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Federalism, Popular Sovereignty, and the Individual Right to Keep and Bear Arms: A Structural Alternative to United States v. Emerson

JACK TRACHTENBERG†

Let us not insult the free and gallant citizens of America with the suspicion that they would be less able to defend the rights of which they are in actual possession, than the debased subjects of arbitrary power would be to rescue theirs from the hands of their oppressors.

—James Madison

INTRODUCTION

Debate on guns, gun control, and the Second Amendment is “often savage.” Polar opposite positions tend

† B.A. and M.A. in Political Science, Case Western Reserve University, 1999. J.D. Candidate, University at Buffalo Law School, Spring 2002. I would like to thank my wife, Christina, for her never-ending inspiration, understanding, love, and support; my parents for providing me a loving and supportive upbringing that encouraged and allowed me to pursue my highest dreams; my brother Marc for always making me laugh and helping me keep life's ups and downs in perspective; and Professor Laura Tartakoff for acting as a model in the search for truth and justice, and for flaming my reverence of our great republic, these United States of America.

to be taken, raising intense passions suggestive of the statement "that we are experiencing a sort of low-grade war . . . between two alternative views of what America is and ought to be." Scholarly debate is often clouded by fear of possible policy implications. That there may be some link between the right of the people to bear arms and liberty is ignored, if not ridiculed.

Apprehensive of a return to the Old West, those seeking to limit or annihilate private ownership of guns cite a host of statistics to show that they are the cause of interpersonal violence. They emphasize horrific descriptions of the

3. Id.; see also Don B. Kates, Jr., Handgun Prohibition and the Original Meaning of the Second Amendment, 82 MICH. L. REV. 204, 206 (1983) ("The meaning of [the Second Amendment] has been extensively debated in light of what has aptly been termed 'The Great American Gun War.' ") (footnote omitted).


I cannot help but suspect that the best explanation for the absence of the Second Amendment from the legal consciousness of the elite bar, including that component found in the legal academy, is derived from a mixture of sheer opposition to the idea of private ownership of guns and the perhaps subconscious fear that altogether plausible, perhaps even "winning," interpretations of the Second Amendment would present real hurdles to those of us supporting prohibitory regulation.

Id. at 642 (footnotes omitted).

5. One author has stated:

[It is irresponsible to make arguments about the relationship between arms and liberty as if we did not live in . . . an era of thoroughly disintegrated public life and disintegrating social order, and an era of rampant violence within and against the urban poor and against women of all socio-economic classes.

Wendy Brown, Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism: On Sanford Levinson's The Embarrassing Second Amendment, 99 YALE L.J. 661, 665 (1989). Professor Brown goes on to recount a story of help she and her three friends received from two men when their car would not start. She describes one of the men, obviously an NRA member and gun owner, as a "California sportsman making his way through a case of beer, flipping through the pages of a porn magazine, and preparing to survey the area for his hunting club in anticipation of the opening of deer season." Id. at 666. She apparently appreciated the assistance, but it "occurred to [her] then . . . that if [s]he had run into him in those woods without [her] friends or a common project for [them] to work on, [she] would have been seized with one great and appropriate fear: rape." Id. As Professor Brown notes, "his gun could well have made the difference between an assault that [her] hard-won skills in self-defense could have fended off and one against which they were useless." Id. at 666-67.

Jonesboro and Columbine school shootings as if to imply the question: Is the cost of enforcing the right to own guns really worth it?

This outcome-based approach leads inevitably to an often passionately expressed sentiment regarding the meaning and interpretation of the U.S. Constitution. It is that the document is flexible, if not wholly vague, and designed to withstand interpretations that change with the times and problems it confronts. While common sense dictates that the words, phrases, and provisions in the Constitution contain a particular meaning and convey a specific intent, it seems reasonable that our governmental charter can withstand a degree of interpretive elasticity within the margins of its federalist structure. In the end, however, no reading of the Constitution, no matter the interpretive theory deployed, may violate the fundamental structure of our system—a structure that was designed to carefully allocate power between the people and their governments, and in the process act as the primary safeguard for our fundamental liberties and freedoms.

Part I of this Comment will begin with a brief discussion of the district court's decision in United States v. Emerson. The Emerson court interpreted the Second Amendment as protecting a personal right to bear arms. This holding contradicts many decisions in federal circuits maintaining that the Second Amendment's protections reach only the states' right to arm a militia. The Emerson court's textual and historical reading, while accurate, will lay the groundwork for an alternative analysis of the Amendment—one that provides a stronger justification for the individual rights theory and closes the door to debate on ancillary grounds such as text, history, prudence, and ethics.

Part II will explore the nature of our constitutional system. It will consider the appropriateness of the "federalism" label often placed on our governmental framework and settle more appropriately on what the Framers considered to be a "compound government" that

7. See id. at 3-4.
8. The interpretive methods typically used are textual, historical, structural, doctrinal, prudential, and ethical. See Levinson, supra note 4, at 643 (citing PHILIP BOBBITT, CONSTITUTIONAL FATE 25-119 (1982)).
incorporated both national and federal qualities. This examination will solidly establish the ultimate sovereignty of the people in our constitutional republic and confirm their unrestricted birthright to allocate, remove, and retain power and authority, as they deem appropriate. This concept of popular sovereignty will then be applied to the Bill of Rights to show that its provisions, including the Second Amendment, provide a primarily structural protection for the people, not the states.

Finally, Part III will validate the claim that the Second Amendment’s right to keep and bear arms protects the individual citizen, as well as the collective body of the people. The relationship between the Second Amendment and the congressional military powers of Article I will be contemplated, and the argument that the Amendment was intended only to ensure the proper allocation of military power between the national and state governments addressed. The notion of popular sovereignty will be reasserted to show that the right of the people to keep and bear arms necessarily connotes the right of the individual to do so.

I. United States v. Emerson

18 U.S.C. § 922(g)(8) is a relatively obscure provision of the 1994 Violent Crime Control Act. It imposes a ban on firearms possession by any individual who is subject to a restraining order. In United States v. Emerson, Judge

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11. The statute states:

(g) It shall be unlawful for any person—

(8) who is subject to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or
Samuel R. Cummings dismissed an indictment under § 922(g)(8) on the ground that the statute violates the Second Amendment of the U.S. Constitution. 15

A. Facts and Holding

The facts of the case are straightforward. Defendant Timothy Joe Emerson, a Texas physician, legally purchased a handgun in 1997. 14 One year later, his wife filed for a divorce and an application for a temporary restraining order. The order contained twenty-nine separate prohibitions aimed primarily at protecting Mrs. Emerson's financial interests. 15 It also restrained Dr. Emerson from interfering with the couple's child in various ways, from threatening or injuring his wife, and from communicating with her in a vulgar or indecent manner. 16 While Mrs. Emerson made no showing, and the judge made no finding, that Dr. Emerson had committed or was likely to commit any of the prohibited acts (she even admitted that he had never threatened her), the order was issued as a matter of routine procedure. 17 After the order was issued, Mrs. Emerson threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury . . . .
Emerson accused her husband of brandishing his pistol and federal prosecutors began an investigation. They later indicted Dr. Emerson for violating 18 U.S.C. § 922(g)(8)(C)(ii), which makes it a federal crime to possess a firearm while subject to a restraining order that explicitly prohibits violence or threatened violence against an intimate partner.18

Judge Cummings held § 922(g)(8) unconstitutional because it allowed the government to deprive Dr. Emerson of his Second Amendment rights without any finding that he posed a credible threat to anyone, let alone his wife or child.19 Without any reasonable nexus between the gun possession and a threat of violence, the statute empowers the state to arbitrarily abridge Dr. Emerson's rights simply by issuing a prophylactic, boilerplate, civil court order "prohibiting the use, attempted use, or threatened use of physical force against an intimate partner."20 As Judge Cummings stated:

[P]rosecution based on such an order would be tautological, for § 922(g)(8)(C)(i) merely repeats in different wording the requirement in subsection (B) that the order "restrains such person from harassing, stalking, or threatening an intimate

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18. The government was limited to indicting Dr. Emerson under subsection (C)(i) which only requires that a person be subject to an order that "by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against an intimate partner or child." 18 U.S.C. § 922(g)(8)(C)(i) (1994). Since there had been no finding that Emerson posed any threat to his wife or child, he could not be indicted under subsection (C)(i) which requires "a finding that such person represents a credible threat to the physical safety" of an intimate partner or child. Id. § 922(g)(8)(C)(i). Since, as a matter of routine, the order prohibited violence against his wife and child, the prosecutors were able to claim that there was an explicit prohibition in the restraining order, thus satisfying (C)(ii). See Lund, supra note 16, at 162.

19. United States v. Emerson, 46 F. Supp. 2d 598, 610 ("18 U.S.C. § 922(g)(8) is unconstitutional because it allows a state court divorce proceeding, without particularized findings of the threat of future violence, to automatically deprive a citizen of his Second Amendment rights.").

20. Id. at 611 (citing 18 U.S.C. § 922(g)(8)(C)(ii)).
partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child."  

Judge Cummings further stated that such a prosecutorial theory creates the possibility that a citizen may be stripped of his rights "not because he has committed some wrong in the past, or because a judge finds he may commit some crime in the future, but merely because he is in a divorce proceeding."  

B. Second Amendment Schools of Thought

The persuasiveness of Judge Cummings's logic should seem as obvious and uncontroversial as it does when applied to other provisions of the Bill of Rights. For instance, while the law prohibits us from libeling one another, the government may not order us to remain silent or ban our printing presses simply by issuing a court order that prohibits the use, attempted use, or threatened use of libel against another person. That would allow other branches of government, such as the legislature, to outlaw (or commandeer) private citizens' printing presses as a means to prevent libel. Such measures clearly constitute prior restraints and violate the First Amendment.

So why does the argument as applied to the Second Amendment lack the general palpability it is granted when applied to the First Amendment? Unless the Second Amendment is in some way fundamentally different than the First, should not the same argument apply? Should not the government be prohibited from abridging Second Amendment rights simply by telling you not to hurt anyone?

These questions bring us to the crux of Judge Cummings's holding, to the fundamental premise underlying his decision, and to the heart of the debate surrounding the scope of the Amendment's protections. As the Judge noted at the outset of his opinion, "[o]nly if the

21. Id. The quoted statutory language is taken from § 922(g)(8)(C)(ii).
22. Id. Judge Cummings contrasted this case to the felon in possession statute, 18 U.S.C. § 922(g)(1) (1994), which deprives a person of his Second Amendment rights upon conviction of a felony. Id.
24. Id.
Second Amendment guarantees Emerson a personal right to bear arms can he claim a constitutional violation? Judge Cummings decided it does. Most other courts disagree. While it is uniformly accepted that the First, Fourth, Fifth, Sixth, and Eighth Amendments shield the individual from governmental intrusion, a significant debate seemingly exists whether the same is true for the Second.

There are two main schools of thought. The individual rights theory falls in line with Judge Cummings's holding; it maintains that the Second Amendment's protections reach the individual. Private ownership of arms is a right "inherent in the concept of ordered liberty," and is secured by the Constitution. States' rights theorists, often citing the opening phrase of the Amendment—"A well regulated Militia, being necessary to the security of the free State”—insist that the provision only allows the states to set up and maintain militias. Under their reasoning, a protection for the individual's right to bear arms does not exist.

25. Emerson, 46 F. Supp. 2d at 600 (emphasis added).
26. In fact, the controversy is almost entirely academic, finding its voice primarily in scholarly circles. The U.S. government considers the issue "well settled' that the Second Amendment creates a right held by the States and does not protect an individual right to bear arms." Id. In the federal courts, the debate is virtually non-existent. Judge Cummings's decision "is inconsistent with a very large mountain of precedent." Lund, supra note 16, at 164. Every other court of appeals either has directly rejected Judge Cummings's approach or has failed to accept it. Id.
27. See Kates, supra note 3, at 206.
29. This theory is also referred to as the "collective rights" hypothesis. Id.; see also 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. 55, 106-07 (1999) (discussing the collective rights hypothesis).
30. U.S. CONST. amend. II. The full text of the Amendment reads: "A well regulated Militia, being necessary to the security of the free State, the right of the people to keep and bear Arms, shall not be infringed." Id.
31. Emerson, 46 F. Supp. 2d at 600; see also David E. Johnson, Taking a Second Look at the Second Amendment and Modern Gun Control Laws, 86 KY. L.J. 197, 198 (1997-98) ("[States' rights] proponents...[hold] that the right was to extend only so far as necessary for the several states to establish and maintain militias, and in no way creates or protects an individual right to own arms.") (footnote omitted); Kates, supra note 3, at 207; Plouffe, supra note 29, at 106-07 ("The collective right hypothesis refers to the idea that the right to keep and bear arms guaranteed to the 'people' in the Second Amendment is actually guaranteed to the state, by permitting the states to form and maintain militias.") (footnote omitted).
C. The Emerson Analysis

While the Emerson analysis is perfectly sound, and even persuasive, this paper seeks to provide a more convincing justification for the conclusion that the Second Amendment offers protection for the individual. Before laying out an alternative analysis, however, let us first examine Emerson's methodology and point out the reasons for its weakness.

In a fashion that is quite common among those who have debated the meaning of the Amendment, Judge Cummings engaged primarily in a textual and historical analysis to support his individual rights holding.32

1. Textual Analysis. Judge Cummings's analysis began with the context and plain language of the Amendment. He held that, fundamentally, reference to "the people" should be interpreted in the same manner it is in the First, Fourth, Fifth, and Ninth Amendments.33 He noted that the states' rights theorists improperly focus on the first clause of the Amendment ("A well regulated Militia, being necessary to the security of the free State"34) and ignore the second clause ("the right of the people to keep and bear Arms, shall not be infringed"35). A proper understanding would read both clauses "in pari materia, to give effect and harmonize both clauses, rather than construe them as being mutually exclusive."36 In other words, if the Amendment simply read, "the right of the people to keep and bear arms, shall not be infringed," there would be no debate. However, the Amendment contains two clauses, and as Judge Cummings points out, the first is subordinate and the second independent.37 Interpreting the first to qualify the second is improper. Collective rights advocates are wrong that, because it is a well-regulated militia that is necessary to the security of a free state, somehow the right of the people to keep and bear arms is constrained.38 The Amendment does not read "[t]o the extent a well regulated Militia is necessary"39 to the security of a free State, the right of the

32. Emerson, 46 F. Supp. 2d at 600-07. The opinion's historical analysis includes discussion under the subheadings of "English History," "The Colonial Right to Bear Arms," "The Ratification Debates," and "Drafting the Second Amendment." Id. at 601-07; see also Lund, supra note 16, at 162 ("Judge Cummings's opinion . . . included a lengthy discussion of the history and meaning of the Second Amendment . . . ").
people to keep and bear arms, shall not be infringed. Instead, "[w]hat the introductory phrase tells us is that this individual right is protected, at least in part, because doing so will foster a well-regulated militia."\footnote{40}

2. History. Judge Cummings further based his ruling on a historical analysis. First, the court noted that a review of English history "explains the founders' intent in drafting the Second Amendment."\footnote{41} Noting the efforts of Charles II and James II to disarm their subjects, the court focused on the right of Englishmen to bear arms as it was eventually codified in the English Bill of Rights of 1689.\footnote{42} Because this

\begin{itemize}
\item \footnote{33. Emerson, 46 F. Supp. 2d at 601; Plouffe, supra note 29, at 61; see also Lund, supra note 16, at 174 ("[M]oreover, the framers of the Bill of Rights were quite aware of the difference between the 'people' and the 'states.' Thus, the framers of this constitutional provision clearly did not mean to say that 'the right of the states to keep and bear arms shall not be infringed.' ").}
\item \footnote{34. U.S. CONST. amend. II, § 1.}
\item \footnote{35. Id. § 2.}
\item \footnote{36. Emerson, 46 F. Supp. 2d at 600-01.}
\item \footnote{37. Id. at 601; see also Lund, supra note 10, at 23 (referring to the two clauses as the "introductory phrase" and the "operative clause," respectively).}
\item \footnote{38. See Emerson, 46 F. Supp. 2d at 601 ("[I]f the amendment truly meant what collective rights advocates propose, then the text would read '[a] well regulated Militia, being necessary to the security of a free State, the right of the States to keep and bear Arms, shall not be infringed.' "). For a further discussion of a textual analysis that is in line with Judge Cummings's, see Akhil Reed Amar, The Bill of Rights 51 (1998). Professor Amar writes:}
\item \footnote{39. Johnson, supra note 31, at 200 (emphasis added).}
\item \footnote{40. Lund, supra note 10, at 23. Lund uses the Patent and Copyright Clause in Article I, § 8 to illustrate why this is the case. The clause, which is the closest grammatically to the Second, gives the Congress power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8. "Nobody thinks the prefatory language limits the reach of the granted power. It doesn't mean that Congress must stop granting copyrights to racists or pornographers ... who are hardly promoting the progress of science." Lund, supra note 10, at 21; see also Lund, supra note 16, at 175-76 (discussing the Patent and Copyright clause).}
\item \footnote{41. Emerson, 46 F. Supp. 2d at 602.}
\item \footnote{42. Id. The English Bill of Rights provided that "the subjects which are Protestants may have arms for their defense suitable to their conditions and as}
right existed prior to and concurrent with the American Revolution, the court next looked to the experience of the American colonists in the exercise of that right to bear arms.\textsuperscript{43} Statutes in effect at the time—many of which required people to maintain arms—reflect heavily on an intent to ensure the arming of the individual.\textsuperscript{44} Furthermore, it was efforts by the British, like those of Charles II and James II, to disarm the colonists that "hardened American resistance."\textsuperscript{45} Third, the court reviewed the ratification debates on the Constitution. Its review of scholarly and historical works supported the position that the Second Amendment guarantees an individual right.\textsuperscript{46} As Noah Webster remarked at his state's ratifying convention:

Before a standing army can rule the people must be disarmed; as they are in almost every kingdom in Europe. The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior

\textsuperscript{43} Emerson, 46 F. Supp. 2d at 602. The English government guaranteed to all the colonists that they would retain "all the rights of natural subjects, as if born and abiding in England." \textit{Id.} (quoting \textsc{Joyce Lee Malcolm}, \textsc{To Keep and Bear Arms: The Origins of an Anglo-American Right} 138 (1994)).

\textsuperscript{44} See id. One such Virginia law required "all masters of families' to furnish themselves and 'all those of their families which shall be capable of arms ... with arms both offensive and defensive.' \textit{Id.} (quoting \textsc{Malcolm, supra} note 43, at 139 (citing \textsc{The Old Dominion in the Seventeenth Century: A Documentary History of Virginia, 1606-1689}, at 172 (Warren M Billings ed. 1975))). Yet another Virginia statute "required 'all men that are fittinge to beare armes, shall bring their pieces to church ... for drill and target practice.'" \textit{Id.} (quoting \textsc{William W. Hening, The Statutes at Large: Being a Collection of All the Law of Virginia From the First Session of the Legislature in the Year 1619, at 173-74 (reprint 1969) (1823)}.

\textsuperscript{45} Emerson, 46 F. Supp. 2d. at 603. These efforts led directly to the formation of the Minutemen, "a nationwide select militia organization." \textit{Id.}

\textsuperscript{46} \textit{Id.} at 604-06. For further discussion of the ratification debates, see Johnson, \textit{supra} note 31, at 208. Johnson states that "[t]here was a common understanding among the Framers, based on the English tradition, and in light of their own recent experiences, that the existence of an individual right to own arms was not really a subject for debate. The necessity of gun ownership by a free citizenry was taken for granted." \textit{Id.} at 207 (footnote omitted).
to any brand of regular troops that can be, on any pretence, raised in the United States.\footnote{Emerson, 46 F. Supp. 2d at 604.}

Finally, the \textit{Emerson} court looked to James Madison, the drafter of the Second Amendment. It concluded that he clearly envisioned a personal right to bear arms.\footnote{Id. at 606. Madison's draft read: "The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms, shall be compelled to render military service." Id.}

\section*{II. The Federalism Alternative?}

As noted, Judge Cummings's analytical method in \textit{Emerson} is typical. This is not intended to imply that it is unpersuasive or unworthy of due consideration. It is, and this author, for one, is more than convinced of the accuracy and ultimate correctness of the judge's arguments and conclusions. However, while the legal discourse is replete with debate that centers on the text and history of the Second Amendment,\footnote{See, e.g., Robert Harman, \textit{The People's Right to Bear Arms—What the Second Amendment Protects: An Analysis of the Current Debate Regarding What the Second Amendment Really Protects}, 18 WHITTIER L. REV. 411 (1997); Johnson, \textit{supra} note 31, at 198 (discussing the debate between the "collective rights" and the "individual rights" schools); Plouffe, \textit{supra} note 29, at 105-06 (comparing the federal judiciary's interpretation of the right to bear arms as a collective right with that of a majority of scholars who interpret the right to keep and bear arms as an individual right).} no semblance of a consensus has been reached.

This is not surprising. Focusing solely on the text and history misses the point altogether. It partakes of a scrutiny that is divorced from a proper understanding of the Second Amendment, and in fact, the entire Bill of Rights. Argument only on the text and history of the Amendment attempts an analysis out of context. It severs the provision from the remainder of the Constitution and fails to consider the meaning of its protections within the framework of the entire government structure.

At its heart, the Constitution is a charter for republican government. Less substantive than structural, it establishes a system of government concerned with a vertical division of powers between the central and state governments, a horizontal separation of powers between the
branches of those governments, and a limitation on the power entrusted to the central government.

This structure, properly employed, is the ultimate bulwark of individual liberty. Once one understands how our republic was formed, along with its nature as constructed by the Constitution, it is easy to recognize the character of the protections inherent in the Second Amendment and other provisions of the Bill of Rights.

A. Compound Government

Federalism: It is often viewed as America’s unique invention and contribution to the world of political science. The concept, resting on the notion of limited government and a belief that the structure of its authority is primarily responsible for the protection of individual liberty, is “full of the inspired political thought of a generation schooled in the Enlightenment.” Ask a contemporary scholar what federalism is and one is likely to be referred to The Federalist. Yet, a proper understanding of our constitutional system recognizes that The Federalist itself does not characterize it as a federal government. “The proposed Constitution... is in strictness neither a national nor a federal constitution; but a composition of both.”

This reference to a compound system, comprised of national and federal characteristics, reflects a difference in

51. Id. at 554.
52. Following the Constitutional Convention in Philadelphia, opposition to the proposed constitution mobilized. Led by John Lamb, George Mason, Luther Martin, John Lansing, and Robert Yates, the Antifederalists published speeches, articles, pamphlets, and letters attacking the Convention’s plan of government. Four states—Pennsylvania, Massachusetts, Virginia, and New York—became crucial to the ratification battle. As a result, an intense propaganda effort was begun to sway the voters, especially in New York. “Publius,” the pseudonym for Alexander Hamilton, John Jay, and James Madison, went on to publish eighty-five letters that laid out the argument for ratification. See THE FEDERALIST vii-ix (Gary Wills ed., 1982). Even today the Federalist papers supply us “with the most authoritative interpretation of the Constitution.” Id. at xi.
54. THE FEDERALIST NO. 39, supra note 1, at 246 (James Madison).
terminology from that which we use today in describing our constitutional framework. We think of the Framers as having created a new "federal" system that is distinct from either a confederation or a purely national government. This modern understanding rests, in part, on a distinction between the terms "confederalism" and "federalism" that the Founders did not make. The Founding generation saw only two basic forms of government to choose from. Confederalism (simply another term for federalism) was the "mode which preserves the primacy and autonomy of the states." A national or unitary government was the "mode which gives unimpeded primacy to the government of the whole society." The Federalist then, maintained a "strict distinction between the federal and national elements in our compound political system."

Thus, if what we call our federal system is actually a compound one, it is critical to understand which elements are national and which are federal. In The Federalist No. 39, James Madison explores the compound theory and "offers a clearer and fuller account of [what we call] federalism." He provides five ways in which we can "ascertain the real character of the government."

First, Madison examines the process by which the Constitution is to be ratified. He states, "it appears ... that the Constitution is to be founded on the assent and ratification of the people of America ... not as individuals composing one entire nation; but as composing the distinct and independent States to which they respectively belong." Thus, the act of establishing the Constitution—of conferring authority upon it—is federal, not national. It requires the assent of each state as distinct entities to complete the process, albeit with power derived from the supreme authority in each state—the people.

55. Diamond, supra note 53, at 1274. The modern understanding of federalism, as we will see, also illustrates our tendency to treat but one aspect of our constitutional system as the whole of it. See id. at 1279 (discussing The Federalist's examination of federalism).
56. Id. at 1274.
57. Id.
58. Id.
59. Id. at 1278.
60. The Federalist No. 39, supra note 1, at 243 (James Madison).
61. Id. (emphasis added).
62. See id. Madison goes on to say:
Second, Madison considers the sources from which the government derives its powers. The House of Representatives is national. It obtains its power from the people of the Union. They are represented in a single body exactly as they would be in any state legislature. The Senate, however, is federal. It draws its power from the states as coequals. The Presidency contains both national and federal characteristics. The states elect the President in their political capacity, but votes are allotted to the states in “a compound ratio, which considers them partly as distinct and coequal societies; partly as unequal members of the same society.”

Third, Madison looks to the operation of the government in exercising its powers. In this sense, the government is primarily national because it can, as any other national government, reach each individual citizen. As Madison precisely makes the point:

The difference between a federal and national Government as it relates to the operation of the Government is supposed to consist of this, that in the former, the powers operate on the political bodies composing the confederacy, in their political capacities: In the latter, on the individual citizens, composing the nation, in their individual capacities.

That it will be a federal and not a national act... is obvious from this single consideration that it is to result neither from the decision of a majority of the people of the Union, nor from that of a majority of the States. It must result from the unanimous assent of the several States that are parties to it.

Id.; see also U.S. Term Limits, Inc. v. Thorton, 514 U.S. 779, 846 (1995) (Thomas, J., dissenting) (“The ultimate source of the Constitution’s authority is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole.”) (citing THE FEDERALIST No. 39, at 243 (James Madison) (Clinton Rossiter ed., 1961)).

63. See THE FEDERALIST No. 39, supra note 1, at 244 (James Madison).
64. Id.
65. See id.; Diamond, supra note 53, at 1278.
66. THE FEDERALIST No. 39, supra note 1, at 244 (James Madison).
67. Id.
68. Id.
69. Id. at 245; see also Diamond, supra note 53, at 1279.
70. THE FEDERALIST No. 39, supra note 1, at 244-45 (James Madison). Madison notes that the operation of government power is not wholly national, a “blemish [that is perhaps unavoidable],” because in several cases—particularly in the trial of controversies to which States are parties—they are proceeded against in their “collective and political capacities only.” Id.
Fourth, Madison analyzes the extent of the government's powers, noting that "[t]he idea of a national government involves in it not only an authority over the individual citizens, but an indefinite supremacy over all persons and things, so far as they are objects of lawful government."71 In this relation, the government cannot be a national one. Supremacy is not vested completely in one national legislature. Congress's jurisdiction extends only to those powers enumerated, "and leaves to the several States a residuary and inviolable sovereignty over all other objects."72 Here, it is interesting to note that Madison, in denying the national character regarding the scope of power, is not saying it is federal. It is not. Madison's notion was best conveyed by Alexis de Tocqueville's observation that, "'[c]learly here we have not a federal government but an incomplete national government.'"73 In other words, one must read Madison's third observation (regarding the extent of government's reach) and fourth observation (relating to the scope of its powers) combined, such that the central government is national to the extent of its enumerated powers, but federal in that much of the governing power remains with the people and the states.

Fifth, and last, Madison examines the amending process. It, he claims, is neither completely national nor federal in character.74 Were it national, the capability to amend the Constitution would reside in the majority of the people of the entire nation. Were it federal, the consent of each state would be necessary to alter it.75

71. Id. at 245 (emphasis added).
72. Id.
73. Diamond, supra note 53, at 1274 (quoting ALEXIS DE TOQUEVILLE, DEMOCRACY IN AMERICA 143 (J. Mayer & M. Lerner eds. 1966)) (emphasis added).
74. Id. at 1279.
75. THE FEDERALIST No. 39, supra note 1, at 246 (James Madison). Madison writes:

Were it wholly national, the supreme and ultimate authority would reside in the majority of the people of the Union; and this authority would be competent at all times, like that of a majority of every national society to alter or abolish its established government. Were it wholly federal, on the other hand, the concurrence of each State in the Union would be essential to every alteration that would be binding on all. The mode provided by the plan of the convention is not founded on either of these principles. In requiring more than a majority, and particularly in computing the proportion by States, not by citizens, it departs from the national and advances towards the federal character;
The foregoing analysis by the “father of the Constitution” supports the contention that the Second Amendment protects the individual’s right to possess arms. For there is one fundamental truth threaded through the constitutional fabric described above: The people are sovereign.

B. Popular Sovereignty

“I start with some first principles. . . . Our system of government rests on one overriding principle: all power stems from the consent of the people.” Madison’s five points on compound government make this clear. Most notably, the interplay between points one, three, and four indicate that all national power derives itself from the consent of the people as the ultimate sovereign. The people of each state assented to transfer certain of their own powers, as well as certain powers of their state governments, to a national government. Once done, the national government could act on behalf of every citizen, regardless of state citizenship, but only to effectuate those limited and enumerated powers granted to it by the people via the ratification process. Where the people did not delegate power, they kept it.

That the people are the ultimate sovereign, possessed with certain natural rights, and vested with the prerogative to retain, delegate, or remove authority as they deem appropriate is a notion that fills the national discourse of our Founding era. Deeply committed to the natural rights and social contract theories of John Locke, William Blackstone, and the Enlightenment philosophers, the Founders refused to view the people’s rights as contingent upon the good graces of any government. Rights are not the

in rendering the concurrence of less than the whole number of States sufficient, it loses again the federal, and partakes of the national character.

Id.

result of a positive grant of privilege, capable of being taken away as easily as they had been given. 79 As John Adams declared, they are “antecedent to all earthly government—Rights that cannot be repealed or restrained by human laws—Rights derived from the great legislator of the universe.” 79, 80

This “spirit of liberty,” once adopted, fueled the American Revolution. 81 It led naturally to the moral claim that the right of the people to alter their form of government is absolute. 82 As stated in the Declaration of Independence:

Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness. 83

The Declaration of Independence, with its moral justification for revolution, was the philosophical expression of individual liberty and popular sovereignty that the Framers sought to enshrine in a working constitutional order. 84 When it came time to crafting a constitutional

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80. Id. (quoting John Adams, A Dissertation of the Cannon and Feudal Law, in 1 PAPERS OF JOHN ADAMS 112 (Robert J. Taylor et al. eds., 1977)). Adams also viewed liberty as a right of nature and believed that these rights would exist in the absence of a God. See id. at 51-52.
81. See id. at 55. Adams described the American Revolution as “first and foremost a revolution ‘in the Minds of the People.’” Id. (quoting Letter from John Adams to Thomas Jefferson (Aug. 24, 1815), in 2 THE ADAMS-JEFFERSON LETTERS: THE COMPLETE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND ABAGAIL AND JOHN ADAMS 454-56 (Lester J. Cappon ed., 1971)). The colonists were “terrified” into rediscovering and restoring “the noble foundations of their ancestors.” Id. (quoting Letter from Gov. Winthrop to Gov. Bradford (Jan. 26, 1767), in 1 PAPERS OF JOHN ADAMS, supra note 80, at 192). Itroused in the “spirit of liberty” . . . necessary to acquire and then keep one’s political and civil liberty.” Id.
83. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
84. See THOMPSON, supra note 79, at 81 (stating that John Adams “sought to identify, protect, and enshrine certain basic rights and liberties from the intrusions of government”).
system, everyone agreed on two things. First, the ultimate aim was to secure the unwritten, natural law rights of the people. Second, this had to be accomplished through a written constitution.

The emphasis on a written constitution was the result of reasoned consideration regarding the abuses the colonists had suffered under the unwritten British constitution. "[T]houghtful Americans had eventually concluded that the British lacked a meaningful Constitution both because it lacked the specificity of written law and because the doctrine of Parliamentary sovereignty permitted Parliament to ignore established principle." The remedy was a written constitution that would limit the scope of the national government's power and make clear that the natural rights retained by the people fell outside the scope of these powers. A sovereign people possessed of their rights would be the ultimate bulwark for liberty, for then the license of government would be limited on the one hand by an understanding that certain natural rights could never be infringed, and on the other hand with an understanding that it could exercise no power but with the consent of the people.

There was extreme disagreement on how to best ensure that this written constitution would achieve its goal of protecting the people's rights. The Antifederalists demanded a Bill of Rights. "They repeatedly insisted that it is 'universally acknowledged' that the natural rights 'can neither be retained to themselves, nor transmitted to their posterity, unless they are expressly reserved.'"

85. See McAfee, supra note 78, at 331 ("The modern debate is not over whether it was a central end of the Constitution to secure natural rights . . . ."); see also Thompson, supra note 79, at 81 (noting that John Adams sought a written constitution based on unwritten natural law).
86. See McAfee, supra note 78, at 332-34.
87. Id. at 334 (footnote omitted).
88. See id. at 334-35. "As one modern scholar has put it, whereas the British relied on 'an unstipulated, imprecise constitution,' the Americans 'insisted in contrast that the principles and rules essential for organizing power and preserving liberty be separated from government and objectively fixed in positive form.'" Id. at 334 (quoting Herman Belz, Constitutionalism and the American Founding, in The Framing and Ratification of the Constitution 333, 337 (Leonard W. Levy & Dennis T. Mahoney eds., 1987)).
89. Id. at 339 (quoting Essays by the Impartial Examiner (Feb. 20, 1788), in 5 The Complete Anti-Federalist 329 (Herbert J. Storing ed., 1981)). The fear in failing to do this was expressed by Patrick Henry when he said that "if you
The Federalists, while opposed to a Bill of Rights, also sought to secure a constitutional status for natural rights. They relied on the Constitution’s enumeration of limited national power and an argument that a Bill of Rights would be inherently dangerous in light of this federal structure. In fact, nothing brings us to the core truth of popular sovereignty faster or more succinctly than Alexander Hamilton's argument in *Federalist No. 84* against a Bill of Rights.

Bills of rights, he argues, are agreements between kings and subjects. They constitute “abridgements of prerogative in favor of privilege, reservations of rights not surrendered to the prince.” The U.S. Constitution is in no need of one because it is “professedly founded upon the power of the people.” The people retain all rights, privileges, and powers that they have not surrendered to government. “[I]n strictness, the people surrender nothing; and as they retain every thing they have no need of particular reservations.”

Such particular reservations were not only unnecessary, but as Hamilton argued, dangerous as well. A Bill of

intend to reserve your inalienable rights, you must have the most express stipulation; for, if implication be allowed, you are ousted of those rights.” *Id.* (quoting 3 *Jonathan Elliot*, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 445 (Patrick Henry, June 14, 1788) [hereinafter *Elliot, The Debates*]).

90. *See id.* at 345-46.
92. Hamilton was not the only person to criticize the call for a Bill of Rights. James Irdell argued:

If we had formed a general legislature, with undefined powers, a bill of rights would not only have been proper, but necessary; and it would have then operated as an exception to the legislative authority in such particulars. It has this effect in respect to some of the American constitutions, where the powers of legislation are general. But where they are powers of a particular nature, and expressly defined, as in the case of the [proposed] Constitution before us, I think, for the reasons I have given, a bill of rights is not only unnecessary, but would be absurd and dangerous.

*Id.* at 347 (quoting 4 *Elliot, The Debates*, *supra* note 89, at 149 (James Irdell, July 28, 1788)).

95. *Id.*
96. *Id.* (“I go further and affirm that bills of rights, in the sense and in the extent in which they are contended for, are not only unnecessary in the
Rights "would contain various exceptions to powers which are not granted" in the first place. Logically, this opens the door for the government to claim more power than it was given. For, if the people must declare, as an example, that liberty of the press shall not be infringed, it must by implication mean that some regulatory power exists in the first instance upon which laws aimed at such rights may rest. Creating such a text that reserves a certain right creates the risk that government will seek to protect only some specifically defined right. Instead of withholding all affirmative power, bills of rights seek to negate an existing plenary authority, which if not broadly accomplished leaves room for the exertion of the government power falling outside the scope of whatever right it is that was retained. As Hamilton notes, men disposed to abuse power might argue that:

[T]he constitution ought not to be charged with the absurdity of providing against the abuse of an authority, which was not given, and that the provision against restraining the liberty of the press afforded a clear implication, that a power to prescribe proper regulations concerning it, was intended to be vested in the national government.

The creation of such constructive powers is precisely what the Constitution, establishing a structure of government with certain limited and defined powers, was intended to guard against. Thus, Hamilton viewed "[t]he Constitution ... itself, in every rational sense, and to every useful purpose, [as] a Bill of Rights."

Hamilton's and the Antifederalists' arguments both echo the founding generation's opposition to unlimited government. Hamilton and his federalist companions saw a

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97. Id. (emphasis added).
98. Id.
99. Id. at 514.
100. Ironically, Hamilton was arguing that a Bill of Rights might raise the inference that the Antifederalists were right, the new Constitution created a government of general power like the extant state constitutions—and many of the rights reserved by the limited grants of power would be forfeited because they would not all be specified in the bill of rights.
McAffee, supra note 78, at 348.
101. The Federalist No. 84, supra note 1, at 515 (Alexander Hamilton).
written constitution as a tool to limit government by dividing authority among different entities. The anti-federalists sought to ensure the confinement of national power by unambiguously placing the people’s rights beyond the reach of government, no matter how its powers were defined. Both reflect the truth expressed in the Tenth Amendment, “which serves as a reminder that there are some powers delegated to the federal government and the remaining powers are reserved to others.”

Those others, ultimately, are the people.

C. The Second Amendment: Popular Sovereignty Applied

In *McCulloch v. Maryland*, Chief Justice Marshall, in discussing the Tenth Amendment, noted that it begged “the question, whether the particular power which may become the subject of the contest has been delegated to the one government, or prohibited to the other.” The Chief Justice answered that it must “depend on a fair construction of the whole instrument.”

Unfortunately, most modern legal scholars have failed to heed the Chief Justice’s admonition. Many fall prey to the conventional wisdom that the original Constitution and the Bill of Rights represent “two very different types of regulatory strategies.” Even law school courses are delineated in this fashion. Constitutional law teaches us about the original Constitution and focuses on organizational structure, federalism, separation of powers, bicameralism, republican government, and constitutional amendment. The provisions of the Bill of Rights, thought to have little connection with these issues, are taught in separate courses. Modern thought sees the Bill of Rights in a vacuum. The scope of its provisions is defined outside the context of the entire document; these stunted explanations are asserted solely as a means to “vest individuals and

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102. Messonnier, *supra* note 82, at 222.
103. *Id.* at 233 ("Powers are distributed to the state and national governments, but the People remain the ultimate authority.").
104. 17 U.S. (4 Wheat.) 316 (1819).
105. *Id.* at 406; Bybee, *supra* note 50, at 575.
107. AMAR, *supra* note 38, at xii.
108. See id.
minorities with substantive rights against popular majorities."

This distinction is too easy. The original Bill of Rights was intended to be more structural than substantive in its protections; it was only one piece in the constitutional framework of our compound government that, as we have seen, was primarily concerned with protecting the people's rights and popular sovereignty. While there is no question that the Fourteenth Amendment significantly impacted the provisions of the Bill of Rights and their interpretation, the modern substantive view and the original structural understanding are not mutually exclusive. Acceptance of the Bill's structural role in the context of the entire charter leads us to understanding the nature of the Second Amendment's protections, even after the adoption of the Fourteenth Amendment.

We have noted two basic facts from which our discussion may proceed. First, the Framers of the Constitution envisioned a compound government. Within that compound government it is clear that its operation is national to the extent of its enumerated powers, but federal in that much of the governing power is retained. Second, the government's power rests on the consent of the people as the ultimate sovereign. Thus, the government may only operate nationally on powers granted to it by the people.

This conception of an incomplete national government resting its power on the sovereignty of the people reflects the Framers' conviction that "no 'merely federal' system would suffice for the purposes of a union." For certain governmental functions, a voluntary association of states would not be adequate. They required the powers of a truly national government. These prerogatives, outlined in Article I, section 8, constitute the entirety of power delegated by the people to the national government. When

109. Id.
111. See discussion supra Part II.A.
112. Diamond, supra note 53, at 1280 (footnote omitted).
113. All legislative power is vested in the Congress. U.S. CONST. art. I, § 1.
the government acts according to these section 8 powers, it
does so on behalf of the citizenry as a whole. Remember, it
is national in character. However, as to those powers and
rights not granted to the national government, the people
could: (1) leave it to the people of the states to delegate it to
the state or local governments; (2) proscribe the use of
power by either the national or state governments; or (3)
not delegate the power to anyone.\textsuperscript{114}

It can now be affirmatively stated that any retention of
power belongs \textit{to the people and not the states}. While the
states are procedurally involved in the ratification and
amending process, and while they may, as political entities,
exert power given to them by the people, they themselves
had nothing to delegate; thus they have nothing to retain.
The people are the ultimate sovereign and when they
explicitly withhold power or refuse to delegate it, they
retain those rights that withholding such power protects.

Clearly, the states' rights theory of the Second
Amendment cannot stand. The provisions of the Bill of
Rights are explicit restrictions against government
authority; they constitute rights retained by the people, not
the states.\textsuperscript{115} The Second Amendment, \textit{regardless of how one

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\textsuperscript{114} Messonnier, \textit{supra} note 82, at 241.
\textsuperscript{115} Having established that the Second Amendment constitutes a
reservation by the people and not the states, it is interesting to note a
jurisprudential split that appears to exist on the Supreme Court regarding the
779 (1995), the majority's position rested on the notion that the Constitution's
authority is based on the consent of the undifferentiated people of the nation as
a whole. \textit{See} Kevin J. Worthen, \textit{The Right to Keep and Bear Arms in Light of
seeks to define its text or interpret its history, provides a federalist, structural protection for a right reserved by the people as against the powers granted to the national government. It’s that simple; but let us look further.

III. AN INDIVIDUAL RIGHT

A backup position seemingly exists for those who concede the argument that the Second Amendment protects the people and not the states, but who nonetheless oppose the notion that the Amendment protects the individual’s right to keep and bear arms. It is that the popular sovereignty line of reasoning itself “provide[s] support for... the collective nature of the right.” As Professor Akhil Reed Amar more poignantly puts it: “To see the un-Reconstructed amendment as primarily concerned with an individual right to hunt or to protect one’s home is like viewing the heart of the speech and assembly clauses as the right of persons to meet to play bridge or to have sex.”

137, 141 (1998). As Justice Kennedy stated in his concurring opinion, “the majority believed that ‘the whole people of the United States... asserted their political identity... when they created the federal system.’ ” Id. (quoting Thornton, 514 U.S. at 838 (Kennedy, J., concurring)). The dissenters disagreed, holding that its ultimate authority stems from the consent of the people of each individual state. Id. This paper is entirely consistent with the Thornton dissent and views the majority opinion as having confused the operation of the national government (which is national in character to the extent of its enumerated powers) with the assent and ratification process by which the Constitution derives its authority. See discussion supra Part II.A.; Thornton, 514 U.S. at 846 (Thomas, J. dissenting). Nonetheless, both theories support this Comment’s ultimate conclusion that the Second Amendment cannot be viewed as a reservation of right or power by the states. All nine justices were in accord with the notion “that the people, as the ultimate sovereign, have certain fundamental rights of sovereignty with which [no government] can interfere without express delegation from the people.” Worthen, supra, at 141. The Thornton debate is centered narrowly on the fundamental question of “who constitutes ‘the people.’ ” Id. This debate leads to a separate argument, whereby some claim, nonetheless, that the “people”—whether of the nation or of each state—means the collective citizenry and not the individual. The argument is disingenuous and will be addressed infra Part III.A-B. For now, it suffices to say that the Amendment cannot be interpreted to be a protective reservation by the state governments.


117. AMAR, supra note 38, at 49 (footnote omitted). While Professor Amar agrees that the Second Amendment cannot be read as a states’ right provision, he views arms-bearing, prior to the adoption of the Fourteenth Amendment, as “collective, exercised in a well-regulated militia embodying a republican right of
other words, while the right may belong to the people, it does so in their collective capacity, not as individuals. This opinion, that the people's right to keep and bear arms is, nonetheless, collective, stems in part from an incomplete understanding of the nature and purpose of militias as a check upon the power of the national government.

A. Standing Armies and the Misunderstood Military Check of Federalism

One of the powers delegated to the national government by the people was the right to raise and support armies. While monetary appropriations for such armies were not to last for a period of longer than two years, many worried that permanent standing armies would form.

The threat of a standing national army was, without question, one of the most disapproved of and feared provisions in the proposed Constitution. Commentary and debate on the process of ratification abounds with condemnation of standing armies as despotic and dangerous to liberty. Accepted as “axiomatic,” at least one author

the people, collectively understood.” Id. at 259. Amar does not deny, however, that following Reconstruction and the Fourteenth Amendment, arms-bearing is “individualistic” and “private.” Id.

118. U.S. CONST. art. I, § 8, cl. 12 (giving the Congress the power to “raise and support Armies”).

119. Id.

120. See THE FEDERALIST NO. 24, supra note 1, at 157 (Alexander Hamilton). The powers proposed to be granted in the national government were met with the objection “that proper provision has not been made against the existence of standing armies in time of peace.” Id.

121. Alexander Hamilton wrote a total of eight papers in The Federalist on the necessity of the national government's military power, a disproportionately high number relative to the amount written on other subjects pertaining to the proposed Constitution. See THE FEDERALIST Nos. 22-29 (Alexander Hamilton).

122. In an address to the people of New York published in the New York Journal, “Brutus” wrote:

The liberties of a people are in danger from a large standing army, not only because the rulers may employ them for the purposes of supporting themselves in any usurpations of power, which they may see proper to exercise, but there is great hazard, than an army will subvert the forms of the government, under whose authority, they are raised, and establish one, according to the pleasure of their leaders.

“presumed it . . . useless, to enter into a laboured argument, to prove [it] to the people of America.” This same author, perhaps leaving nothing to chance, did just that. Quoting the speech of Mr. Pultney, from the floor of the House of Commons of Great Britain, on a motion for reducing the army, he writes:

I have always been, and always shall be against a standing army of any kind; to me it is a terrible thing, whether under that of a parliamentary, or any other designation; a standing army is still a standing army by whatever name it is called; they are a body of men distinct from the body of the people; they are governed by different laws, and blind obedience, and an entire submission to the orders of their commanding officer, is their only principle; the nations around us, sir, are already enslaved, and have been enslaved by those very means; by means of their standing armies they have every one lost their liberties; it is indeed impossible that the liberties of the people in any country can be preserved where a numerous standing army is kept.

This passage clearly expresses the classical republican theory that a standing army of professional soldiers is inconsistent with the concept of liberty. Whereas civilians provide short-term service to local militias, “professional soldiers owe their livelihood and income to the government.” Professional soldiers are more aligned to the interests of the government than the people, “whether its leaders are dishonest and corrupt or not.” The people are more likely to act in the republic’s best interest, regardless of whether action is needed in support or in opposition to the political leadership.

Apprehension of standing armies was as much a result of the colonists’ own experience with the British as it was of empathy for any theory or ideology. While Americans initially did not question the limited presence of the British

123. IX Brutus, An Address to the People of New York, N.Y. J. (Jan. 17, 1788), reprinted in 2 DEBATE ON THE CONSTITUTION, supra note 122, at 41.
124. Id.
125. VIII Brutus, An Address to the People of New York, N.Y. J. (Jan. 10, 1788), reprinted in 1 DEBATE ON THE CONSTITUTION, supra note 122, at 734.
126. Id.
127. Dennis, supra note 2, at 76.
128. Id.
129. See id. at 76-77.
army in the colonies, sentiment changed in the late 1760s. British officials began to question whether the colonists retained any constitutional protections and sent large garrisons to New York and Boston to enforce new imperial tax and customs collections. Tensions mounted following the Boston Massacre and the Boston Tea Party. Britain proceeded to make various constitutional remedies illegal and treasonous, and passed the despised Intolerable Acts. The outbreak of war soon followed after General Gage ordered the surrender of militia arms, "previously kept in private homes," and directed his army to confiscate arms not turned over to the government. This parade of horribles that accompanied British troop occupation led Thomas Jefferson to list among the King's "long Train of Abuses and Usurpations" the complaint that "[h]e has kept among us, in Times of Peace, Standing Armies, without the consent of our Legislature."

130. H. Richard Uviller & William G. Merkel, The Second Amendment in Context: The Case of the Vanishing Predicate, 76 CHI.-KENT L. REV. 403, 463-64 (2000). In fact, Americans welcomed the army's protection against Spanish and Indian raids, and slave insurrections. Id. at 463. Americans also benefitted economically from trade with the army and navy. Id. at 464.

131. Id. at 463-64. The redeployment of British troops to Boston and New York set off a wave of colonial resistance. See id. at 464-65. This included, "refusal of local courts and juries to enforce Crown directives, reassertion of local legislative supremacy, and revival of the local militia." Id. at 465. Others, including the Boston committee of correspondence distributed "a torrent of republican anti-army pamphlets...[that] consciously harkened back to the seventeenth century's radical, insurrectionary opposition." Id. Violent resistance was largely limited to intimidating politicians and British officials, tarring and feathering, rioting, and ransacking. Id.

132. Id. at 466.

133. Id. General Gage's orders brought "colonial hostility...to a fever pitch." Id. at 466-67. On April 19, 1775, Gage's army encountered provincial militia at Lexington and Concord, called out to defend colonial powder stores. Id. at 467. The Revolutionary War had begun. Id. For a more complete discussion of the warrantless searches and seizures of colonial firearms by the British, see Stephen P. Halbrook, Encroachments of the Crown on the Liberty of the Subject: Pre-Revolutionary Origins of the Second Amendment, 15 U. DAYTON L. REV. 91, 104-07 (1989).

134. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

135. Id. During the Constitution's ratification process, Jefferson continued to warn against standing armies and stressed the need for a bill of rights that included protections against them. See Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in ADRIENNE KOCH & WILLIAM PEDEN, THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 404-05 (1944) [hereinafter SELECTED WRITINGS OF THOMAS JEFFERSON]; Letter from Thomas Jefferson to Alexander Donald (Feb. 7, 1788), in SELECTED WRITINGS OF THOMAS JEFFERSON, supra, at
The Framers recognized, if they did not completely understand, the skepticism over the Constitution's grant of military power to Congress. Their initial response was to include a "'military check of federalism'" in Article I, section 8, clause 16. It reserves to the states, "the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." This check would arguably provide a fighting force of citizens, officered, trained, and disciplined by men chosen from the "from among themselves." In the event of government tyranny, the people, "fighting for their common liberties and united and conducted by governments possessing their affections and confidence," could organize just as they did at Lexington and Concord and Bunker Hill. The people, with the advantage of being armed would have their "national will" directed into a "national force"
by state and local governments of their immediate choosing.\(^{144}\)

This military check of federalism embodied in the original Constitution failed to satisfy many Anti-federalists. They continued to note the opening language of Article I, section 8, clause 16 which grants Congress the power, "[t]o 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."\(^{145}\) Many feared that this would provide a pretext for the national government to commandeer the militias; and if they could provide for arming them, could they not disarm them as well?\(^{146}\) Many believed the provision would allow just that:

By this [provision], sir, you see that their control over our last and best defence is unlimited. If they neglect or refuse to discipline or arm our militia, they will be useless: the states can do neither—this power being exclusively given to Congress. The power of appointing officers over men not disciplined or armed is ridiculous...\(^{147}\)

The precise purpose of the Second Amendment was to ensure, in no uncertain terms, that Congress could not disarm the militias.\(^{148}\) Nonetheless, those who view "the people" collectively point to the structural interplay between the Article I military provisions and the Second Amendment. They argue that the Amendment puts a "gloss

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\(^{144}\) Id.

Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms. And it is not certain that with this aid alone they would not be able to shake off their yokes. But were the people to possess the additional advantages of local governments chosen by themselves, who could collect the national will and direct the national force, and of officers appointed out of the militia by these governments and attached both to them and to the militia, it may be affirmed with the greatest assurance that the throne of every tyranny in Europe would be speedily overturned in spite of the legions which surround it.

\(^{145}\) Id. at 299-300 (emphasis added).

\(^{146}\) U.S. CONST. art. I, § 8, cl. 16.

\(^{147}\) See AMAR, supra note 38, at 50.

\(^{148}\) See AMAR, supra note 38, at 50.
on Article I\textsuperscript{149} such that, taken together, the Constitution seeks to make a clear distinction between an army of enlisted soldiers and a militia of citizens.\textsuperscript{150} Article I "painstakingly prescribe[s] the precise role that state governments have to play in training and organizing the militia and in appointing its officers."\textsuperscript{151} This militia system seeks "to protect liberty through localism... bringing together representative citizens to preserve popular values of their society."\textsuperscript{152} The Second Amendment, then, provides a guarantee that this collective force of liberty's bodyguard, organized and led by state officers, would remain armed. But, arms-bearing is "public, with the militia muster on the town square," and "exercised in a well-regulated militia embodying a republican right of the people."\textsuperscript{153} Weapons are to be maintained and provided by the state for the people when needed to protect their liberties.

Even if the purpose behind the Amendment is partly collective in nature, seeking to protect a community of people and not the individual, it does not follow that in practice its purpose must be effectuated collectively; it does not follow that the Amendment only protects the public storing of weapons for use by the entire populace when needed. While that may be one valid method of arming the militia, "the existence of an armed people from which to draw the militia, a people guaranteed the right to hold private arms, could have been seen as a key to fostering the militia envisioned by the Militia Clause."\textsuperscript{154} Simply put, just because the Amendment's protections may be framed, in part, to enforce the right to bear arms in the community's collective defense, it "need not imply that the [right] would

\begin{footnotes}
\item[149] Id. at 56.
\item[150] Id. at 54.
\item[151] Id.
\item[152] Id. at 55-56.
\item[153] Id. at 259.
\item[154] Thomas B. McAffee & Michael J. Quinlan, Bringing Forward the Right to Keep and Bear Arms: Do Text, History, or Precedent Stand in the Way?, 75 N.C. L. Rev. 781, 813 (1997) (emphasis added) (noting that even scholars such as Laurence H. Tribe and Michael C. Dorf, who have been hostile to the individual rights notion of the Second Amendment concede this point). Recently, Professor Tribe has shifted views, stating that the Amendment includes an individual right, "'admittedly of uncertain scope,' to 'possess and use firearms in defense of themselves and their homes.'" Tony Mauro, Scholar's Shift in Thinking Angers Liberals, USA TODAY, Aug. 27, 1999, available at http://www.saf.org/TribeUSA.html.
\end{footnotes}
have no application outside the actions of a formal militia." As with any collective right, it must be applied to and enforced in the benefit of the individuals who compose the group.

Consider the right to choose national representatives, which was at the heart of U.S. Term Limits, Inc. v. Thornton. This sovereign right is one held by the people. While the Justices in Thornton debated whether it was held collectively by the people of the nation as a whole or collectively by the people of each state, there was unanimous agreement that it belonged to some group constituting the people. "[T]he argument that the right to keep and bear arms has no individual aspect is similar to contending that the right of the people to choose their national representatives is a collective right that has no application to individuals." Just as the collective right of the people to choose representatives may only be meaningfully effectuated when "each individual member of the people has the right to vote," so too the collective right of the people to "resist usurpation by force" through arms bearing can only be meaningfully carried out if each individual has the right to own weapons.

Illustrated differently, no one would argue that the First Amendment's "right of the people peaceably to assemble" requires the bringing together of every citizen of a state to be applicable. While it does carry "the collective right of We the People to assemble in a future convention and exercise our sovereign right to alter or abolish our government," it also "protect[s] the ability of self-selected clusters of individuals to meet together." Likewise the Fourth Amendment's protection of "the right of the people to be secure in their persons, houses, papers, and effects," certainly contains a protection for individuals and not the

155. McAffee & Quinlan, supra note 154, at 820.
156. 514 U.S. 779 (1995); see also supra note 115 (discussing Thornton).
158. Id.
159. U.S. CONST. amend. I.
160. AMAR, supra note 38, at 26. Amar argues that the First Amendment's protections, while broad enough to encompass the rights of unpopular minorities, was originally intended to protect the rights of popular majorities by ensuring them a means to redress any self-serving behavior on the part of Congress that did not to reflect the majority will. Id. at 20-22.
161. U.S. CONST. amend IV.
collective citizenry only. 162 “[W]e need not view the phrase the people as sounding solely in collective, political terms . . . [because] the language is broad enough to radiate beyond its core” to protect the individual. 163

B. Back to Popular Sovereignty

Thus, that the individual is protected under the Second Amendment is, at the least, a logical alternative to effectuating what is proposed as the Amendment’s purpose of providing for a collective defense. It is also consistent with the manner in which we carry out all other collective rights. However, having gone through a line of reasoning that debates the collective rights advocates on their own turf, it seems that those who argue “the people” must be viewed collectively often succeed in steering us off the beaten path.

They concede that the Second Amendment protects the people and not the states, then turn around and use Article I to make the right a collective one that is defined and constrained by a reservation to the states of the power to appoint officers and train the men. They argue that the relationship between the Second Amendment and the debate over Congress’s militia powers indicates an attempt to ensure the proper allocation of military power between the national government and the states. 164 However, “it seems clear that the relationship between the Second Amendment and the debate over Congress’s militia powers has been greatly exaggerated by commentators anxious to limit the Amendment’s scope.” 165 Returning to the underpinnings of our popular sovereignty argument makes this obvious.

First, it must be recognized that at the time the national Bill of Rights was being formed and adopted, virtually all the state constitutions contained provisions in their bills and declarations of rights that protected the militias and the right to bear arms. 166

162. “On one reading, the amendment’s language of ‘the people’ could be read as reminding us that we must be especially watchful of government efforts to use search-and-seizure powers to interfere with the people’s political activities.” AMAR, supra note 38, at 65. 163. Id. at 67. 164. See McAffee & Quinlan, supra note 154, at 825. 165. Id. 166. Delaware’s Declaration of Rights, adopted September 11, 1776, stated
Second, it must be remembered that as the popular sovereign, the people maintain the prerogative to retain, delegate, or remove authority from government as they see fit. Protecting rights by retaining power may be accomplished either by refusing to delegate authority in the first place, or by explicitly reserving them by banning the use of power.

In view of these facts, the question becomes: “What did these [state constitutional] guarantees mean as against state governments?” The answer must be that they were efforts by the people of each state to restrain the power of the state governments. By logical necessity, the state-based protections of the right to keep and bear arms must be for the individual citizen. There is no political sub-unit of the state that can be deemed to retain the right in the way it is

“[t]hat a well regulated militia is the proper, natural and safe defence of a free government.” Del. Const. art. I, § 18, reprinted in Young, supra note 147, at 752. Maryland declared in its Declaration of Rights, adopted November 11, 1776, “[t]hat a well regulated militia is the proper and natural defence of a free government.” Md. Const. art. XXV, reprinted in Young, supra note 147, at 758. The Declaration of Rights of the Commonwealth of Massachusetts, adopted October 25, 1780, declared “[t]hat the people have a right to keep and bear arms for the common defence.” Mass. Const. pt. 1, art. XVII, reprinted in Young, supra note 147, at 773. New York, in its Constitution of April 20, 1777, provided that “the militia of this State, at all times hereafter, as well in peace as in war, shall be armed and disciplined, and in readiness for service.” N.Y. Const. art. I, § 50, reprinted in Young, supra note 147, at 764. New Hampshire’s Bill of Rights, adopted June 2, 1784, stated that “[a] well regulated militia is the proper, natural, and sure defence of a state” and that “[n]o person who is conscientiously scrupulous about the lawfulness of bearing arms, shall be compelled thereto.” N.H. Const. pt. 1, art. XIII, reprinted in Young, supra note 147, at 777-78. North Carolina’s Declaration of Rights, adopted December 18, 1776, stated “[t]hat the people have a right to bear arms, for the defence of the State.” N.C. Const. art. I, § 17, reprinted in Young, supra note 147, at 762. Pennsylvania, in its Declaration of Rights, adopted September 28, 1776, declared “[t]hat the people have a right to bear arms for the defence of themselves and the state.” Pa. Const. art. I, § 13, reprinted in Young, supra note 147, at 754. Vermont’s Declaration of Rights, adopted July 8, 1777, held “[t]hat the people have a right to bear arms for the defence of themselves and the State.” Vt. Const. ch. 1, art. XV, reprinted in Young, supra note 147, at 767. Virginia’s Bill of Rights, adopted June 12, 1776, stated “[t]hat 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.” Va. Const. art. I, § 13, reprinted in Young, supra note 147, at 748.

167. See discussion supra Part II.B.
168. See discussion supra Part II.C.
169. McAffee & Quinlan, supra note 154, at 812.
argued the states did via the Second Amendment. Any other answer leads to preposterous results:

Particularly when conceived as a right against state government, the right to "keep and bear" arms seems to be an empty shell if it includes, for example, only the right to employ a firearm while actually serving in the militia, but not a right to hold it privately. Under such a construction, the state might constitutionally disarm the people, and emasculate the protection to liberty that many thought the militia provided, merely by prohibiting private ownership of weapons and then choosing not to call the militia to duty. In light of the declaration by the people of each state regarding their individual right to keep arms, it seems implausible that the people desired to reallocate power to the national government in a manner that would allow it to abrogate their existing individual right to bear arms. Why would the people, through the Second Amendment, have sought to create a structural limitation on the national government to protect state power, with language drawn from existing state constitutional provisions that served to limit those very state governments? In other words, why would the people demand protection for a state power that was restricted or denied under the individual state constitutions? There is no sound explanation.

The real explanation as to why the Second Amendment protects the individual's right to bear arms takes us right back to the discussion earlier that proved the people and not the states were protected. It was not the debate over Congress's military powers qua militia powers that led to the adoption of the Second Amendment. The Second Amendment was not intended to assure the proper allocation of military authority between the state and the

170. *Id.* at 812-13. As a simply practical matter is seems inconsistent in the context of militia service to think that citizens would not be able to keep their arms at home. The militia was intended as a check on the power of the government. Why would the citizenry entrust their weapons to the government "for safekeeping between roll calls." Dennis, *supra* note 2, at 79. "Vesting governments with the sole right to distribute and subsequently collect and store arms when the militia is not in service would completely undermine the very purpose such a militia is designed to serve in the first place." *Id.*

171. See McAfee & Quinlan, *supra* note 154, at 826. The language of the Second Amendment was drawn directly from language included in several state constitutions. *Id.*
national governments. As noted, the argument falls apart in light of the state constitutional protections for individual arms bearing. Instead, there was a demand for the Second Amendment because many feared the national government would do an end-run around their enumerated authority, create constructive powers, and abridge the individual right to bear arms that was guaranteed by their state constitution.\footnote{172. During debate at the Federal Convention on September 12, 1787, George Mason made a proposal, seconded by Elbridge Gerry, that a bill of rights be drafted to "give great quiet to the people." YOUNG, supra note 147, at 12. Mr. Sherman responded that he "was for securing the rights of the people, where requisite," and that "[t]he state declaration of rights are not repealed by this Constitution, and, being in force, are sufficient." Id. This response is consistent with the federalist position that no bill of rights was needed because no power was given to the national government to abridge the rights of the people. That Mr. Sherman was comfortable with this is simply the counter-argument to the Antifederalists who feared the national constitution would allow Congress to abridge the rights protected by the state constitutions.} That such constructive power would be deployed via Congress’s military power was only one, extremely likely, possibility. However, "as with the other individual rights guarantees included in the first eight amendments . . . the Second Amendment stemmed from a general fear that the national government was empowered . . . to invade well-established rights of importance to the people."\footnote{173. Id. at 830.} The national Bill of Rights was needed to provide constitutional protection "for all of the fundamental and essential rights of the people as contained in the state bills of rights."\footnote{174. YOUNG, supra note 147, at xlv (emphasis added).} The people wanted to ensure that their original retention of right and power, reserved as individuals against the states, was not unwittingly usurped by creating a United States of America.

**CONCLUSION**

On October 16, 2001, the Fifth Circuit Court of Appeals rendered their decision on appeal in *United States v. Emerson*.\footnote{175. The Fifth Circuit's decision is reported at 270 F.3d 203.} The Court dedicated approximately forty-two pages to discussing the text and history of the Second Amendment.\footnote{176. See Emerson, 270 F.3d at 218-60. As noted, the district court utilized the same mode of analysis. See discussion supra Part I.C.} It agreed with the district court’s determin-
that the Amendment protects an individual right to keep and bear arms. Nonetheless, the Court reversed the district court's decision because § 922(g)(8), as applied to Dr. Emerson, did not violate his constitutional rights. Specifically, the Court held that the lack of express findings regarding whether Dr. Emerson posed a credible threat to the safety of his wife or child was not inappropriate. Section 922(g)(8) requires only that "the order 'explicitly' prohibit the use . . . of physical force that would reasonably be expected to cause bodily injury." The Court reasoned that Congress expected the existing state laws to provide the appropriate mechanism for determining whether an injunction should be ordered and that the prohibitions of the statute would not be triggered otherwise. Since Texas law meets the general minimum standards for determining when an injunction should be issued, Dr. Emerson's rights were not violated.

Dr. Emerson has appealed the Fifth Circuit's decision to the United States Supreme Court. While the issue appears limited to whether § 922(g)(8) is unconstitutional as applied to Dr. Emerson, that issue cannot be resolved without first determining whether the Second Amendment actually protects an individual right. Thus, if the Court grants certiorari, it will likely be presented with the duty of resolving the Circuit split on the meaning of the Amendment. The Court would have the opportunity "to either enshrine or eliminate the Second Amendment right to keep and bear arms."

177. One line of questioning during oral arguments before the Fifth Circuit panel (consisting of one Reagan, one Bush, and one Clinton appointee) foreshadowed this result. See The "Good" and "Bad" of the Emerson Appeal Oral Argument, at http://www.saf.org/pub/rkba/news/EmersonOralArguments.htm (last visited Oct. 12, 2001). After the U.S. Attorney insisted that the Second Amendment does not protect the right of the individual to keep and bear arms, and that it only protects the bearing of arms that are used in service to the National Guard, Judge DeMoss, Jr. stated to counsel, "You shouldn't let it bother your sleep that Judge Garwood [the senior judge] and I, between us, own enough guns to start a revolution in most South American countries." Id.
178. Emerson, 270 F.3d at 261-65.
179. Id.
180. Id. at 261.
181. Id. at 262.
182. Id.
184. See Fifth Circuit Facing Another Tough Decision: Emerson Impact
If the Supreme Court should ever decide the case, the Justices would show great wisdom in considering the statement that "what it means to take rights seriously is that one will honor them even when there is significant social cost in doing so."¹⁸⁵ Prudential arguments are inconsequential when it comes to fundamental liberty; just as some criminals must go free and some groups must be forced to listen to vitriolic hate speech, so too must society learn to accommodate the untoward side-effects of protecting the individual's right to bear arms.¹⁸⁶

The object of this Comment was to show that the right to keep and bear arms is a fundamental liberty of the individual, embodied in and protected by our constitutional framework. It has sought to provide the reader with more than a "few ripe quotations"¹⁸⁷ regarding the text or history of the Second Amendment. It has appealed to the twin pillars of federalism (as a component of our compound government) and popular sovereignty that hold up the roof of our constitutional republic. These pillars provide more protection for the rights of the people of this great nation than any individual component one may look at. The text is important. So is the history. But in the end, it is the preservation of the balance of power between the people and their governments, of the right of the people to retain that which they have not given up, which is best suited to shield our freedoms and liberties.


¹⁸⁵. Levinson, supra note 4, at 658.
¹⁸⁶. See id.
¹⁸⁷. BELLESILES, supra note 6, at 14.