THE INDIVIDUAL RIGHT TO BEAR ARMS FOR COMMON DEFENSE

Robert Leider*

ABSTRACT

The fundamental Second Amendment debate has reached a stalemate. On the one side are those who believe that the Second Amendment secures an individual right to keep and bear arms for self-defense against crime. On the other are those who consider the right to bear arms to be a collective right to maintain a militia. But there is a third theory of the right to bear arms—a theory that was once generally agreed upon but has largely been forgotten: the right to bear arms is an individual right for common defense.

This Article defines this theory and explains the role of an individual right to bear arms in the Constitution's military structure. The Constitution allowed for dual land forces, a professional standing army and an amateur militia. The Second Amendment responded to concerns about the dangers of professionalizing the land forces by preserving the ability of citizens to act as amateur soldiers. Contrary to the dominant academic narrative, the Second Amendment did not primarily address military federalism. Finally, this Article defends why the individual right for common defense theory is sounder than either collective-right theories or the individual-right theories that have emerged in federal courts after *Heller*, which are focused exclusively on individual self-defense against crime.

* Associate Professor, George Mason University, Antonin Scalia Law School. My thanks to Will Baude, Caroline Cecot, Eric Claeys, Ashley Hlebinsky, Dave Kopel, Craig Lerner, Nelson Lund, Taylor Meehan, George Mocsary, Haley Proctor, Richard Re, Jonathan Urick, and the participants of the Firearms Law Works-in-Progress Conference. Thank you also to D. Anthony Cash and Nicholas Sierco for research assistance. Some footnotes have been adapted from previous articles.

Contents

INTRODUCTION

The Second Amendment marries the desire to preserve "[a] well regulated Militia" with "the right of the people to keep and bear Arms."[1] Recently, however, the Second Amendment and the militia have divorced. In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment protects an individual right of citizens, including those not enrolled in a state-organized militia, to keep and bear arms for personal self-defense against crime.[2] Subsequently, in *New York State Rifle & Pistol Association v. Bruen*, the Court held that the Second Amendment protected the right to carry handguns outside the home for personal self-defense.[3] Neither opinion explained how an individual right to bear arms continues to provide for the militia and public defense.

In the lower courts, these decisions have transformed the Second Amendment from one extreme to the other. Before *Heller*, most federal courts (and a few state courts) had held that the right to bear arms secured by the Second Amendment and some state analogues afforded no constitutional protection for individuals to keep and bear arms.[4] In their view, the Second Amendment protected only a collective right—either a right of states to organize and arm their military forces or a right of individuals enrolled in an organized militia to keep and bear their military arms. After *Heller* and *Bruen*, these courts have gone entirely in the other direction. They now treat the Second Amendment as though it protects keeping and bearing arms exclusively for individual self-defense against crime.[5] When evaluating the constitutionality of gun control laws, modern cases contain virtually no discussion of the Second Amendment's military objective—the one aim provided in the Amendment's text.[6]

In scholarship, too, neither side of the Second Amendment debate explains the connection between an armed populace and the maintenance of modern military forces.

---

[1] U.S. CONST. amend. II.

[2] District of Columbia v. Heller, 554 U.S. 570, 595 (2008).

[3] New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 10 (2022).

[4] *E.g.*, United States v. Rybar, 103 F.3d 273, 286 (3d Cir. 1996); Love v. Pepersack, 47 F.3d 120, 122 (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, 99 (9th Cir. 1996); United States v. Oaks, 564 F.2d 384 (10th Cir. 1977); City of Salina v. Blaksley, 83 P. 619, 620 (Kan. 1905); Commonwealth v. Davis, 343 N.E.2d 847, 848–49 (Mass. 1976); Burton v. Sills, 248 A.2d 521, 528 (N.J. 1968).

[5] *E.g.*, Bianchi v. Brown, 111 F.4th 438 (4th Cir. 2024); Bevis v. City of Naperville, 85 F.4th 1175 (7th Cir. 2023); Delaware State Sportsmen's Ass'n, Inc. v. Delaware Dep't of Safety & Homeland Sec., 664 F. Supp. 3d 584, 602 (Del. 2023); Kolbe v. Hogan, 849 F.3d 114, 137 (4th Cir. 2017); Friedman v. City of Highland Park, 784 F.3d 406 (7th Cir. 2015); Hanson v. District of Columbia, 571 F. Supp. 3d 1, 12 (D.D.C. 2023); New York State Rifle & Pistol Ass'n, Inc. v. Cuomo, 804 F.3d 242, 263 (2d Cir. 2015); *see also* Delaware State Sportsmen's Ass'n, Inc. v. Delaware Dep't of Safety & Homeland Sec., 108 F.4th 194, 207 (3d Cir. 2024) (Roth, J., concurring) (slip op. at 10–11).

[6] Cases cited *supra* note 5; Hanson v. District of Columbia, 120 F.4th 223 (D.C. Cir. 2024). Or if they contain any discussion about the militia at all, it is to categorically exclude arms primarily useful for the militia. *See, e.g.*, *Kolbe*, 849 F.3d at 131; *Bevis*, 85 F.4th at 1193.

Individual rights scholars, who deny the right to bear arms is conditioned on a person's enrollment in a well-regulated militia, argue that the Second Amendment is primarily relevant today by allowing individuals to defend themselves from criminal violence.[7] Most individual rights scholars also argue that the Second Amendment permits citizens to defend themselves from a tyrannical government.[8] Beyond this, they have written virtually nothing on how the right to keep and bear arms furthers the Amendment's goal of maintaining a well-regulated militia.

For collective rights scholars, the proper metaphor is not divorce but extinction. Collective rights scholars argue that the Framing-era universal militia no longer exists, and with its disappearance, they deny that a general right to keep and bear arms currently furthers the maintenance of a well-regulated militia.[9] Many collective rights scholars and judges further treat the Second Amendment as a federalism provision that protects the state's right to maintain military forces without interference by the federal government.[10] The modern National Guard system, however, has subsumed the National Guard (with the states' consent) into the federal Armed Forces. Under these circumstances, they believe that the Second Amendment has become anachronistic,[11] and they bemoan *Heller*'s conclusion that the Second Amendment protects an individual right at all.[12]

---

[7] *E.g.*, Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMM. 87, 89 (1992); Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 GA. L. REV. 1, 56–71 (1996); George A. Mocsary, *Explaining Away the Obvious: The Infeasibility of Characterizing the Second Amendment As A Nonindividual Right*, 76 FORDHAM L. REV. 2113, 2130–33 (2008). This is, of course, but a small sample of this literature.

[8] *See* sources cited *supra* note 7.

[9] *See, e.g.*, H. RICHARD UVILLER & WILLIAM G. MERKEL, THE MILITIA AND THE RIGHT TO ARMS 157 (2002); David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551, 554 (1991); Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5, 39–40 (1989); Lawrence Delbert Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. AM. HIST. 22, 23 (1984); *see also* Brian Doherty, *What is a 'Well Regulated Militia,' Anyway?*, Reason (Dec. 2019), https://reason.com/2019/11/03/what-is-a-well-regulated-militia-anyway/

[10] *McDonald v. City of Chicago*, 561 U.S. 742, 897 (2010) (Stevens, J., dissenting); *Silveira v. Lockyer*, 312 F.3d 1052, 1071 (2002); Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291, 315 (2000) ; Ehrman & Henigan, *supra* note 9, at 23–24.

[11] UVILLER & MERKEL, *supra* note 9, at 157, 228; Ehrman & Henigan, *supra* note 9, at 39–40; *see also* David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 Yale L.J. 551, 614 (1991) ("We have no modern analogue of the universal militia."); William N. Eskridge, Jr., *Sodomy and Guns: Tradition as Democratic Deliberation and Constitutional Interpretation*, 32 HARV. J.L. & PUB. POL'Y 193, 206–07 (2009).

[12] *See* Paul Finkelman, *The Living Constitution and the Second Amendment: Poor History, False Originalism, and a Very Confused Court*, 37 CARDOZO L. REV. 623 (2015); Brief of Global Action on Gun Violence, Professors Leila Sadat, Carl T. Bogus, and Drury D. Stevenson as amicus curiae, *United States v. Rahimi*, No. 22-915, at 17 (calling on the Supreme Court to overturn *Heller*).

The debate has reached both a consensus and a stalemate. Both sides largely agree that the right to bear arms has become detached from the militia.[13] But they disagree about the correctness of *Heller*'s conclusions that the right belongs to individuals and that its primary modern purpose is to facilitate individual self-defense against crime.

The divorce of the right to bear arms from the militia is warping legal doctrine. By turning a blind eye to the militia's preservation, courts easily uphold statutory bans on assault weapons, claiming that they involve a narrow class of weapons with more firepower than individuals need for personal self-defense.[14] Some judges have gone further, ruling that "weapons most useful in military service" are, ironically, categorically unprotected by the Second Amendment.[15] One state court even declared its analogous state constitutional right to bear arms "in defence of the State" to be obsolete and, thus, legally meaningless today.[16] On the other hand, modern courts have invalidated bans on knives, nunchucks, and other weapons that have no public defense value, despite over a century of caselaw holding that such weapons are not constitutionally protected arms.[17] Litigants are also now pressing claims under negligent entrustment and statutory unfair business practices law. These suits allege that arms manufacturers act tortiously when they market and sell military-type rifles to civilians and advertise that their rifles will help individuals prepare for military combat.[18] This legal theory collides with the historical understanding of the right to bear arms. Since the nineteenth century, courts and scholars have declared that the right promotes "the efficiency of the citizen as a soldier" by securing to the citizenry the right to possess and train with military-type arms.[19]

---

[13] *See, e.g.*, sources cited *supra* note 9; Darrell Miller, *Institutions and the Second Amendment*, 66 DUKE L.J. 69 (2016). Many individual rights scholars agree that the militia has disappeared. *See, e.g.*, David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 Harv. J. L. & Pub. Pol'y 559, 625 (1986); Roger I. Roots, *The Approaching Death of the Collective Right Theory of the Second Amendment*, 39 Duq. L. Rev. 71, 105 (2000); Lund, *supra* note 7, at 24 n.55, 25-26; Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 YALE L.J. 995, 1003 (1995).

[14] *See* cases cited *supra* note 5.

[15] *E.g.*, Kolbe v. Hogan, 849 F.3d 114, 131 (4th Cir. 2017); Hanson v. District of Columbia., 671 F. Supp. 3d 1, 11 (D.D.C. 2023) ("*Heller* specifically contemplated that 'weapons that are most useful in military service' fall outside of Second Amendment protection") (quoting *Heller*, 554 U.S. at 627). *But see* Hanson v. District of Columbia, 120 F.4th 223, 233 (D.C. Cir. 2024) (rejecting this interpretation while nevertheless upholding the District of Columbia's ban on magazines holding more than ten rounds).

[16] State v. Misch, 256 A.3d 519, 532 (Vt. 2021).

[17] *E.g.*, Teter v. Lopez, 76 F.4th 938, 942 (9th Cir. 2023), *vacated and en banc petition granted*, 93 F.4th 1150; Maloney v. Singas, 351 F. Supp. 3d 222, 238 (E.D.N.Y. 2018); State v. DeCiccio, 105 A.3d 165, 173 (Conn. 2014); Commonwealth v. Canjura, 240 N.E.3d 213 (Mass. 2024); State v. Hermann, 873 N.W.2d 257, 265 (Wis. Ct. App. 2015).

[18] *See, e.g.*, Soto v. Bushmaster Firearms Int'l, L.L.C., 202 A.3d 262, 284 (Conn. 2019); Zamora v. Daniel Defense, L.L.C., No. 1:23-cv-196, filed Feb. 22, 2023, W.D. Tex., Doc. 1, para. 47, at 18; Turnispeed v. Smith & Wesson Brands, Inc., No. 22LA00000497 (Lake Cty. Cir. Ct., Sept. 28, 2022); *see also* Complaint at 81, Mata v. Meta Platforms, Inc., No. 24SMCV02494, (Sup. Ct. Cal., May 24, 2024) (suing video game and online platforms for "[h]abituating minor uses to the use of firearms to kill" and "using replicas or near-replicas of real-life assault weapons").

[19] Andrews v. State, 50 Tenn. (3 Heisk.) 165, 178 (1871); *see also* sources cited *infra* note 41.

The failure to connect the right to bear arms to the militia has also muddled contemporary legal scholarship. Too often, debates about whether the Second Amendment secures an individual right turn on whether the Amendment protects the possession of arms for individual self-defense against crime. Collective rights scholars conclude (as did Justice Stevens in his *Heller* dissent) that because the Second Amendment protects only military uses of arms, the Amendment does not protect an individual right at all.[20]

The modern Second Amendment debate presents a dichotomy: either the Second Amendment protects having arms for individual self-defense against crime or it is a collective right. That dichotomy is false. There is a third theory of the Second Amendment—that it secures an individual right to keep and bear private arms for defense of the community. This was the dominant theory throughout the nineteenth century. It is compatible with the individual self-defense view, although it does not entail it. It is also compatible with a weak collective rights view that recognizes some concurrent state power over the militia, although it is incompatible with the modern collective rights understanding of the right. By reorienting the debate around bearing arms for common defense, this Article both expounds a fully individual right, and yet, narrows the schism in the Second Amendment debate between individual- and collective-rights scholars.

This Article has four parts. Part I defines an "individual right for common defense."[21] Part II situates that right in Framing-era concerns over standing armies. Part III defends why the individual right for common defense interpretation is superior to both the collective rights interpretation and the exclusive individual self-defense interpretation that has prevailed in federal courts after *Heller*. Part IV then provides implications of this theory for doctrine and scholarship.

---

[20] District of Columbia v. Heller, 554 U.S. 570, 636–37 (2008) (Stevens, J., dissenting); Paul Finkelman, *The Living Constitution and the Second Amendment: Poor History, False Originalism, and A Very Confused Court*, 37 CARDOZO L. REV. 623, 626, 631 (2015); Cress, *supra* note 9, at 42 (treating Story and Cooley's discussions of the right to bear arms—which treat the Amendment as providing for an individual right for public defense—as equivalent to the holding in a modern collective rights case, which required prior governmental authorization to exercise the right); Jack Rakove, Twitter/X, Aug. 27, 2023, https://twitter.com/JRakove/status/ 1695938835795136581 ("The entire point of the 2nd Amendment was to secure the status of the state militia in response to the Militia Clause in Art. I, sect. 8 of the Constitution. No one at the time though[t] it had anything to do with constitutionalizing a common-law concept of self-defense."); *see also* at Lois G. Schwoerer, *To Hold and Bear Arms: The English Perspective* 76 CHI.-KENT L. REV. 27, 34 (2000) (distinguishing "citizen defense" in a militia from "[a]n individual right to arms," as though the former was opposed to the latter). I will explain below why Justice Stevens's theory remains a collective-rights theory, despite his attempt to label his theory of the Second Amendment as an individual right.

[21] I will alternatively label this as "common defense" or "public defense," and I consider the terms interchangeable.
See Aymette v. State, 21 Tenn. 154, 158 (1840).

I. Defining an "Individual Right for Common Defense"

My central thesis is that, in declaring "the right of the people to keep and bear Arms, shall not be infringed," the Second Amendment secures *at least* an individual right to keep and bear arms for common defense.[22] So what does the Second Amendment protect on this account? At a minimum, it protects the right to possess common military arms in the home, to carry them abroad for training and public defense, and incidental rights necessary to make these rights effective, such as the right to purchase arms and ammunition. For purposes of this Article, I take no position on whether the Second Amendment additionally protects a right to possess and carry arms for individual self-defense against crime.

To explain my understanding of the Second Amendment in more detail, let me divide the right into its constituent components: subjects, objects, purpose, and content.[23] The *subjects* of the right consist of the persons who hold the right, while the *objects* of the right are the persons or entities against whom the right is held. The *purpose* of the right explains why the right is recognized. And the *content* of the right is the activities that the right protects.

A. Subjects

The main Second Amendment debate has been over the subjects of the right to bear arms. There are two major camps: collective rights theories and individual rights theories.

1. The collective rights interpretation is not a single theory, but a group of legal theories. What distinguishes them from individual rights theories is the belief that citizens must satisfy two conditions precedent to be vested with a right to bear arms.[24] The first is some form of **prior governmental authorization**.[25] That authorization may take the form of laws requiring

---

[22] U.S. CONST. amend. II. For another recent article looking to reorient an individual Second Amendment right around the militia, see Marcus Armstrong, *The Militia II: Armed Self-Defense, Fundamental Rights, the Second Amendment, Federalism, and the Citizen*, 56 ST. MARY'S L.J. ___ (forthcoming).

[23] DAVID RODIN, WAR AND SELF-DEFENSE 36 (2002). The following sentences in this paragraph follow Rodin's terminology and definitions.

[24] These two conditions precedent, although often left inexplicit in the scholarship, are necessary axioms of the collective-rights theories. Without them, collective-rights theories would collapse into the civic republican theory. Patrick Charles has identified a different set of conditions precedent. *See* PATRICK J. CHARLES, THE SECOND AMENDMENT 95 (2009) ("The conditions are that the individual must be (1) in support of just government, (2) willing to 'keep and bear' arms during times of emergency, rebellion, or invasion, and (3) willing to be subjected to martial law."). I can find no support for his supposed conditions. For example, militia service could be compulsory, so it did not matter whether a person was "willing" to perform military service during emergencies. Robert Leider, *Deciphering the "Armed Forces of the United States,"* 57 WAKE FOREST L. REV. 1195, 1217 (2022); Robert Leider, *The Modern Militia*, 2023 MICH. ST. L. REV. 893, 900–03. Additionally, Anglo-American largely rejected the application of military law applied to the militia, allowing it only in the narrow circumstance that the person was in active military service during war. Otherwise, they were subject only to civilian law. Leider, *Deciphering*, *supra*, at 1218–19.

[25] *See* Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139, 1205 (1996); *see also* Saul Cornell, *Don't Know Much About History: The Current Crisis in Second*

individuals to have arms—in which case, it is difficult to disentangle the *right* to bear arms from the legal *duty*.[26] Alternatively, at a minimum, the authorization may take the form of ordering individuals into organized military service. But if the government does not enroll someone into a well-regulated militia, then the collective-rights position is that he lacks any right to bear arms.[27] The second is **necessity**: individuals only have a right to keep and bear those arms necessary to perform their official militia duties.[28] Provided that the government supplies adequate arms for on duty usage, courts and scholars have denied that individuals have any private right to keep and bear arms at all.[29] For them, the private right acts interstitially to give individuals enrolled in a well-regulated militia a right to keep and bear arms only when those arms are necessary for official duty and not supplied by the government.

Although this family of theories shares the understanding that the Second Amendment protects state militias against disarmament by the federal government, variation exists within the family.[30] The state's right or collective right's position maintains that the Second Amendment confers a right of state governments to arm their military forces.[31] In contrast, the "sophisticated collective rights view" contends that the Second Amendment provides a right of

---

Amendment Scholarship, 29 N. KY. L. REV. 657, 662 (2002) ("A more accurate way to paraphrase the right protected by the original Second Amendment might be to describe it as a right of the people acting through their state governments to form well-regulated militias.").

[26] For examples of the right and duty being lumped together, see, for example, Robert Hardaway, et al., *The Inconvenient Militia Clause of the Second Amendment: Why the Supreme Court Declines to Resolve the Debate over the Right to Bear Arms*, 16 ST. JOHN'S J. OF LEGAL COMMENTARY, 41, 61–75 (2002); Todd B. Adams, *Should Justices Be Historians? Justice Scalia's Opinion in* District of Columbia v. Heller, 55 U.S.F. L. REV. 301, 330 (2021); Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 1, 48 (1989).

[27] *See, e.g.*, United States v. Hale, 978 F.2d 1016, 1028 (8th Cir. 1992); United States v. Rybar, 103 F.3d 273, 286 (3d Cir. 1996); Love v. Pepersack, 47 F.3d 120, 124 (4th Cir. 1995); United States v. Graves, 554 F.2d 65, 66 n.2 (3d Cir. 1977); United States v. Warin, 530 F.2d 103, 106–07 (6th Cir. 1976); Hickman v. Block, 81 F.3d 98, 101–02 (9th Cir. 1996); Silveira v. Lockyer, 312 F.3d 1052, 1075 (9th Cir. 2002); United States v. Oakes, 564 F.2d 384, 387 (10th Cir. 1977); United States v. Haney, 264 F.3d 1161, 1165–66 (10th Cir. 2001); United States v. Wright, 117 F.3d 1265, 1274 (11th Cir. 1997).

[28] *E.g.*, *Haney*, 264 F.3d at 1165.

[29] *See, e.g.*, City of Salina v. Blaksley, 83 P. 619, 620 (Kan. 1905); Commonwealth v. Davis, 343 N.E.2d 847, 849 (Mass. 1976); *Hale*, 978 F.2d at 1019; United States v. Napier, 233 F.3d 394, 402 (6th Cir. 2000); Ehrman & Henigan, *supra* note 138, at 48; UVILLER & MERKEL, *supra* note 9, at 144; *see also* see United States v. Emerson, 270 F.3d 203, 219 (5th Cir. 2001) ("The 'individual' right to *keep* arms only applies to members of such a militia, and then only if the federal and state governments fail to provide the firearms necessary for such militia service.").

[30] *United States v. Emerson*, 270 F.3d 203, 218 n.9 (5th Cir. 2001) ("Not every proponent of the model conceives of it exactly the same way."). These variations rarely affect the merits of a Second Amendment claim, although they can have procedural effects for Second Amendment litigation. *Compare Hickman*, 81 F.3d at 102 (individual litigants lack standing to bring Second Amendment claims because only state governments hold the right), *with* Gillespie v. City of Indianapolis, 185 F.3d 693, 710–11 (7th Cir. 1999) (holding that individuals have standing but their claims fail on the merits).

[31] *Emerson*, 270 F.3d at 218–19; *see, e.g.*, United States v. Warin, 530 F.2d 103, 106 (6th Cir. 1976); *Hickman*, 81 F.3d at 99; Finkelman, *supra* note 12, at 235–36.

individuals to keep and bear arms, but only those individuals who are members of a well-regulated militia and only those arms which are necessary to carrying out their official duties.[32] Richard Uviller and William Merkel provide a third permutation. They seemingly agree with individual rights scholars that the Second Amendment provided—at the Framing—a broad individual right to keep and bear arms.[33] But they claim that this right was conditional on individuals being enrolled in a universal militia system, for which private arms "shall be essential to the maintenance thereof."[34] Given these conditions, their theory is best understood as another version of the sophisticated collective rights claim—the idea that the Second Amendment was limited to the necessary arms carried by those formally enrolled in organized military units—with the added twist that the right presupposed universal service among the political community.

2. At the opposite end of this debate are the individual rights theories. All individual rights theories deny that individuals must fulfill the conditions precedent identified by collective rights theories (prior governmental authorization and necessity). Accordingly, they deny that the right is held by state governments or is conditioned on enrollment in a well-regulated militia. The right is "individual" in the sense that citizens may exercise it by virtue of their membership in the national polity.[35] Thus, individual rights theories are the logical contraries of collective rights theories. They contend that, regardless of how the government organizes the militia, most citizens hold the right.

Although individual rights theories agree that most citizens hold the right to bear arms, they disagree about what kind of self-defense the right facilitates. There are two possibilities: individual self-defense against criminal violence ("private self-defense") or the collective defense of the community ("public defense" or "common defense").

Consequently, the individual rights camp may be subdivided into three tents. Most individual rights scholars believe that the Second Amendment facilitates both private and public defense.[36] The second individual rights position is that the Second Amendment protects only a right to keep and bear arms for private self-defense against crime. I am not aware of any scholars who hold this view, but this has become the predominant position of federal and state

---

[32] *Emerson*, 270 F.3d at 219; *e.g.*, *Haney*, 264 F.3d at 1165; Ehrman & Henigan, *supra* note 9, at 47.

[33] UVILLER & MERKEL, *supra* note 9, at 24.

[34] *Id.*

[35] *See Emerson*, 270 F.3d at 220; *see also id.* at n.12 (collecting individual rights scholarship); Don B. Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 206 (1983); George Mocsary, *Explaining Away the Obvious: The Infeasibility of Characterizing the Second Amendment as a Nonindividual Right*, 76 FORDHAM L. REV. 2113, 2114 (2008).

[36] *E.g.*, Kates, *supra* note 142, at 267–68; Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 GA. L. REV. 1, 59 (1996); JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS 162–63 (1994); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 469, 475 (1995). For early state court decisions adopting this view, see Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90 (1822); State v. Reid, 1 Ala. 612, 616, 619 (1840); Nunn v. State, 1 Ga. 243 (1846); Simpson v. State, 13 Tenn. (5 Yer.) 356 (1833); State v. Chandler, 5 La. 489 (1850); State v. Duke, 42 Tex. 455, 459 (1874).

courts following *Heller* and *Bruen*.[37] The final individual rights position is called the "civic republican" theory."[38] The civic republican theory shares the negative premise of the collective rights theories: the right to bear arms does not protect carrying arms for individual self-defense against crime.[39] But unlike the collective rights theories, its affirmative premise is that all citizens have the right to keep and bear arms for public defense, whether or not they are formally enrolled in the militia.[40] The civic republican theory was the strong minority position of nineteenth-century courts and the preferred theory of many nineteenth-century scholars.[41]

3. The individual right for common defense theory recognizes that the Second Amendment is fully an individual right. The Second Amendment vests a right in the people of the United States by virtue of their membership in the national community.[42] They need "no permission or regulation of law for this purpose."[43]

This vision sharply distinguishes the individual right for common defense theory from collective-right theories. The individual right for common defense theorist does not view the Second Amendment right to belong to state governments, as many collective rights theories maintain. Nor, as the sophisticated collective-rights theories contend, does the right require a person to be formally enrolled in an active, drilling militia. Because this individual rights theory does not condition the right on some form of governmental authorization, this understanding of the right is fundamentally at odds with all modern collective-rights theories.

Some critics have contended that if the Second Amendment protects an individual right for public defense, then the right is held only by citizens who are statutory members of the militia. Currently, federal law defines the militia as all able-bodied men between 17 and 45

---

[37] *See, e.g.*, Bevis v. City of Naperville, 85 F.4th 1175, 1188 (7th Cir. 2023) (claiming that "in *Heller* the Supreme Court severed th[e] connection" between the the militia and the right to bear arms); cases cited *supra* note 5. Many state courts have also adopted an exclusive individual self-defense interpretation under state constitutions that purport to protect the right to bear arms for both individual self-defense and collective defense. *See, e.g.*, People v. Brown, 235 N.W. 245, 246 (Mich. 1931); State v. Misch, 256 A.3d 519, 527 (Vt. 2021); *see also* Robertson v. City & Cnty. of Denver, 874 P.2d 325, 334–35 (Colo. 1994); Benjamin v. Bailey, 662 A.2d 1226, 1232–33 (Conn. 1995); Arnold v. City of Cleveland, 616 N.E.2d 163, 173 (Ohio 1993); Rocky Mountain Gun Owners v. Polis, 467 P.3d 314, 318 n.3 (Colo. 2020) (all neglecting or refusing to analyze whether challenged regulations violate the right to bear arms for collective defense).

[38] Michael P. O'Shea, *The Second Amendment Wild Card: The Persisting Relevance of the "Hybrid" Interpretation of the Right to Keep and Bear Arms*, 81 TENN. L. REV. 597, 606 (2014).

[39] *Id.* at 610 (quoting Aymette v. State, 21 Tenn. 154, 160 (1840)).

[40] *Id.*

[41] State v. Buzzard, 4. Ark. 18 (1842); Aymette v. State, 21 Tenn. (2 Hum.) 154 (1840); Andrews v. State, 50 Tenn. (3 Heisk.) 165 (1871); English v. State, 35 Tex. 473 (1871); Hill v. State, 53 Ga. 472, 474 (1874); State v. Workman, 14 S.E. 9, 11 (W. Va. 1891); 2 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 125, at 74–75 (4th ed. 1868); 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND § 199, at 144 n.20 (William Carey Jones ed., 1976 photo reprint, Bancroft-Whitney 1915) (1715) (note of Professor Hammond); BENJAMIN OLIVER, THE RIGHTS OF AN AMERICAN CITIZEN 176–77 (1832).

[42] United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990).

[43] THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 292 (2d ed. 1891).

years of age.[44] Federal law divides the militia into the organized militia (the National Guard and naval militia) and the unorganized militia, which consists of remaining able-bodied men.[45] According to these critics, this theory implies that the right is held only by members of the militia (whether organized or not) and that women, children, and older men are beyond its protection.[46]

This contention is mistaken. The individual right for common defense theory supports that the right is held by older adults and women. The statutory ages of the militia are arbitrary and subject to revision as public exigencies require. For example, during World War II, Congress required Selective Service registration of all men from eighteen to sixty-four years of age.[47] Even if men above forty-five years of age are not defined as part of the militia today, Congress could change that and draw them into combat in extreme emergencies. Similarly, the federal government can include women as combat soldiers, and indeed, it has expanded the military roles available to women.[48] The Second Amendment facilitates the exertion of the nation's full military power. Consequently, the persons who hold Second Amendment rights do not depend upon arbitrary statutory definitions of "militia" at a particular moment in time.

A second reason why women and older men fall within the right is to facilitate training their children in military matters. As men age out of service, their children reach military age. Women, too, may have sole custody of minors approaching military age. An interpretation of the Second Amendment that protected only those in the statutory militia would produce serious mischief. Men could be forced to sell their arms at age forty-five, only to have their sons rebuy the same arms a short time later as they reach military age. A father who was forty-five or a single mother could not begin training their sixteen-year-old sons in military matters. A broad right to bear arms permits the training of minors in military arms, so that they are combat ready when they reach military age.

As for children, they are in a peculiar position. The individual right for common defense theory does not require that children have their own freestanding right to keep and bear weapons outside parental supervision. But it would likely violate their rights if the law entirely banned older children from possessing and shooting arms under adult supervision. Learning the art of war takes time, and English law has long recognized the importance of developing combat skills in children as they approach fighting age.[49]

B. Objects.

According to the individual right for common defense theory, the right to bear arms is a right held against any government. The right reserves the citizenry's authority to have private

---

[44] 10 U.S.C. § 246(a).

[45] *Id.* § 246(b).

[46] Ehrman & Henigan, *supra* note 138, at 50.

[47] MILLET, ET AL., *supra* note 29, at 381–82.

[48] Danielle DeSimone, *Over 200 Years of Service: The History of Women in the U.S. Military*, USO, Feb. 28, 2023, https://www.uso.org/stories/3005-over-200-years-of-service-the-history-of-women-in-the-us-military.

[49] *See, e.g.*, Unlawful Games Act 1541, 33 Hen. VIII, c.9 (Eng.).

arms. To quote from the Georgia Supreme Court in 1846, the right is "unalienable" and "lies at the bottom of every free government."[50] Consequently, even if the Second Amendment originally only protected the right's infringement against the national government, there is no implication that the people of the United States "ever intended to confer [the power to disarm the people] on the local legislatures. The right is too dear to be confided to a republican legislature."[51]

The precise legal mechanism of restraining governments from infringing the right has changed over time. Pre-incorporation, the Second Amendment may have been legally applicable only against the national government.[52] But the preexisting right that the Second Amendment protected was viewed as a right held against both, with many state constitutions supplying coextensive legal protection against state interference.[53] More controversially, antebellum courts sometimes applied general law rights—including the right to bear arms—to invalidate laws without constitutional codification.[54] The Fourteenth Amendment's incorporation of the right has removed these thorny doctrinal complications.[55]

C. Purpose.

On at least one point, the individual right for common defense theory superficially aligns with the collective-rights theories. Both concur with the Supreme Court's statement in *United States v. Miller* that "[w]ith obvious purpose to assure the continuation and render possible the effectiveness of [militia] forces the declaration and guarantee of the Second Amendment were made."[56] But the agreement stops here at this generality.

Under the individual rights for common defense view, the ultimate purpose of the Second Amendment is to preserve constitutional government—the "security of a free state."[57] This purpose is both aimed at threats abroad and threats from within. As Justice Story described, "The militia is the natural defence of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers."[58]

The bulwark against such threats is the "militia"—that is, all citizens who may be drafted into nonprofessional military service during military emergencies.[59] When called,

---

[50] Nunn v. State, 1 Ga. (Kelly) 243, 250 (1846).

[51] *Id.*

[52] Presser v. Illinois, 116 U.S. 252, 265 (1886); United States v. Cruikshank, 92 U.S. 542, 553 (1875).

[53] *See, e.g.*, State v. Buzzard, 4 Ark. 18, 26–27 (1842) (opinion of Ringo, C.J.); Aymette v. State, 21 Tenn. (2 Hum.) 154, 157 (1840); Andrews v. State, 50 Tenn. (3 Heisk.) 165, 177 (1871); English v. State, 35 Tex. 473, 478 (1872).

[54] *Nunn*, 1 Ga. at 250–51. In antebellum America, there were jurisprudential debates whether preexisting rights were judicially enforceable without constitutional codification. *See* STUART BANNER, THE DECLINE OF NATURAL LAW 74–81 (2021).

[55] McDonald v. City of Chicago, 561 U.S. 742 (2010).

[56] United States v. Miller, 307 U.S. 174, 178 (1939).

[57] On the meaning of a "free state" as a "free country," see Eugene Volokh, *"Necessary to the Security of a Free State,"* 83 N.D. L. REV. 1, 5 (2007).

[58] 3 STORY, *supra* note 87, § 1001, at 708.

[59] *E.g.*, Lund, *supra* note 7, at 22–23.

citizens "were expected to appear bearing arms supplied by themselves and of the kind in common use at the time."[60] These nonprofessional citizen-soldiers stand in contrast to "troops" and "standing armies,"[61] which "convey[] to the mind the idea of an armed body of soldiers, whose sole occupation is war or service."[62] The Second Amendment's bogeyman is the military professional—the regular soldier whose primary occupation is warfare.[63] By guaranteeing an individual right to bear arms, the Second Amendment helps secure the existence of civilians who can perform military service in exigent circumstances and then return to civilian life when hostilities have ceased.[64] These civilians reduce the need for professional forces, thereby mitigating civil-military tensions. And when professional forces are raised, having the whole political community in arms deters any improper use of standing armies to oppress the population or usurp constitutional government.[65]

D. Scope.

The concretization of a right should align the right with its purpose. The Supreme Court correctly recognized in *Miller* that the Second Amendment's purpose was "to assure the continuation and render possible the effectiveness of [militia] forces." Accordingly, the Court declared that the right to bear arms "must be interpreted and applied with that end in view."[66]

1. Arms

Under this theory, constitutionally protected "arms" are those weapons that have "some reasonable relationship to the preservation or efficiency of a well regulated militia."[67] These are the weapons that constitute "the ordinary military equipment," the use of which would "contribute to the common defense."[68] Historically, they have included, by way of example,

---

[60] *Miller*, 307 U.S. at 179; *see also* 1 BLACKSTONE, COMMENTARIES *410 (explaining that the Assize of Arms and the Statute of Winchester required "every man, according to his estate and degree, to provide a determinate quantity of such arms as were then in use").

[61] *Id.* at 178–79.

[62] Dunne v. People, 94 Ill. 120, 141 (1879).

[63] *See, e.g.*, COOLEY, *supra* note 150, at 282.

[64] *Id.* ("The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms . . . .").

[65] 3 STORY, *supra* note 87, § 1890, at 746.

[66] United States v. Miller, 307 U.S. 174, 178 (1939).

[67] *Id.*

[68] Aymette v. State, 21 Tenn. (2 Hum.) 154, 158 (1840); *accord* Andrews v. State, 50 Tenn. (3 Heisk.) 165, 179, 184–87 (1871); Fife v. State, 31 Ark. 455, 458–61 (1876); Hill v. State, 53 Ga. 473, 474 (1874); State v. Workman, 14 S.E. 9, 11 (W. Va. 1891); English v. State, 35 Tex. 473, 476–77 (1871); State v. Smith, 11 La. Ann. 633, 633 (1856); 2 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW, § 124, at 75 (4th ed., Boston, Little, Brown, & Co. 1868); JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF STATUTORY CRIMES § 793, at 469 (2d. ed., Boston, Little, Brown, and Co. 1883); HENRY CAMPBELL BLACK, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW § 144, at 403 (St. Paul, West Publishing Co 1895); Cooley, *supra* note 150, at 282–83; CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES CONSIDERED FROM BOTH A CIVIL AND CRIMINAL STANDPOINT § 140c, at 503 (St. Louis, The F.H. Thomas Law Book Co. 1886); 2 EMLIN MCCLAIN, A TREATISE ON THE CRIMINAL LAW AS NOW

"the rifle of all descriptions, the shot gun, the musket, and repeater"[69] and, more controversially, at least some handguns.[70] "Arms" also includes the necessary armor of a soldier.[71]

That the Second Amendment protected the individual possession of military arms was once a core belief among courts and scholars, particularly those that favored stricter regulation of weapons.[72] In recent years, that belief has flipped. Now, the idea that the Second Amendment protects military-type arms is treated as a reductio ad absurdum of the claim that the Second Amendment secures an individual right for common defense. Surely, critics argue, the Second Amendment cannot guarantee to citizens the right to own tanks, missiles, cannons, and nuclear arms.[73]

Most charitably understood, this objection aims for a reflective equilibrium between a Second Amendment theory's policy implications and modern political realities. But this objection also risks sidetracking serious debates about Second Amendment theory with facile discussions about exactly which modern weapons the Second Amendment protects. Within the confines of this article, I cannot present a complete theory of exactly which arms citizens have a constitutional right to possess. Nor is it possible, for arms that are constitutionally protected, to exhaustively detail every type of permissible regulation. Despite these limitations, let me offer two responses to the concerns raised by this objection.

ADMINISTERED IN THE UNITED STATES § 1030, at 205 (Chicago, Callaghan & Co. 1897); *see also* C.D. Michel & Konstadinos Moros, *Restrictions "Our Ancestors Would Never Have Accepted: The Historical Case Against Assault Weapon Bans*, 24 WYO. L. REV. 89, 105 (2024) (collecting additional nineteenth-century examples). Collective rights scholars agree that the traditional duty of citizens was to possess the arms of modern warfare, not those of merely personal conflict. MICHAEL WALDMAN, THE SECOND AMENDMENT: A BIOGRAPHY 8 (2015).

[69] Andrews v. State, 50 Tenn. 165, 179 (1871).

[70] *Compare, e.g.*, *Hill*, 53 Ga. at 474–75 (stating in dicta that, as a matter of first principles, handguns were not protected arms, but recognizing that precedent was otherwise), *and* Nunn v. State, 1 Ga. 243, 246 (1846) (holding that pistols carried openly were protected arms), and State v. Duke, 42 Tex. 455, 458 (1875) (protecting "such pistols at least as are not adapted to being carried concealed"), *and* State v. Kerner, 107 S.E. 222, 225 (N.C. 1921) (similar) *and Wilson v. State*, 33 Ark. 557, 559–60 (1878) (military pistols only), *with English*, 35 Tex. at 476–77 (leaving most pistols unprotected), *and Workman*, 14 S.E. at 11 (all pistols unprotected).

[71] 1 SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE [p. 180] (6th ed. 1785) (defining "arms" to mean "[w]eapons of offence, or armour of defence"); 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (similar); *see, e.g.*, Assize of Arms 1181, 27 Hen. 2, §§ 1–2 (Eng.); Statute of Winchester 1285, 13 Edw. c. 6 (Eng.) (both requiring that able-bodied men have defensive armor).

[72] *See* sourceds cited *supra* note 68.

[73] *See, e.g.*, Cases v. United States, 131 F.2d 916 (1st Cir. 1942); United States v. Warin, 530 F.2d 103, 106 (6th Cir. 1976); *see also* District of Columbia v. Heller, 554 U.S. 570, 624 (2008) (labeling "startling" any reading of *United States v. Miller*, 307 U.S. 174, 178 (1939), that would understand the Second Amendment to protect "only those weapons useful in warfare"); People v. Brown, 235 N.W. 245 (Mich. 1931) (contending that "[s]ome arms, although they have a valid use for the protection of the state by organized and instructed soldiery in times of war or riot, are too dangerous to be kept in a settled community by individuals").

First, although the individual right for common defense theory claims that the arms protected by the Second Amendment includes military weapons, the theory does not contend that the Second Amendment protects all types of military arms.[74] Instead, constitutionally protected arms are a narrower subset of military weapons. Cases have referred to the right to bear arms as protecting the arms "usually employed" by individual soldiers during "civilized warfare."[75] These weapons, such as rifles and pistols, are commonly employed by citizen reserves during temporary military service.[76]

Second, the individual right for common defense theory does not subscribe to the view that if an arm is constitutionally protected, then it is beyond all legislative regulation.[77] Although constitutionally protected arms and their accessories may not be banned, they may still be regulated for public safety. For example, at the Framing, the personal possession of gunpowder was a necessary incident of keeping a functional musket.[78] State and local laws nevertheless restricted the storage of gunpowder in quantities sufficiently large to pose a fire or explosion risk to one's neighbors.[79] Analogously today, legislatures may regulate the keeping of constitutionally protected arms to mitigate the risk that a person would harm others by abusing the exercise of his rights. For example, legislatures may require that rifles have a reasonable minimum barrel length.[80] Rifles with very short barrels are simultaneously less adapted to military use (because they lose accuracy and range) and more useful for criminal activity (because they are easier to conceal). I discuss the limits of permissible regulation below.[81]

2. The individual right for common defense theory treats the right to keep arms as something separate and distinct from the right to bear them. The right to keep arms secures an

---

[74] In more formal logical language, the theory denies the truth of the following conditional: "If a weapon is military equipment, then it is constitutionally protected."

[75] *Aymette*, 21 Tenn. at 158, 160.

[76] Many military weapons fall outside the "arms" protected by the Second Amendment. For example, there is no military in the world that distributes nuclear arms to its soldiers as part of their "ordinary military equipment." United States v. Miller, 307 U.S. 174, 178 (1939). Nor are nuclear weapons appropriate for the functions of the militia, including enforcing domestic law, suppressing insurrections, and repelling invasions. *See* U.S. CONST. art. I, § 8, cl. 15

[77] For an example of this concern, see *Cases*, 131 F.2d at 922 (complaining that if *Miller*'s ordinary military equipment test were "general and complete," the federal government would be empowered only to regulate antique weapons).

[78] *See, e.g.*, Act of May 8, 1792, ch. 33, § 1, 1 Stat. 271 (requiring citizens to have adequate gunpowder as part of the ammunition they were required to keep).

[79] *E.g.*, An Act to Provide for the Storing & Safekeeping of Gunpowder, ch. 20, § 1, 1801 Mass. Acts 292 (allowing up to twenty-five pounds of gunpowder to be kept at home); An Ordinance for Preventing Fires, New Orleans Police Code, art. 15 (up to 100 pounds); 1793 N.H. Laws 464 (restricting gunpowder to ten pounds for buildings within Portsmouth, New Hampshire).

[80] *Cf.* State v. Kerner, 107 S.E. 222, 225 (N.C. 1921) (making the same claim with respect to pistols).

[81] *Infra* Section IV.A.

"unqualified right" to possess them in the home.[82] The right to keep arms also includes the incidental rights "to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair."[83] Individuals may also transport arms for these purposes, such as to or from a place of purchase or repair.[84] The theory recognizes an individual right because these privileges may be "exercised and enjoyed by the citizen as such, and not by him as a soldier."[85]

The right to bear arms refers to the right to carry them. The individual right for common defense theory recognizes, at a minimum, a right to publicly carry weapons for public defense purposes. These include when called into militia service and when performing law enforcement functions, whether as a posse or as an individual (e.g., suppressing a riot or preventing a forcible and atrocious felony).[86] Common defense purposes additionally include the right to carry arms in public to train with those arms.[87] The right to train with arms, much like the right to keep arms, belongs to all citizens; they are not limited to training only during official militia musters.[88]

On the other questions, the right to bear arms for common defense is agnostic. These include the central question in *Bruen*—whether individuals have a general right to carry handguns for personal self-defense. Those who believe that the Second Amendment secures a broad right of personal and collective defense will recognize such a right, while those who believe in the civic republican understanding will not.[89] The individual right for common defense theorist is not committed to either view. He is only committed to the view that the Second Amendment secures at least that recognized by the civic republican theory. Likewise, the individual right for common defense theorist is not committed to any position whether non-

---

[82] *Aymette*, 21 Tenn. at 160; *accord Hill*, 53 Ga. At 475–76 (same). A recent article suggests that "keep" meant "to maintain or hold in fulfillment of a duty to provide a service." Nicholas A. Serrano, *The Perfect Word: Duty Fulfillment, Service Provision, and the Meaning of* Keep *in the Second Amendment*, 59 GONZ. L. REV. 145, 148 (2023/24). I disagree with the author, *id.* at 187, that "keep" does not imply possession. To the extent that Serrano is actually arguing that "keep" does not mean "possess for purely private use," *see id.* at 187, the individual rights for public defense theory is consistent with this limited understanding—which would convert the individual right for public defense theory into the civic republican understanding of the right. *See Hill*, 53 Ga. at 476.

[83] *Andrews*, 50 Tenn. at 178.

[84] *Id.*

[85] *Id.* at 183–84.

[86] *See* WILLIAM HAWKINS, A TREATISE OF PLEAS OF THE CROWN 489 (John Curwood ed., 1824) (explaining that the crime of going armed to the terror of the people does not apply to someone "who arms himself to suppress dangerous rioters, rebels, or enemies, and endeavours to suppress or resist such disturbers of the peace or quiet of the realm").

[87] *Andrews*, 50 Tenn. at 182; *Hill*, 53 Ga. at 476.

[88] Sources cited *supra* note 87.

[89] *Compare, e.g.*, State v. Reid, 1 Ala. 612, 616–17 (1840) (adopting the public and private defense view), *with Workman*, 14 S.E. 9, 11 (W. Va. 1891) (adopting the civic republican view), *and Hill*, 53 Ga. at 478–79 (adopting the civic republican view, except as limited by prior precedent recognizing some individual self-defense right).

military arms commonly used for self-defense and hunting are additionally protected under the right to bear arms.[90] He is only committed to the view that, at a minimum, the common arms and armor of civilized warfare are constitutionally protected.

One additional limitation warrants mentioning: although individuals have a right to train with arms, they do not have a private right to form nongovernmental military organizations.[91] It would be a fallacy of composition to infer that private organizations have a right to keep and bear arms because each of their members has that right. Individuals have a private right to possess and train with arms. But private military companies trigger the same concerns about armed factionalism that prompted Framing-era objections to standing armies and select militias.[92] Privatizing armed factions does not make them less threatening.

* * *

Thus, the individual right for common defense theory draws heavily from the civic republican understanding of the right. The civic republican theory's affirmative premise—that the Second Amendment protects an individual right to keep and train with military-type arms—is a central component of any proper understanding of the right.[93] By guaranteeing a broad right to keep and bear military arms, the Second Amendment secures the raw material of a militia drawn from the whole people.[94]

Let me end this Part with some concluding thoughts on *Heller*. *Heller*'s conflicting opinions presented a false dichotomy. Justice Scalia's majority opinion was a packaged deal, combining (1) an individual right with (2) a right that protects having arms for private self-defense.[95] But the individual right for common defense theory is compatible with (2) being either true or false.[96] Thus, the soundness of the theory does not rise or fall on the correctness of Justice Scalia's conclusion that the right furthers private self-defense against crime.

---

[90] Compare *Workman*, 14 S.E. at 11 (military arms only), *English*, 35 Tex. at 476 (same), *and Aymette*, 21 Tenn. at 158 (same), *with* State v. Duke, 42 Tex. 455, 458 (1875) (both military arms and common self-defense arms).

[91] Presser v. Illinois, 116 U.S. 252, 264–65 (1886); Commonwealth v. Murphy, 44 N.E. 138, 138 (Mass. 1896); Dunne v. State, 94 Ill. 120, 140–41 (1879).

[92] *See infra* Part II.

[93] For another recent article looking to reorient an individual Second Amendment right around the militia, see Marcus Armstrong, *The Militia II: Armed Self-Defense, Fundamental Rights, the Second Amendment, Federalism, and the Citizen*, 56 St. Mary's L.J. ___ (forthcoming).

[94] Because the individual right for common defense theory is consistent with both the civic republican theory and the predominant individual rights understanding that also includes private self-defense, this Article takes no position on the civic republican theory's negative premise—that the right to bear arms does not extend to individual self-defense.

[95] *Id.* at 628–29.

[96] If a person believes that (1) and (2) are true, he is a standard individual-rights theorist. If he believes, however, that (1) is true and (2) is false, then he holds the civic republican conception of the right. *See, e.g.*, Aymette v. State, 21 Tenn. 154, 160 (1840) ("The citizens have the unqualified right to keep the weapon, it being of the character before described as being intended by this provision."); *id.* at 157 ("No private defence was contemplated, or would have availed anything.").

Meanwhile, Justice Stevens's dissent was a non-sequitur. Justice Stevens purported to deny the individual right by rejecting the majority's focus on individual self-defense.[97] But the denial that the right to bear arms protects private self-defense against crime does not establish that the right is conditioned upon prior enrollment in the militia. To deny that the Second Amendment secures *any kind* of individual right, a person must separately explain why the right is limited only to those citizens that the government enrolls in militia service. Justice Stevens offered no defense for that claim.[98] Yet, this left unsupported his conclusion that Heller had no enforceable Second Amendment rights against the District of Columbia.

II. First Principles

The debate over the Second Amendment has reached a stalemate primarily because of a failure to disentangle two issues in Framing-era constitutional debates over the military. The first was whether to professionalize the land forces. In accordance with the prevailing Whiggish philosophy, the Framing generation viewed professional land forces (armies comprised of soldiers whose primary occupation was the military) as dangerous to public liberty and civilian control of the government. They generally favored land forces comprised of amateur soldiers—citizens who would lay down their civilian occupations and perform military service on an ad hoc basis. The second debate was how to distribute the military power between the national and state governments. Should the national government control the entire military apparatus? Or should states have some access to military forces and if so, which kinds?

Antiprofessionalism and federalism are different concepts, and neither logically implies the other. The United States could have military federalism without antiprofessionalism by allowing both the federal and state governments to raise their own professional armies. Alternatively, the United States could have pure antiprofessionalism without military federalism by giving the national government exclusive control over the militia while banning the national and state governments from having a standing army.

The philosophical foundation of the individual rights for common defense theory is that the right to bear arms countered fears of military *professionalization*. By declaring "a well-regulated militia . . . necessary to the security of a free State," the Second Amendment recognized the value of amateur soldiers and (implicitly) concerns about professional soldiers.[99] And by securing a general right to keep and bear arms, the Second Amendment prevented the federal government from interfering with the ability of civilians to acquire and train with military arms. This general right facilitates rapidly organizing amateur land forces in wartime.

---

[97] *Id.* at 636–37, 651–52 (Stevens, J., dissenting).

[98] Neither do academic historians who have made similar claims in the past. *See* sources cited *supra* note 20.

[99] U.S. CONST. amend. II. For concerns over professionalization, see, for example, CRESS, CITIZENS IN ARMS, *supra* note 9, at 41.

A. Distinguishing an "Army" From a "Militia"

The Framers divided military land forces into two categories: armies and militia.[100] As a military system, the defining characteristic of an "army" was that the government "employ[s] a certain number of citizens in the constant practice of military exercises" whereby they "render the . . . soldier a particular trade, separate and distinct from all others."[101] In other words, "armies" were regular forces; they were comprised of full-time professionals trained in the art of war. Armies may be subdivided into two types: (1) armies temporarily raised for specific conflicts and (2) standing armies, which are armies whose existence continues both in peace and in war. Framing-era objections were not directed toward temporary war armies, which Britain had raised for centuries. Instead, they were directed toward the standing army, an institution in which the government permanently employed professional soldiers.[102]

The militia was the second military land force system. In a militia, individuals "join in some measure the trade of a soldier to whatever other trade or profession they may happen to carry on."[103] Militiamen primarily lived civilian lives and had civilian occupations.[104] During crises, they put down their civilian occupations and bore arms to defend their country. In peacetime, they either did not train at all or they trained on a part-time basis, often only a few days or weeks a year.[105] In contrast to regular soldiers, militiamen were amateurs in warfare.

The British governed the standing army by a legal regime that reflected its professional character. Britain did not generally recognize the legitimacy of compelling someone to become a professional soldier. Armies were raised through enlistments, and "every soldier was supposed to be a volunteer."[106] Except in wartime, soldiers enlisted for long periods, in which

---

[100] U.S. CONST. art. I, § 8, cls. 12–16. On the Framing generation's division of armed forces into these categories, see, for example, LETTER XVIII (Jan. 25, 1788), *reprinted in* 17 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 362 (John P. Kaminski et al. eds., 1995) ("The military forces of a free country may be considered under three general descriptions—1. The militia. 2. the navy—and 3. the regular troops."); Anonymous, *Rudiments of Law and Government Deduced from the Law of Nature, in* AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760–1805 565, 601 (1983) (excerpt originally published 1783) (same division of forces).

[101] 5 ADAM SMITH, WEALTH OF NATIONS, ch. 1, *55–56, at 754 (Edwin Cannan ed. 1944); *see also* JOEL TIFFANY, A TREATISE ON GOVERNMENT § 585, at 394 (1867) ("The militia are the citizen soldiers, as distinguished from those who are trained to arms as a profession, and who constitute the elements of a standing army.").

[102] BERNARD BAILYN, PAMPHLETS OF THE AMERICAN REVOLUTION 1750-1776, at 41 (1965) ("Their fear was not simply of armies but of *standing armies*, a phrase that had distinctive connotations . . . ."); Tiffany, *supra* note 101, at 394.

[103] Smith, *supra* note 101, at *55–56.

[104] *See* Cress, *supra* note 9, at 57.

[105] *See* Robert Leider, *Deciphering the "Armed Forces of the United States,"* 57 WAKE FOREST L. REV. 1195, 1214–15 (2022).

[106] Alan J. Guy, *The Army of the Georges 1714–1783*, *in* THE OXFORD HISTORY OF THE BRITISH ARMY 92, 97 (David Chandler & Ian Beckett eds., 1996) [hereinafter OXFORD HISTORY]; Michael Prestwich, *The English Medieval Army to 1485*, *in* OXFORD HISTORY, *supra*, at 1, 11–12

military service would become their principal career throughout their lives.[107] As volunteer military professionals, they could be used for offensive or defensive wars, and they could be kept home or deployed abroad.[108] Beginning with the first Mutiny Act, regular soldiers became subject to military law at all times.[109] Military law reinforced command hierarchy by punishing offenses against discipline and obedience (e.g., mutiny and desertion).[110] Further reinforcing command hierarchy, the Mutiny Act substituted military courts-martial comprising panels of military superiors for the traditional English right of a trial by a jury of one's peers in a civilian court.

The militia was governed by different rules appropriate for an amateur army organized for defense of the nation. Because English subjects had a duty to defend the country, they could be conscripted into militia service.[111] This service was limited to defensive conflicts or rebellions; English subjects could not be deployed abroad for offensive conflicts without their consent.[112] When not in active service, English subjects received, at most, minimal periodic military training, and the militia was often dormant in stable periods of peace.[113] English subjects also had minimal exposure to the burdens of military law. The Mutiny Act initially did not apply to the militia, and later, when it was extended to them, the act only applied when

---

[107] H.C.B. ROGERS, THE BRITISH ARMY OF THE EIGHTEENTH CENTURY 59 (1977); H. ST. CLAIR FEILDEN, A SHORT CONSTITUTIONAL HISTORY OF ENGLAND 315 (3d ed., BOS., Ginn & Co. 1897); CORRELLI BARNETT, BRITAIN AND HER ARMY, 1509–1970, at 280 (1970).

[108] *See* BARNETT, *supra* note 38, at 196; 1 CLODE, *supra* note 25, at 23, 57; Act for Punishing Officers and Soldiers who shall Mutiny or Desert their Majesties Service, to Continue till *November* 1689, and no longer, (1689), § 5, 3 THE STATUTES AT LARGE FROM MAGNA CHARTA, TO THE END OF THE LAST PARLIAMENT, 1761, at 416.

[109] A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 282 (3d ed. 1889).

[110] Dan Maurer, *A Logic of Military Justice*, 53 TEX. TECH. L. REV. 669, 692 (2021).

[111] Michael Prestwich, *The English Medieval Army to 1485*, *in* THE OXFORD ILLUSTRATED HISTORY OF THE BRITISH ARMY 1, 14–15 (David Chandler & Ian Beckett eds., 1994) [hereinafter OXFORD HISTORY]; CORRELLI BARNETT, BRITAIN AND HER ARMY 1509–1970: A MILITARY, POLITICAL AND SOCIAL SURVEY 116 (1970); CORRELLI BARNETT, BRITAIN AND HER ARMY 1509–1970: A MILITARY, POLITICAL AND SOCIAL SURVEY 168 (1970).

[112] Beckett, *supra* note 37, at 412; BARNETT, *supra* note 42, at 41; Militia Act 1776, 16 Geo. 3 c. 3 (Gr. Brit.) (prohibiting sending militia out of the county, except in cases of invasion or rebellion); *see also* F.W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 456 (Cambridge Univ. Press 1920) (1908); MAHON, *supra* note 112, at 32; U.S. CONST. art. I, § 8, cl. 15.

[113] *See* MATTHEW MCCORMACK, EMBODYING THE MILITIA IN GEORGIAN ENGLAND 103 (2015) (quoting PROPOSALS FOR AMENDING THE MILITIA ACT SO AS TO ESTABLISH A STRONG AND WELL-DISCIPLINED NATIONAL MILITIA 40 (London 1759)); MAITLAND, *supra* note 43, AT 455; BARNETT, *supra* note 111, at 34, 117; MAHON, *supra* note 112, at 18; E. Milton Wheeler, *Development and Organization of the North Carolina Militia*, 41 N.C. HIST. REV. 307, 311 (1964); WILLIAM L. SHEA, THE VIRGINIA MILITIA IN THE SEVENTEENTH CENTURY 133–35 (1983); 4 PROCEEDINGS AND DEBATES OF THE CONVENTION OF THE COMMONWEALTH OF PENNSYLVANIA TO PROPOSE AMENDMENTS TO THE CONSTITUTION 425 (John Agg, ed. 1838).

they were in active service.[114] Thus, only when in active service were militiamen subject to the full burdens of military law.[115] In peacetime, only civilian law governed militiamen, who had their full civilian rights, including to trial by jury.[116] During periodic training, their discipline was "liberal and easy."[117]

There were also great differences in who composed a militia and a standing army. The whole militia consisted of all able-bodied men, so the militia was synonymous with the community.[118] Even when only part of the militia was enrolled, men were chosen for service by ballot, which, in theory, enrolled a fair cross-section of the community.[119] In practice, many found substitutes or paid fines to avoid personal service.[120] Still, the militia was often composed of gentlemen officers from the community and propertied militiamen—individuals who had a stake in the maintenance of a free government.[121]

European standing armies, in contrast, were divided along class lines. Aristocratic officers commanded enlisted recruits who were the "dregs of society."[122] To mold them into the army, commanders isolated and brutalized enlisted soldiers.[123] As Richard Kohn summarizes:

> Most [enlisted personnel] were the scum of society, sold or shanghaied into the service, rootless, lacking any class or national loyalties. To train them, to prevent desertion and violence against officers and civilians, and to push them into battle, eighteenth-century armies practiced savage discipline. The result was a

---

[114] *See* Robert Leider, *Retiring Military Jurisdiction over Military Retirees*, 68 VILL. L. REV. 751, 783–84 (2023) (noting that the Mutiny Act did not initially apply to the militia); 1 CHARLES M. CLODE THE MILITARY FORCES OF THE CROWN 181 (1869) (explaining that the Mutiny Act was extended to the militia in 1756, but only when the militia was in actual service). In America, the Fifth Amendment prohibited extending military law to militiamen, except when they were "in actual service in time of War or public danger." U.S. CONST. amend. V.

[115] *Supra* note 116

[116] DICEY, THIRD EDITION, *supra* note 40, at 285; *Kneedler v. Lane*, 45 P.A. 238, 261 (Woodward, J., concurring) ("In like manner [to the army] the militia, when duly called out and placed 'in actual service,' are subject to the rules and articles of war, all their common law rights of personal freedom being for the time suspended.").

[117] 1 WILLIAM BLACKSTONE, COMMENTARIES *412.

[118] *See, e.g.*, Statute of Winchester 1391, 13 Edw. I, ch. 9 (Eng.), *in* THE STATUTES OF THE REALM 96, 97–98 (Dawsons of Pall Mall 1965); Prestwich, *supra* note 37, at 17, 20.

[119] Jeremy Gibson & Mervyn Medlycott, MILITIA LISTS AND MUSTERS 1757-1876: A DIRECTORY OF HOLDINGS IN THE BRITISH ISLES 4 (4th ed. 2000); Ian Beckett, *The Amateur Military Tradition*, *in* OXFORD HISTORY, *supra* note 106, at 404.

[120] Ian Beckett, *The Amateur Military Tradition*, *in* OXFORD HISTORY, *supra* note 106, at 404; MCCORMACK, *supra* note 106, at 84.

[121] Beckett, *supra* note 106, at 413.

[122] RICHARD H. KOHN, EAGLE AND SWORD 2 (1975); *see also The Impartial Examiner I*, VA. INDEPENDENT CHRONICLE, Feb. 27, 1788, *in* 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 420, 422 (John P. Kaminski & Gaspare J. Saladino eds., 1993).

[123] KOHN, *supra* note 28, at 2.

brutalized soldiery under rigid authority that was obviously capable of wreaking havoc on a civilian population.[124]

B. The Dangers of Professionalizing the Military

The Framing-era discussions that culminated in the Second Amendment primarily concerned how to manage political violence and limit governmental coercion within society. A healthy liberal democracy must possess a golden mean of coercive power. Too little power and the country will descend into anarchy, much as many Framers feared was happening after Shays's Rebellion.[125] A government with too much coercive power, however, can oppress the population, with the civilian population becoming subservient to the military. A proper constitutional structure must strike the right balance between these extremes.[126]

The quantity of coercive power that a society possesses heavily depends on the military institutions that the country maintains. As just explained, the Framing generation recognized two basic types of land forces: the standing army and the militia. The Framing generation widely recognized that the standing army was the more potent military institution, which made it both more efficient for national defense and more dangerous to the polity.[127]

Framing-era fears about standing armies derived from at least five concerns: separation, militarization, politicization, expense, and aggrandizement of government power.

1. **Separation**. The standing army was a separate society. It had its own rulers (the officers), a different code of laws, and its own peculiar interests. The armies lacked a shared identity with the population they defended.[128]

2. **Militarization**. This separate society was militarized, and military law was inconsistent with the basic principles of civil liberty and limited government.[129] Military law stresses obedience and reinforces command hierarchy.[130] Soldiers are told what to do and how to do it.[131] Unlike civilians, they cannot quit their jobs. From civil liberty to

---

[124] *Id.*

[125] RICHARD H. KOHN, EAGLE AND SWORD 73–75, 77 (1975); RUSSELL WEIGLEY, HISTORY OF THE UNITED STATES ARMY 74 (1984).

[126] *See* ALLAN R. MILLETT & PETER MASLOWSKI, FOR THE COMMON DEFENSE: A MILITARY HISTORY OF THE UNITED STATES OF AMERICA 81–82 (rev. ed. 2012) (discussing in context of the Constitutional Convention).

[127] Earl F. Martin, *American's Anti-Standing Army Tradition and the Separate Community Doctrine*, 76 MISS. L.J. 135, 146 (2006); JOHN PHILLIP REID, IN DEFIANCE OF THE LAW 103 (1981).

[128] *See, e.g.*, Federal Farmer, The Anti-Federalist Writings, p. 158; Letter from Samuel Adams to James Warren (1776), http://www.samuel-adams-heritage.com/documents/samuel-adams-to-james-warren-1776.html [https://perma.cc/K78H-LP7X] (last visited Mar. 25, 2024); Roger B. Taney, *Thoughts on the Conscription Law of the United States*, *in* THE MILITARY DRAFT: SELECTED READINGS ON CONSCRIPTION 209, 211 (Martin Anderson & Barbara Honegger eds., 1982); *The Impartial Examiner I*, *supra* note 53, at 422; *accord* Kneedler v. Lane, 45 Pa. 238, 241 (1863) (opinion of Lowrie, C.J.); Jeffers v. Fair, 33 Ga. 347, 349 (1862); Cress, Citizens in Arms, *supra* note 9, at 20. *see also* Williams, *supra* note 9, at 26 (discussing the issue).

[129] Cress, Citizen in Arms, at 20; Letter from Samuel Adams to James Warren, *supra* note 128

[130] Dan Maurer, *A Logic of Military Justice*, 53 TEX. TECH L. REV. 669, 692 (2021).

[131] *See* In re Grimley, 137 U.S. 147, 153 (1890).

religious rights, soldiers lack the basic freedom that they protect for others.[132] Military law stands in contrast to civilian society, which prizes freedom and equality.[133] William Blackstone believed that soldiers' lack of rights placed them in a condition close to slavery and, by not experiencing the freedom they protected for others, "in a state of perpetual envy and hatred towards the rest of the community."[134]

3. **Politicization**. Standing armies created dangerous political dynamics. They had their own interests—for example, increased pay, better living conditions, and pensions.[135] Officers and soldiers who felt neglected by the civilian government presented a danger of mutinying against it.[136] The standing army also increased the Crown's power. Officers could be dismissed,[137] and in Britain, officers were drawn from the politically connected aristocracy.[138] The ability to control officers gave the Crown leverage over the political process.[139] Members of the standing army could also advocate for participation in foreign conflicts, so the army had a reason for existence.[140]

4. **Expense**. The standing army comprised full-time governmental employees. The government had to pay their salaries and provide for their housing. The government also had to take care of those who became sick or disabled while in active service. When not in active service, members of the standing army sought pensions or reduced pay.[141] The expense of standing armies led to difficult political problems, including the burdensome taxes required to fund them and providing for the quartering of soldiers.[142]

---

[132] Goldman v. Weinberger, 475 U.S. 503, 510 (1986).

[133] Bonnie M. Vest, *Finding Balance: Individuals, Agency, and Dual Belonging in the United States National Guard*, 73 HUM. ORG. 106, 107 (2014).

[134] 1 BLACKSTONE, *supra* note 47, at *416–17; *see also The Impartial Examiner I*, *supra* note 53, at 422 ("The severity of discipline necessary to be observed reduces them to a degree of slavery; the unconditional submission to the commands of their superiors, to which they are bound, renders them the fit instruments of tyranny and oppression."); John DeWitt, *To the Free Citizens of the Commonwealth of Massachusetts*, Freeman's J., Jan. 16, 1788, *reprinted in* 4 THE COMPLETE ANTI-FEDERALIST 34, 38 (Herbert J. Storing, ed. 1981).

[135] *See, e.g.*, Cress, Citizens in Arms, *supra* note 9, at 68 (discussing the Revolutionary War half-pay controversy).

[136] *See, e.g.*, KOHN, *supra* note 28, at 17 (discussing the Newburgh Conspiracy).

[137] HARRIS PRENDERGAST, THE LAW RELATING TO OFFICERS IN THE ARMY 235 (rev. ed. 1855).

[138] H.C.B. ROGERS, THE BRITISH ARMY OF THE EIGHTEENTH CENTURY 53 (1977).

[139] *See, e.g.*, 14 WILLIAM COBBETT, THE PARLIAMENTARY HISTORY OF ENGLAND FROM THE EARLIEST PERIOD TO THE YEAR 1803, at 461 n.* (1813) (quoting London Magazine) (discussing in the context of the leverage granted to executive officials by expanding military law to half-pay officers).

[140] WILLIAMS, *supra* note 9, at 27.

[141] Cress, Citizens in Arms, *supra* note 9, at 68; ALLAN R. MILLETT & PETER MASLOWSKI, FOR THE COMMON DEFENSE: A MILITARY HISTORY OF THE UNITED STATES OF AMERICA 77 (REV. ED. 2012).

[142] *See, e.g.*, *The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents*, *in* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 636–39 (Merrill Jensen et al. eds., 1976) [hereinafter 2 DOCUMENTARY HISTORY]; WILLIAMS, *supra* note 9, at 27;

5. **Aggrandizement of Government Power**. The standing army was antithetical to limited government.[143] The Framing-era philosophy was that laws gain their normative force through the consent of the governed.[144] Coercive governmental power is necessary to compel malefactors to obey the law and to ensure people do their legal duties. But where laws engender widespread resistance from the community, there is a strong likelihood that they are unconstitutional or oppressive.[145] A government backed with a large standing army did not need to pay as much attention to the consent of the governed.[146] Even where a law was oppressive or unconstitutional, the government could use force to overcome widespread resistance to its execution.[147]

In sum, Whiggish philosophy viewed standing armies as dangerous to civil liberty and civilian control of the government. A professional military could increase the government's coercive power beyond that to which the political community consented.[148] Professional soldiers were more interested in being paid than in the legitimacy of the cause for which they were fighting or in the constitution and civil liberty they defended.[149] Moreover, armies tended to be personally loyal to those who commanded and paid them—their officers and the executive branch of government.[150] Consequently, large armies could destabilize interbranch relations by increasing the executive's power at the expense of the legislature.[151] There was the possibility the executive branch could employ the army to usurp constitutional government.[152] The army

---

Reid, *supra* note 31, at 67–68 ("By saying they needed soldiers to support the revenue service, they were saying soldiers were needed to collect a tax imposed to maintain soldiers."); William S. Fields & David T. Hardy, *The Third Amendment and the Issue of the Maintenance of Standing Armies: A Legal History*, 35 AM. J. LEGAL HIST. 393, 415, 417 (1991).

[143] John Trenchard, An Argument Shewing that a Standing Army Is Inconsistent with Free Government 2, 4 (London 1697); A Democratic Federalist, PA. HERALD, October 17, 1787, *in* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 193, 196 (John P. Kaminski & Gaspare J. Saladino eds., 1993); Centinel II, Phila. Freeman's J., Oct. 24, 1787, *in* 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 457, 463 (John P. Kaminski & Gaspare J. Saladino eds., 1993); REID, *supra* note 31, at 9.

[144] *E.g.*, The Federal Farmer, Letter VII, *in* The Anti-Federalist 73, 73 (Murray Dry & Herbert J. Storing, eds. 1981) ("In free governments the people, or their representatives, make the laws; their execution is principally the effect of voluntary consent and aid….").

[145] REID, *supra* note 31, at 118.

[146] REID, *supra* note 31, at 107–08, 126, 154–55.

[147] John De Witt V, AMERICAN HERALD (Boston), Dec. 3, 1787, *in* 4 THE COMPLETE ANTI-FEDERALIST 34, 37 (Herbert J. Storing, ed. 1981); Federal Farmer, Letter VII, *supra* note 144, at 73; Cress, *supra* note 9, at 39; REID, *supra* note 31, at 9.

[148] *E.g.*, REID, *supra* note 31, at 9, 28–29.

[149] Trenchard, *supra* note 72, at 12, 28; Reid, *supra* note 31, at 93–94

[150] *E.g.*, Simeon Howard, *A Sermon Preached to the Ancient and Honorable Artillery Company in Boston* (1773), *in* 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760–1805, at 185, 198–99 (1983); Trenchard, *supra* note 72, at 28; KOHN, *supra* note 28, at 2; Reid, *supra* note 31, at 134.

[151] *See* Reid, *supra* note 31, at 82–83 (noting that the English standing army had attacked Parliament).

[152] Centinel II, *supra* note 143, *in* 13 DOCUMENTARY HISTORY, *supra* note 72, at 463; *see, e.g.*, Trenchard, *supra* note 72, at 8–9 (giving historical examples).

could also overthrow the civilian government in pursuit of its own political agenda—for example, if the government ignored their demands for pay.[153]

The expense of the army also created constitutional problems. Soldiers had to be housed, and quartering them in private homes was one way to do it. Quartering soldiers placed the economic burden on homeowners,[154] and the presence of soldiers in private homes was an indirect means to subdue opposition to the government.[155] The government also had to raise revenue to pay the soldiers. But burdensome taxes encouraged smuggling, which then required increasingly repressive measures to combat. This created a cycle in which "money is required to levy the armies, and armies to levy the money."[156]

Importantly, the drawbacks of standing armies did not depend on who employed them. Many collective-rights theorists claim that the Framers feared a "national standing army,"[157] but it is not clear why they add the modifier "national." A standing army employed by a state government would still be a separate militarized society that could threaten individual liberty by aggrandizing governmental power. In fact, the Framers viewed a state standing army as worse than a national standing army because state standing armies could also destabilize relations among sister states and could allow one state to embroil the whole country in a war.[158] (Think if New York massed professional troops on the Canadian or Pennsylvania border.) The Framers were concerned about the dangers of all standing armies, not just those employed by the national government.[159]

Against these drawbacks, the militia system conferred several advantages. A militia is not a standing force; it is composed of civilians. Unlike the regular military, these civilians are not separated from civilian society. Militiamen primarily live under civilian law, with their full constitutional liberties.[160] Militiamen have their own homes and civilian occupations. When the militia is not embodied for service, there is no one to pay or house, and the revenue needed to support a militiaman is much lower than for a regular soldier. The militia was also not a separate political constituency. Particularly if formed through universal service, the militia

---

[153] Trenchard, *supra* note 72, at

[154] Fields & Hardy, *supra* note 71, at 415.

[155] WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 123 (1825).

[156] Williams, *supra* note 9, at 27; *see also* Reid, *supra* note 31, at 67–68.

[157] District of Columbia v. Heller, 554 U.S. 570, 637 (Stevens, J., dissenting); David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 599–607, 667 (2000); *see also* Dorf, *supra* note 10, at 338 (similar).

[158] *See* JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 272 (1833); ST. GEORGE TUCKER, 1 BLACKSTONE'S COMMENTARIES WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA, app. D at 271 (1803).

[159] *See, e.g.*, U.S. CONST. art. I, § 10. cl. 3 (banning state standing army without the consent of Congress); ARTICLES OF CONFEDERATION of 1787, art. VI, para. 4 (same). Many state constitutions had admonitions against standing armies, too. *See, e.g.*, MASS. CONST. pt. 1, art. XVII; MD. CONST. of 1776, Decl. of Rts. § 26; ME. CONST. art. 1, § 17; N.C. CONST. of 1776, Decl. of Rts. § 17; PA. CONST. of 1776, Decl. of Rts. § 13; VA. CONST., Bill of Rts. § 13; VT. CONST. ch. 1, art. XV.

[160] *See supra* notes 114–116.

maintained an identity with the civilian society.[161] Consequently, it was difficult for executive officials to use the militia to enforce unconstitutional or oppressive laws; militiamen would not oppress themselves and their families.[162] This is also why many in the Framing generation feared a "select militia," a militia composed of an unrepresentative subset of the community.[163] Unlike a universal militia, a select militia could be its own separate political faction, and thus, many believed that it was no better than a standing army.[164]

But the militia, as an amateur force, was not a panacea for striking a balance between a country's defense and limiting governmental power. Civilians do not like to be withdrawn from their civilian pursuits for military duties, and they often resisted performing military service.[165] Even in peacetime, some jobs require a permanent military presence, such as guarding forts.[166] Militarily, the militia was not as proficient at fighting.[167] Inadequate training was the norm, not the exception.[168] Worse, Framing-era custom required militiamen to serve no more than ninety days in combat before being rotated out.[169] Although civilian armies can perform reasonably well against professionals, they first need combat experience.[170] Rotating militiamen every ninety days meant that, during the Revolutionary War, militiamen in active service never acclimated to combat.[171] Consequently, many Framers at the Constitutional Convention, including Revolutionary War veterans, rejected entrusting national defense exclusively to the militia. They believed that national defense required the country to raise some professional forces.[172]

---

[161] WILLIAMS, *supra* note 9, at 28–29, 46–47.

[162] *A Letter from a Gentleman in a Neighbouring state to a Gentleman in this City*, CONN. J., Oct. 31, 1787, *reprinted in* 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 380, 389 (Merrill Jensen, et al. eds., 1978); *The Virginia Convention, June 7, 1788*, *reprinted in* 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1006, 1014 (John P. Kaminski et al., eds. 1990); REID, *supra* note 31, at 104

[163] UVILLER & MERKEL, *supra* note 9, at 70–71; WILLIAMS, *supra* note 9, at 56–57; George A. Mocsary, Note, *Explaining Away the Obvious: The Infeasibility of Characterizing the Second Amendment as a Nonindividual Right*, 76 FORDHAM L. REV. 2113, 2117 n.37, 2126 (2008).

[164] WILLIAMS, *supra* note 9, at 56–57 (providing examples of such arguments).

[165] BARNETT, *supra* note 42, at 34–35; KOHN, *supra* note 28, at 7; WEIGLEY, *supra* note 28, at 12, 15–16, 39.

[166] KOHN, *supra* note 28, at 77–78; *see, e.g.*, 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 616 (Max Farrand ed., 1911) 2 616. (expressing "hope[] there would be no standing army in time of peace, unless it might be for a few garrisons"); THE FEDERALIST NO. 24, at 111 (Alexander Hamilton) (Dover Publ'ns 2014); 2 THE RECORDS, *Id.*, at 326 (statement of George Mason)

[167] Earl F. Martin, *America's Anti-Standing Army Tradition and the Separate Community Doctrine*, 76 MISS. L. J. 135, 146 (2006); REID, *supra* note 31, at 103; Cress, Citizens in Arms, *supra* note 9, at 27, 57.

[168] BARNETT, *supra* note 42, at 59–60; JERRY COOPER, THE RISE OF THE NATIONAL GUARD: THE EVOLUTION OF THE AMERICAN MILITIA, 1865–1920, 2 (1997).

[169] MAHON, *supra* note 112, at 18, at 19, 38.

[170] WEIGLEY, *supra* note 28, at 476.

[171] MAHON, *supra* note 112, at 18 at 38–39, 43-44.

[172] 2 RECORDS, *supra* note 95, at 330–31; *see also* George Washington, *Sentiments on a Peace Establishment*, *in* 26 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 1745–1799, at 374 (John C. Fitzpatrick ed., 1938) (1783); THE FEDERALIST, NO. 25, *supra* note 95, at 118 (Alexander Hamilton).

The debates about standing armies during the state ratifying conventions primarily concerned the dangers of professionalizing the military. During the Virginia Convention, Edmund Randolph declared, "With respect to a standing army, I believe there was not a member in the federal convention who did not feel indignation at such an institution."[173] His suggested alternative was to use the militia—the civilian community for military purposes. By doing this, he said, "the general defence is left to those who are the objects of defence" and militiamen (unlike standing soldiers) would personally "suffer if they become the instruments of tyranny."[174] George Mason expressed fears that the federal government would make militia service so burdensome that civilians would demand that the federal government replace them with professional soldiers.[175]

Many passages tendered in support of the collective-rights theory actually support an individual right for common defense. When Mason said, "The militia may be here destroyed by that method which has been practiced in other parts of the world before. That is by rendering them useless, by disarming them,"[176] he was complaining that if the government deprives civilians of their arms, they will not have the capacity to perform military service. This will leave the professional army as the sole instrument of national defense, with all the dangers of tyranny created by professionalization.[177] This is why, a few sentences later, Mason continued, "But when once a standing army is established, in any country, the people lose their liberty. When against a regular and disciplined army, yeomanry are the only defence—yeomanry unskilful and unarmed, what chance is there for preserving freedom?"[178] Patrick Henry similarly complained about Congress's "unlimited" power to "raise and support Armies," a power that he called "despotic" because it made armies—not the people—the "paramount" force in society.[179] These concerns reflected the perceived dangers of professionalizing the military.

Nor were the Anti-Federalists advocating for the power of states to create "well regulated" select militias (militias composed of an unrepresentative subset of the political community). To comply with republican principles of limited government, the Anti-Federalists believed that the country's military force must share an identity with its population; it cannot exist as a separate and distinct entity with its own political interests.[180] Consequently, the organization of select militias was antithetical to their values, and the Anti-Federalists bitterly complained that Congress could create them under the Constitution's Militia Clauses.[181]

---

[173] 10 DHRC, *supra* note 116, at 1289.

[174] *Id.*

[175] *Id.* at 1269–71.

[176] *Id.* at 1270.

[177] *Id.* at 1270–71.

[178] *Id.* at 1271.

[179] *Id.* at 1299.

[180] *See, e.g.*, LETTER XVIII (Jan. 25, 1788), *supra* note 30, at 362–33; *see also* CRESS, *supra* note 9, at 100.

[181] *See, e.g.*, *See, e.g.*, LETTER III (Oct. 10, 1787), *in* 14 DHRC 30, 39; LETTER XVIII (Jan. 25, 1788), *supra* note 30, at 362; 1312; Debates of the Virginia Convention (June 16, 1788), 10 DHRC 1312.

In these debates, federalism concerns were secondary and subsidiary. Another frequently cited quote from collective-rights theorists is Mason's complaint that "[u]nder various pretences, 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 arm them."[182] The thrust of this complaint was not that states were being deprived of their right to raise military forces. The complaint was that if the federal government abandoned the amateur militia in favor of a professional standing army, state governments could not fill the void because they lacked concurrent power to provide for enrolling and arming their citizens.[183] But the central tenant of most collective-rights theories—that the Anti-Federalists wanted states to have the power to organize select militias (and thus were indifferent to disarming those citizens not in active military service)—fails to understand how the Anti-Federalists sought to subordinate the government's coercive power to the power of the citizenry as a whole.

C. The Right to Bear Arms and Military Structure

The Second Amendment emerged as a politically savvy comprise to the Federalist and Anti-Federalist positions. The Federalists wanted a professional standing army.[184] Some Federalists also advocated for drilling only part of the militia.[185] In contrast, the Anti-Federalists sought substantive and procedural restrictions on the creation of a standing army. These included a constitutional declaration about the dangers of a standing army, limits on its peacetime size, and supermajoritarian voting requirements to authorize it.[186] The Anti-Federalists also wanted to deny Congress the power to create a select militia and to give states concurrent power to organize, arm, and discipline their militia if Congress were to fail to act.[187]

---

[182] Virginia Convention (June 14, 1788), *supra* note 91, 10 DHRC at 1270; *see, e.g.*, Silveira v. Lockyer, 312 F.3d 1052, 1082 (9th Cir. 2002); Erhman & Henigan, *supra* note 138, at 28; Rakove, *supra* note 19, at 138; *see also id.* at 139–40.

[183] *See* Virginia Convention (June 14, 1788), *supra* note 91, 10 DHRC at 1270–72. As many previous commentators have noted, separate constitutional amendments, distinct from those securing the right to bear arms, were proposed to clarify whether states had concurrent power to organize their civilians into amateur armies and to provide for their arming. Those provisions were not adopted. *See, e.g.*, United States v. Emerson, 270 F.3d 203, 242–43 (5th Cir. 2001); Mocsary, *supra* note 7, at 2122.

[184] *See* KOHN, *supra* note 28, at 45–48, 77–78, 84–86; MILLET, et al., *supra* note 29, at 82; WEIGLEY, *supra* note 28, at 74.

[185] *E.g.*, The Federalist No. 29 (Alexander Hamilton), at 142 (Carey & McClellan eds. 2001) (arguing that drilling the whole militia would take away from the country's productive labor); *see also* Henry Knox, A Plan for the General Arrangement of the Militia of the United States (1786) (arguing for classing the militia and varying military obligations with age).

[186] 2 RECORDS, *supra* note 95, at 329, 616–17; *The New York Convention, Saturday 26 July 1788*, *in* 22 The DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 2088 (John P. Kaminski et al. eds., 2008) [hereinafter *The New York Convention*] (proposing supermajority amendment to the constitution); *North Carolina*, *in* 30 The Documentary History of the Ratification of the Constitution 27, 447 (John P. Kaminski et al. eds., 2019) [hereinafter *North Carolina*] (citing Article IX of the constitution).

[187] Virginia Convention, 10 DHRC 1270; Virginia Convention Amendments, June 27, 18 DHRC 204; Hillsborough Convention, Aug. 1, 1788, 30 DHRC 451, 456 (Kaminski, et al. eds. 2019).

The Second Amendment made some concessions to the Anti-Federalist positions, without retreating from the core of Federalist military policies. The Second Amendment declared "[a] well regulated Militia" to be "necessary to the security of a free state."[188] Implicitly, Anti-Federalists could read that as an indictment of the standing army.[189] (Why else would the militia be "necessary" for the political community to be "free"?) The Second Amendment, however, did not constitutionalize any explicit disapprobation of standing armies or military professionals, a declaration that met resistance from some Framers as improperly impugning the country's military citizens.[190]

The Second Amendment also guaranteed "the right of the people to keep and bear Arms."[191] This preserved the foundation of a universal militia system because the whole political community had the right to acquire and train with their own arms. Congress could not abuse its enumerated powers (including those to organize and arm the militia) to prevent Americans from having their own arms, and the President could not use his executive power to seize private arms.

But the Second Amendment was also significant for what it did not do. The Second Amendment created no further restrictions on the standing army—no limits on its size, nor any supermajoritarian voting requirements to authorize it. Nor was Congress constitutionally required to organize and drill the entire militia; even after the Second Amendment, Congress could create select militia units if it wanted. Finally, the Second Amendment did not return primary authority over the militia to state governments. Following problems with the militia during the Revolutionary War, nationalists at the Constitutional Convention were adamant that a properly functioning militia required a national military policy, with uniform arms and discipline across states.[192] Anti-nationalists largely agreed with the need for further centralization, although they resisted efforts to entirely nationalize control over the militia.[193] Importantly, the Second Amendment did not repeal or modify Congress's authority to create a "Uniform Militia throughout the United States."[194] Congress retained the critical powers to specify the militia's organization, weapons, and training.

On this understanding, the Second Amendment serves three related purposes. First, while Congress retained the power to create a standing army and select militia units, Congress was prevented from vesting these armed factions with a monopoly on the tools of violence.[195] The legal right to bear arms ensured that the general population could have arms. Congress had the power to *regulate* the armed population. In this sense, to "regulate" is the power "to adjust by rule" and "to put in good order."[196] Congress could specify, for example, that the

---

[188] U.S. CONST. amend. II.

[189] *See* MALCOLM, *supra* note 143, at 164.

[190] 2 RECORDS, *supra* note 95, at 617.

[191] U.S. CONST. amend. II.

[192] *See, e.g.*, 2 RECORDS, *supra* note 95, at 330–31; Knox, *supra* note 185.

[193] 2 RECORDS, *supra* note 95, at 326, 385–86, 388; KOHN, *supra* note 28, at 78–79.

[194] Act of May 8, 1792, ch. 33, 1 Stat. 271.

[195] Mocsary, *supra* note 7, at 2155.

[196] Andrews v. State, 50 Tenn. 165, 195 (1871).

people were required to have certain weapons or to train on a specific number of days. So the right to bear arms was not a libertarian right of complete freedom from regulation. But the power "[t]o regulate" is not the power "to destroy."[197] The right to bear arms meant that in promulgating militia regulations, Congress could not materially interfere with the ability of citizens to acquire and train with appropriate military arms.

Second, the Second Amendment mitigates civil-military tensions by reducing the need for professional soldiers. Armed citizens serve as a substitute for professional soldiers. They are an imperfect substitute because professional soldiers are more militarily proficient.[198] But with proper training, they may serve as an adequate substitute. The Second Amendment permits individuals to acquire and train with arms. Increasing the pool of armed civilians reduces the government's need for full-time military professionals in peacetime.

Other things equal, a smaller standing army reduces civil-military tension. A smaller army means a smaller political faction of armed men who live under military law. A smaller army consumes fewer resources and requires less burdensome taxation to fund it. A smaller army would also have difficulty overthrowing civilian government and ruling militarily, even if it desired that action. And a smaller army makes it difficult for the executive branch to use the professional military as a posse comitatus to enforce the laws.

Third, the Second Amendment equilibrates military power. No less than other areas of constitutional law, there are two themes in the Constitution's division of military power. The first is separation of powers, while the second is checks and balances.[199] As an example of the first, Congress gets to raise armies and declare war, while the President acts as commander-in-chief. But the Framers did not contain abuse of military power solely through separation of powers. They also facilitated a system designed to check abuses of power. Although Congress could raise a standing army, the existence of an armed citizenry "offers a strong moral check against the usurpation and arbitrary power of rulers."[200] And if necessary, it enables the citizenry to resist against a usurping army.[201]

Although the individual rights for common defense theory takes a strong antiprofessionalism stand, this theory is agnostic on military federalism. Most dangers of standing armies do not depend on whether they are organized by a national or state government. Likewise, the benefits of a militia do not depend on which government organizes them. As the Framers recognized, military federalism may provide additional helpful checks against the inherent dangers of military institutions. But the primary purpose of the right to bear arms is to protect the whole nation's amateur militia, not to protect private military forces of individual state governments.

---

[197] *Id.*

[198] *E.g.*, KOHN, *supra* note 28, at 77.

[199] Robert Leider, *Federalism and the Military Power of the United States*, 73 VAND. L. REV. 989, 995 (2020).

[200] Story, Commentaries on the Constitution, § 1891, p. 746.

[201] *Id.* Some collective-rights scholars seem to agree with this. *See* PATRICK J. CHARLES, THE SECOND AMENDMENT 95–96 (2009); *see also id.* at 43.

III. The Superiority of the Individual Right for Common Defense Interpretation

Today, federal courts primarily treat the Second Amendment as guaranteeing a right to keep and bear arms exclusively for individual self-defense against crime. Those who believe that *Heller* wrongly recognized a right to bear arms for individual self-defense generally argue that the Second Amendment confers a collective right. The individual right for common defense theory is sounder than either of these interpretations.

A. The Second Amendment's Text and the Subjects of the Right

The individual right for common defense theory is the only theory that gives effect to the entire text of the Second Amendment. It connects a right to keep and bear arms belonging expansively to "the people" with the desire to maintain a well-regulated militia and the preservation of the security of a free state. By guaranteeing a broad right to keep and bear military arms, the Second Amendment prevents the government from abolishing the military capacity of its citizens. The well-regulated militia of the Second Amendment is the amateur army drawn from the citizenry as a whole, not specialized armed factions of state governments. The "free state" recognizes that reserving part of the nation's military power in the citizenry keeps the nation's military power in balance and mitigates the chance of a calamitous usurpation of power.

The individual right for common defense theory also has no trouble reading across constitutional provisions.[202] The "militia" of Article I, Section 8 is the same "militia" of the Second Amendment: the entire able-bodied political community.[203] Under its authority to "organiz[e]" the militia,[204] Congress may choose to enroll all or part of that body into active militia units. But regardless of how Congress organizes the militia, the Second Amendment prevents Congress from denying to members of the political community their liberty to have and train with arms. This right is particularly useful if Congress decides to forgo military organization and training in peacetime, only to organize military forces abruptly when war is threatened. Thus, a general legal right to keep and bear arms contributes to maintaining a well-regulated militia, even if the right, by itself, does not guarantee the existence of a well-regulated militia (particularly in peacetime when the government often ignores enrolling citizens in military discipline). The individual right for common defense theory also reconciles the Constitution's ban on states having "troops" in peacetime with the Militia Clauses, which reserves some state authority over the militia.[205] The former is a restriction against states having

---

[202] For criticisms that individual rights scholars have problems with this, see Rakove, *supra* note 19, at 109.

[203] An unfortunate factual problem in the Second Amendment debate is that word "militia" has always carried two meanings: (1) the entire political community capable of bearing arms and (2) that portion of the citizenry formally enrolled in part-time military discipline. *See* WEIGLEY, *supra* note 28, at 321. For substantially the same reasons that Justice Scalia gave in *Heller*, 554 U.S. at 596, I believe that the Constitution uses the term in its broadest sense, even though Congress is not required to organize the militia by enrolling everyone into active units.

[204] U.S. Const. art. I, § 8, cl. 16.

[205] *Compare* U.S. Const. art. I, § 10, cl. 3, *with id.* § 8, cl. 15–16.

standing armies of professional soldiers, while the Militia Clauses leave States free to organize and train nonprofessional military units.[206]

Madison's original proposal for the Second Amendment also included a provision that "no person religiously scrupulous of bearing arms shall be compelled to render military service in person."[207] The individual right for common defense theory has no problem accommodating this unadopted provision. The Second Amendment guarantees to every citizen a right to acquire the arms of war and to train with them, so that they may make proficient amateur soldiers. This provision would have prevented Congress from converting this right into a legal duty for Quakers and members of other pacifist religious sects. Despite denying that the right to bear arms is contingent on formal enrollment in the militia, the individual right for common defense theory nevertheless recognizes that all three provisions of Madison's original proposal (the right, the declaration of importance of the militia, and the religious exemption) relate to the military capacity of civilians.

In contrast, collective-rights theories have basic textual problems. The Second Amendment, on its face, vests the right in "the people." It does not vest the right in state governments, as some collective-rights theories assert, nor does the Constitution speak of "rights" when it talks about state governmental powers.[208] This understanding of the Second Amendment treats the right to bear arms as duplicative of a separately proposed constitutional amendment, which, had it been adopted, would have granted states concurrent power over the militia.[209] With respect to sophisticated collective-rights theories, the Second Amendment also does not vest the right only in the enrolled militia.[210] The Amendment does not read that "the right of the people enrolled in the militia to keep and bear arms shall not be infringed."

B. Purpose

Of the three theories, the individual right for common defense theory is the only theory that allows the Second Amendment to secure its function. The Framers were concerned about the dangers posed by armed factions. By guaranteeing a general right to bear arms, the Amendment secures an identity between the community and the coercive power. Furthermore, having an armed population that can perform military service reduces civil-military tensions by diminishing the quantity of regular forces that are necessary for national defense. It also provides a quasi-civilian force for domestic policing when necessary. The Framers believed it to

---

[206] *See* United States v. Miller, 307 U.S. 174, 179 (1939); Dunne v. People, 94 Ill. 120, 141 (1879).

[207] 1 ANNALS OF CONG. 451 (Joseph Gales, ed. 1834).

[208] *District of Columbia v. Heller*, 554 U.S. 570, 579–80 (2008); Cornell, *supra* note 137, at 662; Christopher Chrisman, Note, *Constitutional Structure and the Second Amendment: A Defense of the Individual Right to Keep and Bear Arms*, 43 Ariz. L. Rev. 439, 453-55 (2001).

[209] *Supra* note 183.

[210] COOLEY, *supra* note 150, at 282 ("It might be supposed from the phraseology of this provision that the right to keep and bear arms was guaranteed to the militia; but this would be an interpretation not warranted by the intent. . . . [T]he law may make provision for the enrolment of all who are fit to perform military duty, or of a small number only, or it may wholly omit to make any provision at all; and if the right were limited to those enrolled, the purpose of the guaranty might be defeated altogether by the action or neglect to act of the government it was meant to hold in check.").

be extraordinary dangerous to interject the regular military into domestic law enforcement against the civilian population.

In contrast, collective rights theorists equivocate about the Second Amendment's teleology. As Lois Schwoerer has observed, "specific rights emerged out of practical political disputes, not abstract theoretical discussions."[211] What is the purpose of a right that prevents the government from disarming the organized militia? Collective rights theorists have two possible answers.

The first is a "state army thesis," which maintains that the Second Amendment is a "federalism provision" that protects state armed forces from disarmament by the federal government.[212] In this theory, the Second Amendment was motivated by ratification debates in which Anti-Federalists expressed concern that the Constitution had given Congress exclusive power under Article I, Section 8 to provide for arming the militia. If Congress abused or neglected this power, they believed that nothing in the original Constitution gave states concurrent power to arm their military forces.[213] In the opinion of many collective rights scholars, the Second Amendment remedied this by giving states (or individuals enrolled in organized state military forces) the right to arm soldiers in their organized military forces.[214]

The second purpose I will call the "no karate thesis." The no karate thesis maintains that the Second Amendment and state analogues guarantee that individuals have a right not to be deprived of arms when they are ordered into active military service, provided they are in a governmental militia that is sufficiently well organized and trained to qualify as "well regulated."[215] Under this view, it seems, the concern animating the right to bear arms was that the government would send organized militiamen into combat unarmed, limiting them only to karate when fighting.[216] The no karate thesis treats the right to bear arms as a personal

---

[211] Lois G. Schwoerer, *To Hold and Bear Arms: The English Perspective*, 76 CHI.-KENT L. REV. 27, 37 (2000).
[212] McDonald v. City of Chicago, 561 U.S. 742, 897 (2010) (Stevens, J., dissenting); *see also Heller*, 554 U.S. at 660–61 (Stevens, J., dissenting); Silveira v. Lockyer, 312 F.3d 1052, 1075 (9th Cir. 2002); Commonwealth v. Davis, 343 N.E.2d 847, 850 (Mass. 1976).
[213] *E.g.*, *Heller* 554 U.S. at 655 (Stevens, J., dissenting); *Silveira*, 312 F.3d at 1080; *Davis*, 343 N.E.2d at 850 (Mass. 1976); Burton v. Sills, 248 A.2d 521, 526 (N.J. 1968); Finkelman, *supra* note 12, at 224–25, 234; Ehrman & Henigan, *supra* note 138, at 26–31.
[214] Sources cited *supra* note 212.
[215] *E.g.*, United States v. Haney, 264 F.3d 1161, 1166 (10th Cir. 2001); United States v. Wright, 117 F.3d 1265, 1274 (11th Cir. 1997); State v. Misch, 256 A.3d 519, 532 (Vt. 2021); State v. Wilson, 543 P.3d 440 (Hawaii 2024). Academically, this seems to be Cress's view. Lawrence Delbert Cress, *An Armed Community: The Origins and Meanings of the Right To Bear Arms*, 71 J. AM. HIST. 22, 38 (1984) ("Congress was prohibited from taking any action that might disarm or otherwise render the militia less effective.").
[216] The "no karate thesis" comes from oral argument in Perpich v. Department of Defense, 496 U.S. 334 (1990). Solicitor General Ken Starr argued that any effort by state governments to organize and arm a militia would make them state "troops" for which Congress had to provide consent under the Constitution. *See* Oral Argument Transcript at 29–30, Perpich v. Dep't. of Defense, 496 U.S. 334 (1990) (referencing U.S. CONST. art. I, § 10, cl. 3 (prohibiting states from having "troops" in peacetime without the consent of Congress)). This prompted Justice Scalia to ask whether states had inherent power to organize an unarmed militia, the members of which "will fight with karate if necessary." *Id.* at 29. The

guarantee that organized militiamen will have appropriate military arms while carrying out their official duties. Militiamen purportedly hold this right against their civilian leaders.

Collective rights theorists do not consistently subscribe to either teleological purpose. In federal Second Amendment cases, many have subscribed to some form of the state army thesis. Perhaps this is because the state army thesis seems more plausible than the no karate thesis. Yet, in state cases arising under analogous state constitutional provisions, the federalism purpose has no application.[217] State courts subscribing to the collective-rights view, thus, must switch to some form of the no karate thesis.[218] And some collective-rights opinions lack a unified theory and incoherently draw from both.[219]

In either case, collective rights theories are antithetical to the Second Amendment's function. Collective rights theorists who subscribe to the "state army thesis" recognize the right to bear arms as securing from national interference the power of state governments to create armed factions. But if the Framers' primary fear was that governments would shed their constitutional limitations by employing armed factions against the people, it is odd to recognize a federal constitutional right of state governments to have such dangerous institutions.

The "no karate thesis" also fails to plausibly fit with the Second Amendment's overarching purpose. The federal government and (to a lesser degree) state governments can create armed factions because they have the power to raise armies and to determine who gets enrolled in the militia. Restricting the right to bear arms to the government organized militia protects these armed factions against disarmament, while recognizing no impediment to disarming the bulk of the people if the government neglects to enroll them, too. This is perverse. The Framers recognized that public necessity may require the keeping of specialized troops. The purpose of the right to bear arms is to protect citizens against these separate armed factions, not to protect the armed factions against the citizens.

Nor should the collective-rights theorists get off the hook merely by identifying the changes in American military organization that have occurred since the Framing. Collective-rights theorists are fond of arguing that because a universal militia system of the kind envisioned by some Framers no longer exists, the Second Amendment has no modern

---

"no karate thesis," thus, is the idea that the right to bear arms prevents organized militiamen from having to use karate in combat because they are prohibited from having arms by law.

[217] *E.g.*, Mocsary, *supra* note 7, at 2157.

[218] *E.g.*, *Davis*, 343 N.E.2d at 888; City of Salina v. Blaksley, 83 P. 619, 620 (Kan. 1905); State v. Wilson, 543 P.3d 440, 450–51 (Haw. 2024).

[219] In *Heller*, for example, Justice Stevens declared that the Second Amendment secured an individual right for military purposes, which would seemingly suggest the no karate thesis. *Heller*, 554 U.S. at 636 ("Surely [the Second Amendment] protects a right that can be enforced by individuals."). Yet, his opinions in *Heller* and *McDonald* also treated the Second Amendment as a "federalism" provision that protected the state's right to organize military forces, which suggests the state army thesis. *Id.* at 649 n.20, 661–62; *McDonald*, 561 U.S. at 897–98 (Stevens, J., dissenting).

application.[220] Laying aside that the premise of this objection often exaggerates the differences between the Framing-era military system and our own,[221] the collective-rights theorist still must defend *why* the law should recognize no constitutional protection for the right to bear arms when the government has not enrolled the bulk of the population in the militia. Given that (as both sides of the debate agree) the Second Amendment was a direct response to Framing-era fears that the standing army could oppress the population, which of these two conditionals seems most consistent with the Framing-era concerns over the standing army?

> (1) **The collective-rights theorist**: If the government does not organize the militia, then it may invest the standing army with a complete monopoly of force.
>
> (2) **The individual right for public defense theorist**: Even if the government does not organize the militia, the government still may not invest the standing army with a complete monopoly of force.

The individual right for common defense theorist has the correct principle, and obviously so. Regardless of how the militia is organized (or whether it is organized at all), the government cannot invest the standing army with the despotic power of controlling all of society's force. Although the Second Amendment does not compel the government to organize, arm, and train any or all citizens, it guarantees that citizens may obtain and train with arms on their own, thereby preserving the foundation of amateur military forces.

The state's rights permutation articulated in *Silveira v. Lockyer* also makes little sense.[222] Essentially, Judge Reinhardt's position is: if the federal government does not organize the militia, then it may invest the standing army with a monopoly of force, *unless* state governments choose to arm and organize their citizens.[223] But why should the federal government's ability to invest the standing army with a monopoly of force depend on whether state governments challenge the federal monopoly of force? If the Second Amendment's goal is to protect citizens from the despotic potential of standing armies, it makes little sense to condition the citizenry's right to bear arms on *ex ante* state government authorization. Collective-rights theorists never explain what function is served by requiring citizens to first obtain state governmental authorization before having arms.[224]

---

[220] *E.g.*, UVILLER & MERKEL, *supra* note 9, at 144, 157, 166–67; Ehrlman & Henigan, *supra* note 138, at 39–40; Patrick J. Charles, *The 1792 National Militia Act, The Second Amendment, and Individual Militia Rights: A Legal and Historical Perspective*, 9 GEO. J.L. & PUB. POL'Y 323, 326 (2011); *State v. Misch*, 256 A.3d 519, 532 (Vt. 2021).

[221] *See* Leider, *supra* note 105, at 1243–44.

[222] Silveira v. Lockyer, 312 F.3d 1052 (9th Cir. 2002).

[223] This is Justice Stevens's view, as well. *Heller*, 554 U.S. at 649 n.20.

[224] Nor does Saul Cornell. As noted above, *supra* note 25, Cornell writes that "the more accurate way to paraphrase the right protected by the original Second Amendment might be to describe it as a right of the people acting through their state governments to form well-regulated militias." Cornell, *supra* note 25, at 662. But he never clarifies whether he believes that prior authorization by a state government is necessary to vest a citizen with a right to keep arms, and if it is, what function is served by requiring the people to work through their state governments before the right can vest.

Collective rights theorists also have no consistent account of the specific function that the right to bear arms serves. Some contend that the right permits states to resist an invading force or a usurping national standing army.[225] Others belittle the idea of a constitutional provision that facilitates the states or citizenry waging war against the federal government or its armies.[226] Still others, such as Justice Stevens, offer platitudes that the right protects state "autonomy" and "sovereignty,"[227] without explaining how the right does this.

Compounding these teleological problems with collective rights theories is yet another major equivocation. Collective-rights theorists provide both antiprofessionalism and federalism justifications for the right to bear arms. Unfortunately, however, their discussions are often confused conglomerations of these two separate concepts.[228]

Paul Finkelman has touted that "no serious historians have accepted" the individual right to bear arms.[229] Although this statement is slightly exaggerated,[230] it unfortunately reflects unwarranted complacency and poor intellectual diversity in their field. Scholarship by historians (and by law professors claiming the academic history mantle) have been among the most flagrant confounders of antiprofessionalism and federalism, erroneously writing as though antiprofessionalism necessarily implies military federalism.[231]

---

[225] *E.g.*, PATRICK J. CHARLES, THE SECOND AMENDMENT, 43, 95–96 (2009); Dorf, *supra* note 10, at 311–12.

[226] *E.g.*, Finkelman, *supra* note 12, at 631.

[227] *Heller*, 554 U.S. at 637 (Stevens, J., dissenting); *McDonald*, 561 U.S. at 897 (Stevens, J., dissenting).

[228] *See, e.g.*, David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 599–607, 667 (2000) (exhibiting confusion); Dorf, *supra* note 10, at 338 (improperly combining military federalism and antiprofessionalism explanations) ("By protecting state militias against abolition they hoped to reduce federal reliance on a standing army. . . . ."); United States v. Wright, 117 F.3d 1265, 1273 (11th Cir. 1997) (switching from the standing army and "dangers of relying on inadequately trained soldiers" (a reference to the militia) to a federalism discussion about which government would arm the militia).

[229] Finkelman, *supra* note 12, at 626.

[230] Dissenting voices in the historical field exist, even if they are rare. *See, e.g.*, Robert E. Shalope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599 (1982); Robert J. Cottrol Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 319 (1991); MALCOLM, *supra* note 36.

[231] For representative examples of their confusion, see Finkelman, *supra* note 238, at 212–14, 233–35 (failing to distinguish antiprofessionalism and federalism in the army/militia history of the Second Amendment); MAHON, *supra* note 112, at 18, at 47-48; Cooper, *supra* note 97, at 8; ALLAN R. MILLET & PETER MASLOWSKI, FOR THE COMMON DEFENSE 81–82 (rev. ed. 2012); UVILLER & MERKEL, *supra* note 9, at 157 (purporting to explain why the National Guard is part of the standing army, thus confusing federalism and professionalism); *compare* Rakove, *supra* note 19, (claiming that the Second Amendment protected "state militias" from Congress's authority to regulate the militia in the original constitution), *with* Jack N. Rakove, *The Second Amendment: The Highest State of Originalism*, 76 CHI.-KENT L. REV. 103, 132–33 (2000) (properly situating the debate between standing armies and nonprofessional citizen soldiers); *see also* David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 599–607, 667 (2000) (exhibiting similar confusion); Dorf, *supra* note 10, at 338 (improperly combining military federalism and antiprofessionalism explanations) ("By protecting state militias against abolition

Beyond the academic debate, Justice Stevens's three opinions in *Perpich*, *Heller*, and *McDonald* also illustrate this confused thinking. In *Perpich*, he offers two justifications for the militia: "widespread fear that a national standing Army posed an intolerable threat [1] to individual liberty and [2] to the sovereignty of the separate States."[232] He never develops either theme in *Perpich*, offering instead a high-level history of the militia system.

In his *Heller* dissent, however, Justice Stevens jettisons the first justification without explanation and focuses on the second. The Second Amendment, he says, "was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States."[233] He repeats this sovereignty point again and again.[234] In contrast, Justice Stevens mentions liberty twice[235]: once to quote himself in *Perpich*[236] and once after quoting Justice Story to note that "[Justice Story] then invoked the fear that drove the Framers of the Second Amendment—specifically, the threat to liberty posed by a standing army."[237] Justice Stevens never explains why the Framers believed a "national standing army" threatened individual liberty. Was the problem with having a standing army? Was it that the army's national character? Or was it some combination of both? Nor does he offer any account of how the militia system and the right to bear arms checked the threat against individual liberty.

By *McDonald*, the idea that the standing army threatened individual liberty entirely disappeared from his radar. The Second Amendment, he said, "is a federalism provision" that "serves the structural function of protecting the States from encroachment by an overreaching Federal Government."[238] In other words, "[i]t was the States, not private persons, on whose immediate behalf the Second Amendment was adopted."[239] Here, again, his explanation is wanting. The fit between the Second Amendment and preserving state sovereignty is not obvious. Why would the Framers force the states to check the professional federal army with

---

they hoped to reduce federal reliance on a standing army. . . . ."); United States v. Wright, 117 F.3d 1265, 1273 (11th Cir. 1997) (switching from the standing army and "dangers of relying on inadequately trained soldiers" (a reference to the militia) to a federalism discussion about which government would arm the militia).

[232] Perpich v. Dep't. of Defense, 496 U.S. 334, 340 (1990).

[233] District of Columbia v. Heller, 554 U.S. 570 at 637 (2008) (Stevens, J., dissenting).

[234] Consider these examples: "the ultimate purpose of the Amendment was to protect the States' share of the divided sovereignty created by the Constitution," *id.* at 645; "Article I's Militia Clauses and the Second Amendment [] represent quintessential examples of the Framers' splitting the atom of sovereignty," *Id.* at 652; "The history of the adoption of the Amendment thus describes an overriding concern about the potential threat to state sovereignty that a federal standing army would pose, and a desire to protect the States' militias as the means by which to guard against that danger," *Id.* at 661.

[235] This does not count Justice Stevens's quotation of two rejected proposals that would have declared standing armies to be dangerous to liberty. *See id.* at 657–58.

[236] *Id.* at 653.

[237] *Id.* at 668.

[238] *McDonald*, 561 U.S. at 897.

[239] *Id.*

an irregular militia? If state sovereignty had been the Framers' sole concern, it would have made more sense to repeal the Constitution's restrictions on states keeping standing armies and navies.[240]

It may be, as Justice Stevens's final opinion in *McDonald* illustrates, that collective rights theorists are primarily settling on a federalism justification for the Second Amendment. Their basic idea is that the Second Amendment prevents the national government from interfering in state militaries. But it is difficult to be certain whether this description is accurate. Collective rights theorists provide confused equivocations between antiprofessionalism and military federalism rationales. They have never settled on the Second Amendment's ultimate purpose.

Finally, the exclusive individual self-defense understanding of the right is not plausible. Individual self-defense against crime may be part of the Second Amendment's proper interpretation; the individual right for common defense theory is agnostic on this point. But the exclusive individual self-defense theorist must establish not only that the Amendment protects individual self-defense against crime; he must also defend that this is the Amendment's only purpose. This is preposterous. Framing-era debates were consumed with discussions about the standing army and the militia. Although the operative clause protects "the right of the people to keep and bear Arms," that right is tied to the desire to maintain the militia system.[241] A right that solely preserves individual self-defense against crime fails to connect the right to the militia. Yet, the Amendment's text, history, and tradition all indicate that the right to bear arms has public defense aims. Tellingly, no court that has adopted the exclusive individual self-defense reading has provided any first-principles justification for it. They all claim that *Heller* compels it as an authoritative matter, even though *Heller* does no such thing.[242] Even if *Heller* did, it would mean simply that *Heller* is wrong in this one respect. The exclusive individual self-defense theory is not a credible understanding of the right.

C. Scope of the Right

The Second Amendment secures a right to own military arms and to train with them. It also includes the right to carry arms outside the home for training and collective defense. And the exercise of the right does not require enrollment in the militia. This allows the right to fulfill its purpose of preserving the ability to organize amateur armies from the whole political community, particularly during military emergencies.[243]

On other matters, the individual right for common defense theory is agnostic. These include the right to own non-military self-defense arms and the right to carry arms outside the home purely for personal protection. Such rights are not inconsistent with also having an individual right for public defense. But the individual right for common defense theory is also compatible with the civic republican understanding of the right.

---

[240] U.S. CONST. art. I, § 10, cl. 3.

[241] U.S. CONST. amend. II.

[242] *See infra* note 308.

[243] For the full elucidation of the right's scope, see *supra* Section I.D.

The exclusive individual right of self-defense against crime theory makes a mockery of the right to bear arms. The current understanding of several lower courts is that the Second Amendment secures a right of individuals to have handguns and other weapons of purely private conflict, while excluding arms most useful to militia service.[244] This interpretation leaves the Second Amendment incapable of fulfilling its basic function. Citizens are not prepared for military service if they are armed and trained solely with butterfly knives, switchblades, tasers, and small concealable handguns. Making individual self-defense the lodestar drains the Amendment of its primary function to preserve the militia, and it does nothing to contain the dangers of standing armies.[245]

The collective rights theories have their own peculiar plausibility problems. The collective rights theory's main tenants are that the right to bear arms requires prior governmental authorization to exercise and that the right exists only to the extent that private arms are necessary for a well-regulated militia. But the prior authorization and necessity requirements result in a thin right. Indeed, the right is so thin that collective rights theorists have trouble articulating in non-abstract terms their positive vision of the precise laws or policies that the Second Amendment would prohibit.[246] Here are some illustrative examples of attempts to explain what a "collective right" means:

> Carl Bogus: "[T]he Second Amendment grants the people a collective right to an armed, militia, as opposed to an individual right to keep and bear arms for one's own purposes outside of, or even notwithstanding, governmental regulation."[247]

---

[244] Cases cited *supra* note 5.

[245] I previously indicated my agreement with Blocher's theoretical claim that burdens on the right to bear arms must be judged by their effect on constitutional interests. *See supra* note 315, and accompanying text. Yet, I strongly disagree with Blocher's subsequent statement that "[i]n Second Amendment cases, this would mean evaluating the importance of a particular class of arms to the core interest identified in *Heller*: self-defense." Blocher, *supra* note 315, at 354. Like many judges, Blocher mistakenly treats individual self-defense as the exclusive core interest protected by the Second Amendment.

[246] Roger I. Roots, *The Approaching Death of the Collective Right Theory of the Second Amendment*, 39 DUQUESNE L. REV. 71, 72 n.7 (2000) ("[P]roponents of the collective right theory either have not produced a fully developed explanation of its application or have provided ambiguous or conflicting arguments so epithelial that it is difficult to tell whether their vision of the Second Amendment grants it any real meaning at all."); Brannon P. Denning, *Gun Shy: The Second Amendment As an "Underenforced Constitutional Norm*," 21 HARV. J.L. & PUB. POL'Y 719, 729–30 (1998) ("Perhaps to cast the States' rights model of the Second Amendment as a 'theory' is misleading, because its main proponents neither take it seriously nor carefully follow its logic to a reasonable conclusion. It is most often employed as a makeweight—a convenient way to read the Second Amendment out of existence under the guise of 'interpretation.'"); Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139, 1206 (1996) (describing the collective rights view as the "makeweight view" because that term "accurately describes a view under which the Amendment lacks any specific affirmative function of substantive content.").

[247] Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 3, 4 (2000).

> Saul Cornell and Nathan DeDino: "[T]he Second Amendment makes it possible for the states to preserve their well regulated militias against the threat of disarmament by the federal government."[248]
>
> Michael C. Dorf: "The Second Amendment protects some right of state militias against undue federal interference but no right of individuals against either federal or state regulation."[249]
>
> Paul Finkelman: "[T]he Second Amendment protected the right of the states to maintain and arm their own militias, as long [a]s they were 'well regulated' and ultimately under federal control."[250]
>
> Michael Steven Green: "Under the collective-right interpretation, the Second Amendment protects the interests of state governments, not individuals. For this reason, only regulations of firearms that impair states' abilities to arm their militias can be unconstitutional."[251]

These definitions fail to explain how to operationalize the Second Amendment in practice. When does a law impair the state's ability to arm its militia? May states override federal decisions about which weapons to provide the National Guard? May individual Guardsmen override governmental decisions about which weapons they possess and carry? Do states have a constitutional right to organize military units if federal law forbids it? Despite thousands of pages of collective rights scholarship accumulated over several decades, collective rights theorists have made surprisingly little effort to answer these basic questions.[252]

Even in the rare cases when they try, collective rights theorists have struggled to offer a detailed, coherent affirmative vision of what the right protects. Carl Bogus dedicated an entire article to the subject, in which he was only able to conclude that "the Second Amendment provides the states with some minimum right to an armed militia."[253] He explicitly demurred,

---

[248] Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 488 (2004) (describing view without subscribing to it) (citing the Dorf and Bogus definitions).

[249] Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291, 293–94 (2000).

[250] Paul Finkelman, *"A Well Regulated Militia": The Second Amendment in Historical Perspective*, 76 CHI.-KENT L. REV. 195, 235–36 (2000).

[251] Michael Steven Green, *Why Protect Private Arms Possession? Nine Theories of the Second Amendment*, 84 N.D. L. REV. 131, 131 (2008).

[252] For previous articles that have noted these and similar tensions, see Nicholas J. Johnson, *The Power Side of the Second Amendment Question: Limited, Enumerated Powers and the Continuing Battle over the Legitimacy of the Individual Right to Arms*, 70 HASTINGS L.J. 717, 765–66 (2019); Glenn Harlan Reynolds & Don B. Kates, *The Second Amendment and States' Rights: A Thought Experiment*, 36 WM. & MARY L. REV. 1737 (1995); Lund, *supra* note 7, at 29; J. Norman Heath, *Exposing the Second Amendment: Federal Preemption of State Militia Legislation*, 79 U. DET. MERCY L. REV. 39 (2001).

[253] Carl T. Bogus, *What Does the Second Amendment Restrict? A Collective Rights Analysis*, 18 Const. Commentary 485, 516 (2001); *see also Id.* at 486 (recognizing that the collective rights theory needs to offer a positive vision if it is to be persuasive and not providing a single example where one had been given).

however, to articulate "the parameters of that right."[254] Nor did he think the Second Amendment has ever been violated, except perhaps when the federal government disarmed ten Confederate state governments following the Civil War.[255] In this exceptional case, he thought the federal government "violated the letter of the Second Amendment in order to effectuate its spirit" because those states were in rebellion and had waged war against the national government.[256]

For those engaged in the academic battlefield, the result is that collective rights theories are shapeless targets. They are united in the negative assertion that the right to bear arms does not facilitate individual self-defense against crime. For an affirmative theory, however, all they offer are undescriptive definitions of the right.

D. Objects of the Right

Because collective rights theories do not have a well-developed positive articulation of the right to bear arms, there is much confusion and diversity among them about the right's objects. Collective-rights theorists who hold the "state army" perspective generally view the Second Amendment as "a federalism provision" that exclusively protects state militaries against federal interference.[257] Consequently, they view the federal government as the right's exclusive object. For them, there is no right against state governments, and consequently, the Second Amendment defies incorporation.[258] On the other hand, sophisticated collective-rights theorists who subscribe to the "no karate thesis" can view the right as equally applicable against the national or state governments—either of which could disarm organized militiamen in the performance of their duties.

The individual right for common defense theory lacks such equivocation. It maintains that the people have a claim against any government from being disarmed. Disarmament, whether by a local, state, or national government, obstructs the right's fundamental purpose: to prevent the government from investing armed factions with a monopoly of the tools of violence.

To be sure, the individual right for common defense theorist can recognize that different legal systems may have peculiar rules about the entities against whom rights will be enforced. Originally, the constitutional restrictions contained within the federal Bill of Rights were not

---

[254] *Id.* at 516.

[255] *Id.* at 506.

[256] *Id.*

[257] McDonald v. City of Chicago, 561 U.S. 742, 897 (2010) (Stevens, J., dissenting); *see also* Friedman v. City of Highland Park, 784 F.3d 406 (7th Cir. 2015) ("Some of the weapons prohibited by the ordinance are commonly used for military and police functions; they therefore bear a relation to the preservation and effectiveness of state militias. But states, which are in charge of militias, should be allowed to decide when civilians can possess military-grade firearms, so as to have them available when the militia is called to duty.").

[258] *McDonald*, 561 U.S. at 897 (Stevens, J., dissenting).

directly enforceable against state governments.[259] Individuals had to look to analogous state constitutional provisions to protect these rights.[260] Likewise, because of the Supremacy Clause, an individual could not invoke a state constitutional right to bear arms as a defense to federal legislation.[261] After the Fourteenth Amendment, many legal rights recognized by the federal Constitution became applicable against state and local governments.[262] The individual right for common defense theory is committed to the claim that the right to bear arms applies against any government. But the theory can recognize different ways of making that effective, including by incorporating the Second Amendment or by applying federal and state constitutional rights to bear arms in parallel. And before the federal constitutional right to bear arms was incorporated against the states, the individual right for common defense theorist would also have to accept the possibility that states had the raw power to abrogate the right to keep and bear arms, even if they would not act in accordance with Anglo-American constitutional norms if they did so.[263]

E. Analogous State Constitutional Right to Bear Arms and General Law

The individual right for common defense theory is the only non-anachronistic understanding that can plausibly account for contemporaneous state constitutional protections of the right to bear arms. Many early state constitutions variously protected the right to bear arms "for the common defence," "for the defence of the state," "for the defence of themselves

[259] Barron v. Baltimor*e*, 32 U.S. 243 (1833); United States v. Cruikshank, 92 U.S. 542, 553 (1875); Presser v. Illinois, 116 U.S. 252, 265 (1886).

[260] Andrews v. State, 50 Tenn. 165, 177 (1871).

[261] U.S. CONST. art. VI, cl. 2.

[262] U.S. CONST. amend. XIV, § 1.

[263] *Compare* HENRY CAMPBELL BLACK, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW § 144, at 403 (St. Paul, West Publishing Co 1895) (recognizing that states have power to restrict arms absent state constitutional protection for the right to bear arms), *with* Nunn v. State, 1 Ga. 243, 250 (1846) (holding that the right applied to state governments even without a state constitutional guarantee). Even before the Second Amendment was incorporated, the U.S. Supreme Court denied (in dicta) that state governments have the legal power to deprive citizens of their arms because a disarmed population could not perform military service at the behest of the national government. *See* Presser v. Illinois, 116 U.S. 252, 265 (1886) ("It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the states, and, in view of this prerogative of the general government, as well as of its general powers, the states cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government.").

and the state," and "for the defence of himself and the state."[264] State constitutions (often in the same provision) also warned against the dangers of standing armies.[265]

The individual right for common defense theory has no trouble explaining these provisions. The multiplicity of provisions reflects that the right to bear arms was a general law right common to Anglo-American government.[266] The American right to bear arms descended from the English guarantee, which protected a right of Protestants to have arms.[267] These rights prevented the government from investing armed factions with a monopoly of the tools of violence by ensuring that the whole political community could have arms. By mitigating the dangers of armed factions, the right to bear arms was an important right held against both the national and state governments. Indeed, nineteenth-century courts and commentators recognized that these rights all had the same basic purpose, were approximately equivalent in scope, and thus codified the same preexisting right.[268]

---

[264] *E.g.*, ALA. CONST. art. I, § 27; ARK. CONST. OF 1836, art. II, § 21; CONN. CONST. art. I, § 15; IND. CONST. OF 1816, art. I, § 20; KY. CONST. OF 1792, art. XII, cl. 23; MASS. CONST. pt. 1, art. 17; MICH. CONST. OF 1835, art. I, § 13; MISS. CONST. OF 1817, art. I, § 23; N.C. DECLARATION OF RIGHTS §XVII; OHIO CONST. OF 1802, art. VIII, § 20; PA. CONST. art. 1, § 21; TENN. CONST. OF 1796, art. XI, § 26; VT. CONST. ch. I, art. 16. For a collection of state constitutional provisions, see Eugene Volokh, *State Constitutional Right to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191 (2006).

[265] *E.g.*, MASS. CONST. pt. 1, art. 17; N.C. DECLARATION OF RIGHTS §XVII; OHIO CONST. OF 1802, art. VIII, § 20; PA. DECLARATION OF RIGHTS, cl. XIII; VT. CONST. ch. I, art. 16. These direct warnings stood in contrast to the Second Amendment's oblique reference to "[a] well regulated Militia, being necessary to the security of a free State." U.S. CONST. amend. II.

[266] *See generally* William Baude & Robert Leider, *The General-Law Right to Bear Arms*, 99 N.D. L. REV. 1467 (2024).

[267] An Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown (Bill of Rights) 1689, 1 W. & M., sess. 2, ch. 2, § 7 (Eng.), in 9 STATUTES AT LARGE 67, 69 (Pickering 1764); *see* Aymette v. State, 21 Tenn. (2 Hum.) 154, 157–58 (1840).

[268] *See, e.g.*, State v. Reid, 1 Ala. 612, 615 (1840) (English Bill of Rights and other states' constitutions); Aymette v. State, 21 Tenn. (2 Hum.) 154, 156–57 (1840) (examining English right and Second amendment with Tennessee constitutional provision); State v. Buzzard, 4 Ark. 18, 32 (1842) (opinion of Dickinson, J.) ("The principle contained in the provision of our Constitution . . . is precisely similar to that of the United States; it stands upon the same ground and is declaratory of the same right."); *Id.* at 34 (Lacy, J., dissenting) (treating the Second Amendment and the Arkansas constitutional right to bear arms as fundamentally similar); English v. State, 35 Tex. 473, 478 (1871) (treating the Second Amendment and the Texas Constitution's right to bear arms as similar); Andrews v. State, 50 Tenn. (3 Heisk.) 165, 177 (1871) (Second Amendment and Tennessee Constitution codify "the same rights"); Fife v. State, 31 Ark. 455, 458 (1876) (Second Amendment and state constitutional provision "had a common purpose"); THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 350 (1868); Black, *supra* note 251, at 403 ("The second amendment to the federal constitution, as well as the constitutions of many of the states, guaranty to the people the right to bear arms."); CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES CONSIDERED FROM BOTH A CIVIL AND CRIMINAL STANDPOINT § 140c, at 503 (St. Louis, The F.H. Thomas Law Book Co. 1886).

To be sure, these various rights were not perfectly equivalent. General law rights may be codified differently in various jurisdictions, and the provisions' text may affect their interpretation at the margins.[269] Thus, the American right to bear arms lacked the qualifying language of the English right, which was limited to "Protestants" and recognized class-based limitations.[270] Some early American constitutional declarations of the right to bear arms explicitly protected individual self-defense, while others focused only on common defense.[271] But it is also important not to exaggerate these differences. Regardless of phraseology, these provisions all unite around the idea that the right to bear arms protects at least the individual possession of military arms for public defense.[272]

In contrast, collective rights theorists have a general law problem. Some collective rights proponents, such as Justice Stevens, essentially treat the Second Amendment as a novel written right. Their argument is that the Second Amendment responded to peculiar federalism concerns about national control over the militia that arose during the debates over the Constitution.[273] On this view, the right to have arms recognized in the English Declaration of Rights is a wholly different right from the right to bear arms codified in the Second Amendment.[274] So, too, are the various state constitutional provisions, particularly those that codify a right to bear arms for individual self-defense.[275] Yet, by treating state and federal constitutional provisions as entirely separate creatures of different legal systems, this understanding assumes an anachronistic post-*Erie* rejection of general law. Early Americans recognized the concept of general law, and the consensus of nineteenth-century courts and commentators was that the Second Amendment and state analogues codified a preexisting right to bear arms that was shared among Anglo-American jurisdictions.[276]

Collective rights theories also have a state constitutional law problem. Some state supreme courts have held that their state constitutional rights to bear arms secure only a collective right.[277] But what does this mean? A collective state constitutional right to bear arms is a queer kind of right.[278] The state army (federalism) thesis has no place because state constitutions cannot impose legal restrictions against the national government.[279] Nor can such a theory be adapted by analogy to state constitutions, for it would result in the self-

---

[269] Baude & Leider, *supra* note 254, at 106.
[270] *Aymette*, 21 Tenn. (2 Hum.) at 156, 160.
[271] *See supra* note 264.
[272] Baude & Leider, *supra* note 254, at 132 & n.205.
[273] *Supra* note 213.
[274] District of Columbia v. Heller, 554 U.S. 570, 663–64 (2008) (Stevens, J., dissenting).
[275] *Id.* at 639, 686, 688.
[276] *Supra* note 268.
[277] City of Salina v. Blaksley, 83 P. 619, 620 (Kan. 1905); Commonwealth v. Davis, 343 N.E.2d 847, 848–49 (Mass. 1976); State v. Wilson, 543 P.3d 440, 450–51 (Haw. 2024); *see also* State v. Misch, 256 A.3d 519, 532 (Vt. 2021) (declaring the right to bear arms in defense of the state obsolete because the right has reference only to bearing arms in an organized militia).
[278] *Cf.* J.L. MACKIE, ETHICS: INVENTING RIGHT AND WRONG (1977) (providing an "argument from queerness" to argue against objective moral values).
[279] U.S. CONST. art. VI (Supremacy Clause).

contradictory idea that the state government cannot interfere with the state government's decision to organize military forces.[280] The only alternative is the "no karate thesis," in which these state constitutional rights prevent the state government from organizing a militia and then depriving militiamen of arms. But the protection of armed factions against citizens (rather than citizens against armed factions) perverts the true meaning of the right to bear arms. It is also a thin and strange right, prohibiting the government from disarming its own military forces. But a government is more likely to disband the militia than it is to disarm the armed forces that it organizes and trains. Collective rights theorists have yet to tackle analogous state constitutional guarantees seriously.

The exclusive individual self-defense against crime theory also has a state constitutional problem. Many state constitutions specifically recognize a right to bear arms for individual self-defense. Yet, in the entire history of the United States, no state constitution has ever protected a right to bear arms exclusively for individual self-defense against crime. All state constitutions that specify the kind of defense they protect include bearing arms "for the common defense," the defense "of the state," or some equivalent language. (The converse is not true, of course; some state constitutions protect bearing arms only for the common defense.[281]) All state courts that have upheld bans on arms and accessories primarily for public defense (e.g., assault weapons and large capacity magazines) have done so either by ignoring the collective defense provisions in their state constitutions or, in Vermont's case, by declaring it to be obsolete and unenforceable.[282]

F. Early American Authority

The individual right for common defense theory is most consistent with the judicial and academic understanding of the right until the twentieth century. The nineteenth-century jurisprudential debate was whether the right to bear arms was an individual right for both individual and public defense or an individual right only for public defense against invasion or oppression.[283] Most courts held that the right to bear arms was for both private and public

---

[280] *See* Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 811 (1998); Mocsary, *supra* note 7, at 2157.

[281] Volokh, *supra* note 264 (collecting all such provisions).

[282] *See* Robertson v. City & Cnty. of Denver, 874 P.2d 325, 334–35 (Colo. 1994); Benjamin v. Bailey, 662 A.2d 1226, 1232–33 (Conn. 1995); Arnold v. City of Cleveland, 616 N.E.2d 163, 173 (Ohio 1993); People v. Brown, 235 N.W. 245, 246 (Mich. 1931); State v. Misch, 256 A.3d 519, 527 (Vt. 2021); *see also* Rocky Mountain Gun Owners v. Polis, 467 P.3d 314, 318 n.3 (Colo. 2020) (refusing to decide whether Colorado's magazine restriction violated the right to bear arms "in aid of the civil power when thereto legally summoned" (quoting Colo. Const. art. II, § 13)).

[283] *Compare, e.g.*, State v. Reid, 1 Ala. 612, 619 (1840) (individual self-defense protected), *and* Nunn v. State, 1 Ga. 243, 251 (1846) (same), *and* Cockrum v. State, 24 Tex. 394, 401 (1859), *and* State v. Duke, 42 Tex. 455, 458 (1875) ("The arms which every person is secured the right to keep and bear (in the defense of himself or the State, subject to legislative regulation), must be such arms as are commonly kept, according to the customs of the people, and are appropriate for open and manly use in self-defense, as well as such as are proper for the defense of the State."), *with* State v. Buzzard, 4 Ark. 18, 25–26 (1842) (common defense only).

defense.[284] These courts allowed states to regulate the right using their police powers, such as by prohibiting the carrying of concealed weapons.[285] But courts generally invalidated police power regulations that abrogated (rather than regulated) the right, such as total bans on carrying handguns for personal protection.[286] These courts, moreover, had a somewhat more expansive list of weapons that were constitutionally protected, including more handguns and possibly some fighting knives.[287]

Other courts, led by the supreme courts of Tennessee and Arkansas, took the civic republican approach: that the right to bear arms was exclusively for defense of the community.[288] These states had constitutions that recognized the right to bear arms "for the common defence," without mentioning individual defense.[289] In these states, the right to keep arms was still an individual right. But the "arms" protected by the right were *solely* military arms—muskets, rifles, bayonets, and usually some handguns.[290] In contrast, these courts did not protect weapons of personal conflict with no military value, such as daggers, Bowie knives, and most handguns.[291] The civic republican states, moreover, placed less importance on the ability to carry handguns for personal self-defense. Texas and West Virginia even generally outlawed the carrying of pistols, and their supreme courts nevertheless found those laws constitutional.[292] Many prominent treatises contended that the civic republican decisions were correctly decided and that the right to bear arms was solely for public defense.[293]

Notably absent is a single legal treatise supporting the modern collective rights theories. In *Heller*, Justice Scalia claimed to have "found only one early-19th century-commentator who clearly conditioned the right to keep and bear arms upon service in the militia—and he recognized that the prevailing view was to the contrary."[294] But Justice Scalia was mistaken. The treatise he quoted from, Benjamin Oliver's *The Rights of an American Citizen*, advocated the civic republican theory, while denying the individual right for private self-defense.[295] Oliver

---

[284] *Reid*, 1 Ala. at 616; State v. Smith, 11 La. Ann. 633 (1856); State v. Huntly, 25 N.C. (3 Ired.) 418 (1843); Simpson v. State, 13 Tenn. (5 Yer.) 356 (1833); *Duke*, 42 Tex. At 459; Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90 (1822).

[285] The Kentucky decision in *Bliss* was the sole exception, holding that the right could not be curtailed more than it had been when the state constitution was ratified. Its doctrine was overturned in Kentucky when Kentucky adopted a new constitution, KY. CONST. of 1850, art. XIII, § 25, and its decision was repudiated by other courts, Commonwealth v. Murphy, 44 N.E. 138, 138 (Mass. 1896).

[286] *Reid*, 1 Ala. at 616–17; Nunn v. State, 1 Ga. 243, 251 (1846);

[287] *E.g.*, Cockrum v. State, 24 Tex. 394, 401 (1859); *Duke*, 42 Tex. at 458 (1875).

[288] State v. Buzzard, 4. Ark. 18 (1842); Aymette v. State, 21 Tenn. (2 Hum.) 154 (1840); Andrews v. State, 50 Tenn. (3 Heisk.) 165 (1871).

[289] ARK. CONST. OF 1836, art. II, § 21; TENN. CONST. OF 1834, art. I, § 26.

[290] *E.g.*, *Fife*, 31 Ark. at 461; Andrews v. State, 50 Tenn. (3 Heisk.) 165, 182, 186–87 (1871).

[291] Cases cited *supra* note 290.

[292] State v. Workman, 14 S.E. 9, 11 (W. Va. 1891); English v. State, 35 Tex. 473, 476–77 (1871); *see also* Hill v. State, 53 Ga. 473, 474 (1874).

[293] Sources treatises cited *supra* note 41.

[294] District of Columbia v. Heller, 554 U.S. 570, 610 (2008).

[295] BENJAMIN OLIVER, THE RIGHTS OF AN AMERICAN CITIZEN 176–77 (1832).

claimed that the Second Amendment was intended to protect keeping and bearing military arms so that "every able bodied man" could come to the common defense.[296] He understands the "militia" to be coextensive with "able-bodied citizens."[297] Nowhere did Oliver say (or even suggest) that a citizen has the right only when the government enrolls him in a militia unit. When Oliver then wrote that the right to bear arms was not designed "to prevent congress or the legislatures of the different states from enacting laws to prevent the citizens from always going armed," he was claiming that individuals lacked a right to habitually carry weapons for personal protection.[298] Even on this, he acknowledged that the bulk of authority was against him.[299]

Thus, it is important not to exaggerate the differences between these positions. Every nineteenth-century judicial decision recognized the right to keep and bear arms to be some form of an individual right. Correlatively, not a single judicial opinion (nor any treatise of which I am aware) contended that the right to keep arms was conditioned on the government's decision to enroll the citizen in an actively drilling militia unit.[300] This included decisions long after the universal militia system fell into disuse.[301] There was also complete agreement that individuals could publicly carry military arms when training in their use. Finally, all judicial decisions and treatises agreed that the "arms" protected by the amendment were at least those arms that were common and useful for warfare, such as military muskets, rifles, and bayonets. Judicial decisions and treatises debated whether the right extended to non-military weapons. They debated whether the right to bear arms was designed to additionally further private self-defense against crime. Putting these two together, they debated whether the right to bear arms included carrying handguns for private self-defense. But there was no debate that the Second Amendment protected at least an individual right to bear military arms for public defense.

IV. Implications for Doctrine and Scholarship

There is a thought that the individual/collective rights debate no longer matters. Doctrinally, *Heller* held that the Second Amendment secures an individual right. Lower courts are bound by that ruling. Scholarship has moved onto "second generation" issues, such as the

---

[296] *Id.* at 176; *see also Id.* ("The chief excellence of the militia system, is that every citizen at a moment's warning becomes a soldier; and when the exigency is over, at a moment's warning retires again to the calm and usual pursuits and occupations of peace.").

[297] *Id.* ("[W]ith the exception of the small number [of public officers exempt from militia duty] referred to, the number of the whole militia of the United States, is limited only by that of its effective citizens.").

[298] *Id.* at 177.

[299] *Id.*

[300] *See* Robert Leider, *Our Non-Originalist Right to Bear Arms*, 89 IND. L.J. 1587, 1617–18 (2014) (explaining why the Arkansas case, *State v. Buzzard*, is misidentified as a collective rights case).

[301] The militia system largely disappeared between 1830 and 1850. See MAHON, *supra* note 112, at 83. Most court decisions involving the right to bear arms postdate the collapse of an active universal militia system.

scope of the individual right and the nature of reasonable regulation.[302] So why discuss these first-principle questions?

Three reasons. First, having an understanding of the right to bear arms' fundamental purpose assists courts when they have to reason from first principles in novel and hard cases—cases in which prior legal authority does not control the outcome. Second, the underlying purpose of the Second Amendment is relevant for the academic debate, including to evaluate academic proposals for the future of Second Amendment doctrine and to respond to criticisms that modern doctrine is excessively focused on firearms (as opposed to other weapons). Third, as authority *Heller* still rests on a shaky foundation. Many have criticized the correctness of its holding, and *Heller* could be reevaluated by a future Supreme Court.

In addition to defending why this debate is still relevant, this Part will also explain the doctrinal and academic implications of properly orienting the Second Amendment around its original purpose to provide for the common defense. Post-*Heller* doctrine and scholarship are heavily premised on the idea that the Second Amendment lacks value for public defense. The rejection of this premise, however, profoundly alters the scope of the right.

A. Novel and Hard Cases

The debate over the fundamental purpose of the Second Amendment remains relevant because answering first-principle questions is necessary to adjudicate hard or novel cases. In these cases, the text and purpose of a provision fit hand and glove when doing legal interpretation. As Randy Barnett and Evan Bernick explain, "The Constitution's provisions, like the Constitution as a whole, are calculated to accomplish particular ends or goals that were deemed normatively desirable when they were ratified into law."[303] Resolving textual ambiguities or applying original meaning to novel circumstances requires interpreting the text in light of its purpose.[304] When faced with multiple potential meanings, the best interpretation of a legal provision is an interpretation that will permit it to accomplish the ends for which it was enacted. Eventually, as the area of law matures, cases increasingly become "settled by the authority rather than by reason."[305]

Compared with the First or Fourth Amendments, Second Amendment jurisprudence is underdeveloped. Congress did not start regulating guns in earnest until 1934, and the Second Amendment was not made applicable to the states until 2010.[306] Federal courts also did not generally recognize the Second Amendment to be an individual right until the Supreme Court's decision in *Heller*. Although state courts adjudicated dozens of cases involving the right to bear

---

[302] *See* Eric Ruben & Darrell A.H. Miller, *Preface: The Second Generation of Second Amendment Law & Policy*, 80 LAW & CONTEMP. PROBS. 1 (2017).

[303] RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT 10–11 (2021); *see also* Samuel L. Bray, *The Mischief Rule*, 109 GEO. L.J. 967 (2021) (explaining the traditional canon of interpretation that written law should be interpreted in light of the mischief that the law was designed to remedy).

[304] BARNETT & BERNICK, *supra* note 303, at 11.

[305] Behrens v. Bertram Mills Circus, Ltd., 2 Q.B. 1, 56 (1957).

[306] McDonald v. City of Chicago, 561 U.S. 742 (2010).

arms under equivalent state analogues, they mostly concerned restrictions on carrying weapons.[307] Among many other issues, cases involving bans on machine guns, assault weapons, large capacity magazines, and felons in possession are relatively new areas of law. Given this, lower courts must rely more on reason than authority, and thus, judges must look to first principles to decide Second Amendment questions.

Perhaps reflecting a lack of consensus among the justices in the majority, the Supreme Court has been ambiguous in *Heller* and its progeny about the purposes of the Second Amendment. In describing the English right to arms, the majority in *Heller* described the right "to be an individual right protecting against both public and private violence."[308] Yet, the Court's articulation of the right seemed to focus on individual self-defense against crime. *Heller* held that handguns were protected arms because they were "overwhelmingly chosen by American society for [self-defense]."[309] And the Court said in dicta that automatic rifles could be banned, even though they are the weapons "most useful in military service" today.[310] Lower court judges are understanding these statements to mean that the purpose of the Second Amendment is exclusively to protect a right of individual self-defense against crime.[311]

Lower-court presuppositions that the militia is obsolete and that the Second Amendment (as interpreted by *Heller*) protects only the right to bear arms for individual self-defense against crime are profoundly influencing the case law. Because these federal and state courts recognize only individual self-defense as the "central component of the right," they hold that the arms that are protected are only those weapons useful for individual self-defense. These include handguns, stun guns, billy clubs, and switchblade knives.[312] As a corollary, many lower courts have held that weapons primarily useful for military service are categorically unprotected by the Second Amendment. This has led them to deny constitutional protection to automatic and semiautomatic rifles and to high-capacity magazines.[313] Courts view these weapons and accessories as being unnecessary for self-defense against criminal violence, although useful in war. So their understanding of the scope of the right (yes to self-defense weapons, no to militia-type weapons) is precisely the opposite of those who subscribe to the individual right for common defense, even though both are individual rights theories. Most state courts also ignore (or have declared "obsolete") their state constitutional right to bear arms for collective defense or defense of the state.[314] But those decisions fail to grapple with the basic premise of the individual right for common defense theory: that a broad individual right to bear arms provides for public defense by facilitating an armed and trained population.

---

[307] *See generally* Leider, *supra* note 300 (collecting cases).

[308] *District of Columbia v. Heller*, 554 U.S. 570, 594 (2008).

[309] *Id.* at 628.

[310] *Id.* at 627.

[311] Cases cited *supra* note 5.

[312] *See, e.g.*, State v. Herrmann, 873 N.W.2d 257, 265 (Wis. Ct. App. 2015); State v. DeCiccio, 105 A.3d 165, 173 (Conn. 2014); Teter v. Lopez, 76 F.4th 938, 942 (9th Cir. 2023), *en banc petition pending*; Maloney v. Singas, 351 F. Supp. 3d 222, 238 (E.D.N.Y. 2018).

[313] Cases cited *supra* note 5.

[314] *See* state cases cited *supra* note 37.

Recognizing that the core of the Second Amendment is an individual right to keep and bear arms for common defense results in handling Second Amendment cases differently. The Second Amendment narrows the scope of permissible regulation by preventing the government from nullifying or broadly frustrating the right, even when it regulates for otherwise permissible reasons. As Joseph Blocher correctly explains, burdens on the right to bear arms "should be understood and characterized in light of how they impact people's ability to pursue their constitutional interests."[315] The individual right for common defense theory clarifies that a core constitutional interest protected by the Second Amendment is the ability to have a citizenry who can appear for temporary military service "bearing arms supplied by themselves and of the kind in common use at the time."[316]

To illustrate how this works in practice, consider bans on semiautomatic rifles designated as assault weapons. Laws that define "assault weapons" designate rifles based on the presence of certain military features, such as a flash suppressor or bayonet lug.[317] Prohibiting rifles because they have features that make them useful and proper for military service is unconstitutional.[318] Indeed, given that bayonets have long been recognized as constitutionally protected arms,[319] it necessarily follows that rifles and muskets must have the capacity to hold them. Nor could the prohibition of bayonets be viewed as a reasonable police power regulation of rifles. It is not as if the legislatures that enacted these prohibitions responded to a spate of stabbings with bayonets. These laws were designed to target rifles with military features, and targeting rifles *because* such weapons are useful for military service runs afoul of the Second Amendment.

For a second example, take laws restricting the size of ammunition magazines. Courts should ask whether these laws materially interfere with a person's ability to use constitutionally protected arms for public defense. Standard magazines for military rifles typically hold 30 rounds of ammunition, while handgun magazines for military pistols hold 13 to 20 rounds. A legal restriction that prohibits magazines above 30 rounds in rifles and 20 rounds in pistols do not trigger any constitutional concerns provided such items are not in common military use. Nor would a magazine restriction (regardless of size) create constitutional concerns if it involved a firearm that is not constitutionally protected because it is not useful for public defense (e.g., a small handgun primarily designed as a concealed weapon).[320] In contrast, New York City's ordinance limiting rifles to five rounds of ammunition is unconstitutional.[321] That may be an appropriate police power regulation of rifles if the only reason for civilians owning

---

[315] Joseph Blocher, *Bans*, 129 YALE L.J. 308, 354 (2019). I will discuss this point further *infra* Section IV.A.
[316] United States v. Miller, 307 U.S. 174, 179 (1939).
[317] *E.g.*, CAL. PENAL CODE § 30515(a)(1); N.Y. PENAL CODE § 265.00(22)(a).
[318] *See supra* note 68.
[319] *E.g.*, Hill v. State, 53 Ga. 472, 474 (1874); English v. State, 35 Tex. 473, 476 (1871); *see also A*ymette v. State, 21 Tenn. 154, 159, 160 (1840).
[320] *Cf.* Fife v. State, 31 Ark. 455, 461 (1876) (holding that small pistols are not constitutionally protected arms).
[321] N.Y.C. ADMIN. CODE § 10-306(b).

rifles were hunting. But such magazines are far too small to make rifles useful for public defense.

An inquiry into whether laws materially interfere with a person's ability to use constitutionally protected arms for public defense also resolves the circularity problem when it comes to defining "arms." The Seventh Circuit has complained that the *Heller* test is circular because whether a firearm is constitutionally protected depends on whether it is in common use, and whether a gun is in common use can depend on whether the legislature banned it before the weapon became common for citizens to have.[322] A return to the *Miller*/*Aymette* test—whether the weapon constitutes the "ordinary military equipment" and is in common military use—has no circularity problem because it does not depend on whether the legislature banned such weapons before citizens widely adopted them.[323]

The doctrinal shift to an exclusive individual self-defense theory has also improperly altered the doctrine in common-law and statutory cases. Litigants have filed tort suits under theories that marketing military-type arms to civilians is an unfair trade practice because private citizens are not authorized to act as soldiers. In one lawsuit against an AR-15 manufacturer arising from the Sandy Hook massacre, the Connecticut Supreme Court has held that advertising "promoting the gun's use for illegal purposes—offensive, military style assault missions" could lead to tort liability, despite the Protection of Lawful Commerce in Arms Act.[324] The court also noted that it was unclear whether "the second amendment's protections even extend to . . . quasi-military, semiautomatic assault rifles."[325] Yet, the Second Amendment has been traditionally understood as protecting the ability of civilians to act as temporary soldiers (militiamen) "bearing arms supplied by themselves and of the kind in common use at the time."[326] So the advertising identified by the Connecticut Supreme Court as unlawful and tortious aims squarely at a constitutional interest (the preparation of citizens to act in a temporary military capacity) that the Second Amendment was intended to protect. Litigants have also alleged that entrusting military-type arms to civilians is itself an act of negligence or negligent entrustment.[327] Again, much like the Connecticut Supreme Court opinion, these suits are premised on the erroneous ideas that civilians have no individual right to bear arms for

---

[322] Bevis v. City of Naperville, 85 F.4th 1175, 1190 (quoting Friedman v. City of Highland Park, 784 F.3d 406, 409 (7th Cir. 2015)). Even if *Heller* is circular in this respect, my argument should not be taken as a concession that this circularity is problematic. As customary law, the common law is often circular in the way that the Seventh Circuit complains—as are rules of fashion and etiquette. Stephen E. Sachs, *Finding Law*, 107 CAL. L. REV. 527, 540 (2019).

[323] United States v. Miller, 307 U.S. 174, 178 (1939).

[324] *E.g.*, Soto v. Bushmaster Firearms Int'l, L.L.C., 202 A.3d 262, 278 (Conn. 2019); *supra* note 18.

[325] *Soto*, 202 A.3d at 310.

[326] *Miller*, 307 U.S. at 179; *see also id.* at 178 (explaining that constitutional protection extended only to arms that constitute "any part of the ordinary military equipment" or those arms whose "use could contribute to the common defense").

[327] *Supra* note 18; Parsons v. Colt's Mfg. Co., No. 2:19-cv-01189, 2020 WL 1821306, at *1 (D. Nev. 2020) (describing complaint); Complaint, Parsons v. Colt's Mfg. Co., No. A-19-797891-C, (Clark Cty. July 2, 2019), at 25.

common defense and that the Second Amendment is exclusively concerned with individual self-defense against crime.

B. Academic Debate

Many scholars have made claims about the scope of the Second Amendment that have no validity based on original meaning, original law, or historical tradition. Let me give three examples here and explain why they are fallacious once the Second Amendment is correctly understood to provide an individual right for common defense.

1. Joseph Blocher has argued that the Second Amendment implies a legal right to refrain from keeping or bearing arms.[328] Never mind that there is a strong historical tradition of requiring individuals to own arms and to perform militia service when required. As relevant here, Blocher writes off this tradition in two ways. First, he claims that the "Militia Acts only applied to people who were enrolled in the militia" and, thus, "was more akin to a draft than to a general law requiring keeping of arms."[329] Second, Blocher claims that *Heller*'s recognition of a right to bear arms for individual self-defense swore off the Second Amendment's militia-related interests.[330] Blocher essentially treats the individual self-defense right and the common defense right as incompatible.[331]

Both arguments are problematic. The first has false premises. The "well-regulated militia" envisioned by collective-rights scholars is mostly a fiction. For most of Anglo-American history, the militia lay dormant.[332] During many periods, moreover, "enrollment" in the militia was universal but functioned as little more than registration with the Selective

---

[328] Joseph Blocher, *The Right Not To Keep or Bear Arms*, 64 STAN. L. REV. 1, 37–38 (2012).

[329] *Id.* at 38.

[330] *Id.*

[331] *Id.*; *see also id.* at 1 ("In doing so, the Court rejected the idea that the amendment's function is to protect the state militias from disarmament by the federal government, finding instead that the original public understanding of the Second Amendment gives individuals the right to keep and bear arms disconnected from military service . . . .").

[332] In derogation of this individual right for collective defense, Patrick Charles has claimed that "What constituted a 'well-regulated militia' was a carefully planned constitutional military force controlled by the State and federal governments." Patrick J. Charles, *The 1792 National Militia Act, The Second Amendment, and Individual Militia Rights: A Legal and Historical Perspective*, 9 GEO. J.L. & PUB. POL'Y 323, 326 (2011). His argument is ahistorical, except for some narrow time periods in which the militia was organized in preparation for war. In England, even as older statutes required residents to have arms, the militia mostly lay dormant in peacetime. In the American colonies, the bulk of the militia was also heavily dormant, except when conflict threatened. On the training fluctuations of both the English and American militia, *see infra* note 333. Arms ownership, nevertheless, often remained mandatory, so that military forces could expand when war was threatened. *See, e.g.*, Assize of Arms, 1181, 27 Hen. 2 (Eng.); Statute of Winchester 1285, 13 Edw. I, ch. 9 (Eng.), *in* 1 The Statutes of the Realm 96, 97–98; Ian F.W. Beckett, The Amateur Military Tradition 1558–1945 23 (1991) (noting five times as many armed but untrained men compared with those who were trained). In America, Alexander Hamilton proposed keeping all Americans armed so that they could perform military service when needed; but he also advocated not subjecting these armed Americans to routine militia duty because of the costs involved. THE FEDERALIST NO. 29, at 183–84 (Jacob E. Cooke, ed., 1961).

Service System does today. Individuals mainly registered as being ready for military service; they did not undertake significant military training, even if they were mustered.[333] Yet, arms ownership remained compulsory, so as to facilitate the expansion of the militia during times of conflict.[334]

The second argument is a non-sequitur. A holding that the First Amendment extends to newspaper articles about sports does not falsify that the core objective of the First Amendment is the free exchange of political opinions. With respect to the Second Amendment, *Heller* found that the right to bear arms includes keeping and bearing arms for private self-defense. *Extending* the right to include private self-defense does not imply rejecting its public defense aims. Thus, whether *Heller*'s individual self-defense against crime holding was right or wrong, *Heller* is compatible with individuals also having a right to keep and bear arms for military purposes. Judicial and scholarly arguments based on *Heller*'s purported rejection of the Second Amendment's militia-related aims is a serious misreading of its recognition of individual self-defense as a central component of the right.

2. In a separate article, Blocher argues that Second Amendment doctrine should be sensitive to local needs when determining what counts as reasonable regulation of the right to bear arms.[335] Essentially, he argues that cities should have more room to regulate firearms than rural areas "with regard to matters like the regulation of assault weapons."[336] He finds historical precedents for this primarily on local regulations that involved the public carrying of weapons.[337] In his view, stricter laws in urban areas would not "permit evisceration of the right to keep and bear arms for self-defense."[338]

Here again, Blocher's argument fails to grapple with important distinctions between private and public defense. Assault weapon bans are not problematic because they interfere

---

[333] In peacetime, both English and American militia mostly lay dormant when there was no threat of war or invasion. BARNETT, *supra* note 42, at 34–35, 117, 174 (English militia); MAHON, *supra* note 112, at 18, at 18–20; COOPER, *supra* note 97, at 2; E Milton Wheeler, *Development and Organization of of the North Carolina Militia*, 41 N.C. HIST. REV. 307, 311 (1964) (explaining that the North Carolina militia was dormant from 1715 until the 1740s); WILLIAM L. SHEA, THE VIRGINIA MILITIA IN THE SEVENTEENTH CENTURY 133–35 (1983) (explaining how the Virginia militia's organization declined towards the end of the seventeenth century when Virginia had stable periods of peace); *see also* BECKETT, *supra* note 37, at 27 (explaining that the English trained band's "training dropped to only two days for the entire year in 1601"); *Id.* at 35 (discussing untrained bands that had arms and acted as a reserve for the trained bands); *Id.* at 48 ("Nevertheless, in many other counties besides Hampshire it also seems likely that the select militia had only a paper existence after 1656 and, in fact, the same was true of the general militia. In Norfolk the militia appears to have had no existence at all between 1651 and 1655 . . . .").

[334] The Militia Act of 1792, for example, required arms ownership but did not prescribe any training regimen. Act of May 8, 1792, ch. 33, 1 Stat. 271. Universal militia training progressively began to cease after the War of 1812. Frederick Bernays Wiener, *Militia Clause of the Constitution*, 54 HARV. L. REV. 181, 188–93 (1940); *see also supra* note 332.

[335] Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82 (2013).

[336] *Id.* at 89.

[337] *Id.* at 112–17.

[338] *Id.* at 89.

with keeping and bearing arms for private self-defense. Even when assault weapons are banned, individuals have "access to a wide array of weapons" that can handle most self-defense tasks.[339] Assault weapon bans are constitutionally problematic because they eviscerate the core of the right to keep and bear arms for military purposes. By banning military-type arms, they directly interfere with a civilian's capacity to perform temporary military service and engage in public defense. Instructively, none of Blocher's historical examples involve localities banning their residents from possessing and training with arms suitable for military service. Instead, the local ordinances he identifies involve public carry for individual self-defense, the storage of large quantities of gunpowder (which presents a fire and explosion risk in urban areas), and controlling the discharge of firearms in public places.[340]

Granting cities (but not rural areas) special power to ban the possession of assault weapons results in a regressive constitutional doctrine. If such a doctrine were recognized, only rural residents could obtain and become proficient with military-type arms in peacetime. In the event of war, rural residents would have special martial skills that their urban colleagues would lack. When drafted into temporary military service, this policy would lead to rural residents becoming the frontline of combat defense, while urban and suburban citizens would be primarily relegated to combat support roles.

Dangerous military service, thus, would fall disproportionately to poorer rural residents, whose familiarity with weapons would make them more valuable soldiers. Admittedly, problems of this sort have existed for centuries. Wealthier citizens have often found militia substitutes, pushing the burdens of military service to lower classes.[341] But this kind of regressive policy should not be elevated to constitutional doctrine. Large urban areas should not have special authority to ban their residents from having military-type arms, and thus, prevent them from acquiring the skills necessary for them to shoulder their fair burden of public defense.[342]

3. Eric Ruben has complained that litigation has distorted Second Amendment doctrine by excessively focusing on guns.[343] The gun's "exalted Second Amendment status," he claims, twists Second Amendment doctrine because courts, when faced with gun restrictions, fail to consider the availability of other weapons that serve as adequate substitutes for self-defense.[344] In *Heller*, for example, the District of Columbia's handgun ban did not look so severe, he

---

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

[340] Blocher, *supra* note 335, at 112–17.

[341] BECKETT, *supra* note 37, at 27, 63, 66.

[342] Of course, this argument does not prevent less dramatic forms of firearm localism, even when it involves military-type arms. For example, a person going armed with a military rifle may create more fear in urban areas than in rural areas where public target shooting is allowed. To prevent armed individuals from terrifying the public, the rules governing public carry of military arms may vary somewhat in urban and rural areas. But such justifications do not extend to possession in the home, nor to transportation for target shooting and instruction in the use of arms.

[343] Eric Ruben, *Law of the Gun: Unrepresentative Cases and Distorted Doctrine*, 107 IOWA L. REV. 173, 187 (2021).

[344] *Id.* at 195, 208

contends, if courts recognized the various non-gun alternative weapons that individuals in the District could have still possessed.[345]

If anything is distorting the doctrine here, it is Ruben's single-minded focus on individual self-defense. Like Blocher, Ruben reads *Heller* to conclude that "the 'core' interest served by the Second Amendment is private self-defense, not militia service."[346] But he falsely attributes this negative premise to *Heller*; the majority never said that the Second Amendment protected individual self-defense to the exclusion of bearing arms for the common defense.

The reason for "gun-centricity" in the Second Amendment comes down to the historically contingent fact that firearms are indispensable to modern warfare by individual soldiers. Everywhere in the world, the "ordinary military equipment" of the individual soldier is a firearm (usually a rifle, sometimes also a handgun).[347] This was not always the case. Apply the Second Amendment's legal principles to the factual world of the Middle Ages, and the weapons protected by the legal right would include swords and crossbows. Perhaps in the future, directed energy weapons, such as those envisioned by Star Trek's phasers, will replace firearms as the central weapons of public defense. Until then, Second Amendment cases will be "gun-centric" because guns *are* centric to fulfilling the Second Amendment's military-related objectives of preserving a well-regulated militia.

These are just three examples of this scholarship genre. There are others.[348] Underneath this line of scholarship is the same fundamental mistake. These scholars ignore the possibility that the Second Amendment could protect an individual right to bear arms for public defense. They assume that any right focused on the militia must have the conditions precedent of governmental authorization and necessity. They are blind to the possibility that a general individual right could further militia-related aims. So they falsely assume that a general right that extends to private self-defense necessarily excludes that the right is militia-related. Having made this unjustified logical leap, their remaining arguments are strawmen.

C. Stare Decisis and "Demonstrably Erroneous Precedent"[349]

First-principle questions also remain relevant because the debate over *Heller* has not settled. Many judges and scholars continue to believe that *Heller* was wrongly decided. *Heller* stands with a few other decisions, such as *Citizens United*,[350] the legitimacy of which has never been accepted by those holding opposing views.

At present, that disagreement is manifesting by judges "narrowing from below" the Supreme Court's Second Amendment decisions.[351] But it remains plausible that *Heller* will be reexamined. When it comes to stare decisis, judges feel less constrained by precedent in

---

[345] *Id.* at 208–09.

[346] *Id.* at 175 (quoting District of Columbia v. Heller, 554 U.S. 577, 599, 960 (2008).

[347] *See generally* EDWARD CLINTON EZELL, SMALL ARMS OF THE WORLD (12th ed. 1983) (collecting common military small arms from around the world).

[348] *See, e.g.*, Miller, *supra* note 13.

[349] *See* Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1 (2001).

[350] Citizens United v. Federal Election Comm'n, 558 U.S. 310 (2010).

[351] *See* Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921 (2016).

constitutional cases.[352] This makes these cases unstable, particularly as new judges are appointed to the federal courts. Although the individual/collective rights debate has reached a stalemate, further academic progress on this issue may have the effect of settling or narrowing the jurisprudential disagreement.

CONCLUSION

The Second Amendment debate has reached a stalemate. Individual rights scholars focus on the right to bear arms for private self-defense and for defense against tyranny, while collective rights scholars claim that the right is "militia-centric," and thus, not individual at all. Missing from this debate is a third theory: the idea that a broad right to keep and bear arms fulfills common defense aims. This third theory connects the Second Amendment's operative clause to its prefatory clause, and it was the prevailing theory of the right to bear arms for more than a century.

Today, the individual right for public defense view is often dismissed with little consideration. The United States has replaced a state-based militia system with fully nationalized Armed Forces. Military arms are generally considered inappropriate for civilian possession. And if civilians were drafted, the government would supply the arms. Or so the arguments go.

This Article argues that we should reconsider that summary dismissal. The Second Amendment was designed to preserve the amateur army, not a state army. By guaranteeing a broad right to keep and bear arms, the Second Amendment preserves that amateur army in three ways. First, it allows civilians to train with arms in peacetime. Having a ready base of trained soldiers reduces the country's need for regular forces. Second, it facilitates the rapid expansion of the military in wartime by preventing the government from interfering with citizens having their own private arms. Third, it stabilizes the domestic arms markets, mitigating the logistical challenges that come when the government is a peacetime monopsony purchaser.

The Second Amendment, thus, has important public defense objectives. Contrary to the prevailing wisdom, those objectives have not disappeared since the conclusion of World War II. While warfare has evolved, there are strong continuities. Infantry, small arms, mobilization of personnel, and logistics remain essential keys to military success. We should be wary of legal academics who proclaim that the old ways of warfare have disappeared forever, and thus, the Second Amendment has "fallen silent."[353]

From the other direction, the effort by federal courts to convert the Second Amendment into a right purely for individual self-defense is a doctrinal change that is unwarranted by the text, history, and tradition of the right to bear arms. It is an innovation that ultimately could imperil American national security if allowed to continue. The danger of that policy may not be apparent, particularly during peacetime. But it will materialize when the United States faces war with a peer threat, a time when the country may be at its most vulnerable.

---

[352] Payne v. Tennessee, 501 U.S. 808, 828 (1991).

[353] UVILLER & MERKEL, *supra* note 9, at 228.