constitutional provisions that have been incorporated through the Fourteenth Amendment's Due Process Clause are "implicit in the concept of ordered liberty").

tion,[25] it is difficult to envision a scenario where the Court would hold that the Second Amendment's guarantee is individual, but that its scope is confined to proscribe only laws and regulations enacted under the auspices of federal power. If the Second Amendment's protection is indeed individual, some individual right adherents contend, firearms regulations enacted by states and their political subdivisions ought to be subject to strict scrutiny[26] in light of the fundamental nature of the right that would be implicated. Incorporation is a historical corollary to constitutional rights that are construed as affording individual protections.[27]

Incorporation, however, would fundamentally alter and irreparably damage the delicate balance sought by the Framers of the Second Amendment, who viewed the Second Amendment not as a sweeping individual right to be retained by the general populace, but as a buttress against federal encroachment into the states' provincial authority over the governance and armament of their respective militias. Moreover, the Second Amendment *is* different from other constitutional rights incorporated against state action. Even assuming that the Second Amendment does indeed confer an individual right, it would not necessarily follow that the right itself is presumptively fundamental to the American scheme of justice, such that it ought to be incorporated against individual states.

In the aftermath of the *Emerson* decision and the Ashcroft memorandum to U.S. Attorneys, many criminal defendants and convicted felons have sought refuge under the relatively novel proposition that the Second

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[25] *See* Schilb v. Kuebel, 404 U.S. 357 (1971) (prohibition against excessive bail under the Eighth Amendment); Benton v. Maryland, 395 U.S. 784 (1969) (double jeopardy provision under the Fifth Amendment); Duncan v. Louisiana, 391 U.S. 145 (1968) (jury trial under the Sixth Amendment); Klopfer v. North Carolina, 386 U.S. 213 (1967) (right to a speedy and public trial under the Sixth Amendment); Washington v. Texas, 388 U.S. 14 (1967) (compulsory process for securing witness testimony under the Sixth Amendment); Malloy v. Hogan, 378 U.S. 1 (1964) (privilege against self-incrimination under the Fifth Amendment); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (freedom of speech and press under the First Amendment); Abingdon Sch. Dist. v. Schempp, 374 U.S. 203 (1963) (Establishment Clause under the First Amendment); Gideon v. Wainright, 372 U.S. 335 (1963) (right to counsel under the Sixth Amendment); Robinson v. California, 370 U.S. 660 (1962) (cruel and unusual punishment under the Eighth Amendment); Mapp v. Ohio, 367 U.S. 643 (1961) (unreasonable search and seizure under the Fourth Amendment); Cole v. Arkansas, 333 U.S. 196 (1948) (right to notice of charges); Chicago B. & Q.R. Co. v. Chicago, 166 U.S. 226 (1897) (taking of property without just compensation under the Fifth Amendment).

[26] *See* Janice Baker, Comment, *The Next Step in Second Amendment Analysis: Incorporating the Right to Bear Arms into the Fourteenth Amendment*, 28 U. DAYTON L. REV. 35, 55 (2002) (observing that strict scrutiny "logically follows . . . if the Supreme Court considers a right fundamental to the American scheme of justice").

[27] *Id.*

Amendment confers an individual right.[28] That many of these Second Amendment challenges are increasingly being lodged at the *state* level against *state* law is a testament to the belief, however misguided, that incorporation necessarily follows from the existence of an individual right. In construing the Second Amendment as an individual right, *Emerson* has provided legal ammunition for criminal defendants seeking to overturn their convictions. As a practical matter, the Fifth Circuit's dicta in *Emerson*, if widely embraced, could pave the way for shifting the burden in Second Amendment cases, requiring the government to demonstrate a compelling governmental interest in a statute regulating firearms. In many ways, then, definitively resolving the nature of the right conferred by the Second Amendment is merely a dress rehearsal for proponents who champion the argument that the Second Amendment ought to be incorporated against the states. If the Court determined that the essence of the right under the Second Amendment is individual rather than collective, individual right adherents believe incorporation would not lurk far behind.

Part II of this comment identifies and examines the chief interpretive approaches under the Second Amendment, the collective right approach and the individual right approach. I ultimately conclude that the collective right approach is more congruent with the Second Amendment's text, structure, and history than the individual right approach. Part III analyzes the Court's Second Amendment jurisprudence and its interpretation by the circuit courts. That no federal appellate court has ever overturned a federal gun control law on Second Amendment grounds suggests that the Court's few decisions interpreting the Second Amendment reject the proposition that the right is individual in nature. Part III also highlights the controversy surrounding the viability of the Court's dated—but nevertheless viable—pronouncements on the concomitant debate concerning incorporation of the Second Amendment.

Part IV details the genesis and development of the Court's modern incorporation doctrine, underscoring its endorsement of the selective incorporation approach and its factor-based analysis in *Duncan v. Louisiana*[29] to determine whether a particular constitutional right is fundamental to the American scheme of justice. Part V contends that the Second Amendment is not fundamental to the American scheme of justice under the Court's modern incorporation doctrine, articulated in *Duncan*. Employing the fac-

[28] These challenges, based on *Emerson* and the Ashcroft memorandum, have been uniformly rejected. *See, e.g.*, United States v. Price, 328 F.3d 958 (7th Cir. 2003); Olympic Arms v. Buckles, 301 F.3d 384 (6th Cir. 2002); United States v. Hinostroza, 297 F.3d 924 (9th Cir. 2002).

[29] 391 U.S. 145 (1968).

tors enumerated in *Duncan*, which embrace both originalism and majoritarianism as appropriate modes of constitutional analysis, I conclude that even were the Court to reconsider its Second Amendment incorporation decisions predating *Duncan*, the standards emanating from its incorporation jurisprudence support the conclusion that the Second Amendment should not be incorporated against state action.

Part VI concludes by juxtaposing the individual right approach with the potential incorporation of the Second Amendment. While the overarching interpretive approaches under the Second Amendment continue to be the subject of substantial academic and judicial controversy, the endorsement of the individual right approach should neither be confused nor equated with answering the separate and distinct question of whether a right is fundamental to the American scheme of justice. If the Second Amendment does indeed confer a broader individual right, it is difficult to reconcile the thousands of firearms regulations that gun control opponents often allude to, duly enacted by representatives of "the people," with the notion that such a right is fundamental to the American scheme of justice. Indeed, if the Second Amendment does confer an individual right, it remains likely that many firearms regulations would continue to withstand constitutional scrutiny precisely because the right conferred is not fundamental to the American scheme of justice.

II. THE INTERPRETIVE APPROACHES UNDER THE SECOND AMENDMENT

A. THE COLLECTIVE RIGHT APPROACH[30]

Adherents of the collective right approach contend that the Second Amendment's text, structure, and history render the Amendment's protection collective in nature, guaranteeing to states the right to organize and maintain militias to ensure the security of the State and deter potential encroachment by the federal government.[31]

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[30] I include those embracing the "sophisticated collective right" approach (or the "limited individual right" approach) under the rubric of the "collective right" approach. While the "sophisticated collective right" approach is focused upon the individual rather than the State, the interpretive approach is essentially the same since the ultimate determination hinges upon the regulation's effect on the preservation and efficiency of the militia.

[31] *See, e.g.*, Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309 (1998); Michael Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291 (2000); Keith A. Ehrman & Denis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5 (1989); Paul Finkelman, *"A Well Regulated Militia": The Second Amendment in Historical Perspective*, 76 CHI.-KENT L. REV. 195 (2000); Jack Rakove, *The Second Amendment: The Highest Stage of Orginalism*, 76 CHI.-KENT L. REV. 103 (2000); David Yassky, *The*

First, the text of the Second Amendment is readily distinguishable from other Amendments ensconced in the Bill of Rights because it contains a prefatory clause,[32] which provides the context in which the right to keep and bear arms becomes constitutionally protected.[33] The prefatory clause establishes the parameters for interpreting the operative right of the people to keep and bear arms, which belongs to the militias of the several states.[34] Collective right adherents assert that the militia is a state military force, and thus the right under the Second Amendment inures not to its constituent members, but rather to the "Militia" as a collective entity, for the purpose of ensuring the "the Security of a Free State."[35] That "the Security of a Free State" is to be achieved by the formation of a "well-regulated Militia" suggests that the "right of the people to keep and bear arms" only exists where it effectuates that purpose.[36]

While the operative clause of the Second Amendment is not without ambiguity, its phraseology suggests a military context in which the "right of the people to keep and bear arms" exists. One of the interpretive difficulties associated with the second clause in the Second Amendment is whether to construe "keep and bear arms" as a "unitary phrase,"[37] or as separate and distinct phrases unto themselves ("keep arms" and "bear arms"), each with its own substantive import. The collective right approach posits that the phrase "keep and bear arms" is indeed unitary, and that the use of the word "bear" "has a primarily military connotation."[38] The purpose for keeping

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Second Amendment: Structure, History, and Consitutional Change, 99 MICH. L. REV. 588 (2000).

[32] The Fifth Circuit referred to the Second Amendment's prefatory clause as a "preamble," which presupposes the conclusion it seeks to prove. Calling the prefatory clause a "preamble" necessarily restricts its constructive breadth. The term is a misnomer to the extent that it suggests the "preamble" is but a preface to the Amendment itself. *See* United States v. Emerson, 270 F.3d 203, 233 (5th Cir. 2001) (conceding only that the "the preamble implies that the substantive guarantee is one which tends to enable, promote or further the existence, continuation or effectiveness of that 'well-regulated Militia' which is 'necessary to the security of a free State'").

[33] Silveira v. Lockeyer, 312 F.3d 1052, 1068-69 (2003) ("The first or prefatory clause of the Second Amendment sets forth the amendment's purpose and intent.").

[34] *See* United States v. Miller, 307 U.S. 174, 177-78 (1939).

[35] Yassky, *supra* note 31, at 605-07.

[36] Finkelman, *supra* note 31, at 230-31.

[37] Dorf, *supra* note 31, at 317.

[38] Yassky, *supra* note 31, at 619; *see also* Lucilius A Emery, *The Constitutional Right to Keep and Bear Arms*, 28 HARV. L. REV. 473, 476 (1915) (contending that a "single individual or the unorganized crowd, in carrying weapons, is not spoken of or thought of as 'bearing arms'"). Earlier decisions by State Supreme Courts support the notion that "bear arms" has a unique military connotation. *See* Aymette v. State, 21 Tenn. 154 (1840); English v. State, 35 Tex. 473, 476 (1872); State v. Workman, 35 W. Va. 367 (1891).

arms under the Second Amendment is so that they may by borne by the people in the militia when necessary to preserve the security of the state.[39]

Second, the Amendment itself advances the Constitution's structural solidification of the militia as a state-controlled entity that complements national military power and buttresses the state against potential encroachment by the federal government.[40] The Second Amendment reflects "the delicately balanced military structure envisioned by the Founders—an army constitutionally available, but obviated by a well-prepared, state-based militia."[41] Throughout the drafting and revising of the Constitution, the Anti-Federalists remained deeply troubled by federal hegemony in the military arena, borne by a historical "fear of standing armies."[42] Of particular concern to the Anti-Federalists was Article I, Section 8, which transferred authority over the state militias to the federal government.[43] Collective right adherents construe the Second Amendment as "an affirmation that only certain, specifically described powers had been granted to the federal government, and that residual power remained with the states."[44]

The interpretation of the phrase "the right of the people to keep and bear Arms" thus should not be "divorced from its context among the Constitution's other military provisions."[45] Collective right adherents dispute the proposition, embraced by individual right adherents, that "the people" in the Second Amendment are the same people referred to throughout the Constitution and the Bill of Rights, a notion that would substantially broaden the scope of the right.[46] The practical consequence flowing from

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[39] Silveira v. Lockeyer, 312 F.3d 1052, 1074-75 (9th Cir. 2003).

[40] Yassky, *supra* note 31, at 599.

[41] *Id.* at 610.

[42] *Id.* at 608.

[43] U.S. CONST. art. I, § 8, cl. 15 ("To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."); U.S. CONST. art. I., § 8, cl. 16:

> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

[44] Yassky, *supra* note 31, at 609.

[45] *Id.* at 650.

[46] *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 261 (1990) (noting that its observation was not "conclusive," the Court stated that "'the people' protected by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of people who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community"). *But see* Perpich v. Dep't of Defense, 496 U.S. 334 (1990) (identifying the composition of the militia in accordance with Congressional statute, which would exclude a broad class of persons).

this proposition is that the right to keep and bear arms protects the same "people" under the same terms as (for example) the First Amendment. Collective right adherents contend that construing the term "militia" in a similar fashion, however, conflicts with the notion that the "people" in the Second Amendment are the same "people" that exist throughout the Constitution—namely the unorganized mass of the entire citizenry. If the "militia" in the Second Amendment is the same "militia" in Article I, Section 8, the inevitable conclusion flowing from such a premise is that the militia does *not* include the unorganized mass of the citizens of the United States. The Constitution authorizes Congress to modify membership in the militia by statute through its responsibility to organize the militia, clarifying that the "people" in the militia are not the unorganized mass of the entire citizenry, but rather a statutorily defined group that is subject to modification by Congress.[47]

The Constitution expressly delegates to Congress the authority for organizing the militia,[48] enabling it to define membership eligibility and promulgate exclusions and exemptions from militia service. Under the National Guard statute, Congress' modern militia statute, "a person must be at least 17 years of age and under 45, or under 64 years of age and a former member of the Regular Army, Regular Navy, Regular Air Force, or Regular Marine Corps."[49] If a well-regulated militia only includes those individuals that Congress, pursuant to its constitutional power, chooses to include, "the people" in the Second Amendment only encompass those citizens who are both eligible for and participate in militia service.[50] In *Perpich v. Department of Defense*, the Court adopted the definition of the militia prescribed by Congressional statute, a determination that is of significant consequence to the fate of the "individual right" approach.[51] As Professor Michael Dorf notes,

> That statutory definition expressly excludes women who are not members of the National Guard and men who are not able-bodied and (unless they are former members of the regular armed forces who enlisted in the National Guard before they turned sixty-four) under forty-four years of age. Thus, *the individual rights scholars' theory*

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[47] U.S. CONST. art. I., § 8, cl. 16.

[48] *Id.*

[49] 32 U.S.C. § 313 (a) (1999); *see also* 10 U.S.C. § 311 (a) (1999):

> The militia of the United States consists of all able-bodied males at least 17 years of age and . . . under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States, and of female citizens of the United States who are members of the National Guard.

[50] Yassky, *supra* note 31, at 622-24; Dorf, *supra* note 31, at 305-06.

[51] Perpich v. Dep't of Defense, 496 U.S. 334, 351-54 (1990).

would deny a right to own or possess firearms to the disabled, to most women, to most middle-aged men, and to all older Americans."[52]

Third, collective right adherents contend that the history underlying adoption reflects the Framers' intention that the Second Amendment be restricted to a narrow, specific subject in a narrow, specific context.[53] Collective right adherents argue that both James Madison's original draft of the Second Amendment and its subsequent modifications reflect the general tension between the competing visions of federal and state power broached by the Federalists and Anti-Federalists during the Constitutional Convention and its aftermath.[54] Madison's original draft of the Second Amendment provided the following: "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."[55]

The battle over the phraseology of Madison's Amendment focused almost exclusively on the capacity of the federal government to exempt individuals who were "religiously scrupulous" from "bearing arms."[56] Indeed, Elbridge Gerry, a leading Anti-Federalist, perceived this clause as a potential hegemonic source for the federal government should it wish to proclaim itself as the ultimate arbiter of criteria for participation in the militia, a power that Anti-Federalists sought to ascribe to the states.[57]

The Second Amendment adopted by Congress and ratified by the States thus reflected a compromise that implicitly acknowledged the impor-

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[52] Dorf, *supra* note 31, at 305-06 (emphasis added). Individual right adherents dispute the contention that the substantive right to keep and bear arms is either contextual to militia service or restricted to individuals eligible for militia service.

[53] *See, e.g.*, Silveira v. Lockeyer, 312 F.3d 1052, 1076-85 (9th Cir. 2003). The history underlying the adoption of the Second Amendment is particularly important in the context of incorporation, where originalism has become the preeminent mode of constitutional interpretation. Some collective right adherents, however, eschew originalism as either the primary or a significant mode of constitutional interpretation. *See* Dorf, *supra* note 31, at 92-93 ("Original understanding is not the sole, nor even the principal, measure of a constitutional interpretation's correctness."); Rakove, *supra* note 31, at 108 ("It is far from a self-evident truth that originalism is the sole authoritative mode of constitutional interpretation, nor do many who dabble in originalist analyses always reflect on the logic of what they are doing."). I believe that the original meaning of the Second Amendment is central to the incorporation analysis; this is discussed in greater detail in Section V.

[54] *See* Yassky, *supra* note 31, at 608-10.

[55] THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 169 (Neil Cogan ed., Oxford University Press 1997) [hereinafter "THE COMPLETE BILL OF RIGHTS"].

[56] Yassky, *supra* note 31, at 609-10.

[57] THE COMPLETE BILL OF RIGHTS, *supra* note 55, at 186-88.

tance of state militias as a hegemonic check against the federal army.[58] Conspicuously absent from the debate over the meaning of the Second Amendment in the First Congress, collective right adherents note, is any significant exchange concerning the scope of the right beyond its application to the states' militias.[59] As the Ninth Circuit observed in *Silveira*, "there is not a single statement in the congressional debate about the proposed amendment that indicates that any congressman contemplated that it would establish an individual right to possess a weapon."[60]

B. THE INDIVIDUAL RIGHT APPROACH

Individual right adherents largely approach the interpretation of the Second Amendment in the same fashion as collective right adherents, but reach a far different conclusion about its substantive import. Individual right adherents maintain that the text, structure, and history of the Second Amendment support a broader meaning that encompasses the right of individuals to keep and bear arms, irrespective of whether those individuals participate in an active, well-regulated militia.[61]

First, individual right adherents contend that the text and structure of the Second Amendment, notwithstanding its prefatory clause, inevitably lead to the conclusion that it is "the people" who enjoy the right to keep and bear arms.[62] While the Second Amendment's prefatory clause is anomalous when compared with other Amendments to the Constitution, Professor Eugene Volokh argues that such purpose clauses were "commonplace" [63] in contemporaneous state constitutions. The existence of the prefatory clause in the Second Amendment, Volokh argues, ought to be accorded a modicum of constructive significance, but should not be construed as "something deeply portentous."[64] Volokh asseverates that "the justification clause may *aid* construction of the operative clause but may not *trump* the meaning of the operative clause: To the extent the operative clause is ambiguous, the

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[58] Yassky, *supra* note 31, at 610.

[59] Silveira v. Lockeyer, 312 F.3d 1052, 1085 (9th Cir. 2003).

[60] *Id.*

[61] *See* Stephen Halbrook, *The Right of the People or the Power of the State: Bearing Arms, Arming Militias, and the Second Amendment*, 26 VAL. U. L. REV. 131 (1991); Levinson, *supra* note 2; Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA L. REV. 103 (1987); William Van Alstyne, *The Second Amendment and the Personal Right to Bear Arms*, 43 DUKE L.J. 1236 (1994); Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998).

[62] *See generally supra* note 61.

[63] *See* Volokh, *supra* note 61, at 793.

[64] *Id.* at 797.

justification clause may inform our interpretation of it, but the justification clause can't take away what the operative clause provides."[65]

Volokh's textual exegesis is ultimately unpersuasive. It is not entirely clear what significance, if any, Volokh attributes to the existence of the Second Amendment's prefatory clause.[66] The better extrapolation from Volokh's research is that the prefatory clause of the Second Amendment ought to be accorded greater weight, precisely because it was so unique to the lexicon of the federal Constitution.

Individual right adherents argue that the terms "the people" and the "Militia" are synonymous terms in the Second Amendment encompassing "the ordinary citizenry."[67] Furthermore, the structure of the Constitution, and particularly the Bill of Rights, suggests that "the people" in the Second Amendment are the same "people" in other constitutional provisions that protect individual rights, including the First Amendment and the Fourth Amendment.[68] The term "the people" in the Second Amendment thus "clearly protects individuals', not states', rights."[69] That the term "bear arms" suggests a military usage is not dispositive of the circumstances under which the right may be enjoyed, individual right adherents argue, since

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[65] *Id.* at 807.

[66] *See also* OLC MEMORANDUM, *supra* note 1 ("Similarly, the Supreme Court has held that the Constitution's preamble lacks any operative legal effect and that, even though it states the Constitution's 'general purposes,' it cannot be used to conjure a 'spirit' of the document to confound clear operative language."). Why *actual language in the Second Amendment* ought to be accorded no more constructive breadth than language in the *preamble to the Constitution* is baffling. The logical conclusion emanating from this observation is that the first part of the Second Amendment "lacks any operative legal effect." To the extent that the OLC Memorandum is reading the first clause of the Second Amendment into some constitutional netherworld, its conclusion concerning the nature of the right secured by the Second Amendment is deeply flawed.

[67] *See* Van Alstyne, *supra* note 61, at 1242. There is some disagreement among individual right adherents regarding the precise scope of the militia. The disagreement is important because if the militia encompasses less than the entire citizenry, it is not synonymous with "the people" under the Second Amendment. *See* United States v. Emerson, 270 F.3d 203, 226 (5th Cir. 2001) (The Militia "referred to the generality of the civilian male inhabitants throughout their lives from teenage years until old age and to their personally keeping their own arms, and not merely to individuals during the time (if any) they might be actively engaged in actual military service or only to those who were members of special or select units."); Lund, *supra* note 61, at 106 (noting that the Eighteenth Century definition of the militia "included all citizens who qualified for military service (i.e., most adult males)."). If "the people" and the "Militia" are intratextually synonymous terms, the definition of the militia adopted by Lund and the Fifth Circuit suggests that the range of "the people" who can exercise the right to keep and bear arms would exclude large segments of the population, including women, the aged, and the infirmed.

[68] *See Emerson*, 270 F.3d at 227-29.

[69] Lund, *supra* note 61, at 107.

it is "the people" who retain the right under the Second Amendment.[70] Moreover, the private possession of firearms facilitates "familiar[ity] with the principal instruments of military combat,"[71] which ensures that the individuals who bear arms are in a position to be prepared to use them effectively should circumstances warrant their use in a military conflict.[72]

Second, individual right adherents argue that the history of the Second Amendment demonstrates that the right inures to the individual and not to the militia as a collective entity. As Professor Sanford Levinson asserts, the Second Amendment has an inextricable "linkage to conceptions of republican political order,"[73] which finds its genesis in English conceptions of liberty.[74] *Federalist 46* is often cited by individual right adherents for the proposition that the Second Amendment confers an individual right because James Madison underscored "the advantage of being armed, which the Americans possess over the people of almost every other nation."[75] Individual right adherents contend that Madison did not envision the "advantage of being armed" as conditionally effective upon one's participation in the militia, but rather as a right enjoyed among the general populace.[76]

Individual right adherents also believe that the debates concerning the adoption of the Second Amendment support an individual right. While the Constitution was ratified by the states, most states submitted additional amendments with their ratification documents, which sought to fortify the

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[70] Levinson, *supra* note 2, at 646-47.

[71] Lund, *supra* note 61, at 107.

[72] *Id.* Lund takes this proposition one step further, suggesting that the term "well-regulated" only requires that the militia "be regulated in some way." Lund argues that the widespread right to keep and bear arms under the Second Amendment could regulate the militia by ensuring that the individuals who comprise it at least have the opportunity to become trained in the use of firearms. *Id.*; *see also Emerson*, 270 F.3d at 259 (similarly arguing that "the right of individual Americans to keep, carry, and acquaint themselves with firearms does indeed promote a well-regulated militia by fostering the development of a pool of firearms-familiar citizens that could be called upon to serve in the militia"). Both of these analyses torture the definition of "well-regulated" to the point of meaninglessness. This interpretation *might* carry weight if there were a requirement that potential members of the militia (and that would encompass *all* eligible individuals) keep and bear arms as private citizens. There is no historical evidence to demonstrate that such a requirement ever existed, and indeed, no such requirement exists today.

[73] Levinson, *supra* note 2, at 650.

[74] *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *129, *141, *144. Blackstone distinguished between primary and auxiliary rights. The former referred to natural rights belonging to each individual (such as personal liberty and personal security) while the latter referred to rights that enabled the viability of these natural rights (such as "the right of having and using arms for self-preservation and defence").

[75] THE FEDERALIST NO. 46 (James Madison).

[76] Van Alstyne, *supra* note 61, at 1244-45.

Constitution with additional protections predicated on personal liberty.[77] Individual right supporters argue that the machinations and modifications of Madison's original Second Amendment proposal reflect efforts to protect its individual rather than collective character.[78] The ratification of the language that is currently the Second Amendment therefore "protects individual Americans in their right to keep and bear arms whether or not they are a member of a select militia or performing active military service or training."[79]

III. THE COURT'S SECOND AMENDMENT JURISPRUDENCE AND ITS IMPLICATIONS FOR THE INCORPORATION CONUNDRUM

A. 19TH CENTURY DECISIONS ON THE SCOPE OF THE SECOND AMENDMENT

Prior to the development of its modern incorporation doctrine[80] in *Palko v. Connecticut*[81] and *Duncan v. Louisiana*,[82] but subsequent to the enactment of the Fourteenth Amendment, the Court was confronted with the question of whether the Second Amendment was applicable against state action.[83] In *United States v. Cruikshank*,[84] two defendants were indicted for conspiring to violate the constitutional rights of African-Americans, including the right to peaceably assemble, the right to bear arms, and the right to vote in state elections. In holding that the indictment against the defendants was defective under the Enforcement Act of 1870 because it failed to properly aver violations of federal law committed by a federal entity, the Court observed that the Second Amendment "is one of the amendments that has no other effect than to restrict the powers of the national government."[85]

In rejecting a Second Amendment challenge just eleven years later, in *Presser v. Illinois*, the Court reaffirmed the principle that the Second Amendment is a "limitation only upon the power of Congress and the na-

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[77] *Emerson*, 270 F.3d at 241-44.

[78] This will be discussed more fully in Section IV.

[79] *Emerson*, 270 F.3d at 260.

[80] This will be discussed more fully in Section IV.

[81] 302 U.S. 319 (1937).

[82] 391 U.S. 145 (1968).

[83] *See* Presser v. Illinois, 116 U.S. 252 (1886); United States v. Cruikshank, 92 U.S. 542 (1875). The primary issue in *Cruikshank* was the interpretation of the Enforcement Act, an 1870 federal statute passed to enforce the rights of the citizens of the United States. The primary issue in *Presser* was the legality, under Illinois law, of individuals forming private militias in their capacity as private citizens unaffiliated with the State militia.

[84] 92 U.S. 542 (1875).

[85] *Id.* at 553.

tional government, and not upon that of the States."[86] The Court observed in *Presser* that Illinois' Military Code, which prohibited the formation and activation of a military entity not authorized by the Governor of Illinois, did not implicate the strictures of the Second Amendment where the practical impact of the Code was to preclude citizens in their private capacities from carrying firearms.[87] *Cruikshank* and *Presser* received further solidification in *Miller v. Texas*,[88] where the Court, in upholding a state firearms law against a Second Amendment challenge, opined that "it is well settled that the restrictions of these amendments operate only upon the Federal power, and have no reference whatever to proceedings in state courts."[89]

It is important to note that none of the Court's nineteenth century Second Amendment decisions purported to endorse a specific interpretive approach. *Cruikshank, Presser,* and *Miller* simply reflected the proposition that the Second Amendment posed no barrier to State regulation of firearms or firearms-related activity since the Amendment only restricted the powers of the federal government, and not those of the several States. Moreover, incorporation proponents argue, the authoritative power of *Cruikshank, Presser*, and *Miller* is dubious in light of the development of the Court's modern incorporation doctrine, which has applied many of the protections in the Bill of Rights against the States through the Fourteenth Amendment's Due Process Clause.[90]

B. *MILLER* AND ITS APPLICATION IN THE FEDERAL COURTS

The Court's first (and indeed last) definitive ruling on the scope of the Second Amendment occurred in 1939, where it upheld the National Firearms Act against a challenge from two individuals who were indicted for possessing sawed-off shotguns.[91] In *United States v. Miller,* the Court held that

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[86] 116 U.S. at 265.

[87] *Id.* at 264-65.

[88] 153 U.S. 535, 535 (1894).

[89] *Id.* at 538.

[90] *See* Levinson, *supra* note 2, at 653 (Levinson legitimately asks, "Why . . . should *Cruikshank* and *Presser* be regarded as binding precedent any more than any of the other 'pre-incorporation' decisions refusing to apply given aspects of the Bill of Rights against the states?"). Many proponents of incorporating the Second Amendment against the States, however, accord these decisions almost no precedential weight, in light of their status as dicta. *See, e.g.*, Lund, *supra* note 61, at 110 ("Now that the doctrine of incorporation is so unquestioningly applied to other provisions of the Bill of Rights, this deference to nineteenth century precedent should be abandoned, and the Supreme Court should correct or justify a patent inconsistency in the case law.").

[91] United States v. Miller, 307 U.S. 174 (1939).

> [i]n the absence of any evidence tending to show that the possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. . . . With obvious purpose to assure the continuation and render the possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made.[92]

Collective right adherents contend that *Miller* reflects the Court's conviction that the Second Amendment is only offended where federal firearms regulations adversely affect the preservation or efficiency of well-regulated, state militias.[93] Individual right adherents, however, construe *Miller* for the narrow proposition that because the possession of a sawed-off shotgun itself did not bear a relationship to the preservation or efficiency of the militia, regulating the possession of *that* particular firearm (and that firearm alone) did not violate the Second Amendment.[94] Moreover, individual right adherents contend that the Court's assertion that "the Militia comprised all males physically capable of acting in concert for the common defense . . . enrolled for military discipline"[95] is a clear testament of the Court's belief that the Second Amendment applied to all individuals *capable* of military service, thus encompassing the entire populace of the United States.[96] Since

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[92] *Id.* at 178.

[93] *See* Dorf, *supra* note 31, at 298 (arguing that "the Supreme Court has come to understand *Miller* as standing roughly for the collective right view of the Second Amendment"); Yassky, *supra* note 31, at 663 (noting that "at the very least, it is clear that the *Miller* Court avoided giving the Second Amendment a broad construction similar to that of the First").

[94] *See* Lund, *supra* note 61, at 109 ("*Miller* can be read as standing primarily for the proposition that it is not within *judicial notice* that a sawed-off shotgun is any part of the ordinary military equipment or that its use could contribute to the common defense.") (internal quotations and citations omitted); OLC MEMORANDUM, *supra* note 1 ("The nature of the weapon at issue, not of the defendants or their activities, appeared to be the key fact, and this aspect of the opinion tends to point toward the individual-right view rather than the quasi-collective-right view.").

That *Miller* could be construed for such a narrow proposition strains credulity. The National Firearms Act also prohibited the carriage by private citizens of machine guns, which have been and continue to be employed in military conflicts. While the *Miller* Court was not confronted with the question of whether federal regulation of machine guns violates the Second Amendment, the clear implication of the individual right interpretation of *Miller* is that the regulatory regime under the National Firearms Act is unconstitutional to the extent that it regulates firearms capable of usage in a military context. The logic of this narrow interpretation of *Miller* inexorably leads to the conclusion that regulating the private possession of assault rifles, bazookas, grenades, shoulder-fired missiles, and rocket launchers, all of which are commonly employed military implements, is unconstitutional as well.

[95] *Miller*, 307 U.S. at 179.

[96] *See* Levinson, *supra* note 2, at 646-47 (1989) ("There is strong evidence that 'militia' refers to all of the people, or at least all of those treated as full citizens of the community.").

Miller, the Court has not directly addressed the Second Amendment, repeatedly declining the invitation to clarify its holding.[97]

The development of Second Amendment jurisprudence has largely occurred at the federal appellate level, where courts have overwhelmingly endorsed the collective right approach or the sophisticated collective right approach, upholding federal gun regulations against Second Amendment challenges.[98] Indeed, as Professor David Yassky notes, the district court's decision in *Emerson* "was only the second in the nation's history in which a federal court used the Amendment to *invalidate* a gun control law (the first was the District Court decision in *Miller* which the Supreme Court subsequently reversed in 1939)."[99] While the Fifth Circuit, in dicta, embraced the individual right approach in *Emerson*, the court nevertheless held that the federal gun control law prohibiting individuals under domestic protective orders[100] from possessing firearms was not an unconstitutional infringement of the right to keep and bear arms under the Second Amendment.[101] Such a restriction, the court concluded, was a reasonable, narrowly tailored exception that did not infringe on the Second Amendment rights of citizens.[102]

Indeed, no federal *appellate* court has ever invalidated a federal gun control law on the basis that it infringed the right protected by the Second Amendment.[103] Federal firearm laws largely consist of restrictions on *individuals*, and the individual right approach enjoys little support in the federal courts. Rather, opponents of *Miller* and its progeny have little recourse but

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[97] *See, e.g.*, Silveira v. Lockeyer, 312 F.3d 1052 (9th Cir. 2003), *cert. denied*, 540 U.S. 1046 (2003); Hale v. United States, 978 F.2d 1016 (8th Cir. 1992), *cert. denied*, 507 U.S. 997 (1993); Farmer v. Higgins, 907 F.2d 1041 (11th Cir. 1990), *cert. denied*, 498 U.S. 1047 (1991); Quillici v. Village of Morton Grove, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983); United States v. Oakes, 564 F.2d 384 (10th Cir. 1977), *cert. denied*, 435 U.S. 926 (1978); United States v. Warin, 530 F.2d 103 (6th Cir. 1976), *cert. denied*, 426 U.S. 948 (1976); Cody v. United States, 460 F.2d 34 (8th Cir. 1972), *cert. denied*, 409 U.S. 1010 (1972).

[98] See *supra* notes 10-11 for federal appellate decisions embracing the collective right approach or the sophisticated collective right approach.

[99] Yassky, *supra* note 31, at 592.

[100] *See* 18 U.S.C. § 922(g)(8) (2004).

[101] 270 F.3d 203, 261 (5th Cir. 2001).

[102] *Id.*

[103] In recent years, however, the Court has invalidated parts of two federal gun control laws on separate grounds. *See* United States v. Lopez, 514 U.S. 549 (1995) (holding that a federal statute prohibiting gun possession within 1,000 feet of a school lacked a sufficient nexus to interstate commerce to fall within the purview of Congress' power under the Commerce Clause); Printz v. United States, 521 U.S. 898 (1997) (holding that a requirement that state law enforcement officers participate in the enforcement of federal law requiring background checks on gun purchases unconstitutionally commandeered the administrative apparatus of the State to render federal service).

to argue that the federal courts have entirely misperceived the nature of the right conferred by the Second Amendment. As a matter of practicality, however, such an argument is difficult to reconcile with the principle of *stare decisis*; embracing the individual right approach logically requires either a reevaluation of the Second Amendment by the federal courts or a wholesale condemnation of Second Amendment jurisprudence developed in the circuits.

IV. THE COURT'S MODERN INCORPORATION DOCTRINE

The addendum of a Bill of Rights reflected a profound and enduring belief among Anti-Federalists that the Constitution itself failed to provide sufficient checks on federal power.[104] While Federalists were never particularly enamored with the idea of a Bill of Rights, neither were they opposed to such a concept in principle, provided that it not disrupt the essential governmental structure ensconced in the Constitution. Lingering skepticism concerning federal hegemony under the Constitution helped precipitate the campaign for a Bill of Rights, which sought to constrain the powers of the national government in various ways.[105] Historical events following the adoption of the Constitution, however, fundamentally altered the nature of federal-state relations, effectuating a broad reexamination of the military's structure in light of the United States' historical experience.[106] The changes wrought by the Civil War culminated with the ratification of the Fourteenth Amendment, which established the framework by which the Court would reconsider its previous reluctance to incorporate the Bill of Rights against the states.[107]

A. THE FOURTEENTH AMENDMENT

Section 1 of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

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[104] Yassky, *supra* note 31, at 607.

[105] Rakove, *supra* note 31, at 126-27.

[106] Yassky, *supra* note 31, at 639. Yassky observes that in the aftermath of the Civil War, it is "unthinkable that those who framed and ratified the Fourteenth Amendment expected the military balance of power between the states and the federal government to revert to the status quo ante bellum."

[107] *See* Barron v. Baltimore, 32 U.S. 243, 250 (1883) (establishing the rule, prior to adoption of the Fourteenth Amendment, that the Bill of Rights "is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states").

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[108]

The first sentence in Section 1 of the Fourteenth Amendment effectively overruled *Dred Scott v. Sandford*,[109] where the Court infamously held that black individuals could not become citizens under the meaning of the Constitution because their "ancestors were imported into this country, and sold as slaves."[110] The second sentence in Section 1 of the Fourteenth Amendment, while more difficult to ascertain, generally evinces "an intent to protect the freed blacks, as well as others, from abuses of state power."[111] For the purposes of incorporation, the ultimate question is the extent to which the prohibitions contained in Section 1 of the Fourteenth Amendment encompass the Bill of Rights, thus constraining not only the actions of the federal government, but the actions of state governments (and their political subdivisions) as well.

With the Fourteenth Amendment as its lodestar, the Court began to squarely address this issue not long after ratification of the Fourteenth Amendment.[112] In the *Slaughter-House* cases, the Court upheld a Louisiana statute granting an exclusive license to operate a slaughterhouse in New Orleans.[113] In observing that the Fourteenth Amendment only barred States from enacting statutes that abridged the privileges and immunities of the *United States*, the Court refused to countenance the argument that the privileges and immunities of United States citizens were substantially the same as the privileges and immunities of state citizenship.[114] Moreover, the Court did not construe the Privileges and Immunities Clause of the Fourteenth Amendment as encompassing the Bill of Rights, essentially sounding the death knell for that particular clause as a textual anchor for incorporating the Bill of Rights.[115] Indeed, the Court construed the privileges and immunities protected by the clause in a restrictive fashion, citing the right to interstate travel, protection on the high seas, and the privilege to file a ha-

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[108] U.S. CONST. amend. XIV, § 1.

[109] 60 U.S. (1 How.) 393 (1857).

[110] *Id.* at 403.

[111] Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L.J. 253, 256 (1982-1983).

[112] *See* Slaughter-House Cases, 83 U.S. (1 Wall.) 36 (1870).

[113] *Id.*

[114] *Id.* at 78-79.

[115] *Id.* at 70-71. In so doing, the Court also implicitly rejected the "full incorporation" approach, most prominently championed by Justice Black. The total incorporation approach originally posited that the Privileges and Immunities of the Fourteenth Amendment were the Bill of Rights themselves. That the Court rejected the broad construction of the Privileges and Immunities Clause in the *Slaughter-House* cases suggested a more deliberative, painstaking process by which any right might be incorporated against State action.

beas corpus petition as examples of the rights afforded by the Privileges and Immunities Clause of the Fourteenth Amendment.[116]

B. THE "FUNDAMENTAL FAIRNESS" APPROACH

While essentially foreclosing the prospect of incorporating the Bill of Rights through the Privileges and Immunities Clause, the Court had not addressed the viability of incorporation through the Fourteenth Amendment's Due Process Clause. In *Hurtado v. California*, the Court rejected a defendant's claim that the Fourteenth Amendment's Due Process Clause required a *state* prosecutorial authority to secure a grand jury indictment before prosecuting an individual.[117] Despite its holding, the Court placed its imprimatur on the invocation of the Fourteenth Amendment's Due Process Clause as a potential source for incorporating provisions in the Bill of Rights, opining that due process encompasses "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[118] The procedure employed by the State of California in its indictment of Hurtado (information) preserved due process because it assured "the substantial interest of the prisoner."[119] In contributing to the "fundamental fairness" doctrine under the rubric of incorporation, the Court in *Hurtado* "established a flexible standard of justice that focused on the essence of fairness rather than the familiarity of form."[120]

The Court's "fundamental fairness" approach was refined in subsequent decisions that became harbingers for the advent of the selective incorporation approach, and, ultimately, the Court's modern incorporation doctrine. In *Powell v. Alabama*,[121] the Court held that the Due Process Clause of the Fourteenth Amendment required the appointment of counsel,

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[116] *Id.* at 79.

[117] 110 U.S. 516, 520 (1884). A federal prosecutorial authority is required to secure a grand jury indictment under the Fifth Amendment. *Id.*

[118] *Id.* at 535. While observing that States were entitled to devise and implement their "own modes of judicial proceeding," the Court was careful to observe that "it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint." *Id.* The Court's later opinions addressing the incorporation of various provisions under the Bill of Rights demonstrated that the Due Process Clause of the Fourteenth Amendment was indeed a practical restraint on the States.

[119] *Id.* at 538.

[120] Israel, *supra* note 111, at 274. As Israel explains, the underlying premise of the "fundamental fairness" approach to incorporation is that "the fourteenth amendment's due process clause was designed to make applicable to the states the same concept of due process that the fifth amendment's due process clause traditionally had made applicable to the federal government." *Id.* at 273-74.

[121] 287 U.S. 45 (1932).

under certain circumstances,[122] in serious criminal cases at the state level. After reviewing the history of the right to counsel in English law, as well as its adoption by the states, the Court determined that

> the right involved is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions is obviously one of those compelling considerations which must prevail in determining whether it is embraced within the due process clause of the Fourteenth Amendment, although it be specifically dealt with in another part of the Federal Constitution.[123]

In addressing the incorporation of the Double Jeopardy Clause under the Fifth Amendment, the Court embraced a similar approach in *Palko v. Connecticut*, where a defendant was convicted of second degree murder, but nevertheless was tried a second time and convicted of first degree murder, which carried a death sentence.[124] Following Palko's initial conviction, the State obtained a favorable ruling finding that its case was unduly prejudiced by the exclusion of certain evidence.[125] The Court asked whether the retrial and conviction of Palko on the first degree murder charge constitutes "that kind of double jeopardy to which the statute has subjected [defendant] a hardship so acute and shocking that our polity will not endure it?"[126] In noting that the State was not "attempting to wear the accused out by a multitude of cases with accumulated trials,"[127] but rather seeking only to prosecute a single trial "free from the corrosion of substantial legal error,"[128] the Court implicitly recognized that some circumstances[129] would warrant the application of the Double Jeopardy Clause against the states, but that Palko's was not one of them.[130] The right asserted by Palko, the Court observed, was not "implicit in the concept of ordered liberty."[131]

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[122] *Id.* It is important to note that *Powell* did not hold that the Due Process Clause of the Fourteenth Amendment required the appointment of counsel in *all* criminal cases. The limited principle enunciated by the Court in *Powell* is emblematic of the "fundamental fairness" approach, which posits "that only the core element of the guarantee would be a requisite of due process." Israel, *supra* note 61, at 277.

[123] *Powell*, 287 U.S. at 67 (internal quotations and citations omitted).

[124] 302 U.S. 319 (1937).

[125] *Id.*

[126] *Id.* at 328.

[127] *Id.*

[128] *Id.*

[129] The Court at the time declined to identify the circumstances under which the Double Jeopardy Clause might be applicable against the States. The Double Jeopardy Clause of the Fifth Amendment was subsequently incorporated against State action.

[130] *Palko*, 302 U.S. at 328.

[131] *Id.* at 325.

C. SELECTIVE INCORPORATION

The Court shifted its approach in the 1960's, from one of fundamental fairness to selective incorporation.[132] Fundamental fairness and selective incorporation shared similar tenets, in that they both endorsed incorporation of only those rights deemed fundamental under the Court's machinations of the "ordered liberty" standard, and both encompassed substantive as well as procedural rights, including those rights that became fundamental subsequent to the Constitution's ratification.[133] The subtle, but critical distinction between the two approaches is the scope of a fundamental right where the Court determines that protection is afforded by the Bill of Rights.[134] Professor Jerold Israel describes the difference between the two approaches in the following way:

> The fundamental fairness doctrine focuses on that aspect of the guarantee that was denied by a state in a particular case and often assesses the significance of that element of the guarantee in light of the special circumstances of the individual case. The selective incorporation doctrine, on the other hand, focuses on the total guarantee rather than on a particular aspect presented in an individual case.[135]

Selective incorporation is "wholesale" in character while fundamental fairness is particularized and incremental.[136] Selective incorporation also departs from fundamental fairness in that it "directs a court to test the fundamental nature of a right within the context of the common law system of justice, rather than against some hypothesized 'civilized system' or a foreign system growing out of different traditions."[137]

It was under this framework of selective incorporation that the Court decided incorporation cases that came before it in the 1960's, including *Duncan v. Louisiana*,[138] which established the Court's modern incorpora-

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[132] Israel, *supra* note 111, at 290.

[133] *Id.* See *supra* note 25 for constitutional rights deemed fundamental subsequent to the Constitution's ratification.

[134] Israel, *supra* note 111, at 291.

[135] *Id.* Selective incorporation thus "judges the guarantee as a whole and produces a ruling that encompasses the full scope of the guarantee. Under selective incorporation, when a guarantee is found to be fundamental, due process 'incorporates' the guarantee and extends to the states the same standards that apply to the federal government under that guarantee." *Id.* Israel opines that the two approaches are also distinguishable on the question of which party bears the burden of proving the fundamental nature of the right: "Under the fundamental fairness doctrine, the individual in effect bore the burden of showing that justice could not be served without the application of the right in question. . . . Selective incorporation, on the other hand, placed the burden on the state to show that the long-standing interpretation was beyond the needs of the guarantee." *Id.* at 329.

[136] *Id.* at 309.

[137] *Id.* at 292.

[138] 391 U.S. 145 (1968).

tion doctrine. Duncan, a young, African-American, was charged with simple battery after allegedly striking a young white man.[139] Duncan sought, but was denied, a trial by jury; Louisiana law only required a trial by jury where a potential death sentence or imprisonment at hard labor could be imposed.[140] Validating Duncan's claim that the Fourteenth Amendment's Due Process Clause demanded a jury trial upon request in criminal cases, the Court held that because a "trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee."[141]

The Court emphasized the importance of the right in the context of the "American scheme of justice," and not necessarily its historical precursor or an idealized system of justice.[142] In underscoring this American scheme of justice, the Court observed that "every American State, including Louisiana, uses the jury extensively, and imposes very serious punishments only after a trial at which the defendant has a right to a jury's verdict."[143] While the Court surmised that fair and equitable criminal processes could be devised that might obviate the need for a jury trial, it nevertheless concluded that the right to a trial by jury was "necessary to an Anglo-American regime of ordered liberty."[144]

Just as important as the Court's holding in *Duncan* was the rationale it employed in reaching its conclusion. In determining that the right to a jury trial was fundamental to the American scheme of justice, the Court examined (1) the history of the jury trial in the United States; (2) the existence of the right to a trial by jury in the state constitutions of the original States; (3) popular support for the right to a trial by jury; and (4) the purposes served by the right to a trial by jury.[145] First, the Court noted there was extensive historical evidence to demonstrate that the right to a jury trial was fundamental to the American scheme of justice.[146] Second, the Court found that

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[139] *Id.*

[140] *Id.*

[141] *Id.* at 149.

[142] *Id.* These factors are particularly important in that they personify the selective incorporation approach, as contradistinguished from the fundamental fairness approach, which embraced a more theoretical view of fundamental rights.

[143] *Id.* at 149 n.14.

[144] *Id.*

[145] *Id.* at 151-58.

[146] *Id.* at 151-53. The Court commented that "by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to [the] Magna Carta." *Id.* at 151.

the constitutions adopted by the original States guaranteed jury trials in criminal cases, and that future states entering the Union thereafter universally embraced this right "in one form or another."[147] Third, the Court opined that there was unequivocal popular support for the right to a jury trial in criminal cases, noting that the laws of every state guarantee "a right to jury trial in serious criminal cases; no State has dispensed with it; nor are there significant movements underway to do so."[148] Finally, in examining the purposes underlying the right to a jury trial in criminal cases, the Court concluded that "providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[149] Jury trial provisions in the federal and state constitutions, the Court observed, "reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges."[150]

V. INCORPORATION OF THE SECOND AMENDMENT

Since the development of the Court's modern incorporation doctrine in *Duncan*, the "battle over selective incorporation has been fought primarily in cases in which a substantial number of Justices believed that a pre-incorporation precedent interpreting a particular guarantee should not be applied to the states."[151] The Fifth Circuit's recent decision in *Emerson*, the influx of recent law journal articles endorsing the individual right approach, and the Court's reluctance to address the Second Amendment since *Miller* have fueled considerable speculation that the Second Amendment, *if* it confers an individual right, is ripe for incorporation against state action.

The Court's reluctance to address this issue, however, is better understood as a continuing endorsement of its Second Amendment jurisprudence predating the advent of its modern incorporation doctrine. Indeed, the Court's silence speaks volumes. In the post-*Duncan* era, the Court has twice declined to reconsider its position on the incorporation of the Second Amendment.[152] *Cruikshank* and *Presser*, while preceding the advent of the Court's modern incorporation doctrine, are not susceptible to their

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[147] *Id.* at 153.

[148] *Id.* at 154.

[149] *Id.* at 156.

[150] *Id.*

[151] Israel, *supra* note 111, at 298.

[152] Quillici v. Village of Morton Grove, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983); Burton v. Sills, 248 A.2d 521 (N.J. 1968), *appeal dismissed*, 394 U.S. 812 (1969).

(mis)characterization as relics of a discarded doctrine.[153] For example, the Fifth Circuit, in *Emerson v. United States*, observed the following:

> As these holdings [*Cruikshank* and *Presser*] all came well before the Supreme Court began the process of incorporating certain provisions of the first eight amendments into the Due Process Clause of the Fourteenth Amendment, and as they ultimately rest on a rationale equally applicable to all those amendments, none of them establishes any principle governing any of the issues now before us.[154]

Conspicuously absent from the Fifth Circuit's explication of *Cruikshank* and *Presser*, however, is acknowledgement of the Court's reticence to reconsider precisely this issue in *Burton v. Sillis* and *Quillici v. Village of Morton Grove*,[155] both of which were decided well after *Cruikshank* and *Presser*, and both of which were decided after the incorporation of other provisions in the Bill of Rights. The Fifth Circuit's unequivocal observation that *Cruikshank* and *Presser* are irrelevant simply finds no support in the Court's Second Amendment jurisprudence. The Fifth Circuit's rationale is also tantamount to an endorsement of full incorporation; were the Fifth Circuit's logic applied to other unincorporated rights, decisions predating the advent of the Court's modern incorporation doctrine would become similarly irrelevant, despite the fact that the Court may have declined to reconsider its decision and/or incorporate a particular right. Nothing in *Duncan* suggests that the Court's incorporation decisions predating the ratification of the Fourteenth Amendment are invalid *per se*. Conversely, *Duncan* may implicitly reinforce decisions such as *Presser* and *Cruikshank* by establishing the standard that an unincorporated right will remain so unless it is demonstrated that the particular right in question is fundamental to the American scheme of justice.

The Court's refusal to reconsider incorporation of the Second Amendment since the ratification of the Fourteenth Amendment, and, more importantly, since its decision in *Duncan*, despite being afforded the opportunity to do so, suggests the Court's endorsement of the collective right approach and its concomitant rejection of incorporation. If the Court believed the Fourteenth Amendment transformed the Second Amendment, in a similar fashion to other individual rights conferred under the auspices of the Bill of Rights, it could have seized the opportunity to incorporate the Second Amendment against the states in either *Sillis* or *Qullici*.[156] While individual right adherents view the failure to incorporate the Second Amendment as an abdication of responsibility, the more plausible explanation is that it merely

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[153] *See, e.g.*, Levinson, *supra* note 2; Lund, *supra* note 61.

[154] United States v. Emerson, 270 F.3d 203, 221 n.13 (5th Cir. 2001).

[155] *See supra* note 152.

[156] *See supra* note 152.

reflects the Court's enduring belief that the Second Amendment does not confer an individual right to keep and bear arms, and thus would not constrain state gun regulations targeting individual possession and ownership. Even were the Court to examine this issue under the factors enumerated in *Duncan*, it would ultimately conclude that the Second Amendment is not fundamental to the American scheme of justice.[157]

A. HISTORY OF THE SECOND AMENDMENT IN THE UNITED STATES AND ITS ORIGINAL UNDERSTANDING

It is important to note at the outset that there are "only a handful of sources from the period of constitutional formation that bear directly on the questions that lie at the heart of our current controversies about the regulation of privately owned firearms."[158] This complicates the task of discerning the intentions of the Framers of the Second Amendment, despite the fact that the "Second Amendment, like no other constitutional provision, puts to the test one's commitment to original intent as a source of constitutional meaning."[159] Originalism is particularly important in light of the emphasis that *Duncan* placed on the history of the right in the United States and its existence and prominence in state constitutions.

The Constitution's provisioning for military power arose from the shortcomings in the Articles of Confederation, which empowered the States at the expense of many national functions, including defense.[160] As the delegates convened in Philadelphia for the Constitutional Convention, the lessons of Shays Rebellion underscored the importance of modifying the apportionment of military power.[161] While militia companies in Massachusetts quelled Shays' Rebellion, the military response, to the extent it could be described as such, was not well-coordinated in light of the threat posed by the Rebellion.[162] That the framers of the Constitution sought to confer an individual right to keep and bear arms in the aftermath of Shays Rebellion, which magnified the practical problems of private firearms ownership,

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[157] Concededly, this is a somewhat awkward enterprise, in that the Court's modern incorporation doctrine was developed in the context of determining whether a criminal procedural protection (the right to a trial by jury in criminal cases) was at issue. The Second Amendment is not a criminal procedural protection. That being said, however, the factors enumerated in *Duncan* seem applicable in contexts beyond constitutional criminal procedure, and also provide the only clear test the Court has enunciated for determining whether a particular right ought to be incorporated against the State.

[158] Rakove, *supra* note 31, at 109.

[159] Yassky, *supra* note 31, at 593.

[160] *See* Finkelman, *supra* note 31, at 195.

[161] *Id.*

[162] *Id.* at 195-96.

belies the Second Amendment's insistence that militias be "well-regulated." As Professor Jack Rakove maintains, the Framers

> saw the militia as an institution that would henceforth be regulated through a combination of national and state legislation firmly anchored in the text of the Constitution, rather than some preexisting, preconstitutional understanding. Wherever the exact balance between national and state responsibility would be struck, the militia would always be subject to legislative regulation.[163]

1. Legislative History

The singular thrust during the debate over the Constitution at the Constitutional Convention and the Bill of Rights in the House of Representatives[164] was the relationship between state and federal power. The Anti-Federalists viewed the militia as a buffer to federal power, necessary to secure the primacy of the State as its own political entity. Anti-Federalists were particularly concerned that if Congress possessed discretionary power to arm the Militia as it saw fit, the states, and their security, would become beholden to the whims of the federal government.[165] That the state militias could potentially be allowed to atrophy was unacceptable to Anti-Federalists, who continued to fear the potential presence of a federal standing army.[166] Criticizing the Constitution's treatment of the militia, George Mason, one of the most prominent Anti-Federalists, observed at the Virginia ratifying convention that

> [t]he militia may be here destroyed by that method which has been practised in other parts of the world before; that is, by rendering them useless—by disarming them. Under various pretenses, Congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for Congress has an exclusive right to them .... Should the national government wish to render the militia useless, they may neglect them, and let them perish, in order to have a pretence of establishing a standing army.[167]

The federal government's authority for "calling forth the Militia to execute the Laws of the Union, suppress Insurrection and repel Invasions"[168] in the Constitution also deeply troubled Anti-Federalists, who perceived the clause as enabling Congress, at its discretion, to commandeer the Militia under the pretext of executing the nation's laws.[169] The Second Amendment constituted "an injunction to the federal government not to rely

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[163] Rakove, *supra* note 31, at 132.

[164] The Senate debates over the Second Amendment were held in private.

[165] *See* THE COMPLETE BILL OF RIGHTS, *supra* note 55, at 169-205.

[166] *See* Finkelman, *supra* note 31, at 205.

[167] THE COMPLETE BILL OF RIGHTS, *supra* note 55, at 193.

[168] U.S. CONST. art. I, § 8, cl. 15.

[169] THE COMPLETE BILL OF RIGHTS, *supra* note 55, at 193.

solely on its own army, but to continue to keep the militia well armed and disciplined."[170]

James Madison originally proposed to insert the language that is in the Second Amendment of the Constitution in Article I, Section 9. The original language, which became the Second Amendment after modification, said the following:

> 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.[171]

The debate over Madison's proposal in the House of Representatives focused almost exclusively on the exemption for individuals religiously scrupulous of bearing arms.[172] Anti-Federalists were particularly troubled by ensconcing any power in the Constitution that would enable the federal government to define the terms and conditions of military service.[173] Extending this type of authority in the Bill of Rights would not only empower the federal government to determine who would receive an exemption from militia service for religious reasons, but might also constitute a source of authority for the federal government in future disputes over the control of the militias.[174]

That there is not a single statement in the House of Representatives during the deliberation of the Second Amendment that suggests any legislative intent to create an individual right to keep and bear arms, distinct from one's participation in a well-regulated militia, is particularly salient in understanding the nature of the right that the Framers of the Second Amendment intended to confer.[175] Professor Jack Rakove contends that

> the extant records of deliberation (as well as the plain text) of the Constitution strongly suggest that the only issue its adopters were consciously considering was the militia, which would henceforth exist as an institution defined by law. No coherent intention or understanding of the existence and scope of a private, individual right to keep and bear arms could accordingly be derived, because that question did not present itself for public debate in the form in which we now know it.[176]

That the issue of private ownership of arms was not even broached during the debates of the First Congress thus defies the "contention that the

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[170] Rakove, *supra* note 31, at 151.

[171] THE COMPLETE BILL OF RIGHTS, *supra* note 55, at 169.

[172] *Id.* at 171-72.

[173] *Id.*

[174] *Id.* at 186-90.

[175] *Id.* at 169-91.

[176] Rakove, *supra* note 31, at 111-12.

militia would henceforth exist as a spontaneous manifestation of the community at large."[177] Indeed, the Constitution itself delegates to Congress the authority for "organizing . . . the Militia,"[178] and enacting laws that are "necessary and proper" to effectuate this purpose.[179] The responsibility for organizing the militia, entrusted to the federal government under the Constitution, necessarily delegates to the federal government the authority to determine the militia's size and membership. That Congress has exercised this authority to restrict membership to particular classes of persons eviscerates the oft-advanced assertion that the Constitution and/or the Second Amendment envisioned the militia as an unorganized, amorphous body of citizens.[180]

Following debate in the House of Representatives, but prior to deliberation by the Senate, Madison's original proposal was modified to read:

> A well-regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms, shall not be infringed, but no one religiously scrupulous of bearing arms, shall be compelled to render military service in person.[181]

Three substantive changes to Madison's proposal were made by the Senate, which deliberated secretively.[182] First, the language specifying that the militia was to be "composed of the body of the people," was eliminated.[183] Second, the clause reading "being the best security of a free State" was changed to read "being necessary to the security of a free state."[184] Third, the clause providing an exemption from bearing arms for religiously scrupulous individuals was eliminated.[185]

The Senate's most significant modification to the language adopted by the House was its clarification that the militia was not "composed of the body of the people." Individual right adherents attribute this modification to the clause's status as "unnecessary surplusage"[186] since the proposal already clarified that the "right of the people to keep and bear arms, shall not be infringed." This explanation, however, paints an incomplete picture.

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[177] *Id.* at 129.

[178] U.S. CONST. art. I, § 8, cl. 16.

[179] U.S. CONST. art. I, § 8, cl. 18.

[180] *See* 10 U.S.C § 311(a) (1999); 32 U.S.C. § 313(a) (1999).

[181] THE COMPLETE BILL OF RIGHTS, *supra* note 55, at 170.

[182] *Id.* at 175-76.

[183] *Id.* at 176.

[184] *Id.* at 175.

[185] *Id.* at 176.

[186] United States v. Emerson, 270 F.3d 203, 250 (5th Cir. 2001). Because the Senate's deliberations concerning the Second Amendment were conducted in private, possible explanations for the changes it adopted, including those that I advance, are somewhat speculative.

Article I, Section 8 specifically delegated to Congress the authority to organize the militia, and, as a corollary, to define its membership.[187] By defining the composition of the militia in the Second Amendment (perhaps an unintended consequence), Madison's initial proposal encroached upon the legislative prerogative to define the militia, already ensconced in Article I, Section 8. If the militia was to be *legislatively* defined, as the Constitution provided, its membership was inherently malleable; it could be modified at Congress' discretion. Madison's proposed Second Amendment, however, defined militia membership in an immutable fashion to include the "body of the people," a definition that was incompatible with Article I, Section 8.

The deletion of the "body of the people" from the Second Amendment thus is properly understood as a vindication of the Constitution's ascription of the militia as a legislatively defined entity, consisting not of the entire body of the people, but of those individuals who both meet Congressionally-defined criteria and engage in military service. None of the modifications adopted by the Senate suggest its insistence on an understanding of the Second Amendment as an individual right. That it ultimately eliminated the exemption for individuals religiously scrupulous of bearing arms, which consumed much of the debate in the House of Representatives, reflects a concession to Anti-Federalists who were concerned that the provision would empower Congress to assert complete control over the militia.

2. Ratification by the States

Many states that ultimately ratified the Constitution sought to address the right to keep and bear arms in amendments to their ratifying documents. Massachusetts, New Hampshire, and Pennsylvania sought specific amendments to the federal Constitution that, if adopted, would have clearly established the Second Amendment as an individual right.[188] In some instances, the proposals, attached as amendments, were initiated at the behest of minority contingents at the state conventions.[189] In Massachusetts, for example, a vociferous minority of delegates successfully attached language that proposed amending the Constitution to provide that the Constitution "never be construed . . . to prevent the people of the United States, who are peaceable citizens, from keeping their own arms."[190] New Hampshire sought to ensure that "Congress shall never disarm any Citizen unless such are or have been in Actual Rebellion."[191]

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[187] *See supra* note 180.

[188] THE COMPLETE BILL OF RIGHTS, *supra* note 55, at 181-82.

[189] *Id.*; Finkelman, *supra* note 31, at 208.

[190] THE COMPLETE BILL OF RIGHTS, *supra* note 55, at 181.

[191] *Id.*

Perhaps the most expansive interpretation of the Second Amendment was broached in a manifesto issued by a minority contingent of Pennsylvania Anti-Federalists following the state's ratification of the Constitution. The document included fourteen proposed amendments to the Constitution, many of which were "incorporated, almost word-for-word, into the Bill of Rights."[192] The substance of these proposals, and, in many instances, the exact language employed by the Pennsylvania Minority itself, ultimately became what we now recognize as the Free Exercise Clause, the Free Press Clause, and the Free Speech Clause of the First Amendment, as well as the Fourth, Fifth, Sixth, Seventh, and Eighth Amendments.[193]

Notably, however, the Framers of the Constitution thoroughly rejected the expansive right to keep and bear arms proposed by the Pennsylvania Minority. The Pennsylvania Minority's proposed Second Amendment read,

> 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 purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals.[194]

The variant of the Second Amendment championed by the Pennsylvania Minority is substantively different than the protection ultimately adopted by the Framers, approved by Congress, and ratified by the states. That the Framers declined to endorse a broader individual right comparable to that sought by the Pennsylvania Minority—a position that itself was a minority among States that submitted amendments with their ratifying documents—lends credence to the proposition that the Framers sought to provide for a limited, militia-based prerogative. That sentiment is further solidified by the Framers' simultaneous endorsement of separate individual liberties sought by the Pennsylvania Minority, the overwhelming majority of which are now contained in the Bill of Rights. The absence of the Second Amendment language sought by the Pennsylvania Minority in the Bill of Rights is thus conspicuous:

> By seeing what the framers of the Second Amendment did not do, we can better understand what they did do. . . . Had the proposals of the Pennsylvania Antifederalists on this issue been written into the Bill of Rights, the Second Amendment might be the least controversial of the first ten Amendments. It is of utmost significance, however, that unlike other aspects of the Pennsylvania proposals, which were incorporated into the Bill of Rights almost word-for-word, Madison and his colleagues in the First Con-

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[192] Finkelman, *supra* note 31, at 206.

[193] *Id.* at 206-07.

[194] THE COMPLETE BILL OF RIGHTS, *supra* note 55, at 182.

gress emphatically rejected the goals and language of the Pennsylvania Antifederalists on these issues.[195]

B. THE SECOND AMENDMENT IN THE ORIGINAL THIRTEEN STATE CONSTITUTIONS

Unlike *Duncan v. Louisiana*, where the Court noted that twelve of the thirteen original States unequivocally protected the right to a jury in a criminal trial in their constitutions, there is scant evidence that a critical mass of the original thirteen states embraced an individual right to keep and bear arms. Indeed, quite the opposite is true. Of the thirteen original colonies, five states—Delaware, Georgia, New Hampshire, New York, and Virginia—provided for the arming of the militia or provided specific exemptions for bearing arms in a military context.[196] Three states—Massachusetts, North Carolina, and Pennsylvania—provided for a "right" to keep and bear arms in some capacity in their state constitutions.[197] Four states—Connecticut, Maryland, New Jersey, and Rhode Island—did not adopt any provision at all relating to the armament of citizens, either in an individual or military capacity.[198]

The commonality among the five states (Delaware, Georgia, New Hampshire, New York, and Virginia) providing for the arming of the militia or an exemption from bearing arms is the military context in which the provision became operative. None of the aforementioned five states that

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[195] Finkelman, *supra* note 31, at 208.

[196] THE COMPLETE BILL OF RIGHTS, *supra* note 55, at 183-84. The Delaware Declaration of Rights (1776) read, "That a well regulated militia is the proper, natural and safe defence of a free government." The Georgia Constitution (1777) read, "Every county in this State that has, or hereafter may have, two hundred and fifty men, and upwards, liable to bear arms, shall be formed into a battalion." The New Hampshire Constitution (1783) read, "No person who is conscientiously scrupulous about the lawfulness of bearing arms, shall be compelled thereto, provided he will pay an equivalent." The New York Constitution (1777) read, "That the Militia of the State, at all Times hereafter, as well in Peace as in War, shall be armed and disciplined, and in Readiness for Service." It also contained a clause for religious objectors. The Virginia Declaration of Rights (1777) read, "That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural and safe defence of a free state."

[197] THE COMPLETE BILL OF RIGHTS, *supra* note 55, at 183-84. The Massachusetts' Constitution (1780) read, "The people have a right to keep and bear arms for the common defence." It also noted that danger of standing armies to liberty. The Pennsylvania Constitution (1776) read, "That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in time of peace and dangerous to liberty, they ought not to be kept up." The North Carolina Declaration of Rights (1776) read, "That the People have a Right to bear Arms for the Defense of the State; and, as standing Armies in Time of Peace are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to, and governed by, the civil Power."

[198] *Id.* at 183-84.

adopted provisions for arming the militia ever referred to a "right" that the individuals comprising the militia could assert in the event that firearm ownership or possession became restricted outside of militia service. The primacy of the state as an effective buffer to federal hegemony was the paramount concern among these states; the recognition of an individual right to keep and bear arms by these states was simply not contemplated in their constitutions.

Among the three states that provided a "right" to keep and bear arms, both Massachusetts and North Carolina specifically provided that the right exists for the common defense of the state. Pennsylvania's Constitution provided for the right to keep and bear arms in defense of the state and for self-defense. Pennsylvania was thus the *only* original state to provide that (1) there was a right to keep and bear arms and (2) the right existed outside of a military application. Moreover, to the extent that it can be construed as emblematic of the interpretation championed by individual right adherents, Pennsylvania's Constitution conferred only a limited constitutional right for the purpose of self-defense.

Were the *individual* right to keep and bear arms fundamental to the American scheme of justice, one would expect its unambiguous inclusion in the founding constitutions of the original thirteen colonies. Its *conspicuous exclusion in all but one of the thirteen state constitutions* belies the contention, advanced by supporters of incorporation, that the individual right to keep and bear arms could have been fundamental to the American scheme of justice. The *Duncan* Court, by contrast, concluded that the *inclusion of the right to a jury in criminal trials in all but one of the original thirteen state constitutions* provided substantial support for the characterization of the right as fundamental to the American scheme of justice. Since the *individual* right to keep and bear arms is present in only one of the original thirteen state constitutions—and only in a limited fashion—there is little support for the proposition that this right ought to be construed as fundamental to the American scheme of justice, particularly in light of *Duncan's* lucid frame of reference.

C. POPULAR SUPPORT FOR THE INDIVIDUAL RIGHT TO BEAR ARMS

1. The Right to Keep and Bear Arms in Modern State Constitutions

In assessing whether a particular constitutional guarantee is fundamental to the American scheme of justice, the Court also examines the popular support for the right, asking whether states have strengthened, repealed, or

substantively modified the right.[199] The absence of any genuine controversy over the meaning of the constitutional right to an impartial jury in a criminal trial simplified the Court's inquiry in *Duncan*. This is not to say that there was no genuine dispute about the scope and application of the Sixth Amendment. Indeed, the question of whether a right ought to be incorporated against the states is one of scope and application. That there existed a right to an impartial jury in criminal prosecutions, in some fashion, however, was not at issue in *Duncan*. The unambiguous existence of the right to an impartial jury in criminal trials obviated the need for the court to identify its precise contours. In so doing, it appropriately confined its inquiry to the retention and modification of that right at the state level in determining whether it was fundamental to the American scheme of justice.

The retention and modification of the Second Amendment's guarantee in state constitutions, however, presents more difficult interpretive problems. Unlike the Sixth Amendment's guarantee of an impartial jury in criminal prosecutions, the precise nature of the Second Amendment's guarantee remains the subject of intense debate. The mere existence of the right to keep and bear arms in state constitutions, therefore, is not dispositive of the substantive guarantee it provides.

The language of the right to keep and bear arms provisions in modern state constitutions suggests a popular conception of the right that is different from that envisioned by the Framers of the federal Constitution. While the framers of many state constitutions envisioned the right to keep and bear arms as an individual right, it is the restrictions on the exercise of the right that assume particular salience in resolving the larger question of whether the right is fundamental to the American scheme of justice. That the right is susceptible to its construal as an individual right does not necessitate the conclusion that the right is fundamental to the American scheme of justice. Indeed, many of the restrictions on the exercise of the right to keep and bear arms are ensconced in the state constitutions themselves,[200] suggesting the

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[199] *Id.* at 154 ("Jury trial continues to receive strong support. The laws of every State guarantee a right to jury trial in serious criminal cases; no State has dispensed with it; nor are there significant movements underway to do so. Indeed, the three most recent state constitutional revisions, in Maryland, Michigan, and New York, carefully preserved the right of the accused to have the judgment of a jury when tried for a serious crime.").

[200] *See, e.g.*, FLA. CONST., art. I, §8(a) ("The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law."); ILL. CONST., art. I, § 22 ("Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed."); LA. CONST. , art. I, § 11 ("The right of each citizen to keep and bear arms shall not be abridged, but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person."); TENN. CONST., art. I, §26 ("That the citizens of this State have a right to keep and to bear arms for their common defense; but the Legisla-

existence of a right that is fraught with qualifications and caveats, rather than a right that is fundamental to the American scheme of justice.

The language of the state constitutional provisions endowing a right to keep and bear arms can be grouped into four categories: (1) states where there is no constitutional provision for the right to keep and bear arms;[201] (2) state constitutional provisions that confer a collective right;[202] (3) state constitutional provisions that confer a limited individual right;[203] and (4) state constitutional provisions that confer a broader individual right.[204]

a. States that Provide for No Right to Keep and Bear Arms

California, Iowa, Maryland, Minnesota, New Jersey, and New York have opted not to include a provision granting the right to keep and bear arms in their Constitutions. The absence of the right to keep and bear arms in the constitutions of these states, while significant, is not dispositive of the popular support that the right enjoys.[205] That the right does not appear in the constitutions of these states, however, is dispositive of whether the right is fundamental. The characterization of a right as fundamental, at a minimum, requires its appearance in a state's constitution. It simply strains credulity to argue that the right to keep and bear arms in the aforementioned states is fundamental despite the absence of its inclusion in the preeminent document in which rights are permanently ensconced.

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ture shall have power, by law, to regulate the wearing of arms with a view to prevent crime.").

[201] There are six states in this category: California, Iowa, Maryland, Minnesota, New Jersey, and New York.

[202] There are ten states in this category: Arkansas, Hawaii, Kansas, Massachusetts, North Carolina, Ohio, Rhode Island, South Carolina, Tennessee, and Virginia.

[203] There are eighteen states in this category: Alabama, Alaska, Arizona, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Michigan, Oregon, Pennsylvania, South Dakota, Texas, Vermont, Washington, and Wyoming.

[204] There are sixteen states in this category: Colorado, Delaware, Louisiana, Maine, Mississippi, Missouri, Montana,. Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oklahoma, Utah, West Virginia, and Wisconsin.

[205] *See, e.g.*, MINN. STAT. § 624.714 (2004) (authorizing the carriage of concealed weapons with a permit issued by the State). While Minnesota's concealed firearms statute has been declared unconstitutional on other grounds, *see* Unity Church of St. Paul v. State, No. C9-03-9570, 2004 WL 1630505 (Minn. Dist. Ct. July 14, 2004), Minnesota's state legislature viewed the right of an individual to carry concealed weapons as important.

b. State Constitutional Provisions that Confer a Collective Right

The states that provide for a collective right to keep and bear arms generally do so only in the context of service to or defense of the State.[206] In many instances, the phraseology of these constitutional provisions closely resembles or is identical to the language of the Second Amendment. While there is significant controversy about the nature of the right conferred by the Second Amendment, most states have carefully distinguished their constitutional protections from the Second Amendment by explicitly crafting provisions that confer an individual right to keep and bear arms.[207] In conferring a right upon "the people" for the purpose of common defense, rather than conferring the right upon individual citizens or persons for purposes other than common defense, the states in this category envision a right that exists only for a particular purpose.

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[206] *See* ARIZ. CONST., art. II, § 5 ("The citizens of this State shall have the right to keep and bear arms, for their common defense."); GA. CONST., art. I, § 1, ¶ 8 ("The right of the people to keep and bear arms shall not be infringed, but the General Assembly shall have power to prescribe the manner in which arms may be borne."); HAW. CONST., art. I, § 17 ("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."); KAN. CONST., BILL OF RIGHTS, § 4 ("The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power."); MASS. CONST., pt. 1, art. 17 ("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."); N.C. CONST., art. I, § 30 ("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; and, as standing armies in time of peace are dangerous to liberty, they shall not be maintained, and the military shall be kept under strict subordination to, and governed by, the civil power."); OHIO CONST., art. I, § 4 ("The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power."); S.C. CONST., art. I, § 20 ("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."); R.I. CONST., art. I, § 22 ("The right of the people to keep and bear arms shall not be infringed."); TENN. CONST., art. I, § 26 ("That the citizens of this State have a right to keep and bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime."); VA. CONST., art. I, § 13 ("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, therefore, the right of the people to keep and bear arms shall not be infringed; 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.").

[207] *See infra* notes 209, 213-14.

c. State Constitutional Provisions that Confer a Limited Individual Right

The states that provide for a limited individual right to keep and bear arms generally (1) confer the right upon a citizen, a person, or persons and (2) confine this right to self-defense and defense of the State.[208] These constitutional provisions are thus distinct from the federal Constitution insofar as clarifying that the right is generally conferred upon the individual (rather than "the people") and extends to self-defense as well as defense of the state. While eighteen states have ensconced a limited individual right to keep and bear arms in their constitutions, there is little evidence to suggest that the right, though distinct from that provided in the federal Constitution, is fundamental. Indeed, confining the scope of the right to self-defense and defense of the state necessarily excludes other uses for which an individual may legitimately claim a "right" to possess or use a firearm. That a fundamental right could thrive in an environment where its exercise is both severely curtailed and subject to the states' police power is difficult to conceive.

State courts have recognized the limitations placed on the exercise of this limited individual right, strictly construing the language of the guarantee and recognizing a broad police power to regulate the carriage of firearms. In underscoring the textual limitations concerning the ambit of the right, the Connecticut Supreme Court observed that the state's constitutional right to keep and bear arms "clearly indicates what purposes are *not*

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[208] *See* ALA. CONST., art. I, § 26 ("That every citizen has a right to bear arms in defense of himself and the state."); ARIZ. CONST., art. II, § 26 ("The right of the individual citizen to bear arms in defense of himself or the State shall not be impaired . . . ."); CONN. CONST., art. I, § 15 ("Every citizen has a right to bear arms in defense of himself and the state."); FLA. CONST., art. I, § 8(a) ("The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law."); IND. CONST., art. I, § 32 ("The people shall have a right to bear arms, for the defense of themselves and the State."); MICH. CONST., art. I, § 6 ("Every person has a right to keep and bear arms for the defense of himself and the state."); OR. CONST., art. I, § 27 ("The people shall have the right to bear arms for the defence [*sic*] of themselves, and the State, but the Military shall be kept in strict subordination to the civil power."); PA. CONST., art. I, § 21 ("The right of the citizens to bear arms in defence of themselves and the State shall not be questioned."); S.D. CONST., art. 6, § 24 ("The right of the citizens to bear arms in defense of themselves and the state shall not be denied."); TEX. CONST., art. I, § 23 ("Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime."); VT. CONST., ch.I, § 16 ("That the people have a right to bear arms for the defence of themselves and the State . . . ."); WASH. CONST., art. I, § 24 ("The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men."); WYO. CONST., art. I, § 24 ("The right of citizens to bear arms in defense of themselves and of the state shall not be denied.").

accorded explicit constitutional protection: the bearing of arms for any purpose other than defense of one's self or the state."[209] The Alabama Supreme Court opined that it is "well-settled and 'universally recognized' . . . that this right of a citizen to bear arms in defense of himself and the state is subject to reasonable regulation under the police powers of the state."[210] Noting that the right to keep and bear arms under its State Constitution is only a "qualified right,"[211] the Arizona Supreme Court upheld an ordinance banning the possession of handguns in public parks, concluding that "the principle that reasonable limitations on the right to bear arms do not offend the individual constitutional rights is too well-embedded in the jurisprudence of Arizona and sister states to be the subject of great debate."[212] It is thus apparent that the existence of an individual right to keep and bear arms in State Constitutions does not inexorably lead to the conclusion that the right itself is either fundamental or transformative.

d. State Constitutional Provisions that Confer a Broader Individual Right

States that provide for a broad individual right to keep and bear arms have generally extended the circumstances under which the right can be exercised. Some states that have conferred a broader individual right, however, have only extended the right to keep and bear arms to the defense of property, as well as self-defense and defense of the state.[213] Other states in this category have extended the right to hunting, recreation, defense of

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[209] Benjamin v. Bailey, 662 A.2d 1226, 1231 (Conn. 1995).

[210] Hyde v. City of Birmingham, 392 So.2d 1226, 1227 (Ala. 1980).

[211] City of Tucson v. Rineer, 971 P.2d 207, 212 (Ariz. 1999).

[212] *Id.* at 167.

[213] *See* COLO. CONST., art. II, § 13 ("The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons."); MISS. CONST., art. 3, § 12 ("The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereto legally summoned, shall not be called in question, but the legislature may regulate or forbid carrying concealed weapons."); MO. CONST., art. I, § 23 ("That the right of every citizen to keep and bear arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; but this shall not justify the wearing of concealed weapons."); MONT. CONST., art. II, § 12 ("The right of any person to keep and bear arms in defnse of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons."); N.H. CONST., pt. 1, art. 2-a ("All persons have the right to keep and bear arms in defense of themselves, their families, their property and the state."); OKLA. CONST., art. II, § 26 ("The right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited; but nothing herein shall prevent the Legislature from regulating the carrying of weapons.").

property, and other lawful purposes, in addition to self-defense and defense of the state.[214] Maine is the only state to seemingly impose no restrictions in its constitutional provision granting the right to keep and bear arms.[215]

Despite the seemingly broader ambit of the right to keep and bear arms in these states, state appellate courts and Supreme Courts have refused to endorse the proposition that the right to keep and bear arms enjoys a special status among individual rights. Quite the opposite is true. A Colorado appellate court, in upholding the City of Denver's ordinance prohibiting the carriage of unconcealed firearms on a person and concealed firearms in a motor vehicle, flatly observed that "the right to bear arms is not a fundamental right."[216]

Were the right to keep and bear arms under state constitutions fundamental, however, one would expect state Supreme Courts to impose strict scrutiny on broad firearms regulations that encroach upon the right. Even states that recognize a broader individual right in their constitutions, however, have recognized that the right is neither fundamental, nor beyond the reach of the state's police power. In upholding the City of Portland's con-

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[214] *See* DEL. CONST., art. I, § 20 ("A person has the right to keep and bear arms for the defense of self, family, home, and State, and for hunting and recreational use."); NEB. CONST., art. I, § 1 ("All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty, the pursuit of happiness, and the right to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes, and such rights shall not be denied or infringed by the state or any subdivision thereof. To secure these rights, and the protection of property, governments are instituted among people, deriving their just powers from the consent of the governed."); NEV. CONST., art. I, § 11 ("Every citizen has the right to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes."); N.M. CONST., art. II, § 6 ("No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons."); N.D. CONST., art. I, § 1 ("All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing and obtaining safety and happiness; and to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed."); UTAH CONST., art. I, § 6 ("The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms."); W. VA. CONST., art. 3, § 22 ("A person has the right to keep and bear arms for the defense of self, family, home and state, and for lawful hunting and recreational use."); WIS. CONST., art. I, § 25 ("The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose.").

[215] *See* ME. CONST., art. I, § 16 ("Every citizen has a right to keep and bear arms and this right shall never be questioned.").

[216] Trinen v. City of Denver, 53 P.3d 754, 757 (Colo. App. 2002).

cealed weapons ordinance, for example, the Supreme Court of Maine subjected the law only to rational basis scrutiny, concluding that the ordinance was a "reasonable response to the justifiable public safety concern engendered by the carrying of concealed weapons."[217] The Nebraska Supreme Court opined that its "Right to Bear Arms amendment does not prohibit the State's reasonable regulation regarding possession of firearms . . . pursuant to the State's constitutionally valid exercise of its police power."[218]

Conceding the existence of a broader individual right in these states, the right to keep and bear arms is nevertheless subordinate to the state's police power. Of particular salience to the incorporation debate[219] is the *type* of firearms statutes that have been upheld in the face of state constitutional provisions that confer either a limited individual right or a broader individual right.[220] These state regulations are inapposite to the limited time, manner, and place restrictions that have been recognized in the context of First Amendment jurisprudence, where the challenges were predicated on fundamental freedoms incorporated against the states. The state restrictions on the right to keep and bear arms are indubitably broader, and yet State Supreme Courts have consistently upheld their validity against challenges predicated on constitutional provisions granting the right to keep and bear arms.[221] There is thus scant evidence that the mere existence of an individual right to keep and bear arms in state constitutions transforms the individual right into a fundamental right.

2. The Right to Keep and Bear Arms and Public Opinion

Public opinion polls generally reflect Americans' beliefs that the Second Amendment confers an individual right to bear arms, subject to some regulation. A December 2003 poll conducted by Gallup and the National Constitutional Center found that sixty-eight percent of Americans believe the intent of the Second Amendment was to provide individuals with the right to keep and bear arms, while twenty-eight of Americans believe that the Second Amendment provides a right only for the preservation and exis-

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[217] Hilly v. City of Portland, 582 A.2d 1213, 1215 (Me. 1990).

[218] State v. LaChapelle, 451 N.W.2d 689, 690 (Neb. 1990).

[219] It is important to note that the existence of the right to keep and bear arms in modern State constitutions is but one way to gauge the popular support for the right, which, in turn, is but one factor in the analysis of determining whether a right is fundamental to the American scheme of justice.

[220] *See, e.g.*, Kalodimos v. Village of Morton Grove, 470 N.E.2d 266 (Ill. 1984) (upholding a handgun ban against a challenge based on Illinois' constitutional provision protecting the right to keep and bear arms).

[221] *See, e.g.*, *supra* notes 209-211, 217-18.

tence of the militias.[222] Of the sixty-eight percent of Americans who believe the Second Amendment provides an individual right, eighty-two percent nevertheless believe the right is subject to some government regulation.[223] Americans thus have a nuanced view of the Second Amendment, believing it confers an individual right that is subject to governmental restrictions.

How this conception fits into the Court's modern incorporation doctrine, which considers popular support for a right, is unclear. The Court recently placed considerable emphasis on what it perceived as an emerging national consensus against executing the mentally retarded to determine that such a penalty constituted cruel and unusual punishment under the Eighth Amendment.[224] While it would seem incongruent with the countermajoritarian underpinnings of the Constitution to predicate a rule of decision on an emerging public consensus, the Court's decisions, including the development of its modern incorporation doctrine, suggest that such considerations can inform the Court's judgment. In a blistering dissent in the aforementioned death penalty case, *Atkins v. Virginia*, Chief Justice Rehnquist, who was joined by Justices Scalia and Thomas, disputed the Court's conclusion that a national consensus against the execution of the mentally retarded had emerged.[225] More importantly, Chief Justice Rehnquist and Justices Scalia and Thomas unequivocally disavowed constitutional analysis based (either in whole or in part) on vacillations in public opinion or judicial notice of emerging consensuses. While the issue before the Court in *Atkins* is wholly distinguishable from the incorporation of a constitutional right, it is difficult to envision a scenario where strict constructionists would consider the popular conception of the Second Amendment in determining whether it ought to be incorporated against state action.

Reconciling the public's endorsement of the individual right approach (subject to restrictions) with the Court's recognition of popular support for the right as a legitimate factor in addressing the incorporation issue is not as

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[222] Gallup Organization and National Constitutional Center Poll, Dec. 18, 2003 (Conducted Between Sept. 8-10, 2003). The question asked, "Which of the following comes closer to your interpretation of the Second Amendment to the Constitution—in addition to addressing the need for citizen-militias, it was intended to give individual Americans the right to keep and bear arms for their own defense, or it was intended to preserve the existence of citizen-militias, and does not give individual Americans the right to keep and bear arms for their own defense?" The poll was based on telephone conversations with 1,025 random adults (eighteen and over) from across the United States. The choices were rotated to reduce any bias that might result from consistently placing one of the choices first in the context of the question.

[223] *Id.*

[224] *See* Atkins v. Virginia, 536 U.S. 304 (2002).

[225] *Id.* at 321-28 (Rehnquist, C.J., dissenting).

simple as it may appear at first glance. If the focus is solely on the public's conception of the right as individual in nature, the conclusion logically flowing from such an emphasis is that there is popular support for the proposition that the Second Amendment confers an individual right. If, however, the focus is placed on support for restrictions on the right underlying the Second Amendment, the conclusion logically flowing from such an emphasis is that the restrictions themselves defy the conclusion that the right is somehow fundamental to the American scheme of justice.

The interminable refrain among those opposed to proposed gun regulations is that there are already thousands of gun restrictions imposed at the national, state, and local level. Conceding the validity of that figure (for the sake of argument), it then defies logic to suggest the right is somehow fundamental. Indeed, if the right to keep and bear arms was fundamental to the American scheme of justice, representative legislative bodies, elected by the very people who would be the beneficiaries of such an individual right, would not consistently enact statutes designed to restrict or undermine that right. That a number of these statutes are essentially time, manner, and place restrictions, peripherally analogous to First Amendment limitations, only partially responds to the issue. While some individual right adherents endorse these limited restrictions as constitutional exercises of power, consistent with the right to keep and bear arms as fundamental to the American scheme of justice, the most heavily populated cities in the United States have enacted restrictions that are tantamount to handgun bans; these ordinances thus accomplish far more than simply imposing spatial and temporal restrictions on the possession of firearms.

That Americans (both in large cities and smaller towns) countenance such restrictions counterpoises the conception of the Second Amendment as fundamental to the American scheme of justice. It seems unlikely that Americans would acquiesce to what individual right adherents believe are unequivocal violations of the individual and fundamental right to keep and bear arms if such restrictions were constitutionally oppressive. But Americans do respect these restrictions, not only because of their public safety benefits, but because the right to keep and bear arms, as a *constitutional* right, has never been considered fundamental to the American scheme of justice, particularly when juxtaposed with those constitutional freedoms already incorporated against the States.

D. THE PURPOSE OF THE RIGHT TO KEEP AND BEAR ARMS

Disparate conclusions about the nature of the right conferred by the Second Amendment inexorably lead to disparate conclusions about the pur-

pose(s) it serves.[226] Construing the right to keep and bear arms under the Second Amendment as a right that inures to the individual implies that the Framers preemptively sought to create a guarantee that would preclude the government from encroaching upon the right of individual citizens to own and possess firearms. In fashioning the Second Amendment, however, the Framers did not seek to prospectively obviate the threat of private firearms confiscation.[227] Both the Framers of the Second Amendment and the Delegates who debated its merits at the State Conventions sought to counterpoise the Constitution's significant delegation of military power to the federal government, which included the authority to define the parameters of militia membership. That the federal government could exercise this authority over the manner in which each State sought to protect its inhabitants was anathema to the Anti-Federalists, who construed the Second Amendment as an antidote to federal hegemony ensconced in the Constitution. [228]

Even if one accepts the dubious proposition that the Framers set out to create an individual right to keep and bear arms, there remains the question of whether that right is fundamental to the American scheme of justice, such that the Second Amendment's import demands incorporation against State action. And even if one accepts further the notion that the Second Amendment is *functionally* analogous to other constitutional guarantees and is fundamental to the American scheme of justice, there remains the question of whether the Second Amendment is *conceptually* analogous to other constitutional guarantees incorporated against State action.

Arguments that suggest the Second Amendment's guarantee is conceptually analogous to the First Amendment[229] mistakenly assume that the means by which the right is secured in both instances are inextricably intertwined with the ends it serves.[230] There is little doubt that the First Amendment not only encourages, but protects the broad circulation and dissemination of ideas.[231] Indeed, the First Amendment thrives in a flourishing

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[226] *See supra* Part II.

[227] *See supra* Part V.A.

[228] *See supra* note 167.

[229] *See, e.g.*, William C. Plouffe, Jr., *A Federal Court Holds the Second Amendment Is an Individual Right: Jeffersonian Utopia or Apocalypse Now?*, 30 U. MEM. L. REV. 56, 117 (observing that "the First and Second Amendments are inextricably intertwined: to deny one is to emasculate the other"); Van Alstyne, *supra* note 61, at 1250 ("To put the matter most simply, the governing principle here, in the Second Amendment, is not different from the same principle governing the First Amendment's provisions on freedom of speech and the freedom of the press.").

[230] *See* Benjamin v. Bailey, 662 A.2d 1226, 1235 (Conn. 1995).

[231] *See, e.g.*, Bigelow v. Virginia, 421 U.S. 809, 829 (1975) ("The policy of the First Amendment favors dissemination of information and opinion, and the guarantees of freedom of speech and press were not designed to prevent the censorship of the press merely, but any

marketplace of ideas,[232] but its robustness would indubitably wither if the government actively restricted or prohibited the manner in which ideas are communicated. It is precisely for these reasons that the Court incorporated the First Amendment's free speech guarantee against state action.[233]

The guarantee provided by the Second Amendment, however, whether it is collective or individual, is inapposite to the guarantee provided by the First Amendment. The Second Amendment does not seek to foster widespread dissemination and circulation of firearms, nor does it seek to create a marketplace for them. Under either the collective or individual right approach, the Second Amendment exists to prevent the federal government from either infringing upon the right of the entire citizenry or a segment of the citizenry to keep and bear arms. Restricting *a* means by which the Second Amendment can be exercised, unlike the First Amendment, does not inevitably weaken its guarantee. For example, a ban on the sale, possession, or use of assault weapons does not prevent the sale, possession, or use of handguns, which are commonly employed for self-defense. Restricting or even prohibiting access to certain types of firearms, then, does not infringe upon or eviscerate the right to keep and bear arms.

The purpose served by the Second Amendment is not necessarily intertwined with whether one construes its guarantee as either "individual" or "collective." The proposition that the Second Amendment is either conceptually analogous to the First Amendment, such that both guarantees are readily susceptible to comparison, or functionally analogous to the First Amendment, such that both guarantees are fundamental to the American scheme of justice, requires one to accept the premise that the Second Amendment speaks with sufficient clarity that it can be juxtaposed with the First Amendment's more lucid freedom of speech guarantee. There is simply no evidence that this is the case.

VI. CONCLUSION

Under the factors enumerated in *Duncan*, the Second Amendment is clearly not ripe for incorporation, and it is a particularly unlikely candidate for incorporation in the future. The Fifth Circuit's endorsement (in *dicta*) of the individual right approach in *Emerson* has nevertheless increased the clamor to incorporate the Second Amendment against the states. In deter-

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action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential."); Associated Press v. United States, 326 U.S. 1, 20 (1945) (noting that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public").

[232] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[233] *See generally* New York Times v. Sullivan, 376 U.S. 254 (1964).

mining that the Second Amendment confers an individual right to keep and bear arms, the Fifth Circuit implicitly endorsed incorporation when it reasoned that the Second Amendment

> does not mean that those rights may never be made subject to any *limited, narrowly tailored specific exceptions or restrictions* for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country.[234]

In employing language suggesting the imposition of strict scrutiny, however, the Fifth Circuit's conclusion conflates the two distinguishable concepts of individual rights and fundamental rights. The existence of an individual right is not dispositive of its fundamental character. Even if one construes *Emerson* as embodying the correct interpretive approach to the Second Amendment, *Duncan* requires more than a mere finding that a right is individual before it can be declared fundamental. The Fifth's Circuit's approach in *Emerson* does represent a new paradigm and, indeed, a new chapter for Second Amendment jurisprudence in the federal courts, albeit one that is at odds with the text, structure, and underlying history of the Second Amendment, as well as the doctrine of incorporation.[235] That the right to keep and bear arms is somehow fundamental to the American scheme of justice is a proposition that likely would have been rejected by the Framers of the Constitution. In many ways, it has already been rejected by the very people who would be its ostensible beneficiaries.

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[234] United States v. Emerson, 270 F.3d 203, 261 (5th Cir. 2001) (emphasis added).

[235] Fidelity to the individual right approach, however, would require much more aggressive action than the Department of Justice undertook in President Bush's first term. The Department of Justice did not submit a single brief that calls into question the constitutionality of a federal gun control regulation under the individual right approach during President Bush's first term. While the Department of Justice's brief in *Emerson* endorsed the individual right approach, it did not endorse the invalidation of the underlying federal law that Mr. Emerson challenged. Challenging the constitutionality of a federal firearms law on the basis that it violated the individual right to keep and bear arms would drag the Department of Justice into a battle that it is unwilling to substantively wage, despite its musings to the contrary.