2001

The Second Amendment as a Case Study in Constitutional Interpretation

Akhil Reed Amar
Yale Law School

Follow this and additional works at: https://digitalcommons.law.yale.edu/fss_papers

Part of the Law Commons

Recommended Citation
Amar, Akhil Reed, "The Second Amendment as a Case Study in Constitutional Interpretation" (2001). Faculty Scholarship Series. 855.
https://digitalcommons.law.yale.edu/fss_papers/855

This Article is brought to you for free and open access by the Yale Law School Faculty Scholarship at Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship Series by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
The Second Amendment: A Case Study in Constitutional Interpretation

Akhil Reed Amar* 

The Rocky Mountain West is gun country in popular folklore and probably also in fact. Reliable numbers are hard to come by, but in one recent survey estimating the percentage of households with handguns, the Mountain states ranked well above the national average—and this in a nation with one of the highest per capita gun ownership rates in the world.1 Earlier this year, the National Rifle Association (NRA) announced that it would hold its 2007 annual convention here in Salt Lake City, in part to reward Utah’s gun-friendly laws and lawmakers.2 I suspect that a high percentage of Utahns could recite the Second Amendment by heart.

Or at least part of the Second Amendment—and there’s the rub. Many gun fans stress the Amendment’s “right of the people to keep and bear Arms” language while slighting other words in the Amendment, such as “well regulated” and “Militia.” Even the phrase “bear Arms” and the words “the people” did not quite mean the same thing to the Founders as they do to today’s NRA. To understand the Second Amendment, we must widen our interpretive field of vision. For starters, we must see the Amendment as a syntactical whole, and note the distinctive grammatical linkage between its opening ode and its closing command. But even this is far too narrow a lens. We must consider the Amendment alongside its companion amendments—the First and Third in particular and the Bill of Rights more generally. For example, we must see how the Second Amendment resembles the Fifth, Sixth, and Seventh Amendments, and even the Tenth Amendment. More broadly still, we must read the Second Amendment alongside similarly worded provisions of state constitutions, and against the backdrop of earlier English charters of liberty such as the English Bill of Rights of 1689. Perhaps most important, we must confront later constitutional

*Southmayd Professor of Law, Yale Law School. This essay derives from the Leary Lecture delivered at the University of Utah College of Law on October 25, 2001. Some portions of the Lecture first appeared in an article originally published in THE NEW REPUBLIC, July 12, 1999 and reprinted in 65 LAW & CONTEMP. PROBS. (2001).

I would like to dedicate this Leary Lecture to my boyhood scoutmaster and friend, Mr. Ken Harmon of Boise, Idaho, with thanks for all that he taught me about guns, and about life. My thanks also to Michael McConnell for all his hospitality and generosity.

1Conversation with criminologist Gary Kleck, Aug. 2, 2001 (summarizing data that, in the mountain West, about 28.6% of households have handguns, compared to a national rate of 22.7%; overall gun possession rates are estimated at 43.7% in the Mountain West and 41.8% nationally).


889
amendments, such as the Fourteenth and even the Nineteenth Amendment, and consider how these later texts place the earlier one in a different light.

The results of this holistic study may surprise folks on both sides of the aisle. Contrary to NRA ideology, the Founders’ Second Amendment, by itself, provides only slender support for a robust individual right to own all manner of guns. Later constitutional developments—in particular, the words and deeds of the Fourteenth Amendment—do in fact, when read in conjunction with the Second Amendment, support an individual right to have a gun in one’s home for self-protection; but later developments also support other readings of the Second Amendment on topics far removed from the gun control debate. For example, when read in the light of our entire constitutional structure, including post-Founding amendments, the Second Amendment has some rather remarkable implications for issues such as women in combat and gays in the military. And so, to both conservatives who now love the Second Amendment and liberals who now loathe it, I say, think again: the Amendment may not quite mean what you thought.

In short, I seek to provoke second thoughts about the Second Amendment by reading it in a broader constitutional context. I shall begin by sketching out my substantive reading of the Amendment, and shall conclude with some thoughts on general issues of interpretive method raised by my reading.

I. READING THE CONSTITUTION: SUBSTANCE

So what does the Second Amendment mean? A lot, says the NRA. Not much, say gun-control groups. Until recently, it didn’t much matter who was right. On all but the mildest of measures, the NRA had the votes (and the cash), and that was that. Then came the tragedy at Columbine, here in the Mountain West. Now proposals for serious federal gun controls are in the air, though not quite on the congressional floor. Some proposals aim to limit the amount and type of ammunition that may be purchased; others seek to restrict the number of guns a person can buy in a given week; and still others would require licensing all new guns (and perhaps old ones as well?) on the model of automobile licensing, with gun owners obliged to pass both a written gun safety test and a practical safety and competence exam. If adopted, would such measures violate the Federal Constitution?

Let’s begin with the words of the Amendment itself: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” This curious syntax has perplexed most modern readers: How do the two main clauses with different subject-nouns fit together? Do these words guarantee a right of militias, as the first clause seems to suggest, or a right of people, as the second clause seems to say? In one corner, gun controllers embrace a narrow, statist reading, insisting that the Amendment
merely confers a right on state governments to establish professional state militias like the National Guard. On this view, no ordinary citizen is covered by the Amendment. In the other corner, gun groups read the Amendment in a broad, libertarian way, arguing that it protects a right of every individual to have guns for self-protection, for hunting, and even for sport. Virtually nothing having to do with personal weaponry is outside the Amendment on this view. Both readings are wrong.

The statist reading sidesteps the obvious fact that the Amendment's actual command language—"shall not be infringed"—appears in its second clause, which speaks of "the people" and not "the States." A quick look at the Tenth Amendment, which draws a sharp distinction between "the States" and "the people," makes clear that these two phrases are not identical and that the Founders knew how to say "States" when they meant states. What's more, the eighteenth-century "Militia" referred to by the first clause was not remotely like today's National Guard. It encompassed virtually all voters—like today's Swiss militia—rather than a small group of paid, semi-professional volunteers.

But the libertarian reading must contend with textual embarrassments of its own. The Amendment speaks of a right of "the people" collectively rather than of "persons" individually. And it uses a distinctly military phrase: "bear Arms." A deer hunter or target shooter carries a gun but does not, properly speaking, bear arms. The military connotation was even more obvious in an earlier draft of the Amendment, which contained additional language that "no one religiously scrupulous of bearing arms, shall be compelled to render military service in person." Even in the final version, note how the military phrase "bear Arms" is sandwiched between a clause that talks about the "Militia" and a clause (the Third Amendment) that regulates the quartering of "soldiers" in times of "war" and "peace." Likewise, state constitutions on the books in 1789 consistently used the phrase "bear Arms" in military contexts and no other.

By now it should be evident that we need to understand how all the words of the Amendment fit together, and how they, in turn, mesh with other words in the Constitution. The Amendment's syntax seems odd only because modern

---

3U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States, respectively, or to the people.").

4In Aymette v. State, 21 Tenn. (2 Hum.) 154, 161 (1840), the Tennessee Supreme Court declared that the "bear Arms" phrase had "a military sense, and no other. . . . A man in the pursuit of deer, elk and buffaloes, might carry his rifle every day, for forty years, and, yet, it would never be said of him, that he had borne arms."


6U.S. CONST. amend. III ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.").

readers persistently misread the words “Militia” and “people,” imposing twentieth-century assumptions on an eighteenth-century text. The key subject-nouns were simply different ways of saying the same thing: at the Founding, the militia were the people and the people were the militia. Indeed, the earlier draft of the Amendment linked the two clauses with linchpin language speaking of “a well regulated militia, composed of the body of the people.” This unstylish linchpin was later pulled out, but the very syntax of the final Amendment as a whole equates the “Militia” of the first clause with “the people” of the second. In a sound republic, the “people” and the “militia” are one and the same: those who vote serve in the military and those who serve in the military vote.

Underlying these words was a certain skepticism about a permanent, hierarchical standing army that might not truly look like America but could instead embody a dangerous culture within a culture, a proto-military-industrial complex threatening republican equality and civilian supremacy. The root idea is not so much guns per se, nor hunting, nor target shooting. Rather the key idea concerns the link between democracy and the military: We the People must rule, and must assure Ourselves that Our military will do Our bidding rather than its own. According to the Amendment, the best way to guarantee this is to have a military that represents and embodies Us—the people, the voters, the democratic rulers of a “free state.” Rather than placing full confidence in a standing army filled with aliens, convicts, vagrants, and mercenaries—who do not truly represent the electorate, and who may pursue their own agendas—a sound republic should rely on its own armed citizens—a “militia” of “the people.”

Call this the small-r republican reading as opposed to the statist and libertarian readings that dominate modern discourse. Statists anachronistically read the “Militia” to mean the government (the paid professional officialdom) rather than the people (the ordinary citizenry). Equally anachronistically, libertarians read “the people” to mean atomized private persons, each hunting in his own private Idaho, rather than the citizenry acting collectively. But, when the Constitution speaks of “the people” rather than “persons,” the collective connotation is primary. In the Preamble, “We the People ... do ordain and establish this Constitution” as public citizens meeting together in conventions and acting in concert, not as private individuals pursuing our respective hobbies. The only other reference to “the people” in the Philadelphia Constitution of 1787

\(^8\)The Complete Bill of Rights, supra note 5, at 170–73. Cf. 3 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 425 (Jonathan Elliot ed., AYER Co., 1987) (1836) (remarks of George Mason at Virginia Ratifying Convention) (“Who are the militia? They consist now of the whole people ...”); id. at 112 (remarks of Francis Corbin at Virginia Ratifying Convention) (“Who are the militia? Are we not militia?”); XVIII Letters from The Federal Farmer in 2 The Complete Anti-Federalists 341 (Herbert J. Storing ed., 1981) (“A militia, when properly formed, are in fact the people themselves. ... and include ... all men capable of bearing arms ... ”).
appears a sentence away from the Preamble, and here, too, the meaning is public and political, not private and individualistic: every two years, "the People"—that is, the voters—elect the House.\(^9\) To see the key distinction another way, recall that women in 1787 had the rights of "persons" (such as freedom to worship and protections of privacy in their homes) but did not directly participate in the acts of "the people"—they did not vote in constitutional conventions nor for Congress, nor were they part of the militia/people at the heart of the Second Amendment.

The rest of the Bill of Rights confirms this republican reading. The core of the First Amendment's Assembly Clause, which textually abuts the Second Amendment, is the right of "the people"—in essence, voters—to "assemble" in constitutional conventions and other political conclaves.\(^10\) Likewise, the core rights retained and reserved to "the people" in the Ninth and Tenth Amendments were rights of the people collectively to govern themselves democratically.\(^11\) The Fourth Amendment is trickier: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ...."\(^12\) Here, the collective "people" wording is paired with more individualistic language of "persons." And these words obviously focus on the private domain, protecting individuals in their private homes more than in the public square. Why, then, did the Fourth use the words "the people" at all? Probably to highlight the role that jurors—acting collectively and representing the electorate—would play in deciding which searches were reasonable and how much to punish government officials who searched or seized improperly. An early draft of James Madison's amendment protecting jury rights helps make this linkage obvious and also resonates with the language of the Second Amendment: "[T]he trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate."\(^13\) Note the obvious echoes here—"security" (Second Amendment), "secure" (Fourth Amendment), and "securities" (draft amendment); "shall not be infringed," "shall not be violated," and "ought to remain inviolate"; and, of course, "the right of the people" in all three places.

\(^9\)U.S. CONST. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States ....").

\(^10\)U.S. CONST. amend. I ("Congress shall make no law ... abridging ... the right of the people peaceably to assemble ...."). For more support for my reading of the core right implicated here, see AMAR, supra note 7, at 26–32.

\(^11\)U.S. CONST. amend. IX ("The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."); id. amend. X, quoted supra note 3. For more support for my populist reading of these Amendments, see AMAR, supra note 7, at 119–22.

\(^12\)U.S. CONST. amend. IV.

\(^13\)THE COMPLETE BILL OF RIGHTS, supra note 5, at 493–94.
If we want an image of the people's militia at the Founding, we should begin by envisioning the militia's first cousin, the jury. Whereas the Second Amendment highlights the militia, the Fifth, Sixth, and Seventh Amendments, along with the Fourth, feature the jury. (The Fifth protects grand juries; the Sixth, criminal juries; and the Seventh, civil juries). Like the militia, the jury was a local body countering imperial power—summoned by the government but standing outside it, representing the people, collectively. Like jury service, militia participation was both a right and a duty of qualified voters, who were regularly summoned to discharge their public obligations. (Nonvoters—women, children, aliens—were in general excluded from both the jury and the militia.) Like the jury, the militia was composed of amateurs arrayed against, and designed to check, permanent and professional government officials (judges and prosecutors in the case of the jury; a standing army in the case of the militia). Like the jury, the militia embodied collective political action rather than private pursuits.

Founding history confirms this. The Framers pictured Minutemen bearing guns, not Daniel Boone gunning bears. When we turn to state constitutions, we consistently find arms-bearing and militia clauses intertwined with rules governing standing armies, troop-quartering, martial law, and civilian supremacy. A similar pattern appears in the famous English Bill of Rights of 1689, where language concerning the right to arms immediately followed language condemning unauthorized standing armies in peacetime. Libertarians cannot explain this clear pattern that has everything to do with the military and nothing to do with hunting. Conversely, statists also make a hash of these state constitutional provisions, many of which use language very similar to the Second Amendment to affirm rights against state governments.

Keeping the jury-militia analogy in mind, we can see the kernel of truth in these competing accounts and also what's missing from each. Statists are right to see the Amendment as localist and to note that law and government help bring the militia together. So too with the jury. Twelve private citizens who simply get together on their own to announce the guilt of a fellow citizen are not a lawful jury but a lynch mob. Similarly, private citizens who choose to own guns today are not a well-regulated militia of the people; they are gun clubs. But what the statist reading misses is when the law summons the citizenry together, these citizens, in an important sense, act as the people outside of government rather

---

14See U.S. Const. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury ....”); id. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to ... an impartial jury of the State and district ....”); id. amend. VII (“In Suits at common law ... the right of trial by jury shall be preserved ....”).

15See sources cited supra note 7.

16The English Bill of Rights 1689, 1 W. & M., c. 2 §§ 5–6 (Eng.).
than as a professional and permanent government bureaucracy. Just as the bureaucratic EPA is obviously not a true jury, so too the semi-professional National Guard is not a general militia. Libertarians rightly recoil at the authoritarianism of their opponents in the debate, but wrongly privatize what is an inherently collective and political right. It is as if Ross Perot insisted that the First Amendment guaranteed him the right to conduct his own poll and, on the basis of this private poll, proclaimed himself president.

But to see all this is to see what makes the Second Amendment so slippery today: the legal and social structure on which the Amendment was built no longer exists. The Founders' juries—grand, petit, and civil—are still around today, but the Founders' militia is not. America is not Switzerland. Voters no longer muster for militia practice in the town square.

Of course, we are free today to read the Second Amendment more broadly if we choose. Thoughtful legal scholars of all stripes—from Sanford Levinson on the Left to Eugene Volokh on the Right—have reminded us that other amendments have been read generously; why not the Second? But given that a broad reading is a policy choice rather than a clear constitutional command, we are entitled to ask ourselves whether a given broad reading makes good sense as a matter of principle and practice. And the mere fact that, say, the First Amendment has been read expansively is not an automatic argument for equal treatment for the Second. For example, violent felons, even while in prison and especially after their release, obviously have a First Amendment right to print their opinions in newspapers. Yet such felons have never had a Second Amendment right to own guns. Even the NRA accepts this double standard. But what underlies it? The obvious commonsensical idea is that sticks and stones and guns in the hands of dangerous felons can indeed hurt others in ways that their words cannot.

Especially today's guns. At the Founding, single-fire muskets had certain attractive and democratic properties. A person often had to get close to you to kill you, and in getting close, he usually rendered himself vulnerable to counterattack. It took time to reload and so one person could not typically mow down dozens in a few seconds. One person, one gun, one shot was not as perfect a system of majority rule as one person, one vote, but the side with the most men often won; and there was a rough proportionality of capacity to kill and be killed. What's more, madmen were constrained by the strong social network of the well-

---

regulated militia. Today, technological and social strictures have loosened, perhaps rendering madmen more dangerous.\textsuperscript{18}

Moreover, the Founders acted and wrote in a world where democratic self-government had never truly existed on a continental scale. Then-conventional wisdom associated liberty and democracy with localism, and linked geographically expansive regimes with empire and tyranny. If the framers were slightly paranoid about the potential evil of a central Leviathan, they had good reason for this paranoia in light of their lived experience with the British empire and the history of the world before 1800. But the last two centuries have shown that the federal government in general has redeemed the hopes of its friends more than it has confirmed the fears of its enemies. To rail against central tyranny today is to be considerably more paranoid than were the Founders, given the general track record of the United States since 1787. Put another way, because ballots and the First Amendment have generally worked to prevent full-blown federal tyranny, bullets and the Second Amendment need not bear as much weight today as some pessimists anticipated two centuries ago.

Another point: regardless of the original meaning of the Second Amendment, today’s interpreters must read this Amendment in light of later constitutional words and deeds. After the experience of the Civil War, the strong localism of the original Second Amendment seems more problematic. Constitutionally speaking, the heroes of the Civil War fought for the Union army, not the rebel militias. In the wake of this war and the Amendments it produced, we need to rethink the vision of Union armies and state militias in our constitutional order. Moreover, various post-Founding amendments have dramatically expanded American suffrage. How might these constitutional redefinitions of the electorate affect our understanding of “the people” and the “Militia” at the heart of the Second Amendment?

If we seek broad readings of the Amendment faithful to the core values of the Founding yet attentive to subsequent legal and factual developments, here are a couple that the NRA hasn't proposed but that are at least as plausible as their preferred broad readings.

1. \textit{Take the “mil” out of the militia.} In highly sophisticated scholarship transcending the typical statist-versus-libertarian debate, Indiana law professor David Williams has emphasized how the militia bound citizens together in a common venture.\textsuperscript{19} It played an important social function in the community and

\textsuperscript{18}It may be countered that the federal government today is also more dangerous, given vast improvements in military technology. True enough, but for reasons I shall soon elaborate, today’s federal government is also less likely to use this military technology to tyrannize its citizens than many at the Founding realistically feared.

embodied a democratic culture in which rich and poor citizens from all walks of life came together as equals—as with the jury. Without some forms of democratic glue, our culture risks flying apart, especially in today's world of increasing demographic diversity and specialization of labor. Thus, a broad modern reading of the Amendment would call for compulsory or quasi-compulsory national service, with both military and nonmilitary alternatives like VISTA or the Civilian Conservation Corps. (Recall that an early version of the Amendment provided for compulsory military service with an opt-out for conscientious objectors. And note that early militias also performed important nonmilitary functions like disaster relief.) Instead of bowling alone, Americans would band together, building a more solid base of social capital and civic virtue.

2. Create an Army that truly looks like America. At the Founding, a standing army in peacetime was viewed with dread and seen as The Other—mercenaries, convicts, vagrants, and aliens, as opposed to ordinary citizens. Today, we view our professional Armed Forces with pride. These forces represent Us, not Them. Thus, the Founders' militia has begun to morph into today's Army, Navy, Air Force, and Marine Corps. Given this development, women and gays should play as equal a role as possible in today's institutions of collective self-defense. The militia celebrated by the Second Amendment should reflect the people, just as the jury should. To put the point another way, the Second Amendment says that voters should bear arms and that arms-bearers should vote: The voting electorate ("the people") and the democratic military ("the Militia") should in republican principle be one and the same. Since the Nineteenth Amendment has made women equal voters, the Second Amendment demands that they be given equal status in arms. (Allowing women to buy guns at the local sporting goods store might make them equal in libertarian gun-toting, but it does not make them equal in republican arms-bearing; it fails to include them on equal terms in modern America's militia-substitute.)

And what's true for women may also be true for gay men: the Armed Forces' discrimination on grounds of sexual orientation is, formally speaking, discrimination "on account of sex," in tension with this Nineteenth Amendment ideal. (If Leslie has intimate physical relations with John, it is a form of sex discrimination to treat Leslie one way if she is a woman and a different way if he is a man.) Formal sex discriminations can be justified in some cases, but they should be closely interrogated. For example, separate bathrooms for men and women are, formally, a kind of sex discrimination, but this arrangement is widely seen as justified by legitimate privacy concerns. So, too, certain sex-based exclusions in

---

20 See supra note 5 and accompanying text.
21 U.S. Const. amend. XIX, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.").
22 Id.
military policy might be justifiable, where these exclusions reflect real physical differences relevant to modern warfare. However, where exclusions of women and gays are justified merely by the need to maintain “morale” and “unit cohesion,” we should be wary: similar arguments were once used to maintain racial discrimination in our Armed Forces.\textsuperscript{23}

But is there nothing to be said for the strong libertarian view of guns put forth by the NRA? In fact, there is a great deal to be said on behalf of an individual right to keep a gun in one’s home for self-defense, as even Harvard Law School’s Laurence Tribe—no pawn of the NRA—has publicly acknowledged of late.\textsuperscript{24} But the best constitutional arguments for this view come not from the Founding but from the Reconstruction some fourscore years later.

Even with regard to the Founding, it’s simplistic to deny any link between collective security and individual self-defense. Lawyer and legal scholar Don Kates reminds us that somewhat like standing armies, roving bands of thugs and pirates posed a threat to law-abiding citizens, and trusty weapons in private homes were indeed part of a system of community policing against predators.\textsuperscript{25} (Note that the Amendment encompasses the right to “keep” as well as “bear” arms.) But this was not the main image of the Second Amendment at the Founding. Rather, the Amendment was about Lexington and Concord and Bunker Hill. When arms were outlawed, only the king’s men would have arms.

The amendments forged in the afterglow of the Revolution reflected obvious anxiety about a standing army controlled by the new imperial government, and affection for the good old militia. But things looked different to Americans after a bloody civil war. Massachusetts militiamen had once died for liberty at Bunker Hill, but more recently Mississippi militiamen had killed for slavery at Vicksburg. The imperial Redcoats at the Founding were villains, but the boys in blue who had won under Grant and Sherman were heroes—at least in the eyes of Reconstruction Republicans. Thus, when this great generation took its turn rewriting the Constitution, it significantly recast the right to weapons. Textually, the Fourteenth Amendment proclaimed the need to protect fundamental “privileges” and “immunities” of citizens.\textsuperscript{26} Although the Supreme Court ignored


\textsuperscript{24}See 1 Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW § 5–11 at 900–03 (3d ed. 1999).


\textsuperscript{26}U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of...
this language for almost a century, there are recent signs that suggest the Justices may be willing to give this clause a second look.\textsuperscript{27}

If they do, gun groups would have reason to cheer. As scholars such as Stephen Halbrook, Michael Kent Curtis, Robert Cottrol, and Ray Diamond\textsuperscript{28} have documented in great detail, the framers of the Fourteenth Amendment strongly believed in an individual right to own and keep guns in one's home for self-protection. Most obviously, blacks and Unionists down South could not always count on the local police to keep white night-riders at bay. When guns were outlawed, only Klansmen would have guns.\textsuperscript{29} Thus, the Reconstruction Congress made quite clear that a right to keep a gun at home for self-protection was indeed a constitutional right—a true "privilege" or "immunity" of citizens.

Many speeches to this effect may be found in the 1866 floor debates, but the most dramatic evidence comes not from individual congressmen, but from Congress itself. Section One of the Fourteenth Amendment was importantly linked to (though it also went farther than) the Civil Rights Act of 1866. The companion statute to the Civil Rights Act, the Freedmen's Bureau Bill of 1866, provided that "personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens."\textsuperscript{30} This language made clear that a personal right to firearms was among the privileges and immunities of citizens, according to the Reconstruction Congress that drafted the Fourteenth Amendment. Nor was this a view unique to Reconstruction Republicans. A decade earlier, Chief Justice Taney's lead opinion in the \textit{Dred Scott} case had proclaimed that if blacks ever became citizens, it would necessarily follow that they would enjoy all the "privileges and immunities of citizens" including "full liberty of speech in public and in private upon all subjects upon which [a state's] citizens might speak; [liberty] to hold public meetings upon political affairs, and to keep and carry arms wherever they went."\textsuperscript{31} Of course, for Taney

\footnotesize{citizens of the United States ....")}. The Amendment explicitly limited state governments, but its authors made clear that no government, state or federal, had authority to violate fundamental rights of citizens. See \textit{Amar}, \textit{supra} note 7, at 281–83; infra text accompanying note 57–59.

\textsuperscript{27}See Saenz v. Roe, 526 U.S. 489, 501–11 (1999), (relying squarely on clause to invalidate a state statute).


\textsuperscript{29}Of course, I am here using the word "Klansmen" generically, to refer to all sorts of white terrorists and thugs who emerged in the aftermath of the Civil War.

\textsuperscript{30}Freedmen's Bureau Bill, ch. 200 § 14, 14 Stat. 173, 176 (1866) (emphasis added).

and company, this meant that blacks, even if free, could never be deemed citizens. The Reconstruction Congress obviously disagreed, and said so in the first sentence of the Fourteenth Amendment, affirming the citizenship of all persons—black and white, male and female, rich and poor—born in America. But Reconstruction Republicans agreed with Taney on what citizenship implied: a right to have a gun for self defense.

In contrast to the image of arms at the Founding—a right of the people as a collectivity to organize themselves militarily—both *Dred Scott* and the Freedmen's Bureau Bill tended to privatize and demilitarize the image of gun-toting, the former by speaking of an individual's right to "carry arms" rather than "bear arms," and the latter with its repeated use of the word "personal" in contrast to the Founders' collectivist "people."

Thus the Reconstruction Amendment, when read in the light of its history, does support an individual right to have a gun in one's home for self-protection. Yet today's NRA tends to stress the Second Amendment far more than the Fourteenth. This is ironic indeed. The NRA itself was born after the Civil War, sired by a group of ex-Union officers; its swaddling clothes come from the Reconstruction more than the Founding, as does its individual rights ideology.

If modern courts were to take the Reconstruction vision seriously, state and local governments would be limited along with federal officials; in legal jargon, the Second Amendment right to arms would be "incorporated" against the states. That's the good news for the NRA. But the bad news, at least for the most ardent gun lovers, is that whatever Fourteenth Amendment right exists is a limited one. Virtually no one today is seriously arguing to take away all guns from homes. And actually trying to do so would be a nightmare for anyone who cares about liberty and privacy, given that guns are stashed everywhere and come close to outnumbering people in America. (Once again, it is useful to look beyond the Second Amendment itself, to ponder the Fourth Amendment implications of any widespread confiscation program.) Instead, most proposals seek to regulate

---

32U.S. CONST. amend XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside ... ").


34Thus far, the Second Amendment is one of the few parts of the Bill of Rights that the Supreme Court has not held to be incorporated against state and local governments. Indeed, the Court has said very little about the Amendment in the last sixty years—the period in which incorporation of most other provisions of the Bill of Rights took place. For strong historical arguments in favor of incorporation, see the sources cited supra note 28. Recently, one Justice has openly hinted that the Supreme Court might do well to revisit the question of the Second Amendment's meaning. See Printz v. United States, 521 U.S. 898, 937-39 (1997) (Thomas, J., concurring).
rather than prohibit—for example, limiting the amount and type of guns and ammo one can buy. Requiring registration of guns and even licenses with practical and book tests, on the model of licensing drivers, sends some gun lovers up the wall—the first step toward confiscation, they predict in dire tones. But this is hard to take seriously. The authors of the Second Amendment, after all, were perfectly comfortable knowing that the government would know who had weapons—every voter—and also were perfectly comfortable requiring those who owned guns to be properly trained and monitored in their use: training and monitoring were at the heart of militia musters. Reasonable gun control laws of the sort I have mentioned may not be exactly what the Framers had in mind when they said that the armed citizenry should be "well regulated." But—at least in a world that is so distant from the Founders—they are close enough.

II. READING THE CONSTITUTION: METHOD

I hope I have said enough to give you a sense of my constitutional take on substantive topics such as gun control and American military policy. In the time I have left, I propose to offer a few words about my constitutional method—about the interpretive tools I have used today and elsewhere, the interpretive moves I have made in my claims about the Second Amendment and the rest of the Constitution.

Proper constitutional interpretation begins with the text of the Constitution itself. Textual interpretation, however, can be done well or badly, and even when done well is only the first step of analysis. As James Madison, writing as Publius, reminded his audience in The Federalist No. 37, the natural and social universe is often blurry, lacking clean joints; and language itself introduces further complexities. Words sometimes have relatively clear core meanings but then shade off gradually when we move away from the core. In law, we often seek the meaning of a phrase or an entire sentence, in which the legal whole may be more or less than the sum of the linguistic parts, especially when we deal with legal terms of art and metaphors more generally. Consider, for example, the Fifth Amendment command that “[n]o person shall ... be subject for the same offence to be twice put in jeopardy of life or limb.”35 Should the words “life or limb” here be read literally, allowing the government to try me again after I have been acquitted in a fair trial so long as the punishment at issue is neither death nor dismemberment? (Suppose the government merely seeks to imprison me for twenty years and subject me to monthly floggings.) Here, it seems clear that the “life or limb” phrase is best read as a poetic pairing, a graphic synecdoche for all serious criminal punishment.

35U.S. CONST. amend V.
The Second Amendment presents a similar challenge: though the word "bear" is roughly synonymous with "carry" and the word "Arms" encompasses "guns," there is, I have argued, a subtle difference between the phrase "bear Arms" and the words "carry guns"—especially when the "bear Arms" phrase is surrounded by other military language. My claim is not that no one at the Founding ever used the phrase "bear Arms" to encompass, say, hunting. In fact, we can find such uses—\textsuperscript{36}—but they are rare, the proverbial linguistic exceptions that prove the rule and illustrate the elasticity and metaphoric nature of language generally.

Further complications arise as language evolves. Today, the phrase "bear Arms" has for many Americans lost its overwhelmingly military meaning and has become more synonymous with gun-toting in general.\textsuperscript{37} But good textual interpretation of the Constitution should generally seek to read the text as it was understood by the people who framed and ratified the language in question, or who reglossed it when adopting a later amendment. When real people have lived through real evils and carefully crafted language to prohibit these evils from recurring—"Never again!"—their posterity would be wise to read their language in light of the historical mischief they aimed to banish. This is the insight of my colleague Jed Rubenfeld, who urges modern readers to attend to the "paradigm case"—the core historical evil—underlying many a constitutional prohibition.\textsuperscript{38} In reminding you of the evils of an imperial standing army in the late 1700s, and conjuring up images of Lexington and Concord and Bunker Hill, I have tried to be faithful to this mode of textual and historical interpretation.

\textsuperscript{36}\textit{See, e.g., AMAR, supra} note 7, at 47, 262 (quoting amendment proposed by some Pennsylvania Anti-Federalists affirming a right of the people to "bear arms for the defence of themselves and their own State, or the United States, or for the purpose of killing game ...") (emphasis added).

In an opinion handed down days before this lecture, a Fifth Circuit panel claimed to have found "numerous instances" of early usage "indisputably" supporting a nonmilitary, libertarian reading of arms-bearing. See United States v. Emerson, 270 F.3d 203, 230 n.29 (5th Cir. 2001). Most of the cited sources postdate the Constitution by decades. Of the remaining material cited, only one source in fact clearly supports a nonmilitary libertarian reading as opposed to what I have called the republican reading of the "bear Arms" phrase. That one source is above-quoted language from some Pennsylvania Anti-Federalists.

\textsuperscript{37}A great many modern state constitutions use the "bear Arms" phrase outside a strictly military and collective context. A significant number of states—including Delaware, Nebraska, Nevada, New Mexico, North Dakota, West Virginia, and Wisconsin—explicitly link the "bear Arms" phrase to hunting and/or recreation. These state constitutional references to hunting and recreation appear to be of a distinctly recent vintage, enacted in the 1980s and 1990s. For a recent catalogue of state constitutional provisions, see David B. Kopel et al., \textit{A Tale of Three Cities: The Right to Bear Arms in State Supreme Courts}, 68 TEMP. L. REV. 1177, 1180-83 n.13 (1995). \textit{See also} WIS. CONST. art. I, § 25 (adopted 1998).

\textsuperscript{38}\textit{JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT} 178-95 (2001).
A different approach, which sought only the modern meanings of words, would risk constitutional command by pun. If a public school prohibited students from wearing tank tops, surely nothing should turn on whether some clever plaintiff characterizes this dress code as infringing his right to "bare arms." (This would remain true even if some trendy back-to-phonics movement had somehow succeeded in convincing most ordinary Americans to spell "bear" and "bare" the same way: bAr.)

In seeking out the core meaning of a constitutional prohibition and the historical paradigm case that prompted the prohibition, good textualists have many tools at hand.

I have highlighted the significance of language quite similar to the Second Amendment's in antecedent state constitutions, and in other landmark texts such as the English Bill of Rights. The historical and linguistic links between these documents and the Second Amendment are relatively clear. Others have suggested that the Founders' Second Amendment borrowed from Blackstone's account of the right to have arms for individual self-defense; but these scholars have not shown any tight linguistic linkage between the Second Amendment's phraseology and Blackstone's or any specific historical evidence suggesting that the Founders had Blackstone primarily in mind here. Elsewhere, I have presented evidence that Blackstone's view of arms was much more influential for the Reconstruction generation than for the Founders. Those who lived through Lexington and Bunker Hill did not need or want Blackstone—an Englishman who had opposed the American Revolution—to explain to them the core meaning of militias and the people's right to arms. Unlike Blackstone, the Founding generation highlighted the political and populist nature of collective arms bearing rather than its individualistic dimension: the Second Amendment was a military provision focused on collective security rather than individual self defense.

Here is where the words of adjoining clauses—the opening ode to the militia, and the neighboring Third Amendment—seem decisive, especially when read against the general backdrop of the American Revolution itself. Attention to contiguous clauses in the Constitution is an interpretive technique that one finds on prominent display in classic Marshall Court opinions authored by Marshall himself and his towering colleague Joseph Story. Another technique visible in these opinions is what I have recently called "intratextualism"—reading a constitutional word or phrase in light of other uses of that phrase elsewhere in

---


40 See Amar, supra note 7, at 226 n*, 261–66.

In this tradition, I have today emphasized that the words “the people” in the Second Amendment should be read alongside the use of these words in the Preamble and Article I, and their later appearance in the First, Ninth and Tenth Amendments. And I have also explained how the Fourth Amendment’s usage is more complicated because it features the word “person” alongside the more collective-sounding “the people.”

A skeptic might wonder if I am simply fabricating a linguistic distinction without a difference: aren’t “the people” just individual “persons” added up, one by one? No. For starters, some “persons” are not within the core meaning of “the people” as the Constitution uses the term. As a general matter, aliens were not part of those who ordained the Constitution, or voted in congressional elections, or served on juries or militias. So too with women (prior to the Nineteenth Amendment) and children. What’s more, the phrase “the people” suggests an interactivity among persons whereby the whole group is more than simply the parts added together one by one. A militia has an interactive social structure, as does a jury, and (ideally) an electorate. A world in which everyone has a gun for sport but never musters with others is not a true militia: these gun owners are acting as private persons, not a collective people.

Intratextual analysis is also useful in understanding the people’s Second Amendment counterpart: the “Militia.” Several provisions of Article I, section 8 address the militia, and a complete analysis of the Second Amendment should explain how its words mesh with, and gloss, those earlier provisions. Elsewhere, I have tried to do just this, explaining the important social and legal differences at the Founding between localist militias of ordinary citizens and a paid, professional centralized standing army. And all this strongly confirms that at the Founding, the Second was primarily a military amendment. Contrary to libertarian ideology and the NRA credo, neither hunting nor individual self-defense lay at the core of the Founders’ Second Amendment.

None of this means that individual self-defense cannot be recognized as a constitutional right. Not all constitutional rights are strictly textual, and even texts

---

43 Senate rules circa 1866 apparently did not allow foreigners to petition that body, on the theory that petition was a right of “the people.” See Amar, supra note 7, at 174, 364 n.41.
44 See generally Williams, supra note 19.
45 See U.S. Const. art. I, § 8, cl. 15–16:
[Congress shall have Power] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.
46 See AMAR, supra note 7, at 50–59.
may often be properly read as radiating beyond their core command. If “life or
limb” can be read poetically and metaphorically beyond the literalistic core of
death and dismemberment, so in theory can the words “bear Arms,” especially if
we stress the additional word “keep.” The question thus becomes, what reasons
do we have for reading the words broadly, beyond the core case?

The Ninth Amendment is suggestive here: “The enumeration in the
Constitution, of certain rights shall not be construed to deny or disparage others
retained by the people.”47 Thus, the mere fact that a given right is not explicitly
enumerated—not textually specified—should not lead us automatically to
conclude that the right does not exist; rights may exist even if textually
unspecified. But the Ninth is better at telling us what not to do than at providing
detailed guidance about where, how, and why to find nontextual rights.

Here, then, are a few thoughts of my own on the much mooted topic of
unenumerated rights. Even though the text may not enumerate a right, it might
nonetheless imply it. For example, although the Constitution’s text does not quite
enumerate it, surely a defendant has the right to confront physical evidence
introduced against him and the right to introduce reliable physical evidence in his
favor—by subpoena if necessary. These unenumerated rights follow a fortiori
from his enumerated rights to confront opposing witnesses and subpoena his own
witnesses; and are also implicit in due process, even if not explicitly and minutely
specified (that is, enumerated).48 As another example, consider whether Congress
may punish the author of a handwritten political tract criticizing federal policy.
Strictly speaking, the tract is neither oral “speech” nor the product of a printing
“press.” Yet surely, the enumerated rights of “speech” and “press”49—and the
broader structural logic of the Constitution’s scheme of republican self-
government—imply that this nonenumerated form of political expression must
likewise be a right retained by members of the self-governing citizenry.

Sometimes, we should read a textual right more broadly than its core
command might demand because these extra applications of the right can provide
a buffer zone protecting the core. Buffer zones are especially apt if, in applica-

47 U.S. CONST. amend VIII.
48 See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right
... to be confronted with the witnesses against him; [and] to have compulsory process for obtaining
witnesses in his favor ...”); id. amend. V (“No person shall ... be deprived of life, liberty, or
property, without due process of law ...”). For more detailed analysis of the interactions and
implications of these provisions for nonspecified rights, see AKHIL REED AMAR, THE CONSTITUTION
AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 94–96, 132 (1997); Akhil Reed Amar, Constitutional
49 U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion,
or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the
right of the people peaceably to assemble, and to petition the Government for a redress of
grievances.”).
tion, it is hard to demarcate crisply the outer boundaries of a given enumerated right. Consider once again the First Amendment. The core idea underlying the Founders’ Freedom of Speech Clause was a right to engage in political expression, especially anti-government speech. Intratextual and historical analysis confirms that this was the core idea: the phrase “freedom of speech” derives from the English Bill of Rights protecting “freedom of speech, and debates ... in parliament.” “Parliament”—from the French “parler,” to speak—is a parley place, a speaking spot. But Parliament is not quite a spot for any and all utterances: the core concept here is political expression. So too, our Constitution’s Article I, section 6 protects congressional freedom of “Speech [and] Debate,” and state constitutions circa 1789 likewise protected legislative speech and debate. In all these contexts, it is clear that the key concern is political expression. Moreover, the First Amendment phrase “Congress shall make no law” suggests that Congress simply lacked enumerated power to regulate speech. This phrase confirms that the Founders were thinking of political speech, rather than, say, commercial advertising or commercial contracting, both of which are also done with words, but with words that do fall within Congress’s enumerated power to regulate interstate commerce. It thus makes sense to say that political speech is the core right in the First Amendment, and that commercial speech is not.

In today’s world, however, it may not be possible to sharply distinguish between the two in all contexts. Is a newspaper ad only commercial speech? Even if it criticizes government policy? This is no mere law professor hypothetical: it is the basic set of facts underlying New York Times v. Sullivan, perhaps the most important First Amendment case of the modern era. Given the difficulty of sharply distinguishing between political and commercial speech in some situations, a strict regime in which commercial speech got no protection at all might threaten our core right; we might be better off with a kind of sliding scale approach protecting some commercial speech in order to buffer the core right of political expression.

Similarly, even if the core right of “the people” to assemble in the First Amendment focused on political conclaves of voters—constitutional conventions and the like—we might have sound structural reasons to read the amendment

---

50 For more documentation of my claims today about the First Amendment, see generally AMAR, supra note 7, at 24–25, 36–42; Akhil Reed Amar, Some Notes on the Establishment Clause, 2 ROGER WILLIAMS U. L. REV. 1 (1996).
51 English Bill of Rights, 1689, 1 W. & M., c.2, § 9 (Eng.).
52 U.S. CONST. art. I, § 6, cl. 1 (“[A]nd for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place.”).
53 See U.S. CONST. art. I, § 8, cl.3 (“[Congress shall have Power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”).
beyond this core, protecting even nonvoters’ rights to get together for a variety of noncommercial and expressive purposes—prayer, fellowship, parades, and so on. Such a broad right would cohere with other rights affirmed by the First Amendment—freedom of religion, for example—and this broad right also draws historical support from the Reconstruction Amendment, which reflected a strong commitment to the associational rights even of nonvoters (paradigmatically, blacks and women).\(^{55}\)

Now let’s return to the Second Amendment, and ask whether there are comparably good reasons to read the “bear Arms” right broadly, outside its original core meaning. Given that the militia no longer exists as a genuine institutional reality, an individual right serves little purpose as a buffer zone around the core. (The core has melted away.) Nor is an individual right strongly presupposed by the very logic of a collective militia. Nor do general structural arguments on behalf of expressive organizations and intermediate associations in a working democracy—arguments that counsel broad readings of the First Amendment—apply to a broad libertarian reading of the Second Amendment.

History, however, does provide some support for a broad libertarian reading of the right to “keep and bear Arms,” but the best historical argument for libertarians comes not from the Founding but from Reconstruction. The Fourteenth Amendment’s framers emphatically proclaimed their intent to make the Bill of Rights applicable against states.\(^{56}\) In effect, they readopted the Bill, glossing it with their own understandings. Although the Founders fused together arms-bearing with militias, the Reconstruction statute that I have quoted drove a wedge between the two, severing the idea of individual gun ownership for self protection from militia service. Concretely: the Fourteenth Amendment affirmed the civil right of black men—and of black women and white women, for that matter—to have a gun for self protection even though these persons did not (yet) enjoy the distinct political right to be part of the militia.

If this seems to you like overly clever time travel—reading the 1789 “bear Arms” phrase in light of 1868 understandings that reglossed that phrase in the course of formally rewriting the Constitution—an even simpler textual and historical argument for an individual right is as follows: Put the Second Amendment aside. The Fourteenth Amendment itself says that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” The Amendment also presupposes that the federal government may not interfere with these privileges and immunities either—they inhere in American citizenship itself and are protected from federal abridgement by the Amendment’s first sentence declaring national birthright citizenship.\(^{57}\)

\(^{55}\)See AMAR, supra note 7, at 241–46.

\(^{56}\)Id. at 137–294, and sources cited therein.

\(^{57}\)See supra note 26. See generally AMAR, supra note 7, at 281–83.
(The Amendment's second sentence proceeded to make explicit that *states* could not violate these rights of citizenship because an 1833 Supreme Court case, *Barron v. Baltimore*, had seemed to insist on special *Simon Says* language where states were concerned.) One of these privileges and immunities is a right to have a gun in one's home for self-protection. The precise boundaries of this right may be blurry and fluid—reasonable regulations are permissible, total prohibitions more suspect—but it is quintessentially an individual, libertarian right, as highlighted by the text, logic, and history of the Fourteenth Amendment. The text speaks of a "privilege"—a kind of private right—of "citizens." Black men, and women of all races, are indeed citizens covered by this Clause, even if they don't vote, serve on juries or militias, or wield other political rights. And given the paradigm evil of Klan-style thuggery in the minds of Reconstruction Republicans, the right to a gun in one's home was indeed a core component of the original vision of the Fourteenth Amendment.

Yet another Fourteenth Amendment approach might say that judges seeking to identify unenumerated "privileges" and "immunities" deserving federal constitutional protection should look not merely to Reconstruction history but also to the American tradition more broadly and to modern state constitutional law. On this approach, it is noteworthy that many state constitutions have been written and/or construed to protect private gun ownership, and that—like it or not—a gun in one's home for self-protection is deeply rooted in the American ethos. Of course, on this view as well, the libertarian right would not be an absolutist one. The American tradition has encompassed many reasonable regulations of weapons short of total confiscation, and state judges in the modern era have rarely used state constitutions to strike down moderate gun controls.

Against this understanding of the Fourteenth Amendment's privileges and immunities clause, it might be argued that Supreme Court precedent has generally repudiated reliance on this clause, and that it is now too late to go back. But open reliance on this clause would not overturn Court precedent so much as recast it, encouraging the Justices to be more candid and careful about what they have been doing all along under the awkward label of "substantive due process." More generally, I have tried to argue elsewhere that mistaken precedents alone do not amend the Constitution, and that the document itself generally invites
judges to repudiate mistaken interpretations in cases where doing so would not frustrate legitimate reliance interests. 64

My exposition of the Second Amendment today has not dwelt on modern Supreme Court precedent; there is rather little Second Amendment precedent to go by, and even that little is murky. The Court has not applied the Amendment against the states, but has failed to give cogent reasons for treating it differently from most other provisions of the Bill of Rights, which do now apply against states. Nor has the Court made clear exactly what the Amendment bars the federal government from doing. 65 Under my interpretive framework, perhaps the most important Supreme Court pronouncement on arms bearing came, ironically enough, in Dred Scott v. Stanford. 66 Even if the Dred Scott Court was wrong in the 1850s to declare a libertarian right of gun-toting to be a privilege or immunity of citizenship, 67 We the People were entitled to rely—and did rely—on that pronouncement when amending the Constitution in the 1860s. Thus Dred Scott provides strong evidence for deeming individual gun ownership to be a core privilege of citizenship protected by the Fourteenth Amendment.

So much for text, history, and precedent. Even after all these have been considered, our constitutional analysis is still incomplete. Given that the world of 1789 and the world of 1866 are very different from our own, how are we to “translate” these old commands into rules and principles that make constitutional sense today? 68 The Founders’ militia no longer exists, I have argued. What, then, are we to make of an amendment built on that rock? The slightly paranoid anti-central-government ideology underlying the original Second Amendment seems less justified in the year 2001. Is it permissible to disavow paranoia in applying the Amendment today? Or is this disavowal simply disagreement with Founding values that might justify openly amending the Second out of the document but cannot justify undermining it via hostile “interpretation”? Guns are far more deadly today—is this relevant?

My answers to all these questions travel through the Fourteenth Amendment. The very fact of this amendment was publicly predicated on a profoundly un-Founding-like understanding of the central army and local militias. Bluntly, the Fourteenth Amendment became law thanks to the Union army, which helped suppress rebel militias. Indeed, the Reconstruction Act of 1867 provided for federal military occupation and governance of the unreconstructed South, and in

67 Id. at 416–17.
effect told Confederate states that they must ratify the Fourteenth Amendment (and comply with various other conditions) before they would be allowed to resume their regular role within the Union. 69 Although the Fourteenth Amendment's text did not explicitly rewrite the Founders' elaborate rules about militias and armies, the simple fact of the amendment itself invites a new understanding in which local militias are no longer the unambiguous heroes, and the Union's army is no longer the presumed villain, of America's epic constitutional narrative. The American Constitution is an act as well as a text—it is a doing, a constituting. "We the People ... do ordain and establish ...."70 So too, with amendments, which are deeds as well as words. And the deed of the Fourteenth Amendment—the brute fact of its enactment and the physical exertions that made that enactment occur—are part of the Constitution itself. To read and follow the text is necessarily, I think, to accept the general validity of the open exertions that made the text law. These open exertions, the things publicly done to get various texts adopted, are unenumerated (that is, nontextual) aspects of the Constitution, but inextricable parts of the Constitution nonetheless.71 On this view, the Fourteenth Amendment itself—implicitly and nontextually, but openly and emphatically—modified some of the Founders' military provisions. Thus, the death of the Founders' militia is not something—like an erroneous precedent—that faithful constitutionalists must seek to undo if at all possible. (That is why one possible and legitimate response today to an obviously military Second Amendment is an interpretation that seeks to "take the 'mil' out of the Militia.")

A less paranoid view of the federal government is implicit in the Fourteenth Amendment itself; it is not merely some extra-constitutional fact about modern American society. And the increased deadliness of weaponry may indeed be one among several relevant considerations as modern judges define the precise boundaries of the unenumerated privilege of gun ownership, or (to put the point a different way) the Reconstructed right of individuals to "bear Arms" (read broadly) far outside the bounds of the Founders' militias. The Fourteenth


70 U.S. CONST. pmbl. (emphasis added).

71 The ideas presented in this paragraph may profitably be compared and contrasted with the fascinating work of my colleague Bruce Ackerman. See 1 Bruce Ackerman, We the People: Foundations (1991); 2 Bruce Ackerman, We the People: Transformations (1998).
Amendment does not textually specify the precise boundaries of this right, and today’s interpreters may legitimately note important differences between nineteenth-century firearms on the one hand, and twenty-first century weapons on the other.

One other modern development deserves mention in the context of “translating” Founding and Reconstruction visions into twenty-first century doctrines. The Reconstruction generation embraced private gun ownership because local police officials in the South could not be trusted to protect blacks. If in some places today this is no longer the case, might private gun ownership be given less protection? Is the real “privilege” best understood as a gun itself, or the underlying security from thugs? If the latter, perhaps a better translation of the Reconstruction vision would seek to ensure that local police departments provide far better protection to minority communities; and a complementary translation of the Founding vision might demand that today’s local militia-substitute—the local police—department genuinely reflect the demographic diversity of the local community it serves.72 Those wielding guns and enforcing local laws (the Founders’ militia, and today’s police departments) should truly be composed of the body of the people (white men at the Founding, all adults today).

This last suggestion—that our police departments should truly look like America, with blacks alongside whites, men alongside women, and gays alongside straights—takes us back to my similar claims about America’s Armed Forces. In essence, the Founders’ militia has been replaced by two sets of twenty-first century institutions. Locally, law enforcement has shifted to police departments; nationally, collective military defense is now dominated by a professional Army, Navy, Air Force and Marine Corps. The deepest idea of the Second Amendment, I have argued, is that these collective arms-bearing/gun-toting entities should reflect the American electorate they are supposed to serve and protect. And, after the Fifteenth73 and Nineteenth Amendments, that electorate has become more diverse. If sex discrimination and race discrimination are suspect at the ballot box, they are likewise troubling in the jury room and in our defense forces.

In support of that constitutional vision, I have highlighted the text of the Second Amendment, but that text is merely the tip of a constitutional iceberg. In

---

72My tone is tentative here (and at several other points today) precisely because the many intervening changes of fact and law make it difficult to identify with perfect confidence the uniquely best modern interpretation and synthesis of the Founding and Reconstruction texts, as opposed to the range of plausible and responsible readings. In part I have chosen the Second Amendment for exposition today precisely because it illustrates many of the difficulties that accompany good-faith efforts at modern constitutional interpretation.

73U.S. CONST. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”).
the few moments that remain, let me try to outline the underlying iceberg. In the process, I hope to give you a sense of what is meant by structural interpretation of the Constitution, reading its various provision as part of a coherent whole proclaiming and embodying grand themes.

In word and deed, the Constitution's biggest idea is popular sovereignty. Here, the people rule. In word, We the People ordained the Constitution. In deed, too. Despite all its exclusions, the ratification of the document in the 1780s was more inclusive than anything that had yet occurred on planet Earth: never before had so many been allowed to vote on how they and their posterity were to be governed. In word, the document proclaimed that states must feature "republican" as opposed to aristocratic or monarchical forms of government. In deed, the Fourteenth Amendment embodied and expanded this promise, excluding from Congress various Southern states that failed to allow large numbers of their free male population (who happened to be black) from voting. With later amendments like the Fifteenth and Nineteenth, the grand theme of democracy has been strengthened and deepened in both word and deed.

In order to rule, the people must retain ultimate control over all institutions of government. Ideally, the people should participate in all branches of government. They should directly elect the House of Representatives—the people's house—every two years. They should participate in executive law enforcement—at the Founding via militias and posses, today via more professional organizations of community defense. The people should also form part of the judiciary, via the jury. Popular participation is the grand unifying idea underlying many separate provisions of the original Constitution, the Founders' Bill of Rights, and still later Amendments.

My comments today have tried to highlight links between jury service, military service, and voting. The Second Amendment's grammar implicitly links two of these; but many other parts of the Constitution reinforce the point. At the Founding, various states allowed Patriot militiamen to vote even if they failed to meet ordinary property qualifications. Section 2 of the Fourteenth Amendment defined a state's presumptive electorate in manner roughly akin to its presumptive arms-bearers: male citizens over twenty-one. The Fifteenth Amendment gave black men the vote ahead of white women in part because these black men had proved their valor—and helped win the Civil War—on the battlefield of glory.

---

74 U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government.").
76 For more discussion and documentation of the claims in this paragraph, see generally AMAR, supra note 7, at 48 n.*.
Woodrow Wilson endorsed the Nineteenth Amendment in recognition of the role women were playing on the home front in World War I. The Twenty-Sixth Amendment gave young adults the vote on the theory that those old enough to fight and die in Vietnam should be allowed to vote on the wisdom of that war, and all other important matters. (The reverse is also true: if women and gays are excluded from military equality, their voices might count for less in national debates about military policy, and they are less likely to win high positions of political power that have so often gone to those who have served in America's military.)

In talking about gender issues in the military, I of course am relying on the Nineteenth Amendment in tandem with the Second. The Nineteenth at its core protects a right to vote in ordinary elections; but there are sound historical and structural reasons for reading it broadly beyond its narrow core. The Amendment should be understood to protect not just a right to vote, but a right to be voted for—that is, a right to seek and hold office. It should be read to guarantee a right to vote in the judicial branch as well as for the legislature—that is, a right to vote and serve on juries. And finally, in tandem with the Second, it should be read to affirm a right to political equality in modern America's militia substitutes.

It is now confession time. I have chosen this venue to proclaim this vision not merely because the Mountain West is gun country. It is also because this place has a unique if unsung role in the history of woman's suffrage. In 1869-70, the Wyoming Territory embraced women's political equality—encompassing voting, jury service, and officeholding—and in 1890 Wyoming entered the Union as the first state with full suffrage for women. Over the next six years, and long before any other state followed suit, Colorado, Utah, and Idaho enacted full woman suffrage. By my reckoning, this lecture hall lies remarkably close to the geographic center of these four pathbreaking states. The next state to join the full suffrage club did so in 1910, and by the end of 1914 seven sister states had joined the pioneering four. Interestingly enough, these seven—Washington, California, Oregon, Arizona, Kansas, Nevada, and Montana—likewise form a circle roughly centered on Salt Lake City. And here are a few more facts about neighboring Wyoming. According to its official state website, Wyoming's current motto is

---

77 U.S. CONST. amend. XXVI, § 1 ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.").

78 Some of these arguments are sketched out in Akhil Reed Amar, Women and the Constitution, 18 HARV. J. L. PUB. POL’Y 465 (1995); for much more elaboration, see Vikram David Amar, Jury Service as Political Participation Akin to Voting, 80 CORNELL L. REV. 203 (1995).


80 See id.

81 Id. at 192, 204 n.20.
“Equal Rights” and one of its three nicknames is the “Equality State” because of the state’s historic leadership on the rights of women “to vote, serve on juries and hold public office.”82 The website goes on to remind visitors that in 1925 Wyoming became the first state to have a woman as governor, Nellie Tayloe Ross.83

On the topic of women’s rights, then, this region was once way ahead of its time. I confess that some of what I have said today about women’s rights is likewise probably ahead of its time. But this seems to me the right place to make the case. In fact and folklore, the Mountain West may well be Second Amendment country; but let us not forget that it is also home to the Nineteenth Amendment.

83Id.