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CLAYTON E. CRAMER

Affiliation Unknown

JOSEPH OLSON

Hamline University

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Abstract:

Among the many heated controversies concerning the Second Amendment is the correct meaning of the phrase keep and bear arms. Those who argue that the original meaning of the Second Amendment was only to protect a collective right, either of the states to maintain militias, or perhaps of citizens to jointly form state-controlled militias, assert that bear arms refers exclusively or at least overwhelmingly, to the military carrying of weapons. Some have claimed that even keep arms was exclusively military in its meaning. While one might challenge the overly narrow focus on bear arms instead of the entire phrase keep and bear arms, those arguing for a collective right have thrown down the gauntlet by making this strong claim about just two words. This paper demonstrates that the Founding Generation did not understand bear arms as limited to military or collective militia duty but saw it as merely one way of expressing the concept of possession (as a modern speaker might say carry a gun).

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Email address for JOSEPH OLSON
Hamline University

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1536 Hewitt Avenue
School of Law
St. Paul , MN 55104
United States
612-641-2142 (Phone)
612-621-2236 (Fax)

Contact Information for CLAYTON E. CRAMER

Email address for CLAYTON E. CRAMER
Affiliation Unknown
No Address Available

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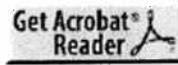
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What Did “Bear Arms” Mean in the Second Amendment?

Clayton E. Cramer¹

and

Joseph Edward Olson²

Among the many heated controversies concerning the Second Amendment is the meaning of the phrase “keep and bear arms.”³ Those who argue that the original meaning of the Second Amendment was only to protect a collective right, either of the states to maintain militias, or perhaps of citizens to jointly form militias, assert that “bear arms” refers exclusively⁴ or at least overwhelmingly, to the collective, military carrying of weapons.⁵ Some have claimed that even “keep arms” was exclusively military in its meaning,⁶ although the Rhode Island Supreme Court has argued that “keep arms” was non-military, while “bear arms” referred to

¹ B.A. (*with Distinction*); M.A. (History), Sonoma State University.

² B.A., University of Notre Dame; J.D., Duke University (*with Distinction*); LL.M., University of Florida. Professor of Law, Hamline University School of Law. We thank Eugene Volokh and Don B. Kates, Jr. for their comments.

³ U.S. CONST. amend. II.

⁴ See John Levin, *The Right to Bear Arms: The Development of the American Experience*, 48 CHI.-KENT L. REV. 148-161 (1971), cited in STAFF OF S. COMM. ON THE JUDICIARY, 97TH CONG., THE RIGHT TO KEEP AND BEAR ARMS (Comm. Print 1982); David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 618-21 (2000); *Silveira v. Lockyer*, 312 F.3d 1052, 1086 (9th Cir. 2002); *Mosby v. Devine*, 851 A.2d 1031, 1041 (R.I. 2004).

⁵ Michael C. Dorf, *What Does the Second Amendment Mean Today*, 76 CHI.-KENT L. REV. 291, 314-17.

⁶ David Thomas Konig, *Arms and the Man: What Did the Right to “Keep” Arms Mean in the Early Republic?*, 25 LAW & HIST. REV. 177, 182-83 (2007).

WHAT DID “BEAR ARMS” MEAN IN THE SECOND AMENDMENT?

military use.⁷ While one might challenge the overly narrow focus on “bear arms” instead of the entire phrase “keep and bear arms,” those arguing for a collective right have thrown down the gauntlet by making this strong claim about just two words. This paper demonstrates that the Founding Generation, and at least two generations after them, did not understand “bear arms” as limited to military or collective militia duty.

If “bear arms” referred *only* to the military carrying or use of arms, then the right protected by the Second Amendment would not be an individual right to possess or carry arms for personal self-defense. The right would be for a government organized militia, or at best, to exercise what the Tennessee Supreme Court in *Aymette* acknowledged was a right to revolution. After explaining that the Tennessee Constitution’s guarantee included the qualifier “for their common defence” (explicitly rejected by the U.S. Senate for the Second Amendment) the Court articulated an individual *right* that existed to serve a collective *purpose*, “[t]he object then, for which the right of keeping and bearing arms is secured, is the defence of the public. The free white men may keep arms to protect the public liberty, to keep in awe those who are in power, and to maintain the supremacy of the laws and the constitution.”⁸

Previous scholarly examination of the phrase “bear arms” in English language documents published around the time of the Constitution does show almost entirely military uses or contexts. But this is perhaps reflective of a selection bias problem. Consider Dorf’s statement that, “Searching for the phrase ‘bear arms’ in the Library of Congress’s database of congressional and other documents from the founding era produces a great many references, nearly all of them in a military context.” This should be no surprise; Dorf’s footnote recommends that readers “click on ‘Political Science and Law,’ and choose a database.”⁹ If you look in databases consisting almost entirely of government documents, it should not be a surprise that most of the uses will be governmental in nature.

⁷ *Mosby*, 851 A.2d at 1058.

⁸ *Aymette v. State*, 21 Tenn. (3 Hum.) (1840).

⁹ Dorf, *supra* note 5, at 314. A computer search of Readex’s *Early American Imprints* for the phrases “bear arms,” “bearing arms,” “bore arms,” and “borne arms” found seven matches that used one of these expressions, all of which referred to the bearing of arms in some form of military or militia service. See also Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEX. L. REV. 237, 244-52 (2004) (book review) (describing other examples of contemporary uses of “bear arms” in non-military contexts).

WHAT DID “BEAR ARMS” MEAN IN THE SECOND AMENDMENT?

Searching more comprehensive collections of English language works published before 1820 shows that there are a number of uses that are clearly individual, and have nothing to do with military service. Some of these uses are by authors and in contexts that give special weight to an individual rights understanding.

In some cases, the document is a statute, and it seems clear that statutory uses of “bear arms” in a non-military context should be given considerable weight as evidence for understanding later legal uses of the phrase. A statute of Henry VIII made it unlawful for any resident of Wales to:

“bring or *bear*, or cause to be brought or *borne* to the same Sessions or Court, or to any place within the distance of two Miles from the same Sessions or Court, nor to any Town, Church, Fair, Market, or other Congregation . . . nor in the Highways in affray of the King's Peace, or the King's liege People, any Bill, Long-bow, Cross-bow, Hand-gun, Sword, Staff, Dagger, Halberd, Morespike, Spear, or any other manner of Weapon”¹⁰

The specific problem that the statute sought to correct was not even Welsh rebellion, but simple criminal actions interfering with the operation of the courts.¹¹

More recently—and in more modern English—are several statutes prohibiting the carrying of arms in the Scottish Highlands:

“Whereas the Custom that has too long prevailed amongst the *Highlanders of Scotland*, of having Arms in their Custody, and using and bearing them in traveling abroad in the Fields, and at publick Meetings, has greatly obstructed the civilizing of the People within the Counties herein after named; has prevented their applying themselves to Husbandry, Manufactories, Trade, and other virtuous and profitable Employments”¹²

¹⁰ 4 DANBY PICKERING, STATUTES AT LARGE FROM THE FIRST YEAR OF KING RICHARD III TO THE THIRTY-FIRST YEAR OF KING HENRY VIII 220 (London, Cambridge 1763) (quoting 26 Hen. 8, c. 6, s. 4 (1534)); see also 2 HAROLD NUTTALL TOMLINS, A DIGEST OF THE CRIMINAL STATUTE LAW OF ENGLAND: ALPHABETICALLY AND ANALYTICALLY ARRANGED, 1098 (London, Henry Butterworth 1819).

¹¹ 4 W. F. FINLASON, REEVES' HISTORY OF THE ENGLISH LAW, FROM THE TIME OF THE ROMANS, TO THE END OF THE REIGN OF ELIZABETH [1603], at 295 (Phila., M. Murray 1880); 4 JOHN REEVES, HISTORY OF THE ENGLISH LAW, FROM THE TIME OF THE SAXONS TO THE END OF THE REIGN OF PHILIP AND MARY 195-96 (A.M. Kelley 3d ed. 1969) (1814); ANDREW AMOS, OBSERVATIONS ON THE STATUTES OF THE REFORMATION PARLIAMENT IN THE REIGN OF KING HENRY THE EIGHTH 221 (London, V. & R. Stevens and G.S. Norton 1859); 2 *The Legal Observer, or Journal of Jurisprudence*, Oct. 19, 1844, at 478.

¹² 1 Geo. 1, c. 54 (1715).

WHAT DID “BEAR ARMS” MEAN IN THE SECOND AMENDMENT?

The statute is an exception for “Peers of this Realm,” their sons, and officials “employed in the Execution of Justice” to the prohibition “of keeping, bearing or wearing any warlike Weapons”¹³

In spite of the word “warlike,” there is nothing in the statute that indicates that “bearing” of weapons was a military action. The context is clearly civilian carrying of arms.

This statute not having been completely effective, Parliament passed, “[a]n act for more effectual disarming the highlands in that part of Great Britain called Scotland; and for the better securing the peace and quiet of that part of the kingdom.”¹⁴ After specifying a list of shires in Scotland where this law applied, it prohibited:

To have in his, her or their custody, use or *bear*, broad sword or target, poynard, whingar or durk, side-pistol or side-pistols, or gun, or any other warlike weapons, in the fields, or in the way coming or going to, from or at any church, market, fair, burials, huntings, meetings, or any occasion whatsoever, within the bounds aforesaid, or to come into the low counties armed as aforesaid: and in case any of the said person or person above described should have in his custody, use or *bear arms*, otherwise than in the said act was directed¹⁵

While there is reference to “warlike weapons,” the locations where arms bearing were prohibited, and the stated purpose of the act, demonstrate that this was to prohibit *individuals* from carrying weapons during peacetime. There is not even a hint of a military purpose. Similarly, both the 1746 and 1748 statutes prohibited Highlanders “to have in his or their custody, use, or bear, broad sword or target, poignard, whinger, or durk, side pistol, gun, or other warlike weapon”¹⁶ and required them to turn in their arms and “restraining the Use of the Highland Dress” provided for punishment for those “having or *bearing* any *Arms* or Warlike Weapons”¹⁷

John Home’s 1802 history of the Highland rebellions continues to use the phrase in a civilian, public safety sense:

¹³ *Id.*

¹⁴ 9 Geo. c. 26 (1724).

¹⁵ 15 THE STATUTES AT LARGE, FROM THE NINTH YEAR OF KING GEORGE I TO THE SECOND YEAR OF KING GEORGE II 246-47 (Cambridge, Joseph Bentham 1765) (emphasis added).

¹⁶ CHARLES GRANT ROBERTSON, SELECT STATUTES CASES AND DOCUMENTS TO ILLUSTRATE ENGLISH CONSTITUTIONAL HISTORY, 1660-1832, at 127 (New York, G. P. Putnam’s Sons 1904) (quoting 19 Geo. 2, c. 39 (1746)).

¹⁷ 21 Geo. 2, c. 34 (1748) (emphasis added).

WHAT DID “BEAR ARMS” MEAN IN THE SECOND AMENDMENT?

By an act of the 1st of the late King, entitled For the more effectual securing the peace of the Highlands; the whole Highlands, without distinction, are disarmed, and for ever forbid to use or *bear arms* under penalties.¹⁸

A later measure disarming the Highlanders, uses the present perfect form of “bear arms” as part of an amnesty for those turning in their arms:

That from and after the time of affixing any such summons as aforesaid, no person or persons residing within the bounds therein mentioned, shall be sued or prosecuted for his or their having, or having had, *bearing*, or having *borne arms* at any time before the several days to be prefixed or limited by summons as aforesaid, for the respective persons and districts to deliver up their arms. . . .¹⁹

In debates in the House of Lords on June 19, 1780, in the aftermath of the Gordon Riots in London, Lord Richmond objected to certain parts of the King’s speech concerning the actions taken to suppress the riots:

His next object of censure was the conduct of the Commander in Chief of the army, for the letters he sent to Colonel Twisleton, who commanded the military force in the City, ordering him to disarm the citizens, who had taken up arms, and formed themselves in to associations, for the defence of their lives and properties. These letters he considered as a violation of the constitutional right of Protestant subjects to *keep and bear arms* for their own defence.

Lord Amherst agreed that the disarming order was intended only for the rioters, “but no passage in his letter could be construed to mean, that the arms should be taken away from the associated citizens, who had very properly armed themselves for the defence of their lives and property.”

Earl Bathurst stated the difference between the right of *bearing arms* for personal defence, and that of bodies of the subjects arraying themselves, without a commission from the king; the latter he declared to be unlawful.²⁰

The duality of the contemporary usage was shown by a contemporaneous pronouncement by the Recorder of London -- the city’s chief legal officer -- when asked if right to *have arms* in the English Declaration of Rights protected armed groups as well as armed individuals. He wrote:

¹⁸ JOHN HOME, THE HISTORY OF THE REBELLION IN THE YEAR 1745, at 303 (London, T. Cadell, Jun. and W. Davies 1802) (emphasis added).

¹⁹ 18 CHARLES BATHURST, STATUTES AT LARGE, FROM THE 15TH TO THE 20TH YEAR OF KING GEORGE III 526 (Cambridge, Joseph Bentham 1765) (describing Geo. 2 c. 39 (1746)) (emphasis added).

²⁰ THE LONDON MAGAZINE, OR GENTLEMAN’S MONTHLY INTELLIGENCER, Oct. 1780, at 467-68 (emphasis added).

WHAT DID “BEAR ARMS” MEAN IN THE SECOND AMENDMENT?

The right of his majesty's Protestant subjects, to **have** arms for their own defence, and to **use** them for lawful purposes, is most clear and undeniable. It seems, indeed, to be considered, by the ancient laws of this kingdom, not only as a *right*, but as a *duty*; for all the subjects of the realm, who are able to **bear arms**, are bound to be ready, at all times, to assist the sheriff, and other civil magistrates, in the execution of the laws and the preservation of the public peace. And **that right, which every Protestant most unquestionably possesses, individually**, may, and in many cases *must*, be exercised collectively, is likewise a point which I conceive to be most clearly established by the authority of judicial decisions and ancient acts of parliament, as well as by reason and common sense.²¹ (emphasis added)

The common law was in agreement. Edward Christian's edition of Blackstone's Commentaries that appeared in the 1790's described the rights of Englishmen (which every American colonist had been promised) in these terms “everyone is at liberty to keep or carry a gun, if he does not use it for the [unlawful] destruction of game.”²² This right was separate from militia duties.²³

Literary uses in Britain in this period also show that “bear arms” was not exclusively military. From John Potter's *Archaeologia Graeca, or the Antiquities of Greece* (1818):

Afterwards a penalty was laid by Solon upon those who wore arms in the city without necessity; and having in former times been the occasion of frequent murders, robberies, and duels. On the same account was made the following law of Zaleucus . . . *that no person should bear arms in the senate.*²⁴

This is clearly a civilian context, not a military one. If “bear arms” was exclusively military in its meaning in 1818 English, one presumes that Potter would have translated this as “that no person should *carry* arms in the senate.”

Thomas Taylor's 1804 translation of *The Dissertations of Maximus Tyrius* also uses the past tense of “bear arms” to distinguish those who were free from those who were not, with the bearing of arms in a non-military context as a defining characteristic of freedom, “[w]hen were the Cretans

²¹ 1 William Blackstone, *Commentaries* *133-34 (St. George Tucker ed., 1803) (quoting William Blizard, *Desultory Reflections on Police* 59-60 (1785)).

²² 2 William Blackstone, *Commentaries on the Laws of England* *441, ed. Edward Christian, (12th ed., London, 1793-1795).

²³ Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right*, Ch. 7 (Cambridge, Harvard University Press, 1994).

²⁴ JOHN POTTER, *ARCHAEOLOGIA GRAECA, OR THE ANTIQUITIES OF GREECE* 453 (Edinburgh, Stirling & Slade 1818) (emphasis added).

WHAT DID “BEAR ARMS” MEAN IN THE SECOND AMENDMENT?

free? when they bore arms, when they were exercised in archery and hunting. When were they slaves? when they were husbandmen.”²⁵

An especially appropriate non-military, individual use of “bear arms” comes from John Lingard’s *The Antiquities of the Anglo-Saxon Church* (1810), where he discusses restrictions on the clergy:

To *bear arms* was strictly forbidden: but arms were always worn by the Saxon as a token of his freedom, and the number of statutes by which they were prohibited, is a proof of the diffusion and obstinacy of this national prejudice.²⁶

The first clause would not be terribly persuasive; it could refer to either the civilian carrying of arms, or of military service, but Lingard’s equating of “bear arms” with “arms were always worn by the Saxon as a token of his freedom” suggests that this referred to the common carrying of arms as a civilian—not as part of the militia or other military force.

In Debrett’s *Collection of State Papers Relative to the War Against France* (1797), there is a discussion of orders from the French military upon occupying “the Country beyond the Rhine”:

The inhabitants of the villages, who shall take arms against the French, shall be shot, and their houses burnt, as shall likewise all who *bear arms* without permission from the French generals.²⁷

While those who “shall take up arms” would qualify as military action, “all who *bear arms* without permission” clearly are *not* engaged in military action; the phrase “as shall likewise” tells us that this a different group and situation. The only way in which those “who *bear arms* without permission” can be understood as referring to military units is if French generals were in the practice of giving permission to civilians to fight against them.

In David Ramsay’s *Universal History Americanised* (1819) there is a discussion of the feudal period and chivalry that uses the phrase in the context of individual self-defense:

²⁵ MAXIMUS TYRIUS, *THE DISSERTATIONS OF MAXIMUS TYRIUS* 134 (Thomas Taylor, trans., London, C. Whittingham 1804).

²⁶ JOHN LINGARD, *THE ANTIQUITIES OF THE ANGLO-SAXON CHURCH* 68 (Newcastle, Edward Walker, 2d ed. 1810) (emphasis added).

²⁷ 5 JOHN DEBRETT, *A COLLECTION OF STATE PAPERS, RELATIVE TO THE WAR AGAINST FRANCE NOW CARRYING ON BY GREAT BRITAIN AND THE SEVERAL OTHER EUROPEAN POWERS* 46 (London, J. Debrett 1797) (emphasis added).

WHAT DID “BEAR ARMS” MEAN IN THE SECOND AMENDMENT?

To check the insolence of overgrown oppressors, to succor the distressed, to rescue the helpless from captivity; to protect, or to avenge, women, orphans, and ecclesiastics, who could not *bear arms* in their own defence . . . were deemed acts of the highest prowess and merit.²⁸

Nearly identical language appears in *The History of Spain* (1793):

He swore to accomplish the duties of his profession, to check the insolence of overgrown oppressors, to rescue the helpless from captivity, to protect or to avenge women, orphans, and ecclesiastics, who could not *bear arms* in their own defence. . . .²⁹

Women were not warriors in European civilization until very recently; to use the term “bear arms” with reference to women would be a non-military use.

One proponent of the collective meaning claim of “bear arms” acknowledges that the Pennsylvania Antifederalist request for a Bill of Rights used the phrase in an individual sense, “[t]hat the people have a right to *bear arms* for the defence of themselves and their own State, or the United States, *or for the purpose of killing game*” (which is not normally considered a collective or military act) but asserts that the Antifederalist request used the phrase “idiosyncratically.”³⁰ Yet not only do we have the British uses of “bear arms” in a non-military context, but there are many American writers who do so—and these are writers of particular importance to understanding the original meaning of the Constitution, and the Second Amendment.

The Framers’ generation used “bear arms” in both civilian and military contexts. Just four short years before he penned the first draft of the Bill of Rights, James Madison himself presented to the Virginia General Assembly, in October of 1785, a Bill for the Preservation of Deer drafted by Thomas Jefferson. The bill prohibited the hunting of deer under certain circumstances and ends with the following restriction:

²⁸ 3 DAVID M. RAMSAY, *UNIVERSAL HISTORY AMERICANISED; OR, AN HISTORICAL VIEW OF THE WORLD, FROM THE EARLIEST RECORDS TO THE YEAR 1808*, at 36 (Phila., M. Carey & Son 1819) (emphasis added).

²⁹ 2 CHARLES JOHN ANN HEREFORD & JOHN ADAMS, *THE HISTORY OF SPAIN, FROM THE ESTABLISHMENT OF THE COLONY OF GADES BY THE PHOENICIANS TO THE DEATH OF FERDINAND, SURNAMED THE SAGE* 195 (Dublin, J. Exshaw, L. White, and Wm. Jones 1793) (emphasis added).

³⁰ Dorf, *supra* note 5, at 314, n. 113 (emphasis added).

WHAT DID “BEAR ARMS” MEAN IN THE SECOND AMENDMENT?

[A]nd, if, within twelve months after the date of the recognizance he shall bear a gun out of his inclosed ground, unless whilst performing military duty, it shall be deemed a breach of the recognizance, and be good cause to bind him a new, and every such bearing of a gun shall be a breach of the new recognizance and cause to bind him again.³¹

As Randy Barnett notes, “here ‘bear a gun’ is clearly being used in a nonmilitary context, as it exempts military bearing of a gun from the prohibition imposed on those who previously violated the act” and are now restricted from bearing (carrying) a gun off their own property. In 1789, one would expect Madison to retain these same linguistic habits regarding the use of “bear” in a legislative context. Madison and Jefferson, at least, understood “bear” as a word not locked into a military or militia usage. And, as shall be demonstrated, so did other men who were present during the debates over the language of the Bill of Rights.

Barnett lists other similar usages of the Framing generation in his 2004 article, “Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?”³²

In a discussion of the history of Bologna in *A Defence of the Constitutions of Government of the United States of America*, John Adams describes how “these new magistrates in Bologna were obliged to adopt” various measures:

In order to purge the city of its many popular disorders, they were obliged to forbid a great number of persons, under grievous penalties, to enter the palace: nor was it permitted them to go about the city, nor to *bear arms*.³³

There is nothing in the context that would suggest that this ordinance was a limitation on military service or duty, or that these disorderly persons were engaged in an organized rebellion. These were simply disorderly and troublesome persons. It is rather difficult to imagine that Adams would use

³¹ Thomas Jefferson, A Bill for the Preservation of Deer (Oct. 31, 1785), in 2 *The Papers of Thomas Jefferson* 443, 444 (Julian P. Boyd ed., 1950).

³² Randy E. Barnett, WAS THE RIGHT TO KEEP AND BEAR ARMS CONDITIONED ON SERVICE IN AN ORGANIZED MILITIA? 83 *Texas L. Rev.* 237, 244-245 (November, 2004).

³³ 2 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 422 (London, John Stockdale 1794) (emphasis added). Somewhat more ambiguous is a reference to “forbid all others to bear arms.” *Id.* at 79.

WHAT DID “BEAR ARMS” MEAN IN THE SECOND AMENDMENT?

the phrase “bear arms” rather than “carry arms” in such a context if he believed that phrase was exclusively military in nature.

James Wilson was a member of the Constitutional Convention, one of the authors of the 1790 Pennsylvania Constitution, a University of Pennsylvania law professor, and a U.S. Supreme Court associate justice until his death in 1798. In writing about homicide and self-defense:

With regard to the first, it is the great natural law of self preservation, which, as we have seen, cannot be repealed, or superseded, or suspended by any human institution. This law, however, is expressly recognized in the constitution of Pennsylvania. “The right of the citizens to *bear arms* in the defence of themselves shall not be questioned.” This is one of our many renewals of the Saxon regulations. “They were bound,” says Mr. Selden, “to keep arms for the preservation of the kingdom, and *of their own persons*.”³⁴

When the a law professor who was one of the authors of a state constitution tells you what a clause means—and explicates that “bear arms” included defense “of their own persons”—it is best to assume that he knows what he is talking about.

Since some of these Americans were lawyers—and one could even say “superlawyers,” considering their positions—it strains credulity to believe that they casually and incorrectly used the phrase “bear arms.”

The generation after the Founders continued to use “bear arms” in the sense of an individual right in both state constitutions, and in commentaries about the Second Amendment. We have William Rawle’s 1829 *A View of the Constitution* that explained the meaning of the Second Amendment. The militia clause and the right of the people clause were connected, but the right to bear arms wasn’t limited to the militia. Rawle explained the “right of the people” clause, “[t]he prohibition is general. No clause in the Constitution could by any rule of construction be conceived to give to congress a power to disarm the people. Such a flagitious [shamefully wicked] attempt could only be made under some general pretence by a state legislature.”³⁵ While Rawle argues that “the right of the people to keep and bear arms” exists to support the militia purpose, it is clear that this is a right not just of militia members while in militia service, but a broader protection of “the people.”

³⁴ 3 JAMES WILSON, WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. 84 (Bird Wilson, ed., Lorenzo Press 1804) (emphasis added).

³⁵ WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 125-26 (Phila., P.H. Nicklin 1829).

WHAT DID “BEAR ARMS” MEAN IN THE SECOND AMENDMENT?

We have Jonathan Elliot’s *Debates in the Several State Conventions* (1836). In the index, under “Rights of the citizen declared to be” is “To keep and bear arms” listed in the Second Amendment. It is not listed under “rights of the militia” or a power of the states. What about the militia part of the Second Amendment? Elliot’s table of contents does not consider *that* one of the “Rights of the citizen.”³⁶

Noah Webster’s first edition of *An American Dictionary of the English Language*, published in 1828, showed several subtle variations on the verb “bear” in the sense of “carry” or “wear”; the closest sense to military service is “to wear; to bear as a mark of authority or distinction; as, to bear a sword, a badge, a name; to bear arms in a coat.”³⁷ But there is nothing specific to military service in that definition, even though one example—“a badge”—is official in nature.

The Oxford English Dictionary shows a definition of “bear” that might include a military sense: “To carry about with one, or wear, ensigns of office, weapons of offence or defence; *to bear arms against*: to be engaged in hostilities with.” But only one definition is in any way specific to arms, and even there, only “*to bear arms against*” is specific to warfare or military service—the broader definition refers generally to weapons, not just in military service. These uses appear as early as *Beowulf*, in the ninth century, and as late as 1862.³⁸

Unsurprisingly, most of the state constitutions adopted in the early Republic period contain guarantees of a right to bear arms—and many of them are identical to, or very similar to, the guarantees in the Pennsylvania Constitutions of 1776 and 1790. Vermont’s 1777, 1786, and 1793 Constitutions, “[t]hat the people have a right to bear arms for the defence of themselves and the State”³⁹ Ohio Constitution of 1802⁴⁰ and Indiana Constitution of 1816⁴¹ use identical language, with only slight differences in capitalization and punctuation. The similarity to the Pennsylvania

³⁶ JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at xv (Washington, n.pub., 2d ed. 1836).

³⁷ NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE, (Found. for Am. Christian Educ. 1st ed. 1970) (1828).

³⁸ I J. A. SIMPSON & E. S. C. WEINER, OXFORD ENGLISH DICTIONARY 634 (Clarendon Press 2d ed. 1989).

³⁹ VT.C ONST. ch. 1, art. 15 (1777); VT. CONST., ch. 1, art. 18 (1786) (including a comma after “arms”); VT. CONST. art. 16 (1793).

⁴⁰ OHIO CONST. art. VIII, § 20 (1802).

⁴¹ IND. CONST. art. I, § 20 (1816).

WHAT DID “BEAR ARMS” MEAN IN THE SECOND AMENDMENT?

Constitution of 1790 is quite striking, “[t]hat the right of citizens to bear arms, in defence of themselves and the State, shall not be questioned.”⁴² Kentucky’s 1792 and 1799 Constitutions are somewhat more specific to citizens, “[t]hat the rights of the citizens to bear arms in defence of themselves and the State shall not be questioned.”⁴³ Missouri Constitution of 1820 uses language similar to that of the Pennsylvania Constitution—but tied the right more closely to a clearly individual right:

That the people have the right peaceably to assemble for their common good, and to apply to those vested with the powers of government for redress of grievances by petition or remonstrance; and that their right to *bear arms* in defence of themselves and of the State cannot be questioned.⁴⁴

Other state constitutions of the era also use “bear arms” and in language that is even more clearly individual. The Mississippi Constitution of 1817 declares, “[e]very citizen has a right to bear arms, in defence of himself and the State.”⁴⁵ The Connecticut Constitution of 1818 also declares, “[e]very citizen has a right to bear arms in defense of himself and the State”⁴⁶ as does the Alabama Constitution of 1819.⁴⁷ The Michigan Constitutions of 1835 and 1850, “[e]very citizen has a right to bear arms in defense of himself and the State.”⁴⁸ Whatever one might want to claim about the state constitutions that used the Pennsylvania language protecting the right of the people to bear arms “for the defence of themselves and the State,” it is self-evident that, “[e]very citizen has a right to bear arms in defense of himself” refers to an individual right to self-defense—and thus, “bear arms” was not always military in its meaning.

In light of Justice Wilson’s exposition of what this right means, it is no surprise to see that there are many antebellum decisions that recognized that the right to bear arms was individual in nature (although often subject to regulation), and not specific to military duty. Eleven of these decisions were

⁴² PA. CONST., art. IX, § 21 (1790).

⁴³ KY. CONST. art. XII, § 23 (1792), KY. CONST. art. X, § 23 (1799). The 1799 constitution refers to “rights” rather than “right.” *Id.*

⁴⁴ MISS. CONST. art. XIII, § 3 (1820) (emphasis added).

⁴⁵ MISS. CONST. art. I, § 23 (1817). The 1832 version of the Mississippi Constitution is identical except for removing the comma after “arms.” MISS. CONST. art. I, § 23 (1832).

⁴⁶ CONN. CONST. art. I, § 17 (1818).

⁴⁷ ALA. CONST. art. I, § 23 (1819).

⁴⁸ *Compare* MICH. CONST. art. I, § 13 (1835), *with* MICH. CONST. art. I, § 7 (1850) (“Every person has a right to bear arms for the defense of himself and the state.” (emphasis added)).

WHAT DID “BEAR ARMS” MEAN IN THE SECOND AMENDMENT?

cases where the court determined the limits of the right to bear arms.⁴⁹ Two other decisions did not dispute that the right was individual in nature—sometimes just not applicable, because the defendant was the wrong color.⁵⁰ Most of these decisions upheld statutes that sought to regulate either the carrying of certain *categories* of arms (usually edged weapons and pistols), or certain *ways* of carrying them (such as concealed carry).⁵¹ If “bear arms” was widely understood to refer only to militia duty, or military purposes,

⁴⁹ *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90 (1822) (holding a ban on concealed weapons is contrary to the Kentucky Constitution’s guarantee of the “rights of the citizens to *bear arms* in defence of themselves and the State” (emphasis added)); *Simpson v. State*, 13 Tenn. (5 Yer.) 356 (1833) (overruling a conviction for “affray” on the grounds that “that the freemen of this state have a right to keep and to *bear arms* for their common defence” (emphasis added)); *State v. Reid*, 1 Ala. 612 (1840) (upholding a conviction of Montgomery county sheriff for concealed carry on the grounds that open carry was still allowed and protected by the guarantee in Alabama’s Constitution of the “right to *bear arms* in defence of himself and the State” (emphasis added)); *State v. Huntly*, 25 N.C. (3 Ired.) 418, 422-23 (1843) (upholding a conviction for “riding or going armed . . . to the terror of the people” but acknowledging that carrying arms under other conditions was protected by North Carolina Constitution, which allows “the people have a right to *bear arms*, for the defence of the State” (emphasis added)); *Nunn v. State*, 1 Ga. 243, 250-51 (1846) (striking down a ban on “bearing arms *openly*” for being contrary to the Second Amendment’s guarantee of a right to “*bear arms*” (emphasis added)); *State v. Chandler*, 5 La. An. 489, 490-91 (1850) (upholding a ban on concealed carry, but holding that open carry was protected by the Second Amendment’s right to “*bear arms*” (emphasis added)); *Smith v. State*, 11 La. An. 633, 634 (1856) (upheld a ban on concealed carry, again repeating that open carry was protected by the Second Amendment); *State v. Schoultz*, 25 Mo. 128 (1857) (finding that “the people’s right to *bear arms* in defense of themselves cannot be questioned, and that no presumption ought to arise in the minds of the jury from the defendant’s going armed with a pistol, it could not possibly aid the jury in their deliberations. This right is known to every jury man in our State, but nevertheless the right to bear does not sanction an unlawful use of arms” (emphasis added)); *State v. Jumel*, 13 La. An. 399, 400 (1858) (upholding a ban on concealed, same reasoning as *Smith v. State*, 11 La. An. 633); *Owen v. State*, 31 Ala. 387, 388-89 (1858) (upholding a ban on carrying concealed, but acknowledged that “to *bear arms* in defense of himself and the State” included self-defense, and that “bears” is a synonym for “carries” (emphasis added)); *Cockrum v. State*, 24 Tex. 394, 401-03 (1859) (upholding enhanced sentencing for murder with a Bowie knife but finding that “the right of a citizen to *bear arms*, in the lawful defence of himself or the State, is absolute” (emphasis added)).

⁵⁰ *State v. Mitchell*, 3 Blackf. 229 (Ind. 1833) (upholding a conviction for concealed carry but did not dispute that the Indiana Constitution’s “the people have a right to *bear arms* for the defence of themselves, and the state” might have some applicability (emphasis added)); *State v. Newsom*, 27 N.C. (5 Ired.) 250, 254 (1844) (upholding a conviction of a free black for unlicensed shotgun possession on the grounds that “[s]elf preservation is the first law of nations,” clearly not possible if blacks were allowed to carry guns).

⁵¹ See CLAYTON E. CRAMER, *CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC: DUELING, SOUTHERN VIOLENCE, AND MORAL REFORM* (Praeger Press 1999) (discussing the motivations and sequence of antebellum concealed weapon regulation).

WHAT DID “BEAR ARMS” MEAN IN THE SECOND AMENDMENT?

the courts could have greatly shortened the decisions upholding these regulatory measures with a simple statement: The guarantee of a right to “bear arms” refers only to militia duty under the direction of the government, and has no relevance to an individual carrying arms.

In addition, another seven antebellum decisions included dicta that recognized that the right to “bear arms” belonged to individual citizens. *Herman v. State* may be considered fairly typical.⁵² The question before the Indiana Supreme Court was whether a ban on making alcoholic beverages was constitutional or not—and the Court concluded that such a ban was unconstitutional, as a violation of the rights of property. In articulating the limits of legislative authority, the Court argued that the legislature’s authority to prohibit certain actions was restricted by the state constitution:

It cannot so declare the holding of political meetings and making speeches, the *bearing of arms*, publishing of newspapers, &c., &c., however injurious to the public the legislature might deem such practices to be; and why? Because the constitution forbids such declaration and punishment, and permits the people to use these practices. So with property: the legislature cannot interfere with it further, at all events, than the constitution permits. In short, the legislature cannot forbid and punish the doing of that which the constitution permits; and cannot take from the citizen that which the constitution says he shall have and enjoy.⁵³

In short, the Court held that the bearing of arms was an individual right, just as freedom of speech and freedom of the press were. If “bear arms” referred only to militia duty—something done for and by the authority of the legislature—it is extraordinarily odd that the Court would have included this in a list of individual rights that the legislature did not have the authority to prohibit.

Dicta these decisions may be, and not based on any properly argued claim about the right to bear arms, but they certainly show that judges believed that “bear arms” was not exclusively military in nature.⁵⁴

⁵² *Herman v. State*, 8 Ind. 545 (1855).

⁵³ *Id.*

⁵⁴ *United States v. John P. Sheldon*, 5 Blume Sup. Ct. Trans. 227 (Mich. 1829) (comparing the right to keep and bear arms to freedom of the press, “[t]he constitution of the United States also grants to the citizen the right to keep and *bear arms*. But the grant of this privilege cannot be construed into the right in him who keeps a gun to destroy his neighbor” (emphasis added)); *Johnson v. Tompkins*, 13 F. Cas. 840 (C.C.E.D. Pa. 1833) (holding that both the Pennsylvania Constitution and Second Amendment’s “right to keep and *bear arms*” were personal rights enjoyed by Johnson (emphasis added)); *Campbell v. State*, 11 Ga. 353, (1852) (including depriving “the citizen of *the right to keep and bear*

WHAT DID “BEAR ARMS” MEAN IN THE SECOND AMENDMENT?

Yassky claims that “nineteenth-century judges had no trouble understanding that “the phrase ‘bear arms’ . . . has a military sense, and no other . . .” and points to three nineteenth century decisions to support his claim: *Aymette v. State* (Tenn. 1840), *English v. State* (Tex. 1872), and *State v. Workman* (W.V. 1891).⁵⁵ Yassky seems to have missed the similar claims in *State v. Buzzard* (Ark. 1842)⁵⁶ and *State v. Hill* (Ga. 1874).⁵⁷ But these are most definitely the exceptions and a more careful examination of these decisions shows that Yassky’s claim is not correct even for the minority of decisions.

A few of the state constitutions of the Revolutionary and early Republic period use “bear arms” in conjunction with “common defence”—for example, the Tennessee Constitution alluded to earlier in the *Aymette* decision. Why did they add “common defence” phrases to these state constitutions “bear arms” guarantees? Similarly, the U.S. Senate discussed adding “for the common defence” to the Second Amendment after “the right of the people to keep and bear arms,” but voted against doing so.⁵⁸ Why did they propose this addition? And why did it fail?

If the Founding Generation understood “bear arms” as exclusively or generally referring to military purposes, militia duty, or some other collective purpose, then adding the phrase “for the common defence” was completely superfluous. Since we have seen that “bear arms” in this period was used in both a collective sense, and an individual sense, adding “for the common defence” was a necessary qualifier. Adding it would have clearly

arms” in a list of individual rights that the United States Bill of Rights protects against the national government (emphasis added)); *State v. Quarles*, 13 Ark. 307 (1853) (holding that “the right of trial by jury, the right to keep and bear arms, and like every other right reserved to the citizen, it is subject to such legislative regulation as may be demanded by the exigencies of society, as may not essentially invade its true nature”); *Pope's Ex'r v. Ashley's Ex'r*, 13 Ark. 262, (1853) (holding “[t]he right of *bearing* arms – which with us is not limited and restrained by any arbitrary system of game laws as in England, but is practically enjoyed by every citizen, and is among his most valuable privileges, since it furnishes the means of resisting, as a freeman ought, the inroads of usurpation”); *Herman v. State*, 8 Ind. 545 (holding that “[i]t cannot so declare the holding of political meetings and making speeches, the *bearing of arms*, publishing of newspapers, &c., &c., however injurious to the public the legislature might deem such practices to be . . .” (emphasis added)); *Choate v. Redding*, 18 Tex. 579, (1857) (ruling that “the right to keep and *bear arms* cannot be infringed by legislation, yet, strange as it may be, it must succumb before the power of a creditor” (emphasis added)).

⁵⁵ Yassky, *supra* note 4, at 619 n. 129.

⁵⁶ *State v. Buzzard*, 4 Ark 18 (1842).

⁵⁷ *State v. Hill*, 53 Ga. 472 (1874).

⁵⁸ *Senate Journal*, 1st Cong., 1st sess., Sept. 9, 1789, 77.

WHAT DID “BEAR ARMS” MEAN IN THE SECOND AMENDMENT?

demonstrated that “the right of the people” was limited to a collective purpose, which might include violent overthrow of the government. However, even if for a collective purpose, the right might still be individual—as the Tennessee Supreme Court acknowledged in the *Aymette* decision. That most state constitutions left out “common defence” from their “bear arms” guarantees, and the U.S. Senate’s vote against this addition, could be understood as leaving both collective *and* individual rights to arms on the table.

What other evidence is there that would help us to clarify the Senate’s intent on this matter? A letter from John Randolph (nephew of Rep. Theodorick Bland) to St. George Tucker two days after the U.S. Senate’s vote suggests that at least he understood this vote as giving a broad guarantee of a right to be armed, since at the time “militia” included most free white men (as well as free black men in North Carolina⁵⁹), “[a] majority of the Senate were for not allowing the militia arms & if two thirds had agreed it would have been an amendment to the Constitution.”⁶⁰ There is no record of the vote that caused the Senate to reject this amendment, and so we do not know if Randolph was correct that “a majority” but not a 2/3 majority was for the proposed amendment, but Randolph clearly understood “for the common defence” as somehow limiting the nature of “the right to keep and bear arms.”

Saul Cornell argues that the concern expressed by Randolph’s letter was “not individual versus collective rights, as gun rights scholars have claimed, but clearly was federal versus state control” As Randolph’s letter to Tucker suggests, the issue before the Senate was control of the militia, not an individual right to use guns for personal defense or hunting.”⁶¹ Here Cornell mixes an accurate statement—Randolph said nothing about personal defense or hunting—with an inaccurate statement. Randolph’s

⁵⁹ JOHN HOPE FRANKLIN, *THE FREE NEGRO IN NORTH CAROLINA, 1790-1860*, at 101-02 (J.G. de Roulhac Hamilton et. al. eds., Univ. of North Carolina Press 1995) 101-02. As late as 1746, North Carolina’s militia statute still required “all the Freemen and Servants . . . between the Age of Sixteen Years, and Sixty” to enlist in the militia but failed to exclude free blacks. A COLLECTION OF ALL THE PUBLIC ACTS OF ASSEMBLY OF THE PROVINCE OF NORTH-CAROLINA: NOW IN FORCE AND USE 215-19 (Newbern, N.C., James Davis 1751).

⁶⁰ HELEN VEIT, KENNETH R. BOWLING, & CHARLENE BANGS BICKFORD, *CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS* 293, 310-11 (Johns Hopkins Univ. Press 1991).

⁶¹ Saul Cornell, *St. George Tucker and the Second Amendment: Original Understanding and Modern Misunderstandings*, 47 WM. & MARY L. REV. 1123, 1129 (2006).

WHAT DID “BEAR ARMS” MEAN IN THE SECOND AMENDMENT?

letter said nothing about “federal versus state control” but instead expressed concern about “not allowing the militia arms”

Randolph’s letter is not a terribly strong piece of evidence by itself—but it is the only immediately contemporaneous discussion of the Senate’s action, and is therefore worthy of consideration. It does suggest that the attempt to add in “for the common defence” was understood in at least some quarters as a necessary qualifier to limit the “right of the people” to a collective purpose. Robert Churchill provides a thoughtful examination of criticism of “for the common defence” in the 1780 Massachusetts Constitution’s right to keep and bear arms provision. Churchill points to evidence that two towns out of hundreds understood it as a limitation on an individual right to arms—but others explicitly argued that the addition of this phrase did not impair or threaten an individual right.⁶²

As we have previously seen, *Aymette* was decided based on the Tennessee Constitution’s explicit “for their common defence” provision—and even this was used only to prohibit the *concealed* carrying of Arkansas toothpicks and Bowie knives or their sale.⁶³ Open carry remained lawful (though discouraged by a more severe punishment for use “on a sudden reencounter,” even in self-defense).⁶⁴ Attempts to add “sword canes and pistols” to the ban failed.⁶⁵

Buzzard was similarly decided based on the Arkansas Constitution’s guarantee, “[t]hat the free white men of this State shall have a right to keep and to *bear arms for their common defence*.” The *Buzzard* decision (which was only one justice’s opinion on a divided three justice supreme court) was also careful not to claim that “for their common defence” eliminated all individual rights with respect to arms, “[t]he act in question does not, in my judgment, detract anything from the power of the people to defend their free state and the established institutions of the country. It inhibits only the wearing of certain arms concealed.” Perhaps most importantly with respect to the meaning of “bear arms,” the decision’s next sentence used “bear” with reference to the individual’s carrying of weapons,

⁶² Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 LAW & HIST. REV. 139, 168-171 (2007).

⁶³ *Acts Passed at the First Session of the Twenty-Second General Assembly of the State of Tennessee: 1837-1838*, at 200-201, ch. 137 §§ 1-2 (Nashville, S. Nye & Co. 1838).

⁶⁴ *Id.* 200-201, ch. 137 § 4.

⁶⁵ *House of Representatives*, NASHVILLE DAILY REPUBLICAN BANNER, Jan. 13, 1838, at 2.

WHAT DID “BEAR ARMS” MEAN IN THE SECOND AMENDMENT?

“[t]his is simply a regulation as to the manner of bearing such arms as are specified.”⁶⁶

While Yassky correctly quotes the language in *English v. Texas* that held that only the “arms” that might be used by a soldier were constitutionally protected, *English* at no point argues that “bear arms” referred only to their military use. Indeed, in upholding the Texas statute regulating the carrying of deadly weapons, *English* acknowledges that the state’s authority was not unlimited. After quoting the Texas Constitution’s guarantee, “[e]very person shall have the right to keep and *bear arms* in the *lawful defense of himself* or the state, under such regulations as the legislature may prescribe,” the Texas Supreme Court admitted that these regulations could not be unlimited in scope, “[o]ur constitution, however, confers upon the legislature the power to regulate the privilege. The legislature may regulate it without taking it away—this has been done in the act under consideration.”⁶⁷ *English* recognized that “bear arms” included an individual right to “*bear arms* in the lawful defense of himself”

The *State v. Hill* decision (three generations removed from the Founders, and confronting a newly freed population of slaves) argued that “bear arms” was specifically military in nature—and then undercuts itself by using the present perfect tense of “bear” when referring to a distinctly non-military carrying, “if they may at pleasure be *borne* and used in the fields, and in the woods”⁶⁸

*State v. Workman*⁶⁹ (four generations from the Founders) also follows *English*’s lead, although based only on the Second Amendment, not a state constitutional provision. Instead of asserting that “bear arms” refers only to a collective purpose, such as a militia, *Workman* discriminates based on the type of weapon being carried, rather than arguing that the right was collective:

The keeping and bearing of arms, therefore, which at the date of the amendment was intended to be protected as a popular right, was not such as the common law condemned, but was such a keeping and bearing as the public liberty and its preservation commended as lawful, and worthy of protection. So, also, in regard to the kind of arms referred to in the amendment, it must be held to refer to the weapons of warfare to be used by the militia, such as swords, guns, rifles, and muskets--arms to be used in defending the State and civil liberty--and not to

⁶⁶ 4 Ark 18, 27 (emphasis added).

⁶⁷ *English v. State*, 35 Tex. 473, 478 (1872) (emphasis added).

⁶⁸ 53 Ga. 472, 475-76.

⁶⁹ *State v. Workman*, 35 W.Va. 367, 373-74 (1891).

WHAT DID “BEAR ARMS” MEAN IN THE SECOND AMENDMENT?

pistols, bowie-knives, brass knuckles, billies, and such other weapons as are usually employed in brawls, street-fights, duels, and affrays, and are only habitually carried by bullies, blackguards, and desperadoes, to the terror of the community and the injury of the State.⁷⁰

While *English* and *Workman* might be part of an interesting (but wrong) argument for limiting the protections of the Second Amendment to “the weapons of warfare” such as machine guns and “assault weapons,” it does not support Yassky’s claim that “bear arms” referred only to a collective right. Again, like *English*, the West Virginia Supreme Court could have greatly shortened its decision by demonstrating that the right to “bear arms” referred only to militia duty, and not an individual right.

Of five nineteenth century decisions that Yassky either could claim or did claim have some relevance to this question, only two argue that “bear arms” was for a collective purpose, and both are based on state constitutional provisions that expressly qualify the right with “common defence” clauses. As we have previously seen,⁷¹ eleven decisions either explicitly recognized that the right was individual, or implied that the right was individual -- and it would have greatly shortened some of these decisions to just say, “bear arms” means militia service -- not individuals carrying weapons. A twelfth decision was completely silent on the claim while the thirteenth concluded that because the defendant was a free black man, he had a right to arms because “[s]elf preservation is the first law of nations”

There is no dispute that the Founding generation often used the phrase “bear arms” in a military sense—but the evidence above shows that common usage included the purely individual, civilian carrying of arms as well. The need to add, “for the common defence” or “for their common defence” in the Massachusetts and Tennessee Constitutions also shows that “bear arms” alone was insufficient to establish a collective or military meaning. The reaction of John Randolph to the U.S. Senate’s failure to add, “for the common defence” to the Second Amendment also suggests that “bear arms” without that qualifier was understood to protect an individual right. Many of the state constitutions, and a strong majority of the court decisions in the two generations that followed ratification of the Second Amendment also continued to understand “bear arms” without a “common defence” qualifier protected an individual right—even when it would have

⁷⁰ *Id.* at 373-74.

⁷¹ On page 12.

WHAT DID "BEAR ARMS" MEAN IN THE SECOND AMENDMENT?

simplified the decisions to hold that the right was collective or for military service alone.

Throughout the eighteenth, nineteenth and twentieth centuries, and into the twenty-first, "bear" is widely used as a synonym for "carry." As recently as 1998, the U. S. Supreme Court construed a 1968 law prohibiting the carrying of firearms by drug dealers in connection with their criminal activity. Though disagreeing on other things, both majority and dissenting justices used the phrase "bear arms" to describe a situation in which an individual "carries" a gun.⁷²

To "bear arms" means to carry them – phraseology which shows that the Second Amendment contemplates an individual right since in every context it is people who "bear" arms, not states.

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⁷² *Muscarello v. United States* , 524 U.S. 128 at 130 and at 143, 118 S. Ct. 1911, 141 L.Ed.2d 111 (1998).