

FROM MUSKETS TO MACHINE GUNS? THE HISTORICAL LIMITS OF THE SECOND AMENDMENT

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ABSTRACT

This Comment agrees with *New York State Rifle & Pistol Association, Inc. v. Bruen* and *United States v. Rahimi* that modern firearm restrictions must be evaluated through a framework grounded in the Second Amendment's text and historical understanding. However, it disagrees with the under-specified historical test the Supreme Court left lower courts with. By consolidating the history of the right to bear arms, this Comment proposes a rule rooted in the original public meaning of the Amendment: the right to keep and bear arms protects the storage and carrying of weapons for the purpose of lawful confrontation. This framework draws no distinction between weapons and accessories, nor between arms used for war and those used for personal protection. Rejecting judicially constructed tests like "common use" or historical analogs, the Comment locates the proper boundary of the right in the historical doctrine limiting only the dangerous and unusual use of weapons. As this Comment points out, at common law, this restriction applied to individuals who misused arms in a manner that terrorized the public—not to classes of weapons themselves.

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Ultimately, the Comment urges the Supreme Court to continue in the direction set by *Rahimi*, but to solidly anchor Second Amendment jurisprudence in constitutional text and enduring historical principle by providing a bright-line rule.

TABLE OF CONTENTS

1. INTRODUCTION.....	689
2. MODERN INTERPRETATIONS OF THE SECOND AMENDMENT.....	691
3. THE TEXTUAL LIMITS	694
3.1. The Meaning of “Keep,” “Bear,” and “Arms” in the 18th Century .	694
3.1.1. “To Keep and Bear”	696
3.1.2. “Arms”	701
3.2. A Brief Note on “Militia”	705
4. THE HISTORICAL LIMITS	708
4.1. The English Common Law Did Not Restrict the Right to Bear Arms Based on the Weapon, but on the Individual.....	711
4.1.1. The Feast of St. Thomas the Apostle.....	712
4.1.2. <i>Sir John Knight’s Case</i>	713
4.2. Firearm Regulations in the American Colonies Were Even Less Restrictive	715
4.3. The Founders Intentionally Broadened the Right to Self-Defense Beyond What Was Recognized Under English Law.	717
4.4. Weapons of War Were Regularly Carried by the Founding Generation and, at One Point, Congress Even Required It.	719
4.5. After the Founding, Private Citizens Owned Weapons Capable of Rapid Fire.	721
4.6. The Dangerous And/Or Unusual Weapons Standard Has No Historical Basis.	722
5. THE NEED FOR EFFECTIVE SELF-DEFENSE IN MODERN SOCIETY	725
6. ADDRESSING THE LIMITS: WEAPONS BEYOND THE SCOPE OF THE SECOND AMENDMENT	727
7. CONCLUSION.....	729

1. INTRODUCTION

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*.¹

All firearms are inherently dangerous. Yet the Second Amendment has stood at the heart of American liberty since 1791. Given this delicate balance, no one, not even a group of intelligent and honorable men and women on the bench, should be deciding the scope of the Second Amendment on a case-by-case basis. This Comment offers a practical framework for shaping the contours of the right to bear arms in the wake of *New York State Rifle & Pistol Association, Inc. v. Bruen* and *United States v. Rahimi*,² particularly in the aftermath of the Court's denials of certiorari in both *Harrel v. Raoul*³ and *Ocean State Tactical, LLC v. Rhode Island*⁴—a pattern of avoidance

¹ U.S. CONST. amend. II (emphasis added).

² *United States v. Rahimi*, 602 U.S. 680, 689 (2024) (“In *Bruen*, we explained that when a firearm regulation is challenged under the Second Amendment, the Government must show that the restriction ‘is consistent with the Nation’s historical tradition of firearm regulation.’” (quoting *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 24 (2022))).

³ *Bevis v. City of Naperville*, 85 F.4th 1175 (7th Cir. 2023), *cert. denied sub nom.*, *Harrel v. Raoul*, 144 S. Ct. 2491 (2024); *see also* Petition for Writ of Certiorari at i, *Harrel*, 144 S. Ct. 2491 (2024) (No. 23-877) (“Whether the Constitution allows the government to prohibit law-abiding, responsible citizens from protecting themselves, their families, and their homes with semiautomatic firearms that are in common use for lawful purposes.”).

⁴ *Ocean State Tactical, LLC v. Rhode Island*, 95 F.4th 38 (1st Cir. 2024), *cert. denied*, 145 S. Ct. 2771 (2025) (No. 24-131); *see* Petition for Writ of Certiorari at i, *Ocean State Tactical, LLC*, 145 S. Ct. 2771 (2024) (No. 24-131) (questioning whether a retrospective, confiscatory ban on common ammunition-feeding devices (i.e., clips and magazines) violates the Second Amendment). This Comment also has implications for the Ninth Circuit’s recent decision in *Duncan v. Bonta*, 133 F.4th 852 (9th Cir. 2025), which includes Judge VanDyke’s recent *video dissent* that has been causing a storm in legal circles. *See* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, *Dissent Video in 23-55805 Duncan v. Bonta*, (YouTube, Mar. 20, 2025), <https://perma.cc/3RP5-4MM2>. Although not specifically designed to address *Carralero*, the framework proposed in this Comment directly engages with that case’s central issue: whether magazines constitute “arms” that qualify for Second Amendment protection. *Id.*

that has left lower courts without meaningful guidance and further entrenched interpretative instability in Second Amendment doctrine.⁵

The limiting principle proposed here is based on a literal, original meaning of the text: the Second Amendment protects the right to *store* and *carry* weapons for the *purpose of lawful confrontation*. “Arms” does not distinguish between weapons and their necessary component parts or accessories. Nor does it separate instruments of war from those of self-preservation. Historically, the Amendment has been understood to permit limitations on the carrying of dangerous and unusual weapons.⁶ Contrary to popular interpretations, this historical limitation was not a prohibition on specific types of weapons but rather a prohibition on individuals who demonstrated dangerous behavior.⁷ Therefore, based on a strict application of the “historical tradition model,”⁸ the Supreme Court’s jurisprudence should continue in line with *Rahimi*—laying to rest an interpretation of the Second Amendment based on weapon type and instead focusing on limiting the uses or people wielding the weapons.⁹

High-capacity magazines are the first arms at risk of censure by the Supreme Court. But all advanced weaponry is in the crosshairs. Post-*Bruen*, several appellate courts have upheld bans on AR-15s and similar firearms, reasoning that they are “disproportionate to the need for self-defense.”¹⁰

⁵ Cf. *Harrel*, 144 S. Ct. at 2492 (Thomas, J., dissenting from denial of certiorari) (“[T]his Court must provide more guidance on which weapons the Second Amendment covers . . . ,” as lower courts “contriv[ing] . . . limitation[s] . . . unmoored from both text and history.”).

⁶ *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008) (stating that “the historical tradition . . . prohibit[ed] the carrying of ‘dangerous and unusual weapons’”).

⁷ See *Chune v. Piott* (1615) 80 Eng. Rep. 1161, 1162 (KB); see also WILLIAM WALLER HENING, *THE NEW VIRGINIA JUSTICE* 17 (1795) (“[W]here a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause a terror in the people . . . is said always to have been an offence at common law . . .”).

⁸ D. Arthur Kelsey, *Bracton’s Warning and Hamilton’s Reassurance*, 66 VA. LAW. 20, 21 (2017) (requiring the judge, when the text is ambiguous, to look at what the word meant “to those who wrote the words and, more importantly, to those who voted for those words to become law”).

⁹ *United States v. Rahimi*, 602 U.S. 680, 700 (2024) (holding that the “tradition of fire-arm regulation allows the Government to disarm individuals who present a credible threat to the physical safety of others”).

¹⁰ See, e.g., *Bianchi v. Brown*, 111 F.4th 438, 441 (4th Cir. 2024).

These decisions stretch both the text and historical tradition beyond their limits. To ban and confiscate these devices is to eviscerate a constitutional right. Accordingly, a new standard for regulating “Arms” is required.¹¹ Before fleshing out that standard, however, it is necessary to summarize the Court’s current Second Amendment jurisprudence.

2. MODERN INTERPRETATIONS OF THE SECOND AMENDMENT

In *District of Columbia v. Heller*, the Supreme Court interpreted the Second Amendment to protect an individual right to keep and bear arms, reading its prefatory clause as reinforcing rather than limiting that personal guarantee.¹² Although the exact contours of the Second Amendment are

¹¹ As Justice Thomas observed:

The Seventh Circuit’s decision illustrates why this Court must provide more guidance on which weapons the Second Amendment covers. By contorting what little guidance our precedents provide, the Seventh Circuit concluded that the Second Amendment does not protect “militaristic” weapons. It then tautologically defined “militaristic” weapons as those “that may be reserved for military use.” The Seventh Circuit’s contrived “non-militaristic” limitation on the Arms protected by the Second Amendment seems unmoored from both text and history.

Harrel v. Raoul, 144 S. Ct. 2491, 2492 (2024) (Thomas, J., dissenting from denial of certiorari) (citations omitted).

¹² 554 U.S. 570, 595–96, 598 (2008). On a slight aside, some jurists have critiqued Scalia’s approach of analyzing the Second Amendment’s operative clause before its prefatory clause. See, e.g., *id.* at 642–43 (Stevens, J., dissenting). Grammar principles, however, provide support for Scalia’s methodology. Commas typically set off nonessential phrases—elements that provide additional information but do not alter a sentence’s core meaning. See *Commas with Nonessential Elements*, PURDUE UNIV., <https://perma.cc/2GGL-CCV9>. Consider this example: “My brother, kind and generous, a man of great wisdom, always offers the best advice.” The core meaning remains intact without the phrases between commas. If we apply this grammatical principle to the Second Amendment, its core meaning becomes: “A well regulated Militia . . . shall not be infringed.” The two clauses separated by commas then function as nonessential modifiers clarifying that this right belongs to “the people” and is “necessary to the security of a free State.” This interpretation aligns with the historical understanding of “Militia” as comprising all able citizens. See *Heller*, 554 U.S. at 595–96. While this grammatical approach ultimately yields the same individual-rights interpretation as

indeterminate, the Court has acknowledged that the right is not unlimited.¹³ For example, before *Heller*, the Court in *United States v. Miller* upheld the National Firearms Act's regulation of short-barreled shotguns.¹⁴ In *Heller*, Scalia explained that *Miller* had allowed for the banning of military weapons, interpreting the term "ordinary military equipment" to mean weapons that were "in common use at the time."¹⁵ Specifically, he stated:

The traditional militia was formed from a pool of men bringing arms "in common use at the time" for *lawful purposes* like self-defense. "In the colonial and revolutionary war era, [small-arms] weapons used by militiamen and weapons used in defense of person and home were one and the same." . . . We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.¹⁶

The cornerstone of the Court's analysis was the *use* of arms for *lawful purposes*—a concept deeply rooted in common-law principles.¹⁷

Despite Scalia's recognition of "common use" in *Miller*, it is not the prevailing test used by the Court today. The *Bruen* Court determined that [w]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."¹⁸

Justice Scalia's analysis, it offers an additional linguistic lens through which to understand the Amendment's structure and meaning.

¹³ *Heller*, 554 U.S. at 595.

¹⁴ *United States v. Miller*, 307 U.S. 174, 175–76, 178 (1939).

¹⁵ *Heller*, 554 U.S. at 624–25.

¹⁶ *Id.* (citation omitted) (alteration in original) (emphasis added).

¹⁷ See discussion *infra* Section 4.1 (addressing the historical development of these principles).

¹⁸ *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 24 (2022) (citing *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50 n.10 (1961)).

In other words, the Second Amendment *prima facie* extends to all instruments that constitute bearable arms, even those not in existence at the time of the founding.¹⁹ The burden of proving the contrary rests with the State.²⁰ Only if the regulation aligns with the Nation’s tradition of firearm regulation may a court conclude that the individual’s conduct falls outside the Second Amendment’s “unqualified command.”²¹

This history-and-tradition test was reaffirmed in *Rahimi*.²² On the one hand, *Rahimi* illustrated the limitations of the Second Amendment by demonstrating when individuals may be lawfully disarmed.²³ On the other hand, *Rahimi* showed that the Second Amendment walks in step with the American people, protecting the right to the weapons they have today.²⁴

Yet the current state of the law has shown that *Bruen*’s test is a hard target for both litigants and courts to hit. Eleven states and the District of Columbia ban semi-automatic weapons,²⁵ and courts like the Ninth and First Circuits are drawing questionable lines between “arms” and “accessories.”²⁶ The common thread is the meaning of “Arms” in the Second Amendment, something that neither historical analogs nor the common use test clearly defines.

Ultimately, the Supreme Court’s attempts to trace the contours of the Second Amendment have sown uncertainty in the lower courts. Given that confusion, the Court should consider returning to the text itself as the history of the phrase “keep and bear Arms” suggests a natural limit on the right. Critics contend that modern weapons—machine guns, high-capacity

¹⁹ *Id.* at 28.

²⁰ *Id.* at 24.

²¹ *Id.*

²² *United States v. Rahimi*, 602 U.S. 680, 691 (2024).

²³ *See id.* at 702 (“An individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment.”).

²⁴ *See id.* at 691 (“[T]he reach of the Second Amendment is not limited to those arms that were in existence at the founding.” (citing *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008))).

²⁵ *Assault Weapons*, GIFFORDS L. CTR., <https://perma.cc/XVP5-PWJW> (California, Connecticut, Delaware, Hawaii, Illinois, Maryland, Massachusetts, New Jersey, New York, Rhode Island, and Washington).

²⁶ *Ocean State Tactical, LLC v. Rhode Island*, 95 F.4th 38, 47–49 (1st Cir. 2024); *Carralero v. Bonta*, 125 F.4th 1246, 1248 (9th Cir. 2024).

magazines, and the like—exceed the Founders’ vision, but a historical and linguistic examination of “keep,” “bear,” and “arms” tells a different story. Part 3 now turns to a close reading of those key terms.

3. THE TEXTUAL LIMITS

To understand the Second Amendment’s textual limits, this Part examines the original public meaning of its key terms: “keep,” “bear,” and “arms.” A plain reading of the Amendment, set against its historical canvas, reveals that it protects not only traditional firearms but also advanced weaponry and their essential components. This approach offers a clear and consistent interpretive boundary, one grounded in text and history rather than modern judicial analogies or policy-driven standards.

3.1. The Meaning of “Keep,” “Bear,” and “Arms” in the 18th Century

The Court has established that the Second Amendment guarantees a personal right that applies to the States.²⁷ It has also acknowledged that this right has limits, with certain regulations being permissible.²⁸ Currently, the Court relies on history in determining permissible regulations. But the current historical-analog test for determining the regulatory limits gives lower courts a significant degree of discretion.²⁹ The lower courts’ discretion in

²⁷ *Heller*, 554 U.S. at 636 (holding that the Second Amendment protects an individual right to keep and bear arms); *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010) (holding that, because the Second Amendment is a fundamental right deeply rooted in this Nation’s history and tradition, it is fully applicable to the States through the Fourteenth Amendment’s Due Process Clause).

²⁸ *See Heller*, 554 U.S. at 627 (recognizing limitations on the right to keep and bear arms).

²⁹ The historical-analog test, established in *Bruen*, requires modern gun laws to align with firearm regulations from the 18th-century. *See Bruen*, 597 U.S. at 28–29. But this approach has significant flaws. First, history is often inconclusive, with conflicting precedents that allow courts to cherry-pick sources to justify different rulings. *See, e.g., Carralero v. Bonta*, 125 F.4th 1246, 1248 (9th Cir. 2024) (VanDyke, J., dissenting) (criticizing the majority for relying on two outlier laws—“an anti-poaching colonial law and . . . a discriminatory Reconstruction era Black Code”—to uphold sweeping modern restrictions). Second, it disadvantages new gun owners and evolving

determining what constitutes a close enough analog leads many to argue that “common use” is a better limiting principle.³⁰ Although the common-use approach debunks the argument differentiating “arms” from “accessories,” its flaws suggest that a different limitation based on the text would better honor the right.

The “common use” test for the Second Amendment, as discussed in *Heller*, has several significant flaws. First, it lacks a clear standard, as courts have not defined how widespread a weapon’s use must be to qualify as “common.”³¹ Second, the logic underlying common use is circular. It fails to protect emerging firearm technologies until they become widespread, yet it permits the government to prevent that from happening in the first place.³² In effect, this allows the government to shape the definition of “common use” by artificially limiting, through regulation, which weapons qualify for protection.³³

technologies, potentially denying constitutional protection to innovative weapons simply because they did not exist in 1791. *See, e.g., Ocean State Tactical, LLC*, 95 F.4th at 47–49 (holding that new arms or accessories lacking a historical analog may fall outside constitutional protection, regardless of their legitimacy or common use). Relatedly, the test risks freezing constitutional rights in the past, an approach that, if extended to other amendments, could limit free speech to 18th-century printing presses and physical letters rather than digital communication. *Id.*; *see also* David B. Kopel & Joseph G.S. Greenlee, *The Second Amendment Rights of Young Adults*, 43 S. ILL. U. L.J. 495, 512 (2019) (“In the same sense, ‘the freedom of the press’ is not just about owning printing presses, but also includes the relevant accessories, such as printing ink, ink magazines, moveable type, etc., and indeed the entire system of gathering, publishing, and distributing periodicals, pamphlets, and books.”). Ultimately, the test invites judicial subjectivity, historical manipulation, and inconsistent rulings, rendering it an unreliable standard for modern Second Amendment interpretation.

³⁰ *See, e.g., Carralero*, 125 F.4th at 1247 (Collins, J., dissenting) (arguing that the proper standard under *Bruen* is “common use”).

³¹ *See Constitutional Law — Second Amendment — En Banc Fourth Circuit Upholds Maryland Assault Weapons Ban Under Bruen’s “Text and History Test.” — Bianchi v. Brown*, 111 F.4th 438 (4th Cir. 2024) (*en banc*), 138 HARV. L. REV. 1153, 1157–58 (2025) (noting that *Bianchi* and other recent lower court decisions highlight the continued lack of a clear definition for “common use” under *Bruen* and *Heller*).

³² *See id.* at 1158 (stating that, under the Fourth Circuit’s logic, “a legislature could constitutionally regulate a new weapon only before it became too popular”).

³³ *Cf. Bianchi v. Brown*, 111 F.4th 438, 460 (4th Cir. 2024) (“[U]nder appellants’ common use inquiry, . . . dangerous weapons could gain constitutional protection merely [by becoming] popular before the government can sufficiently regulate [them].”).

Third, the common-use standard has no historical foundation. The Framers never imposed such a requirement and early militia laws often mandated ownership of military-grade arms.³⁴ These realities underscore the common-use standard's fourth flaw: reliance on arbitrary lines between civilian and military weapons, even though, historically, civilians owned arms used by soldiers.³⁵ Finally, courts apply the test inconsistently, sometimes focusing on ownership and other times on actual use, leading to unpredictable rulings and inconsistent rationales.³⁶ These issues make the test vague, manipulable, and inadequate for determining the scope of Second Amendment rights.

Fortunately, the text offers a more straightforward boundary that is less prone to judicial subjectivity: "arms" that citizens can physically "bear" and "keep."³⁷ This interpretation provides a clear answer to what arms a citizen has a right to possess.

3.1.1. "To Keep and Bear"

The Court has recognized that at the founding, the phrase "keep Arms" would have been interpreted as an individual right, with the most natural reading of "keep" meaning "to 'have weapons.'"³⁸ Similarly, the Court has understood "bear" to mean "to 'carry,'" particularly for the purposes of confrontation.³⁹ The Court's interpretation is mostly consistent with the historical understanding of the phrase, but a literal translation of the words implies an even broader right.

In the Second Amendment, both "keep" and "bear" are transitive verbs sharing the direct object "Arms." The use of the coordinating

³⁴ See, e.g., The Militia Acts of 1792, ch. 33, § 1, 1 Stat. 271, 271 (1792) (requiring able-bodied men to furnish their own firearms suitable for military service).

³⁵ See *id.*

³⁶ Compare *United States v. Berger*, 715 F. Supp. 3d 676, 686–87 (E.D. Pa. 2024) (suggesting that the common-use test should focus on whether weapons are commonly owned, rather than whether they are actually used for self-defense), with *Bianchi*, 111 F.4th at 460 (arguing that the analysis should center on actual use, particularly for self-defense, rather than mere ownership).

³⁷ See U.S. CONST. amend. II.

³⁸ *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008).

³⁹ *Id.* at 584.

conjunction “and” makes these two words a conjoined phrase. Unlike a *hendiadys*, which pairs two terms to express a single complex idea, both verbs in a conjoined phrase retain their distinct and independent meanings.⁴⁰ Lindley Murray, author of one of the most influential founding-era grammar books, notes that similar words often heighten and complete their object.⁴¹ The linguistic structure of the Second Amendment thus reveals a complementary relationship between “keep” and “bear,” together forming a comprehensive protection for the possession, maintenance, and carrying of arms.

“To discover the plain and ordinary meaning of everyday language, we consult general-purpose dictionaries.”⁴² The word “keep” has changed little since 1791. Today, “keep” means “to retain in one’s possession” or “to have control.”⁴³ In 1791, it similarly meant “[t]o hold” or “to retain in one’s power or possession.”⁴⁴ Yet, founding-era dictionaries also provided broader definitions, including “[t]o retain; not to lose” and “[t]o have in custody.”⁴⁵

⁴⁰ Elizabeth Fajan & Mary R. Falk, *Hendiadys in the Language of the Law: What Part of “and” Don’t You Understand?*, 17 LEGAL COMM’N & RHETORIC 39, 42 (2020) (explaining that a “hendiadys” expresses a single complex idea and contrasting it with ordinary conjoined phrases in which the two terms retain independent, distinct meanings).

⁴¹ LINDLEY MURRAY, *ENGLISH GRAMMAR* 250 (4th ed. 1798) (“Scarcely in any language are there two words that convey precisely the same idea . . . [An] accurate writer can employ them to great advantage, by using them so as to heighten and complete the object which he presents to us.”).

⁴² *Tomlin v. Commonwealth*, 888 S.E.2d 748, 756 (Va. 2023).

⁴³ *Keep*, MERRIAM-WEBSTER, <https://perma.cc/96KK-TNEM>.

⁴⁴ 2 NOAH WEBSTER, *AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE* (N.Y., S. Converse 1828) (“KEEP *v. t.* . . . 1. To hold; to retain in one’s power or possession; not to lose or part with; as, to *keep* a house or a farm; to *keep* any thing in the memory, mind or heart. 2. To have in custody for security or preservation.”).

⁴⁵ The most popular dictionaries in public use at the time of the founding defined the term broadly. 1 SAMUEL JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* (London, 6th ed. 1785) (“To KEEP. *v. a.* . . . To retain; not to lose. . . [such as,] *Keep* in memory what I preached unto you.” (quoting 1 Cor. 15:2 (King James))); see JAMES BARCLAY, *A COMPLETE & UNIVERSAL ENGLISH DICTIONARY* (1792) (“To KEEP . . . to retain, preserve; to hold . . .”); THOMAS SHERIDAN, *A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE* (London, 2d ed. 1789) (“To retain; to have in custody; to preserve in a state of security; to protect, to guard; to detain; to hold for another; to reserve, to conceal; to tend to preserve in the same tenor or state . . .”).

This broader interpretation is further supported by William Blackstone, who used the word *keep* to mean “to store” arms.⁴⁶

Though the precise limits remain somewhat ambiguous, a layman at the Founding likely understood “to keep” as protecting a preexisting right to have weapons.⁴⁷ The concept encompasses not merely physical possession but also proper storage and maintenance of arms.

While “keep” addresses possession and storage, “bear” concerns transportation and use. At the time of the founding, the word “bear” was said to be “used with such latitude, that it is not easily explained.”⁴⁸ Historical dictionaries reveal the term had multiple dimensions:

1. It could mean “to convey or carry,” like “[t]o carry . . . a burden.”⁴⁹

⁴⁶ See 4 WILLIAM BLACKSTONE, COMMENTARIES *56 (stating that Catholics who failed to attend Church of England services could be penalized by being prohibited from keeping arms in their houses).

⁴⁷ See *id.*; see also *Second Draft by Jefferson, [Before 13 June 1776]*, FOUNDERS ONLINE, <https://perma.cc/DH2F-PF3U> (“No freeman shall be debarred the use of arms.”); Letter from the Federal Farmer to the Republican (Jan. 25, 1788) [hereinafter Federal Farmer XVIII], in 2 THE COMPLETE ANTI-FEDERALIST 339, 342 (Herbert J. Storing ed., 1981) (“[T]o preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them . . .”); THE FEDERALIST NO. 29, at 184 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (“Little more can reasonably be aimed at with respect to the people at large than to have them properly armed and equipped; and in order to see that this be not neglected, it will be necessary to assemble them once or twice in the course of a year.”); *Patrick Henry Speech Before Virginia Ratifying Convention*, TEACHING AM. HIST., <https://perma.cc/QJ9V-R2EB> (“Guard with jealous attention the public liberty. Suspect everyone who approaches that jewel. Unfortunately, nothing will preserve it but downright force. Whenever you give up that force, you are inevitably ruined.”); 4 BLACKSTONE, *supra* note 46, *144 (“So long as these remain inviolate, the subject is perfectly free; for every species of compulsive tyranny and oppression must act in opposition to one or other of these rights, having no other object upon which it can possibly be employed.”).

⁴⁸ 1 JOHNSON, *supra* note 45 (“We say to *bear* a burden, to *bear* sorrow or reproach, to *bear* a name, to *bear* a grudge, to *bear* fruit, or to *bear* children. The word *bear* is used in very different senses.” (quoting ISAAC WATTS, LOGICK: OR, THE RIGHT USE OF REASON IN THE ENQUIRY AFTER TRUTH 60 (London, Clark, Hett, Matthews, & Ford 1729))).

⁴⁹ SHERIDAN, *supra* note 45; BARCLAY, *supra* note 45; 1 WEBSTER, *supra* note 44 (“1. To support; to sustain; as, to *bear* a weight or burden. 2. To carry; to convey; to support and remove from place to place . . . as, ‘they *bear* him upon the shoulder;’ [or] ‘the

2. It could also mean “to wear” something.⁵⁰

3. And it could mean “to carry away.”⁵¹

Despite this variety of uses, all shared a common thread: they involve carrying something, either metaphorically or physically. This semantic range supports a broad understanding of the right to “bear” arms, encompassing the carrying of weapons in various manners and contexts.

Both “keep” and “bear” have expansive meanings that are clarified through historical context. For example, the Militia Act of 1792 provides valuable insight into these terms as a unified concept. The Act required “each and every free able-bodied white male citizen . . . [to] *provide himself with* a good musket or firelock.”⁵² The requirement to “provide himself with” a musket implies a duty not just to acquire, but to possess and maintain a functional weapon for readiness. While the statute does not use the phrase “keep and bear,” this mandated responsibility offers contextual support for interpreting “keep and bear arms” as encompassing the full lifecycle of arms ownership—including acquisition, maintenance, storage, and lawful carrying.

James Madison’s writings further illuminate these interrelated terms. Across the nine volumes of his collected works,⁵³ Madison appears to have understood “keep” to mean the possession, maintenance, and retention of arms by the citizenry,⁵⁴ while he used “bear” to refer primarily to the carrying and use of weapons in military or defensive contexts.⁵⁵ His frequent use of

eagle beareth them on her wings.”); *see also* 1 JOHN BOUVIER, A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION & LAWS OF THE UNITED STATES OF AMERICA 124 (Phila., T & J.W. Johnson 1839) (“BEARER, one who bears or carries a thing.”).

⁵⁰ BARCLAY, *supra* note 45; 1 WEBSTER, *supra* note 44.

⁵¹ BARCLAY, *supra* note 45; 1 WEBSTER, *supra* note 44; SHERIDAN, *supra* note 45.

⁵² The Militia Acts of 1792, ch. 33, § 1, 1 Stat. 271, 271 (1792).

⁵³ *See generally* 1–9 THE WRITINGS OF JAMES MADISON (Gaillard Hunt ed., 1900–1910) [hereinafter MADISON].

⁵⁴ *See* 4 MADISON, *supra* note 53, at 195 (“The people who have been so lately *in arms* agst G. B. for their liberties, will not easily give them up.” (emphasis added)); 8 MADISON, *supra* note 53, at 223 (“[E]very citizen was ready to fly *with his arms* at once to protect his brethren against the blood-thirsty savages This patriotic zeal . . . has embodied an ample force” (emphasis added)).

⁵⁵ *See* 7 MADISON, *supra* note 53, at 35 (“[E]mboldening the advocates for an immediate redress *by arms*.” (emphasis added)); 6 MADISON, *supra* note 53, at 7 (“[W]ith *arms in their hands* [they] have renounced the Government of the Emperor forever.” (emphasis added)); 9 MADISON, *supra* note 53, at 250–51 (“[M]ost of them *with arms in*

phrases such as “take arms,” “in arms,” and “with arms in their hands” reflects a consistent understanding of the unified concept of keeping and bearing arms as essential to preserving liberty.

Furthermore, both terms were closely connected to Madison’s conception of a “well regulated militia” as indispensable to a free society.⁵⁶ His writings suggest he viewed these rights as both individual and collective in nature,⁵⁷ grounded in civic responsibility and the defensive needs of the new republic.⁵⁸ The right to “keep and bear arms” thus intertwined an individual right with citizenship obligations.⁵⁹

their hands, no inconsiderable part fresh from the use of them, all inspired with rage at the patricidal attempt, and not only guided by the federal head, but organized & animated by their local Governments . . .” (emphasis added)); 1 MADISON, *supra* note 53, at 480 (“The Committee after so conferring informed Congress, that it was the opinion of the Executive that the Militia of Philadelpa [sic] would probably not be willing to *take arms* before their resentments should be provoked by some actual outrage . . .” (emphasis added)); 2 MADISON, *supra* note 53, at 2 (“The Citizens here in general regret the departure of Congs., disavow the idea that they were unwilling to *take arms* in defence of Congs., and will probably enter into some declaration tending to invite their return.” (emphasis added)); *id.* at 389 (“Members of Empire [are] restricted . . . from *taking arms one agst another* . . .” (emphasis added)).

⁵⁶ See 1 MADISON, *supra* note 53, at 39 (“That a well regulated militia, composed of the *body of the people*, trained to arms, is the proper, natural, and safe defence of a free state . . .” (emphasis added)); see also 4 MADISON, *supra* note 53, at 237 (“Mr. Elsworth was for going as far in submitting the militia to the Genl. Government as might be necessary . . . The whole authority over the militia ought by no means to be taken away from the States whose consequence would pine away to nothing after such a sacrifice of power.”).

⁵⁷ See 4 MADISON, *supra* note 53, at 279–80 (“Mr. King added to his former explanation that *arming* meant not only to provide for uniformity of *arms*, but included the authority to regulate the modes of furnishing, either by the militia themselves, the State Governments, or the National Treasury . . .” (second emphasis added)); 8 MADISON, *supra* note 53, at 282 (“[T]he Secretary will . . . obtain from them convenient designations of adequate portions of their Militia, with every other arrangement depending on the State Executives for having them in the best readiness for actual service in cases of emergency.”).

⁵⁸ See 3 MADISON, *supra* note 53, at 185 (“A certain portion of military force is absolutely necessary in large communities. Massts. is now feeling this necessity & making provision for it. But how can this force be exerted on the States collectively. It is impossible. It amounts to a war between the parties.”).

⁵⁹ See 1 MADISON, *supra* note 53.

In sum, “keep and bear” together form a comprehensive protection and a clear limitation: the right to possess, maintain, and store arms (“keep”) *and* the right to carry them for defense or other lawful purposes (“bear”). The textual analysis of these verbs, however, remains incomplete without examining their direct object: “Arms.”

3.1.2. “Arms”

The common thread underlying bans on magazines and semi-automatic weapons is a fundamental misunderstanding of the term “arms” as used in the Second Amendment. Although the *Heller* Court correctly recognized that “arms” includes weapons beyond the military context, its textual analysis remains incomplete.⁶⁰ In a literal sense, it is true that arms have always referred to weapons that may be wielded defensively or offensively.⁶¹ But, in 1791, it was more than just the musket that was protected. “Arms” broadly encapsulated “[a]ny thing that a man wears for his defence, or takes in his hands, or uses in his anger, to cast at or strike another.”⁶²

Madison’s papers also reflect a broad interpretation of the term.⁶³ He seems to have understood “arms” as both physical objects (weapons of various types)⁶⁴ and as a component in the broader system of national security

⁶⁰ See *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008) (“The 18th-century meaning is no different from the meaning today. The 1773 edition of Samuel Johnson’s dictionary defined “arms” as “[w]eapons of offence, or armour of defence.”).

⁶¹ At the time of the founding, “arms” were broadly defined as “weapons of offence, or armour of defence.” 1 JOHNSON, *supra* note 45; SHERIDAN, *supra* note 45 (“To Arm, v. a. To furnish with armour of defence, or weapons of offence; to place with any thing that may add strength; . . .”); 2 WEBSTER, *supra* note 44 (“Weapons of offense, or armor for defense and protection of the body.”).

⁶² 1 BOUVIER, *supra* note 49, at 88 (“ARMS. Any thing that a man wears for his defence, or takes in his hands . . .” (citing U.S. CONST. amend. II)); accord 1 TIMOTHY CUNNINGHAM, A NEW AND COMPLETE LAW DICTIONARY (1764) (“Armour or Arms, (*Arma*) . . . In the understanding of law, [arms] are extended to any thing that a man wears of his defense, or takes into his hands, or useth in wrath to cast at or strike another.”).

⁶³ See *supra* notes 54–57 and accompanying text.

⁶⁴ See 7 MADISON, *supra* note 53, at 83–84 (“Contraband of war shall consist of the following articles only: Salt petre, sulphur, cuirasses, pikes, swords, sword belts, knapsacks, saddles and bridles, cannons, mortars, fire arms, pistols, bombs, grenades, bullets, fire locks, flints, matches and gun powder; . . .”); see 8 MADISON, *supra* note 53, at 162 (“The manufacture of cannon and small arms has proceeded with due success,

and constitutional liberty.⁶⁵ Even so, his usage of the phrase “keep and bear arms” suggests that he understood “arms” as primarily military weapons—ranging from personal firearms to artillery.⁶⁶

In the context of the Second Amendment specifically, his writings indicate that he viewed such arms in terms of their usefulness for military service.⁶⁷ His close association of the phrase “well regulated militia” with the right to keep and bear arms indicates that his conception of “arms” was tailored to weapons appropriate for that context: those that would contribute to “the proper, natural, and safe defence of a free state.”⁶⁸ Overall, his understanding incorporated both the individual dimension of arms possession and the collective dimension of organized defense, suggesting a citizenry armed with military weapons.

Moreover, at the time of the founding, “arms” appeared in everyday conversation across numerous contexts.⁶⁹ The critical question is, “To what kinds of weapons did the right refer?” There were two types of guns at the time. There were “[g]reat guns . . . generally called *cannon*, and known likewise under the term *ordnance*,” and then there were “[s]mall guns . . . such as are portable, and include musquets, musketoons, carbines, blunderbusses, fowling pieces, &c.”⁷⁰ The Founders’ failure to distinguish between what type of gun the right encapsulated, and their decision to refrain from

and the stock and resources of all the necessary munitions are adequate to emergencies.”).

⁶⁵ See 1 MADISON, *supra* note 53; see also, e.g., 8 MADISON, *supra* note 53, at 238–39 (“To render the war short, and its success sure, animated, and systematic exertions alone are necessary; and the success of our arms now may long preserve our country from the necessity of another resort to them.”); *id.* at 162 (“The manufacture of cannon and small arms has proceeded with due success, and the stock and resources of all the necessary munitions are adequate to emergencies.”).

⁶⁶ See *supra* notes 54–57 and accompanying text.

⁶⁷ See 5 MADISON, *supra* note 53, at 377–78 (“The right . . . to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country: . . .”).

⁶⁸ See 1 MADISON, *supra* note 53, at 39.

⁶⁹ 1 JOHNSON, *supra* note 45 (“And when Abram heard that his brother was taken captive, he *armed* his trained servants, . . . and pursued them into Dan. . . . The[ir] wounded steeds . . . / Yerk out their *armed* heels at their dead masters.” (alteration in the original) (internal quotation marks omitted) (first quoting *Genesis* 14:14 (King James)); and then quoting WILLIAM SHAKESPEARE, *HENRY V* act 4, sc. 7, l. 81, 83).

⁷⁰ BARCLAY, *supra* note 45; 1 WEBSTER, *supra* note 44.

using the word “gun” in lieu of the broader, more inclusive term “Arms,” suggests a broad protection.

A central question in modern Second Amendment jurisprudence is whether “arms” include the entire weapon—specifically, magazines—or whether such attachments are merely unprotected “accessories.”⁷¹ To answer this, we must examine the historical understanding of “arms” and its components.

The historical definitions suggest that “arms” encompassed complete, functional weapons.⁷² A “weapon” was, and remains, an “instrument of offence,” the means by which one human may harm another.⁷³ The weapon most closely associated with “arms” is a gun. A “gun” has consistently been defined as the device from which a bullet is fired.⁷⁴ For a gun to function as an “arm,” it requires ammunition and a mechanism for loading it. Without these components, a firearm is rendered inoperative and cannot serve its intended purpose. Stripped of its essential parts, a gun becomes a little less than a club (and perhaps a tad more barbaric).

Further evidence of the Second Amendment’s broad, protective scope lies in the Founders’ choice of words. Their use of the expansive term “arms”—rather than the narrower “guns”—reflects an intent to protect not just firearms themselves, but also the essential components and accessories

⁷¹ On March 20, 2025, the Ninth Circuit held that magazines capable of holding more than ten rounds are unprotected accessories and fall outside the scope of the Second Amendment. *Duncan v. Bonta*, 133 F.4th 852, 865 (9th Cir. 2025) (“[T]he plain text of the [Second] Amendment protects the right to bear ‘Arms,’ not *accessories* to firearms that are neither arms themselves nor necessary to the ordinary functioning of a firearm.” (emphasis added)). Judge VanDyke passionately disagreed, even providing a visual demonstration. UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, *Dissent Video in 23-55805 Duncan v. Bonta*, at 05:31–18:46 (YouTube, Mar. 20, 2025), <https://perma.cc/F49R-RQEA>.

⁷² See 1 BOUVIER, *supra* note 49, at 88; CUNNINGHAM, *supra* note 62.

⁷³ 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1773) (“WEAPON. *n. s.* . . . Instrument of offence; something with which one is armed to hurt another.”); SHERIDAN, *supra* note 45 (“Instrument of offence.”).

⁷⁴ 1 JOHNSON, *supra* note 45 (“GUN. *n. f.* . . . The general name for fire-arms; the instrument from which shot is discharged by fire.”); SHERIDAN, *supra* note 45 (same); THOMAS NOBLE, BARCLAY’S NEW UNIVERSAL DICTIONARY 441 (William Shorten ed., 1835) (“GUN, *s.* . . . a firearm or weapon which forcibly discharges a ball, shot, or other offensive matter, through cylindrical barrel, by means of gunpowder.”).

that make them effective. This would include ammunition and magazines. And while a gun may function with a small magazine, historical tradition and modern use suggest that access to magazines of varying capacities is part of what makes arms suitable for lawful defense. Thus, restrictions on such magazines implicate the core protections of the Second Amendment.

The term “magazine” historically referred to an arsenal, not a firearm component.⁷⁵ Therefore, the closest historical analog to modern magazines is the “cartridge.”⁷⁶ Historical dictionaries defined cartridges in relation to “charging firearms,” or making guns capable of functioning as arms.⁷⁷ This historical understanding reinforces a critical principle: a firearm without the means to load and fire ammunition is not a functional “arm” under the Second Amendment. Indeed, when the term “arms” was used, it often encompassed more than just the firearm; it included cartridges, gunpowder, and other essential components.⁷⁸

As a practical matter, modern magazines serve an even more integral role than historical cartridges. They attach directly to firearms and are essential to their operation. If cartridges were a protected “arm” because they were necessary to render a gun operable, then magazines, which serve an equivalent or greater function in contemporary weapons, must also fall

⁷⁵ 2 JOHNSON, *supra* note 45 (“Magazine, n. s. . . . 1. A storehouse, commonly an arsenal or armoury, or repository of provisions.”); SHERIDAN, *supra* note 45 (same); NOBLE, *supra* note 74, at 600 (same).

⁷⁶ *Compare Magazine*, MERRIAM-WEBSTER, <https://perma.cc/5LWS-V83P> (“Magazine noun . . . a supply chamber: such as . . . a holder in or on a gun for cartridges to be fed into the gun chamber.”), *with* SHERIDAN, *supra* note 45 (“CARTRIDGE, . . . A case of paper or parchment filled with gunpowder, *used for the greater expedition in charging guns*.” (emphasis added)), *and* BARCLAY, *supra* note 45 (“[A] charge of powder wrapped up in thick paper, pasteboard, or parchment, for charging fire-arms with the greater expedition.”).

⁷⁷ *See* SHERIDAN, *supra* note 45 (“CARTRIDGE, . . . A case of paper or parchment filled with gunpowder, *used for the greater expedition in charging guns*.” (emphasis added)); BARCLAY, *supra* note 45 (“[A] charge of powder wrapped up in thick paper, pasteboard, or parchment, for charging fire-arms with the greater expedition.”).

⁷⁸ *See, e.g.*, 7 FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3787–88 (Virginia) (Francis Newton Thorpe ed., 1909) [hereinafter FEDERAL AND STATE CONSTITUTIONS] (“[T]hat they, and every of them, by their Deputies, Ministers, and Factors, may transport the Goods, Chattels, *Armor, Munition*, and Furniture, needful to be used by them.” (emphasis added)).

within the Amendment's scope. This conclusion aligns with established jurisprudence, which holds that rendering arms inoperable violates the Second Amendment.⁷⁹ Historically, "arms" were defined more by function than form, meaning that all components necessary to make a firearm operable as a weapon fall within the scope of protected "arms."⁸⁰

3.2. A Brief Note on "Militia"

Madison's understanding of "arms" was tied to weapons appropriate for the "militia." Thus, the natural question after analyzing Madison's usage of "keep," "bear," and "arms," is what he meant by "militia." A linguistic analysis of his writing shows he conceived of the militia primarily as an organized defense force composed of *ordinary citizens*, not professional soldiers.⁸¹ This militia required regulation, training, and sufficient arms to fulfill its role as "the proper, natural, and safe defence of a free state."⁸² Madison's close association of "militia" with "body of the people" further indicates that he

⁷⁹ See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) ("[R]endering any lawful firearm in the home [in]operable for the purpose of immediate self-defense [is unconstitutional]."); *Jackson v. City & County of San Francisco*, 746 F.3d 953, 967–68 (9th Cir. 2014) ("[T]he right to possess firearms for protection implies a corresponding right to obtain the bullets necessary to use them.") (internal quotation marks omitted); *United States v. Pruess*, 703 F.3d 242, 245–46 (4th Cir. 2012) (applying the Supreme Court's interpretation of the Second Amendment to ammunition); *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011) ("The right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use; the core right wouldn't mean much without the training and practice that make it effective.").

⁸⁰ See THOMAS M. COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* 271 (Boston, Little, Brown, & Company 1880) (stating that the right to bear arms is general and includes "learning to handle and use them in a way that makes those who keep them ready for their efficient use"); see also Kopel & Greenlee, *supra* note 29, at 511 ("The militia statutes [of Colonial America] required possession of arms (e.g., guns, swords), ammunition, and also equipment for arms—including repair, maintenance, carrying, storage, and home manufacture.").

⁸¹ See 5 MADISON, *supra* note 53, at 377–78; 1 MADISON, *supra* note 53, at 39; 3 MADISON, *supra* note 53, at 185.

⁸² See, e.g., 1 MADISON, *supra* note 53, at 39.

viewed militia service as broadly participatory rather than limited to a specialized class of citizens.⁸³

The original purpose of the Second Amendment was to equip the citizenry to stand as a bulwark against tyrannical government and standing armies. In *Federalist No. 46*, Madison argued that the primary safeguard against tyranny is an armed citizenry.⁸⁴ He contrasted the American system with European monarchies, where “governments are afraid to trust the people with arms,” and emphasized that a well-armed populace, supported by state and local governments, could effectively resist federal overreach.⁸⁵ Madison calculated that a standing army of 25,000–30,000 men would be no match for “a militia amounting to near half a million of citizens with arms in their hands.”⁸⁶

In this light, the rationales underpinning the Second Amendment, rooted in both the natural law right to self-defense and the necessity of resisting tyranny, support a broad interpretation of the right to bear arms. For the individual, it embodies the right to “fight fire with fire”; for the collective, it ensures the capacity to resist despotic power. Together, these principles establish that the Second Amendment protects the right to possess arms sufficient not only to defend against criminal threats but also to maintain meaningful parity with government forces.

Despite common misconceptions, the Second Amendment’s broad protections were not contingent on the absence of a standing military. George Washington proposed the establishment of a standing army in 1783.⁸⁷ Although Congress under the Articles of Confederation rejected his

⁸³ *Id.*

⁸⁴ THE FEDERALIST NO. 46, *supra* note 47, at 321–22 (James Madison) (“Besides the advantage of being armed, which the Americans possess over the people of almost every other nation,” local governments provide an additional barrier against tyrannical ambitions.).

⁸⁵ *Id.*

⁸⁶ *Id.* at 321; 1 BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 220 (Thomas Nugent trans., 4th ed. 1766) (“Political liberty is to be found only in moderate governments: and even in these, it is not always found. It is there only when there is no abuse of power; but constant experience shows us, that every man invested with power is apt to abuse it; and to carry his authority as far as it will go. . . . To prevent this abuse, it is necessary from the very nature of things, [that] power should be a check to power.”).

⁸⁷ Washington’s *Sentiments on a Peace Establishment*, 1 May 1783, FOUNDERS ONLINE, <https://perma.cc/6455-BYGS>.

proposal, the First United States Congress implemented Washington's recommendation on the first day of its first session.⁸⁸

Far from diminishing the need for an armed citizenry, the existence of a standing army only strengthened the founding-era case for the Second Amendment. This was one of the few areas where Federalists and Anti-Federalists found common ground. In *Federalist No. 29*, Hamilton envisioned citizens being armed at a level comparable to government forces in the event that a standing army should exist.⁸⁹ Similarly, the *Federal Farmer* wrote that "to preserve liberty, it is essential that the whole body of the people always possess arms," cautioning that a standing army would leave the general population defenseless and vulnerable to domination.⁹⁰

In sum, the existence of a modern standing army does not alter the textual framework proposed here: the Second Amendment protects the right to *store and carry weapons* for the *purpose of lawful confrontation*. This protection does not distinguish between weapons and accessories. And rather than relying on historical analogs (which can be attenuated and difficult to apply) or common use (which is atextual and lacks historical grounding), the natural limit of this protection is rooted in the text itself, specifically in the transitive verbs "keep" and "bear."

The text is clear: "arms" is defined broadly. If advanced weaponry, including ARs and high-capacity magazines, falls within the scope of the Second Amendment, then it is entitled to constitutional protection. Determining the outer limits of permissible regulation requires a close examination of the Second Amendment's historical conception.

⁸⁸ Act of Sep. 29, 1789, ch. 25, 1 Stat. 95.

⁸⁹ Hamilton advocated for a "well digested plan" for organizing the militia, including "a select corps of moderate size." THE FEDERALIST NO. 29, *supra* note 47, at 184 (Alexander Hamilton). But his argument rested on the premise that a standing army would not endanger liberty so long as "there is a large body of citizens, little, if at all, inferior to them in discipline and the use of arms, who stand ready to defend their own rights." *Id.*

⁹⁰ Federal Farmer XVIII, *supra* note 47, at 342. Patrick Henry echoed this sentiment during the Virginia Ratification Convention, asking rhetorically, "[O]f what service would militia be to you, when, most probably, you will not have a single musket in the state [if Congress were to control armaments]?" *Patrick Henry Speech Before Virginia Ratifying Convention, June 5, 1788*, TEACHING AM. HIST., <https://perma.cc/6U6K-ANXS>.

4. THE HISTORICAL LIMITS

Because there is no historical tradition of banning arms based on weapon type, weapons capable of rapid fire have historically been within the scope of the Second Amendment. The Founders did not limit the right to keep and bear arms to the technology of their time.⁹¹ Just as private citizens

⁹¹ The language of the Second Amendment does not specify any particular type of weapon, nor does it limit the right to arms available only at the time of its drafting. It does not even require that weapons be in “common use.” The Founders intended the Second Amendment as a safeguard against oppressive regimes, implying a citizenry armed at least comparably to any potential threat. *See* 5 MADISON, *supra* note 53, at 377–78 (“The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country . . .”). For example, George Washington emphasized before Congress that readiness for conflict is essential to maintaining peace: “To be prepared for war, is one of the most effectual means of preserving peace. A free people ought not only to be armed but disciplined; to which end, a Uniform and well digested plan is requisite.” *George Washington to the United States Senate & House of Representatives*, 8 Jan. 1790, FOUNDERS ONLINE, <https://perma.cc/F9P8-WG22>. Thomas Jefferson similarly asserted that power resides inherently in the people, insisting that it is both their right and duty to remain armed at all times. *See From Thomas Jefferson to John Cartwright*, 5 June 1824, FOUNDERS ONLINE, <https://perma.cc/9EAS-VJZ3>. Finally, Justice Joseph Story captured the essence of the Second Amendment:

The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, *enable the people to resist and triumph over them*.

3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 842 (Lonang Inst. ed. 2003) (1833) (emphasis added). This enduring perspective underscores the Founders’ conviction that a sufficiently armed populace is essential to safeguarding American freedoms against oppressive government. *See* 1 BLACKSTONE, *supra* note 46, at *143–44 (“So long as these remain inviolate, the subject is perfectly free; for every species of compulsive tyranny and oppression must act in opposition to one or other of these rights, having no other object upon which it can possibly be employed.”); *see also* ALAN I. MORRIS, IN DEFENSE OF SECURITY, LIBERTY AND PROPERTY: THE ENGLISH ORIGINS OF AN INDIVIDUAL RIGHT TO BEAR ARMS 2–3 (2019) (Master’s thesis, Seton Hall University) (noting that English legal and political literature available to the Founders informed their belief that an armed citizenry was a necessary defense against tyrannical government).

once lawfully owned cannons,⁹² repeating rifles (a type of semi-automatic firearm),⁹³ and other militarily relevant arms,⁹⁴ they retain today the right

⁹² There were no laws prohibiting private citizens from owning cannons. In fact, private ownership appears to have been so widespread that “one of the first types of arms restrictions imposed . . . were ordinances restricting the times and locations where” citizens could fire cannons. *Second Amendment Myths & Misinformation*, HERITAGE FOUND., <https://perma.cc/H92L-ULCQ>; see, e.g., AN ACT INCORPORATING THE CITY OF CINCINNATI, AND A DIGEST OF THE ORDINANCES OF SAID CITY 43 (Cincinnati, Lodge, LHommedieu & Co. 1835) (“That if any person or persons . . . shall hereafter discharge any cannon . . . on the public commons of [Cincinnati], every person so offending shall . . . pay to the city of Cincinnati any sum not exceeding two dollars, nor less than one dollar, with costs of prosecution.”). Furthermore, during the War of 1812, President James Madison permitted and even encouraged private citizens to own and operate cannons. See, e.g., *Madison & Monroe Signed Letter Of Marque For The Privateer Banyer, 1814*, UNIV. ARCHIVES (Oct. 18, 2023, at 11:00 ET), <https://perma.cc/5RMJ-LA2G> (authorizing a private vessel and citizens to carry weapons of war); see also EDGAR STANTON MACLAY, A HISTORY OF AMERICAN PRIVATEERS 20–21 (1899) (describing how ordinary commercial vessels, in response to British hostilities, quickly mounted their vessels with *cannons* and joined the War of 1812). Citizens in New Orleans, Baltimore, and Boston also used privately owned cannons to help defend their cities against British invasion. See, e.g., GEORGE F. EMMONS, THE NAVY OF THE UNITED STATES, FROM THE COMMENCEMENT, 1775 TO 1853: WITH A BRIEF HISTORY OF VESSEL’S SERVICE & FATE 171–72 (1853) (listing the warships belonging to private citizens and their locations).

⁹³ Many modern commentators assert that the Founding Fathers could not have imagined repeating firearms (guns capable of discharging multiple rounds without manual reloading) when they drafted the Second Amendment. But the historical record, particularly the correspondence involving inventor Joseph Belton, proves this view inaccurate. In 1777, Joseph Belton wrote to Congress that he had “discovered an improvement in the use of Small Armes, wherein a common small arm, may be maid to discharge eight balls one after another, in eight, five or three seconds of time.” *Letter from Joseph Belton, to the Honorable Continental Congress in Philadelphia* (Apr. 11, 1777), <https://perma.cc/U4HL-RVRT>; see also *Benjamin Franklin to George Washington, 22 July 1776*, FOUNDERS ONLINE, <https://perma.cc/9WXZ-GD6L> (referencing Belton’s April 11, 1777 letter to Congress in footnote 1). On May 7th, Congress authorized the alteration of one hundred muskets to this new model:

Resolved, That John Belton be authorized and appointed to superintend, and direct, the making or altering of one hundred muskets, on the construction exhibited by him, and called “the new improved gun,” which will discharge eight rounds with once loading; and that he receive a reasonable compensation for his trouble, and be allowed all just and necessary expences.

to own firearms that serve the same lawful purposes—whether semi-automatic or fully automatic.

Even so, critics find historical footing in a ban on “dangerous or unusual weapons.”⁹⁵ But the historical record shows that the standard is not “as broadly prohibitive as many assume.”⁹⁶ Instead, the true limiting principle

7 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 324 (1907). But the deal collapsed when Belton demanded excessive compensation:

A letter, of the 8, from Joseph Belton, was read, requiring an extraordinary allowance for his new invented gun.

Ordered, That the same be dismissed.

Id. at 361. Benjamin Franklin, however, expressed serious interest in Belton’s invention. In a letter written while in Europe, Franklin referenced a planned demonstration: “We will expect you, M. D’Arcy and I, at his House friday next at twelve o’clock to try the gun of M. Belton.” *Le Roy to Benjamin Franklin*, [20 Jan. 1779?], FOUNDERS ONLINE, <https://perma.cc/5FCR-V6AA>. About three weeks later, Belton received “Fifty Louis d’ors on Account of Public Service to the United States which I have undertaken to perform” from Franklin. *Joseph Belton: Receipt*, 13 Feb. 1779, FOUNDERS ONLINE, <https://perma.cc/Z6ZG-NVXP>. Thus, far from being unaware of such technology, the Founders were not only informed of rapid-fire weapons—they actively explored adopting them. The Belton case illustrates that innovations in firearm technology were both known and embraced by the very generation that ratified the Second Amendment. Another example comes from the Lewis and Clark expedition, during which American explorers used one of the world’s earliest repeating rifles. See Fred Guercio, *1790 Girandoni Repeating Rifle*, NRA NAT’L FIREARMS MUSEUM (Feb. 1, 2014), <https://perma.cc/LCX7-GR4T> (“The Girandoni . . . was used by Lewis & Clark 1803 to 1806. [It] is a 22 shot repeater that can fire 22 rounds in 30 seconds. . . . They could fire a total of 44 rounds . . . a minute.”); see also NRA NATIONAL FIREARMS MUSEUM, *NFM Treasure Gun – Girandoni Air Rifle as Used by Lewis & Clark* (YouTube, Feb. 1, 2011), <https://perma.cc/U79S-GP3Y> (stating that the Girandoni was used shortly after the American Revolution in the Napoleonic Wars and was carried by Lewis and Clark between 1803 and 1806).

⁹⁴ One example is the Militia Act of 1792, which required able-bodied men to furnish their own firearms suitable for military service. The law imposed no restrictions on the type of weapon; instead, it established a minimum standard for firearm quality. See The Militia Act of 1792, ch. 33, § 1, 1 Stat. 271, 271 (1792) (“An Act more effectually to provide for the National Defence by establishing a Uniform Militia throughout the United States.”). Many states enacted similar statutes. See, e.g., 1779 Vt. Acts & Laws 19–20 (prescribing the minimum weapons that heads of households in Vermont were required to keep).

⁹⁵ 4 BLACKSTONE, *supra* note 46, at *148.

⁹⁶ Clayton E. Cramer, The Legal History of “Dangerous or Unusual” Weapons 1 (Nov. 7, 2015) (unpublished manuscript), <https://perma.cc/ZHC4-4P9W>.

drawn from history focuses not on the type of weapon but on the character of the individual possessing it. To understand this, we begin at the source: the English common law.

4.1. The English Common Law Did Not Restrict the Right to Bear Arms Based on the Weapon, but on the Individual.

Though England did not codify the right to bear arms until the 1689 Declaration of Rights,⁹⁷ the right was recognized as one of the subjects' ancient "and indubitable Rights."⁹⁸ As Member of Parliament M.J. O'Connell later explained, "by the bill of rights, the right to carry arms for self-defence was not created, but declared as of old existence."⁹⁹ Likewise, Blackstone wrote that "the right of having and using arms for self-preservation and defence" is a part of "the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression."¹⁰⁰ He further described it as the "right of the subject" to have "arms for their defence, suitable to their condition and degree."¹⁰¹ These sources informed the American Founders' understanding of the right to bear arms.¹⁰²

So entrenched was the right to bear arms in English thought that King James II was overthrown in 1688 in part due to his efforts to disarm the Protestant population.¹⁰³ His refusal to allow Protestants the right to carry

⁹⁷ *Bill of Rights 1688: An Act declareing the Rights and Liberties of the Subject and Setleing the Succession of the Crowne*, 1 W. & M., Sess. 2, ch. 2 (1688) ("That the subjects which are Protestants may have Arms for their Defence suitable to their Conditions and as allowed by Law.").

⁹⁸ *Id.* ("[T]he Rights and Liberties asserted and claimed in the said Declaration are the true auntient and indubitable Rights and Liberties of the People of this Kingdome . . .").

⁹⁹ 69 HANSARD'S PARLIAMENTARY DEBATES: THIRD SERIES 1151 (1843).

¹⁰⁰ 1 BLACKSTONE, *supra* note 46, at *144.

¹⁰¹ *Id.* at *143.

¹⁰² See, e.g., 3 LEGAL PAPERS OF JOHN ADAMS 245–48 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965) (citing Blackstone and William Hawkins in preparation for the Boston Massacre trial).

¹⁰³ See 6 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 241 (3d ed. 1924) (noting that King James II's denial of the right to bear arms to Protestants contributed to the demand for the English Bill of Rights); Brief for Professors of Second Amendment Law

arms was seen as a direct assault on their liberties.¹⁰⁴ Chancellor James Kent later observed that “the English nation . . . had frequently been obliged to recover their indefeasible rights by intrepid councils, *or by force of arms*, and then to proclaim them by the most solemn and positive enactments,” most predominantly in a “bill of rights.”¹⁰⁵ Accordingly, when Parliament offered the English Crown to William and Mary, it did so on the condition that they accept the 1689 Declaration of Rights, which expressly included the right to be armed for the purpose of resisting tyranny.¹⁰⁶

4.1.1. The Feast of St. Thomas the Apostle

Evidence that the English right to bear arms predated its formal recognition in the 1689 Bill of Rights can be found as early as 1343, in a royal decree issued before the Feast of St. Thomas the Apostle.¹⁰⁷ The King’s instruction “ordered London hostelryes to warn their guests ‘against going armed into the City,’”¹⁰⁸ implicitly acknowledging that travelers would be armed.¹⁰⁹ The decree did not prohibit carrying weapons altogether but rather directed hostelryes to tell travelers to pause their usual practices.¹¹⁰ The same order also required hostelryes to refuse travelers “not of good fame” or known “evildoers” and to report any “[s]uspicious characters.”¹¹¹ This suggests that the concern was not the bearing of arms itself, but *who* was bearing them.

The King’s decree, however, was in tension with existing legislation. In 1328, Parliament codified the infamous Statute of Northampton.¹¹² This

et al. as Amici Curiae Supporting Petitioners at 7, *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1 (2022) (No. 20-843) [hereinafter Brief for Professors of Second Amendment Law].

¹⁰⁴ *Id.*

¹⁰⁵ 2 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 7 (O.W. Holmes, Jr. ed., 12th ed. 1873) (emphasis added).

¹⁰⁶ See William III (r. 1689-1702) and Mary II (r. 1689-1694), *ROYAL HOUSEHOLD*, <https://perma.cc/9S4P-QWRJ>.

¹⁰⁷ Brief for Professors of Second Amendment Law, *supra* note 103, at 8 (quoting 1 *CAL-NDAR OF PLEA & MEMORANDA ROLLS* 156 (A.H. Thomas ed., 1926)).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ See 1 *CAL-NDAR OF PLEA & MEMORANDA ROLLS*, *supra* note 107, at 156.

¹¹¹ *Id.*

¹¹² See 2 *Edw. 3, c. 3* (1328).

statute was highly restrictive and prevented citizens from carrying arms in public places.¹¹³ Yet, just two decades later, and within seven years of the King's decree for the Feast of St. Thomas, Parliament enacted the Statutory Crime of Affray in 1350, which shifted focus from the mere act of carrying arms to the manner in which they were used.¹¹⁴ Rather than prohibiting weapon possession outright, the statute criminalized specific violent conduct involving arms.¹¹⁵ For example:

[I]f percase any man of this realm ride armed . . . against any other, to *slay him, or rob him, or take him, or retain him* till he hath made fine or ransom for to have his deliverance, . . . it shall be judged . . . felony or trespass . . .¹¹⁶

The Affray Statute arguably did not restrict the possession of arms *per se* but instead penalized their misuse in the commission of crimes such as murder, robbery, or abduction. In this way, early English arms regulations appear to have been concerned less with the type of weapon and more with the character and conduct of the individual bearing it.

These principles would eventually shape the development of English common law.¹¹⁷ But before that evolution could occur, the common law first had to grapple with the broader prohibitions in the Statute of Northampton.

4.1.2. *Sir John Knight's Case*

The most famous English case addressing the right to bear arms was *Sir John Knight's Case* in 1686.¹¹⁸ Sir John Knight, a respected Protestant gentleman from Bristol, was charged under the Statute of Northampton for peaceably carrying a firearm while he attended church.¹¹⁹ Sitting on the

¹¹³ See *id.*

¹¹⁴ See 25 Edw. 3, st. 5, c. 2, § 13 (1350).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ See, e.g., 1 BLACKSTONE, *supra* note 46, at *121, *143–44 (expressing that “the right of having and using arms for self-preservation and defense” is rooted in “the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.” This “right of the subject” includes possessing “arms for their defence, suitable to their condition and degree”).

¹¹⁸ *Sir John Knight's Case* (1686) 87 Eng. Rep. 75, 75–76; 3 Mod. 117, 117–18 (KB).

¹¹⁹ *Id.*

King's Bench, Chief Justice Herbert regarded the Statute of Northampton as "gone in *desuetudinem*," or obsolete through disuse.¹²⁰ Nevertheless, he recognized it as a codification of the "common law" principle against going "armed to terrify the King's subjects."¹²¹ Herbert concluded that "conduct 'will come within the Act,'—i.e., would terrify the King's subjects—only 'where the crime shall appear to be *malo animo*,' [that is] with evil intent or malice."¹²² The jury ultimately acquitted Knight.¹²³

His acquittal was more than a personal victory; it reaffirmed a principle that would later echo across the Atlantic.¹²⁴

¹²⁰ Rex v. Sir John Knight (1686) 90 Eng. Rep. 330, 330; 1 Comb. 38, 39 (KB).

¹²¹ *Sir John Knight's Case*, 87 Eng. Rep. at 76.

¹²² N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 24, 44 (2022) (citing Rex, 90 Eng. Rep. at 330); see also David B. Kopel, *The First Century of Right to Arms Litigation*, 14 GEO. J.L. & PUB. POL'Y 127, 130 (2016) ("Sir John Knight . . . affirmed that the peaceable public carrying of arms is lawful, and that carrying with malicious intent to terrify people is not.").

¹²³ See Rex, 90 Eng. Rep. at 330; *Sir John Knight's Case*, 87 Eng. Rep. at 76.

¹²⁴ William Hawkins's 1716 *Treatise of the Pleas of the Crown*, a leading criminal law authority in early America, cited *Sir John Knight's Case* "for the precise point that peaceable defensive carry of ordinary arms is lawful." Brief for Professors of Second Amendment Law, *supra* note 103, at 11. Hawkins's treatment of the right to bear arms was frequently cited in American courts. See, e.g., *Simpson v. State*, 13 Tenn. 356, 358–59 (1833). Notably, prominent Founders such as Thomas Jefferson and John Adams owned copies of his treatise. See *A Treatise of the Pleas of the Crown*, WM. & MARY L. LIBR., <https://perma.cc/LBQ2-T4GK> (listing Jefferson as an owner of the treatise); *Adams' Notes of Authorities for His Argument for the Defense: October 1770*, FOUNDERS ONLINE, <https://perma.cc/AH9E-Y2UN>. The influence of *Sir John Knight's Case* in early America extended further through its inclusion in two English reporter series, one of which—*Modern Reports*—was owned by George Wythe. See *Modern Reports*, WM. & MARY L. LIBR., <https://perma.cc/J6CN-LTQK> (noting that a prominent owner of the *Modern Reports* was George Wythe). Wythe, a signer of the Declaration of Independence and the first law professor in America, mentored future leaders including President Thomas Jefferson; Chief Justice John Marshall; Speaker of the House and Secretary of State Henry Clay; and St. George Tucker. *George Wythe*, WM. & MARY L. LIBR., <https://perma.cc/KL5V-K24S>. He bequeathed his library to Thomas Jefferson, which later formed the foundation of the Library of Congress. *George Wythe, June 11, 1806, Last Will and Testament with Codicil*, THOMAS JEFFERSON PAPERS LIBR. CONG., <https://perma.cc/227W-YGWB> ("I give my books and small philosophical apparatus to Thomas Jefferson, president of the united states of America; a legacie considered abstractlie perhaps not deserving a place in his musaeum, but, estimated by my good will to him, the most valuable to him of any thing which i have power to bestow."); *To*

4.2. Firearm Regulations in the American Colonies Were Even Less Restrictive

The first Englishmen to hold a written, unequivocal right to bear arms were the settlers of the Virginia Colony in 1606,¹²⁵ followed by those in the New England Colony in 1620.¹²⁶ The royal charters for these colonies granted them the right to import “Armour, Weapons, Ordinances, Munition, Powder, Shott, Victuals, and . . . all other Things necessary . . . for their Use and Defence.”¹²⁷ The term “Ordinances” in this context referred to heavy artillery, such as cannons.¹²⁸ This confirms that colonial settlers were permitted to possess not only personal arms, but also the most advanced military weapons of the era.

Additionally, the Statute of Northampton did not apply to the colonies.¹²⁹ The North Carolina Supreme Court in *State v. Huntly*¹³⁰ accurately reflected the Statute’s authority in America¹³¹ and articulated its understanding of the common law offense related to carrying dangerous and unusual weapons:

[T]he carrying of a gun *per se* constitutes no offence. For any lawful purpose . . . the citizen is at perfect liberty to carry his gun. It is the *wicked purpose*—and the mischievous result—*which essentially constitutes the crime*. He shall not carry about this or any other weapon of death to terrify and

Samuel H. Smith From Thomas Jefferson, 21 Sept. 1814, FOUNDERS ONLINE, <https://perma.cc/QV9E-EG8U> (“I ask of your friendship therefore to make for me the tender of it to the library committee of Congress . . . so that the whole library, as it stands in the catalogue at this moment should be theirs, without any garbling.”). In short, the impact of *Sir John Knight’s Case* on American legal thought—particularly on the understanding of the right to bear arms—was deep and enduring.

¹²⁵ 7 FEDERAL AND STATE CONSTITUTIONS, *supra* note 78, at 3787–88 (“[T]hat they, and every of them, by their Deputies, Ministers, and Factors, may transport the Goods, Chattels, *Armor, Munition*, and Furniture, needful to be used by them.” (emphasis added)).

¹²⁶ 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 78, at 1834–35 (New England).

¹²⁷ *Id.*

¹²⁸ *Ordnance*, ETYMOLOGY ONLINE, <https://perma.cc/X24D-LRXJ>.

¹²⁹ See *State v. Huntly*, 25 N.C. 418, 420 (1843).

¹³⁰ *Id.*

¹³¹ Brief for Professors of Second Amendment Law, *supra* note 103, at 24–25.

alarm, and in such manner as naturally will terrify and alarm, a peaceful people.¹³²

Because this reflected the widespread understanding of arms rights during the colonial and founding eras, the right to bear arms was rarely restricted.¹³³ In fact, the carrying of arms was so central to public safety in the colonies that it was often required.¹³⁴ The only limitations imposed concerned either the character of the individual or the commission of crimes involving weapons—never the type of weapon possessed.¹³⁵

This distinction between lawful defensive carry and malicious or terrorizing conduct was featured prominently in one of the most widely recognized legal cases in colonial America: the Boston Massacre trial. The parties in that case stipulated that Bostonians had the right to carry arms for self-defense.¹³⁶ The prosecution argued that due to the Redcoats' conduct in Boston, even "the most peaceable" citizens "found it necessary to arm themselves with heavy Walking Sticks or Weapons of Defence when they went abroad."¹³⁷ In response, John Adams crystallized the governing principle: "every private person is authorized to arm himself, and on the strength of this authority, I do not deny the inhabitants had a right to arm themselves at

¹³² *Huntly*, 25 N.C. at 422–23 (emphasis added).

¹³³ See, e.g., 1 WILLIAM WALLER HENING, *THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA* 401–02 (1823) (restricting recreational shooting to funerals and weddings due to fears of provoking Indian raids).

¹³⁴ *District of Columbia v. Heller*, 554 U.S. 570, 601 (2008); see, e.g., 19 *COLONIAL RECORDS OF THE STATE OF GEORGIA* 137–40 (Allen D. Candler ed., 1911) (noting that failure to bear arms was a fineable offense in colonial Georgia); *THE CODE OF 1650: BEING A COMPILATION OF THE EARLIEST LAWS AND ORDERS OF THE GENERAL COURT OF CONNECTICUT* 72 (1822) ("[A]ll persons that are above the age of sixteen years . . . shall beare arms . . . [and] shall have in continuall readines, a good muskitt of other gunn, fitt for service . . . also such other military provision of powder, match and bullitts . . .").

¹³⁵ See, e.g., *Huntly*, 25 N.C. at 422–23; see also Act of Mar. 14, 1776, ch. VII, 1775–1776 Mass. Acts 32 (proposing the disarmament of individuals "who are notoriously disaffected to the cause of America, or who have not associated and refuse to associate to defend by Arms these United Colonies, against the Hostile attempts of the British Fleets and Armies").

¹³⁶ 3 *LEGAL PAPERS OF JOHN ADAMS*, *supra* note 102, at 248 ("I do not deny the inhabitants had a right to arm themselves at that time.").

¹³⁷ *Id.* at 274.

that time, for their defence, not for offence, that distinction is material and must be attended to.”¹³⁸

Although subtle, the idea of *in terrorem populi Regis*, prohibiting the wielding of weapons to terrorize the public, had made its way across the Atlantic.¹³⁹

4.3. The Founders Intentionally Broadened the Right to Self-Defense Beyond What Was Recognized Under English Law.

Although the English common law traditionally protected a broad right to possess arms, focusing more on who bore arms than on what kind they carried, this principle was applied inconsistently. Over time, England carved out exceptions to this right, often in service of aristocratic or sectarian interests. The English Bill of Rights of 1688, for instance, limited the right to “have arms” to Protestants.¹⁴⁰ Earlier laws prohibited certain groups, including commoners¹⁴¹ and Catholics,¹⁴² from bearing arms, or prohibited weapons in specific areas such as royal forests.¹⁴³ These deviations reflected not a rejection of the right itself but a narrowing of its scope along socio-economic and religious lines.

American thinkers at the founding rejected such limitations.¹⁴⁴ When James Madison introduced the Second Amendment, he pointedly

¹³⁸ *Id.* at 247–48.

¹³⁹ See, e.g., HENING, *supra* note 7, at 17.

¹⁴⁰ Bill of Rights, 1 W. & M., 2d sess., c. 2 (1688).

¹⁴¹ See, e.g., Statute of Northampton 1328, 2 Edw. 3 c. 3 (Eng.) (exempting only the King’s agents from the arm’s restriction).

¹⁴² See generally An Act for the Better Securing the Government by Disarming Papists and Reputed Papists 1688, 1 W. & M., c. 15 (Eng.) (authorizing the disarmament of Catholics).

¹⁴³ See Game Act 1831, 1 & 2 Will. 4 c. 32 (UK) (expanding regulations on hunting and other forest activities, and prescribing penalties for violations); see also 2 BLACKSTONE, *supra* note 46, at *410 (“For prevention of popular insurrections and resistance to government, by disarming the bulk of the people . . . is a reason oftener meant, than avowed, by the makers of forest or game laws.”).

¹⁴⁴ See, e.g., COOLEY, *supra* note 80, at 270 (“[The Second Amendment] was adopted with some modification and enlargement from the English Bill of Rights of 1688.”); 1 GEORGE TUCKER, BLACKSTONE’S COMMENTARIES 300 (1803) (“In England, the people have been disarmed, generally, under the specious pretext of preserving the game: a

criticized the “English Decln. of Rts” for protecting only “arms to Protestts,” arguing that it failed to reflect the natural rights of *all* people.¹⁴⁵

St. George Tucker echoed the same sentiment. Most notably, he opined that “[t]he right of the people to keep and bear arms shall not be infringed . . . and this without any qualification as to their *condition or degree*, as is the case in the British government.”¹⁴⁶ He criticized the British right to bear arms as illusory, noting that restrictions based on social class and pretexts, such as game laws, effectively disarmed the common people, leaving liberty in peril wherever standing armies existed.¹⁴⁷ He emphasized, “Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.”¹⁴⁸ To challenge a standing army, Tucker must have been calling for the citizenry to have weapons of equal or similar force.

William Rawle raised similar critiques. The English right to arms was limited based on a citizen’s “suitable . . . conditions.”¹⁴⁹ In other words, one’s

never failing lure to bring over the landed aristocracy to support any measure, under that mask, though calculated for very different purposes. True it is, their bill of rights seems at first view to counteract this policy: but the right of bearing arms is confined to protestants, and the words suitable to their condition and degree, have been interpreted to authorise the prohibition of keeping a gun or other engine for the destruction of game, to any farmer, or inferior tradesman, or other person not qualified to kill game. So that not one man in five hundred can keep a gun in his house without being subject to a penalty.”).

¹⁴⁵ Notes for Speech in Congress, [CA. 8 June] 1789, FOUNDERS ONLINE, <https://perma.cc/BR7T-2CT3>.

¹⁴⁶ 1 TUCKER, *supra* note 144, at *143 n.40 (emphasis added).

¹⁴⁷ *Id.* at 300.

¹⁴⁸ *Id.*

¹⁴⁹ WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 126 (Phila., 2d ed. 1829) (“In most of the countries of Europe, [the right to bear arms] does not seem to be denied, although it is allowed more or less sparingly, according to circumstances. In England, a country which boasts so much of its freedom, the right was secured to Protestant subjects only, on the Revolution of 1688; and it is cautiously described to be that of bearing arms for their defense, ‘suitable to their conditions, and as allowed by law.’”). When interpreting the Second Amendment, specifically, Rawle stated that its “prohibition is general.” *Id.* at 125. He further states that “[n]o 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 attempt could only be made

right to bear arms was contingent on social status, such as being Protestant or having the privilege to hunt in the King's forest.¹⁵⁰ Notably, neither Tucker nor Rawle in their prominent treatises distinguished between types or grades of weapons. Instead, Tucker referenced arms in the context of standing armies, suggesting military weapons are protected.¹⁵¹ And Rawle added that England, unlike America, tied arms ownership to class.¹⁵²

Justice Joseph Story sheds additional light. He similarly criticized the English right, stating that "the effect of this provision has been greatly narrowed; and it is at present in England more nominal than real, as a defensive privilege."¹⁵³ His accompanying footnote is especially revealing. Referencing Blackstone, Story described the Second Amendment as an "escape from . . . large standing arm[ies]."¹⁵⁴ Like Tucker, this framing implies that the American citizenry was intended to be armed in a manner comparable to the contemporary militia.

In the years immediately following ratification, Congress enacted legislation that reflected both Story's vision and the Founders' own practices regarding arms and militia readiness.

4.4. Weapons of War Were Regularly Carried by the Founding Generation and, at One Point, Congress Even Required It.

Shortly after the states ratified the Bill of Rights and incorporated them into the Constitution, Congress passed the U.S. Militia Act of 1792.¹⁵⁵

under some general pretence by a state legislature." *Id.* at 125–26. But even then, he postulated that the Second Amendment applied to restrain both Congress and state legislatures. *Id.* at 126 ("But if in any blind pursuit of inordinate power, either [state or federal government] should attempt [to disarm the citizenry], [the second] amendment may be appealed to as a restraint on both."). This was a remarkably prescient position that predated incorporation doctrine by over a century.

¹⁵⁰ See RAWLE, *supra* note 149, at 126.

¹⁵¹ See 1 TUCKER, *supra* note 144, at 300.

¹⁵² See RAWLE, *supra* note 149, at 126.

¹⁵³ 3 STORY, *supra* note 91, at 842.

¹⁵⁴ *Id.* at 847 n.60 ("It would be well for Americans to reflect upon the passage in Tacitus (*Hist.* IV, ch. 74): . . . Is there any escape from a large standing army but in a well-disciplined militia? There is much wholesome instruction on this subject in 1 Black. Comm. ch. 13, pp. 408 to 417.").

¹⁵⁵ Militia Act of 1792, ch. 33, 1 Stat. 271.

The Act required all able-bodied white men between the ages of 18 and 45 to own a musket and ammunition. Specifically, it stated:

[E]ach and every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of age of eighteen years, and under the age of forty-five years . . . *shall*, within six months thereafter, provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch, with a box therein to contain not less than twenty-four cartridges, suited to the bore of his musket or firelock¹⁵⁶

The Act thus establishes a direct link between personal gun ownership and the possession of military-grade arms.

Weapons available to citizens at the founding included “any lock, stock, and barrel . . . that fires,” encompassing muskets and other shoulder arms, long rifles, pistols, swords, and polearms.¹⁵⁷ These were some of the most advanced weapons of the time, and they were owned by everyday citizens.¹⁵⁸

Some of those everyday citizens included the Founders. When Thomas Jefferson was only ten, “he was given a gun by his father and sent into the forest alone in order to develop self-reliance.”¹⁵⁹ As an adult, Jefferson wrote about making holsters for his trusted Turkish pistols.¹⁶⁰ He even advised his nephew to possess his gun at all times.¹⁶¹ Patrick Henry had a similar upbringing, as did James Monroe.¹⁶² The Allen brothers (Ira and

¹⁵⁶ *Id.*

¹⁵⁷ GEORGE C. NEUMANN, *THE HISTORY OF WEAPONS OF THE AMERICAN REVOLUTION* 21 (1967); *see generally id.* at vii (cataloging more than twelve hundred “major military arm[s] used in America between 1700 and 1783”).

¹⁵⁸ Receipts from citizens during the Revolutionary era, such as this one, provide strong circumstantial evidence of the public understanding of the right to keep and bear arms. *Receipt for a Stand of French Arms*, MUSEUM AM. REVOLUTION, <https://perma.cc/Z3RQ-FEFP>.

¹⁵⁹ 1 DUMAS MALONE, *JEFFERSON AND HIS TIME: JEFFERSON THE VIRGINIAN* 46 (1948).

¹⁶⁰ 10 *THE PAPERS OF THOMAS JEFFERSON: RETIREMENT SERIES* 320–21 (J. Jefferson Looney ed., 2013).

¹⁶¹ 1 *THE WRITINGS OF THOMAS JEFFERSON* 398 (H.A. Washington ed., Phila., J.B. Lippincott & Co. 1869).

¹⁶² *See* HARLOW GILES UNGER, *LION OF LIBERTY: PATRICK HENRY AND THE CALL TO A NEW NATION* 10 (2010) (“[Young Patrick Henry] was remarkably fond of his gun.”); TIM

Ethan) were also gunslingers. Ira wrote that he and his brother “never walked out without at least a case of pistols.”¹⁶³

Private citizens at large were equally familiar with advanced weaponry. This pattern continued after the founding, as they began acquiring weapons capable of rapid fire.

4.5. After the Founding, Private Citizens Owned Weapons Capable of Rapid Fire.

The theme of ordinary citizens owning advanced weaponry extends beyond the founding generation and into constitutional America. A notable example was the Gatling Gun. The Gatling gun, a hand-cranked weapon capable of firing 1,200 rounds per minute, was a precursor to modern automatic weapons and marked a significant step toward the development of the machine gun.¹⁶⁴

Historians have noted that “it was not only military men but also . . . wealthy private citizens who desired (Gatling guns).”¹⁶⁵ In July 1863, during the peak of the Civil War Draft Riots in New York City, Henry Jarvis Raymond—co-founder and proprietor of *The New York Times*, as well as a supporter of President Lincoln and the recently enacted Conscription Act—positioned three Gatling guns on the newspaper office’s roof and in its windows to deter rioters from defacing the building.¹⁶⁶

By the 1870s, mine owners and railroad tycoons had realized that Gatling guns were a practical tool for controlling unruly workers.¹⁶⁷ During the Railroad Strike of 1877, the Gatling Gun Company marketed accordingly. One advertisement stated:

McGRATH, JAMES MONROE: A LIFE 9 (2020) (“Well before dawn, James left for school, carrying his books under one arm with his powder horn under the other and his musket slung across his back.”).

¹⁶³ 1 JAMES BENJAMIN WILBUR, IRA ALLEN: FOUNDER OF VERMONT 1751–1814, at 44 (1928).

¹⁶⁴ R.J. Gatling, *Machine Guns. The Gatling Gun: Its Positive Feed, High-Angle Fire, and Use in War*, PROCEEDINGS U.S. NAVAL INST., Apr. 1884; David Corrigan, *The Mere Presence of a Gatling*, MUSEUM CONN. HIST., <https://perma.cc/BD8G-WVSE>.

¹⁶⁵ Corrigan, *supra* note 164.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* This might be an understatement. There were likely neither sloth nor strikes when an employer pointed the equivalent of a machine gun at his employees.

The recent riotous disturbances throughout the country have shown the necessity of preparation by such confrontations as the one over which you preside, to meet violence by superior force and skill. The calls made upon us during the existence of the riots were too sudden to be promptly met, and we have the honor to suggest that you strengthen yourselves now against such emergencies in the future, by providing yourselves with Gatling guns. The reputation, character and effectiveness of the gun, are too well known to be repeated.¹⁶⁸

Notably, there appears to have been no legal challenge to civilian ownership of this first-generation machine gun, despite its prevalence and advertised use.

4.6. The Dangerous And/Or Unusual Weapons Standard Has No Historical Basis.

The “dangerous and unusual” weapons standard, as understood by modern courts, lacks a firm historical foundation.¹⁶⁹ Blackstone attributed such restrictions to the Statute of Northampton, but that statute was never applied in colonial or post-revolutionary America.¹⁷⁰ Instead, the common law approach focused on conduct *in terrorem populi Regis*—the use of arms in a manner that terrorized the public—rather than restricting access to specific types of weapons.¹⁷¹

¹⁶⁸ *Id.*

¹⁶⁹ See Cramer, *supra* note 96, at 1–2 (explaining that the “dangerous and unusual” standard has no foundation in positive law).

¹⁷⁰ Cramer, *supra* note 96, at 2. Compare 4 BLACKSTONE, *supra* note 46, at *149 (“The offence of riding or going armed with dangerous or unusual weapons is a crime against the public peace, by terrifying the good people of the land, and is *particularly prohibited by the statute of Northampton*.” (emphasis added)), with Statute of Northampton 1328, 2 Edw. 3, c. 3 (Eng.) (prohibiting the public carrying of arms, except by the King’s agents), and *Chune v. Piott* (1615) 80 Eng. Rep. 1161, 1162 (KB) (“[I]f contrary to the Statute of Northampton, he sees any one to carry weapons in the highway, *in terrorem populi Regis*; he ought to take him, and arrest him, notwithstanding he doth not break the peace in his presence.”).

¹⁷¹ Brief for Professors of Second Amendment Law, *supra* note 103, at 9–10 (quoting *Chune*, 80 Eng. Rep. at 1162) (“Without all question, the sheriffe hath power to commit, est custos, & conservator pacis, if contrary to the Statute of Northampton, he sees

Historical statutes and the common law did not categorically exclude weapons from civilian ownership but instead targeted behavior deemed threatening to public order. This distinction is illustrated by comparing two English cases. *Baron Snigge v. Shirton* involved a tenant who stocked his home with “usual weapons” amid a dispute with his landlord—a context suggesting preparation for violence.¹⁷² Conversely, in *Rex v. Rowland Phillips*, Lord Mansfield held that a sailor’s use of a weapon to fire warning shots that inadvertently killed another sailor did not constitute the use of an unusual weapon.¹⁷³ In both cases, the weapons themselves were ordinary; yet the legal outcomes diverged.¹⁷⁴ The key distinction lies not in the type of arms, but in the reasonableness of the conduct and the perceived threat it posed.¹⁷⁵

This understanding is further exemplified by the writings of William Hawkins and Blackstone. Hawkins considered actions such as throwing a pot or firing a pistol as using a “dangerous weapon.”¹⁷⁶ While Blackstone, in his discussion of forcible entry and detainer, stated that “the entry now allowed by law is a peaceable one; that forbidden is such as is carried on and maintained with force, with violence *and unusual weapons*.”¹⁷⁷ It is unlikely that Blackstone meant to require the possession of rare or exotic weapons as a prerequisite to an unlawful entry.¹⁷⁸ More likely, he was synthesizing the common law approach reflected in cases such as *Chune*, *Rex*, and *Baron*

any one to carry weapons in the high-way, *in terrorem populi Regis*; he ought to take him, and arrest him, notwithstanding he doth not break the peace *in his presence*.”); HENING, *supra* note 7, at 17.

¹⁷² (1607) 79 Eng. Rep. 173, 173–74 (KB) (“[Tenant] kept the possession [of his abode] with drum, guns, and halberts, &c. . . .”).

¹⁷³ (1778) 98 Eng. Rep. 1385, 1386 (KB) (“[He was] armed with a musquet and ball . . .”).

¹⁷⁴ Brief for George K. Young as Amici Curiae Supporting Petitioners at 9, *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1 (2022) (No. 20-843).

¹⁷⁵ *Id.* (“The relevant difference between the cases is whether the use of force was reasonable.”).

¹⁷⁶ 1 WILLIAM HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN* 90 (John Curwood ed., 1824).

¹⁷⁷ 4 BLACKSTONE, *supra* note 46, at *148 (emphasis added).

¹⁷⁸ Daniel R. Page, *Dangerous and Unusual Misdirection: A Look at the Common Law Tradition of Prohibiting Going Armed with Dangerous and Unusual Weapons to the Terror of the People as Cited in District of Columbia v. Heller* 6 (May 4, 2011) (unpublished manuscript), <https://perma.cc/686Z-2QSB>.

Snigge, which equated “unusual weapons” with weapons “used in a threatening or shocking manner,” or employed to “facilitate an unlawful endeavor.”¹⁷⁹ Blackstone’s parallel use of “unusual attendance” to describe threatening assemblies (rather than rare gatherings) supports this interpretation of “unusual weapons” as referring to manner of use rather than rarity.¹⁸⁰

The militia system of the 18th and 19th centuries likewise illustrates the lack of a historical basis for banning particular types of arms. The Militia Act of 1792 required able-bodied men to provide their own firearms suitable for military service, without imposing restrictions on weapon type.¹⁸¹ In fact, the Acts effectively established a *minimum* standard for armament.¹⁸² Firearms commonly possessed for militia service often featured superior range and firepower, reflecting the expectation that civilians could own military-grade weapons.¹⁸³ The modern distinction between “dangerous” and “undangerous” arms had no counterpart in the Founding era.¹⁸⁴

In sum, modern judicial interpretations have misapplied the “dangerous and unusual” standard to uphold firearm prohibitions that are inconsistent with historical precedent.¹⁸⁵ The historical record shows that firearms

¹⁷⁹ *Id.*

¹⁸⁰ 4 BLACKSTONE, *supra* note 46, at *257 (“A recognizance for the good behavior may be forfeited . . . by going armed with unusual attendance, to the terror of the people . . .”).

¹⁸¹ The Militia Act of 1792, ch. 33, § 1, 1 Stat. 271, 271 (1792).

¹⁸² *See id.* (“[W]ithin six months thereafter, [every qualifying citizens shall] provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch with a box therein to contain not less than twenty-four cartridges suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball; or with a good rifle, knapsack, shot-pouch and powder-horn, twenty balls suited to the bore of his rifle, and a quarter of a pound of powder.” (emphasis added)).

¹⁸³ *See id.*

¹⁸⁴ *See* Cramer, *supra* note 96, at 4 (arguing that at the time of the founding, there was no such thing as an *undangerous* weapon); *see also* HAWKINS, *supra* note 176, at 90 (“[I]t seems, that the discharging a Pistol, or throwing a Pot, or other dangerous Weapon . . . is within the equity of the word, ‘having a weapon drawn.’” (citation omitted)).

¹⁸⁵ *See, e.g.,* District of Columbia v. Heller, 554 U.S. 570, 627 (2008) (applying the “dangerous and unusual” standard to conclude that M-16s (machine guns) are not protected by the Second Amendment).

now deemed “dangerous and unusual” were widely owned and used for lawful purposes.¹⁸⁶ As such, the modern application of this standard distorts the original understanding of the Second Amendment and lacks any legitimate historical foundation.¹⁸⁷

5. THE NEED FOR EFFECTIVE SELF-DEFENSE IN MODERN SOCIETY

With this historical and textual foundation in mind, we can now evaluate modern firearm restrictions in light of both constitutional principle and historical precedent. The textual framework proposed here holds that the Second Amendment protects the right to *store and carry weapons* for the *purpose of lawful confrontation*. This rule draws no distinction between weapons and accessories. Nor does it distinguish between weapons of war and self-defense. Moreover, rather than relying on historical analogs (which are often attenuated and difficult to apply) or common use (which is atextual and

¹⁸⁶ For example, blunderbusses were a precursor to the sawed-off shotgun. Both the text and historical record suggest these firearms were lawfully owned by private citizens. See BARCLAY, *supra* note 45 (“[s]mall guns . . . such as *blunderbusses*, etc.”) (emphasis added); Kopel & Greenlee, *supra* note 29, at 516–17 (“The blunderbuss was notable for its flared muzzle, which made reloading easier while riding on a stagecoach or aboard a water vessel. It could be loaded with a single very large bullet, but the more common load was twenty large pellets, or even up to fifty. It was devastating at close range, but not much use beyond twenty yards. In the Revolution, it was most useful for ‘street control, sentry duty and as personal officer weapons.’” (quoting NEUMANN, *supra* note 157, at 20)). Yet in *Miller*, the Court held that sawed-off shotguns were not protected by the Second Amendment. See *United States v. Miller*, 307 U.S. 174, 178 (1939). Granted, the Court’s reasoning was based on an outdated understanding of the Second Amendment: viewing it as a collective, military right rather than an individual one. *Id.* But see *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008) (recognizing that the Second Amendment protects an individual right).

¹⁸⁷ “Dangerous and unusual” appears to function as a form of *hendiadys*—a rhetorical device in which two terms, joined by a conjunction, are intended to convey emphasis rather than specificity. Cramer, *supra* note 96, at 48; see GEORGE THADDEUS WRIGHT, *HEARING THE MEASURES: SHAKESPEAREAN AND OTHER INFLECTIONS* 4 (2001) (“The Latin grammarian Servius, writing about A.D. 400, coined the term to describe a common figurative device in Virgil’s *Aeneid*: the use of two substantives, joined by a conjunction . . . to express a single but complex idea.”). The Constitution’s Bill of Rights employs hendiadys in the phrase “cruel and unusual.” See Samuel L. Bray, “*Necessary AND Proper*” and “*Cruel AND Unusual*”: *Hendiadys in the Constitution*, 102 VA. L. REV. 687, 688 (2016).

historically unsupported), the proper limit on the right is rooted in its historical boundary: the dangerous and unusual *use* of weapons. Historically, this restriction applied only to individuals who used arms in a manner that terrorized the public (*in terrorem populi Regis*), not to classes of weapons.¹⁸⁸ Accordingly, the Supreme Court's Second Amendment jurisprudence should continue in line with *Rahimi*.¹⁸⁹

Under this historical framework, the answer is clear: citizens have a right to machine guns and other similarly advanced weapons. Automatic and semi-automatic weapons are *arms* that can be *stored* and *carried*. Further, the founding generation was aware of at least the potential for automatic weapons at the time the text was adopted.¹⁹⁰ The only disputable point is whether weapons of this kind meet the historical force-parity standard—the arms available to law-abiding citizens must be sufficient to defend against all threats, including those posed by lawbreakers or even the government.¹⁹¹

Modern gangs are armed for war and criminals possess advanced weaponry.¹⁹² In times like these, law-abiding citizens may reasonably require

¹⁸⁸ See *Chune v. Piott* (1615) 80 Eng. Rep. 1161, 1162 (KB); accord *HENING*, *supra* note 7, at 17.

¹⁸⁹ See *United States v. Rahimi*, 602 U.S. 680, 702 (2024) (holding that “[a]n individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed, consistent with the Second Amendment”).

¹⁹⁰ See 7 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 93, at 324.

¹⁹¹ See, e.g., 1 TUCKER, *supra* note 144, at 145 n.42 (recognizing the “right of self-preservation,” and explaining that Americans at the founding understood it to permit a citizen to “repe[l] force by force” when “the intervention of society in his behalf, may be too late to prevent an injury”).

¹⁹² See Associated Press, *Mexico Demands Investigation into U.S. Military-Grade Weapons Being Used by Drug Cartels*, PBS NEWS (Jan. 22, 2024, at 18:29 ET), <https://perma.cc/QX22-WES7>; *Aurora Residents Confirm Venezuelan Gang Violence*, CONGRESSWOMAN LAUREN BOEBERT (Sep. 7, 2024), <https://perma.cc/U82P-TKAJ>; *The U.S. Homeland Security Role in the Mexican War Against Drug Cartels: Hearing Before the Subcomm. on Oversight, Investigations, & Mgmt. of the Comm. on Homeland Security*, 112th Cong. 4 (2011) (statement of Michael McCaul, Chairman, Tex.) (“The [ICE] agents were forced off a highway in Central Mexico in their vehicle bearing diplomatic license plates. Both agents pleaded for their lives in Spanish identifying themselves as United States Federal agents. Members of the Los Zetas cartel responded by firing more than 80 rounds from automatic weapons, killing [both agents].”); Kim Bolan, *B.C. Gangs Getting More Access to Firearms—Including Deadly Automatics, Expert Says*, VANCOUVER SUN (Feb. 28, 2024), <https://perma.cc/5X8E-RU7X> (reporting

access to automatic and semi-automatic firearms to defend themselves. Without even reaching the question of resisting governmental oppression, the Second Amendment encapsulates this pre-existing right.

6. ADDRESSING THE LIMITS: WEAPONS BEYOND THE SCOPE OF THE SECOND AMENDMENT

Some critics argue that a broad reading of the Second Amendment would lead to absurd results—such as permitting private ownership of nuclear weapons or fighter jets.¹⁹³ But this objection misunderstands the historical and textual limits embedded in the amendment itself.

Even the broad historical interpretation of the Second Amendment presented here would exclude weapons of mass destruction. The Founders understood “arms” to mean weapons that could be borne by individuals, not indiscriminate tools of destruction beyond personal control or use. Gunpowder, for example, was considered an “arm” by the founders,¹⁹⁴ but there was a distinction between gunpowder used for weapons and gunpowder used as an explosive.¹⁹⁵ For instance, while grenades existed at the time,¹⁹⁶ large-scale explosions were rare and usually accidental.¹⁹⁷ Because of the danger associated with such events, many states imposed restrictions on gunpowder

on the increasing prevalence of homemade semi-automatic firearms used by gangs against law-abiding citizens).

¹⁹³ See Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291, 297 (2000).

¹⁹⁴ See 7 MADISON, *supra* note 53, at 83 (“Contraband of war shall consist of the following articles only: Salt petre, sulphur, cuirasses, pikes, swords, sword belts, knapsacks, saddles and bridles, cannons, mortars, fire arms, pistols, bombs, grenades, bullets, fire locks, flints, matches and gun powder . . .”).

¹⁹⁵ See, e.g., 2 THE STATUTES AT LARGE OF PENN. FROM 1682 TO 1801, at 68 (James T. Mitchell & Henry Flanders eds., 1896) (“That no person within the said town of Philadelphia . . . presume to keep in their houses, shops or warehouses more than six pounds of gunpowder . . .”).

¹⁹⁶ *Grenade*, NAT’L MUSEUM AM. HIST., <https://perma.cc/Z2WD-MBFG>.

¹⁹⁷ Two noteworthy examples during the Revolutionary War were the explosions of the HMS *Augusta* and Adonijah Peacock’s powder mill. Rachel Christian, *A Furious Cannonade, and a Great Explosion*, NAVAL HIST., Feb. 2022; John Hunt, *John Hunt Journal*, TRICOLLEGE LIBR. DIGIT. COLLECTIONS 53 (Jan. 20, 1777).

storage.¹⁹⁸ This early regulatory practice tracks with modern jurisprudence, which distinguishes between dangerous¹⁹⁹ and *extremely* dangerous weapons.²⁰⁰ Thus, nuclear armaments likely fall outside the definition of “arms” as understood at the founding.

Similarly, modern fighter jets and warships do not appear to be arms under a historical understanding. During the War of 1812, merchant ships were *equipped* for war.²⁰¹ And although the cannons that transformed these private vessels into the American fleet were obtained by the private citizens who captained them,²⁰² it was President Madison’s licensing of this makeshift fleet that made their use for war legal.²⁰³ This precedent suggests that while the Second Amendment extends to the private ownership of military-grade arms or even warcraft (whether naval or aerial), its use can still be regulated. The Constitution by no means compels the government to divulge military secrets to the citizenry regarding weapons manufacture. Neither is it required to legalize the use of such warcraft.

In short, the Second Amendment protects an individual’s right to keep and bear arms for confrontation within the bounds of lawful use, but this right can be restricted for those who demonstrate dangerous behavior. Further, the government retains regulatory authority over warcraft and extremely dangerous weapons, such as explosives.

¹⁹⁸ See 2 THE STATUTES AT LARGE OF PENN. FROM 1682 TO 1801, *supra* note 195, at 68.

¹⁹⁹ *McLaughlin v. United States*, 476 U.S. 16, 17–18 (1986) (holding that a firearm is inherently dangerous).

²⁰⁰ See *M. W. Worley Const. Co. v. Hungerford, Inc.*, 210 S.E.2d 161, 163–64 (Va. 1974) (“Blasting is, however, intrinsically dangerous and ultrahazardous activity since it is impossible to predict, with certainty, the extent or severity of a blast. This fact has led to almost universal application of the rule of absolute or strict liability where one lawfully engaged in blasting operations casts rocks or other debris upon adjoining or neighboring premises and causes direct damage to property or causes direct injury to persons.”).

²⁰¹ See, e.g., *Madison & Monroe Signed Letter Of Marque*, *supra* note 92; see also Maclay, *supra* note 92.

²⁰² Fredrick C. Leiner, *Yes, Privateers Matter*, 28 NAVAL HIST., Mar. 2014.

²⁰³ *Id.*

7. CONCLUSION

The modern Court is right: the Second Amendment is no relic encased in amber.²⁰⁴ Should we properly conclude, then, that everyone should own a machine gun? Perhaps not.²⁰⁵ But the Second Amendment's protection must extend to the arms of our era, even to those that some may find unsettling. The constitutional guarantee to keep and bear arms does not rest on public comfort. If restrictions beyond the history and text are needed, the proper path lies with the People, through the process of constitutional amendment—not judicial fiat.

Yet shots have already been fired. Starting with the First Circuit's ban on high-capacity magazines²⁰⁶ and followed most recently by the Ninth Circuit's artificial distinction between arms and accessories.²⁰⁷ Even the Supreme Court has erroneously determined that machine guns are not encapsulated by the text.²⁰⁸

Second Amendment jurisprudence is presently characterized by uncertainty. The course must be corrected before it ossifies into *stare decisis*. By departing from history, the judiciary has set the stage for a decision with far-reaching consequences. The Court's next ruling will either uphold or defy natural law. Either way, it will give life to Emerson's words and be nothing less than a "*shot heard round the world*."²⁰⁹

²⁰⁴ United States v. Rahimi, 602 U.S. 680, 691 (2024) (stating that the Court's precedents do not "suggest a law trapped in amber").

²⁰⁵ See *id.* at 702 (holding that "[a]n individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment"); see also Reply Brief for Petitioners at 9, *Malpasso v. Pallozzi*, 590 U.S. 991 (2020) (No. 19-423) ("A man has a clear right to protect himself when he is . . . travelling or going for the ordinary purposes of business" but not to carry arms in a way that would "produce terror and alarm." (quoting *Rex v. Dewhurst*, 1 State Trials, N.S. 529, 601–02 (1820))).

²⁰⁶ *Ocean State Tactical, LLC v. Rhode Island*, 95 F.4th 38, 47–49 (1st Cir. 2024).

²⁰⁷ *Duncan v. Bonta*, 133 F.4th 852, 867 (9th Cir. 2025).

²⁰⁸ See *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008) (acknowledging that the right to bear arms is not unlimited and suggesting that bans on military-style weapons, such as M–16s, may be permissible).

²⁰⁹ 9 RALPH WALDO EMERSON, *THE WORKS OF RALPH WALDO EMERSON* 139 (James Elliot Cabot ed., Cambridge, Mass., Houghton, Mifflin & Co. 1883) (1867) (emphasis added).