United States v. Emerson and the Second Amendment

BY WADE MAXWELL RHYNE*

"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]

I. INTRODUCTION

On March 30, 1999, a federal judge for the United States District Court for the Northern District of Texas did something no federal court had done in more than 60 years.[2] District Judge Sam Cummings held that the Second Amendment guarantees an individual's right to own a gun.[3] The case dealt with a federal statute which prohibited possession of a firearm by anyone under a restraining order. The issue was whether the Second Amendment protects only the states' rights to arm their own military forces, or whether it actually protects an individual's right to bear arms.[4] This debate over the meaning of the Second Amendment has been a source of argument among constitutional law scholars for more than twenty years. Now this question is about to spill out of the ivory tower and flow directly into the real world of guns and gun control.[5] "American history has often seen social and political problems transformed into constitutional issues. The gun control issue is no exception to this phenomenon, and particular attention has been focused on the Second Amendment to

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1. U.S. CONST. amend. II.

2. Eugene Volokh, *Guns and the Constitution*, WALL ST. J., Apr. 12, 1999, at A23.

3. *See id.*

4. *See id.*

5. *See* Richard Willing, *Texas Case Could Shape the Future of Gun Control*, USA TODAY, Aug. 27, 1999, at 1A.

the United States Constitution. . . ."[6] There has been very little case law construing the individual right question with respect to the Second Amendment. As a result, *United States v. Emerson*[7] could very well be the catalyst that forces a final answer to the question of whether or not there is an individual right to own a firearm.

If the Fifth Circuit upholds *Emerson*, the result will be in conflict with prior appellate decisions.[8] The likely result would be review by the United States Supreme Court and determination of whether or not there is such an individual right. If the individual right position continues to prevail, as it has in Texas, the right of an individual to own a gun and the interests of the government to control that right will officially clash for the first time. The key word is the word, "right." Should there actually be an individual "right" to own a gun? The bounds of that right will have to be drawn. Once a right is involved, presumably the whole picture changes with respect to government action affecting that right. "Any law impacting on that right might have to pass a much stricter test."[9]

This Note analyzes the district court decision in *United States v Emerson* by explaining how the court reached its decision. With respect to the states' rights versus the individual rights schools of thought, this Note delves into these two competing theories and explains which is superior. In doing so, the soundness of these competing schools of thought is examined historically, textually, doctrinally, prudentially, and structurally.[10] Assuming that there is in fact an individual right to bear arms provided in the Constitution, this Note then proposes a level of scrutiny and subsequent test for the government's curtailment of that individual right. My goal is to define the outer boundaries of the permissible limits that the government may put on the individual right to own a gun. Lastly, this Note critiques the *Emerson* court's rationale in light of the new proposed test.

II. BACKGROUND OF *UNITED STATES v. EMERSON*

The facts leading up to *Emerson* began in August of 1998 when a

6. Roy G. Weatherup, *Standing Armies And Armed Citizens: An Historical Analysis of the Second Amendment*, HASTINGS CONST. L.Q. 961, 962 (1975)(citation omitted).

7. *See* United States v. Emerson, 46 F Supp. 598 (N.D. Tex. 1999).

8. *See* Willing, *supra* note 5, at 1A.

9. *Id.*

10. *SEE* PHILIP BOBBITT, CONSTITUTIONAL FATE THEORY OF THE CONSTITUTION 7-8 (1982).

26-year old nurse, Sacha Emerson, filed for divorce from her husband, 41-year old, Dr. Timothy Emerson.[11] In addition to filing for divorce, Sacha Emerson also filed an application for a temporary restraining order.[12] The application for the temporary restraining order sought to enjoin Dr. Emerson from engaging in various financial transactions in order to maintain the financial status quo.[13] The application also sought to enjoin Dr. Emerson from making any threatening communications upon his wife during the pendency of the divorce proceedings.[14] The application itself was a form order that is frequently used in Texas divorce procedures.[15] The petition stated no factual basis for relief other than the necessary recitals required under the Texas Family Code regarding domicile, service of process, dates of marriage and separation, and the "insupportability" of the marriage.[16]

The 119th District Court of Tom Green County, Texas, held a hearing on the merits of Sacha Emerson's application for the restraining order on September 4, 1998.[17] Dr. Emerson appeared at the hearing *pro se*,[18] while Sacha Emerson was represented by her attorney.[19] During the course of the proceeding, Sacha Emerson testified regarding her financial situation with respect to her requirements in the way of child support and spousal support.[20] Sacha Emerson also expressed her desires regarding temporary conservatorship of their minor child.[21] In the course of the hearing, Sacha Emerson alleged that Dr. Emerson threatened over the telephone to kill the man with whom she had been having an adulterous affair.[22] The Honorable John E. Sutton granted the boilerplate temporary restraining order despite the fact that there was no evidence adduced regarding any acts of violence or threats of

11. *See* Willing, *supra* note 5, at 1A.
12. *See Emerson*, 46 F. Supp.2d at 599.
13. *See id.*
14. *See id.*
15. *See id.*
16. *See id.*
17. *See id.*
18. *See id.*
19. *See id.*
20. *See id.*
21. *See id.*
22. *See id.*

violence by Dr. Emerson against any member of his family.[23] Moreover, the court made no findings of any sort of violence or threats of violence by Dr. Emerson, and further failed to admonish Dr. Emerson that he would be subject to federal criminal prosecution for doing nothing more than possessing a firearm while being subject to the temporary restraining order.[24]

The statute under which Dr. Emerson was indicted for violating is an obscure federal law which bars gun possession by anyone who is under such a restraining order.[25] The actual violation occurred when Dr. Emerson failed to dispose of his firearms and was subsequently prosecuted under the federal law "for gun possession, rather than gun misuse."[26] As a result, Dr. Emerson was indicted for possession of a firearm while being under a restraining order, in violation of 18 U.S.C. § 922(g)(8), which states that:

> (g) It shall be unlawful for any person—
>
> (8) who is subject to a court order that—
>
> (A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;
>
> (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
>
> (C) (i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
>
> (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury. . . .[27]

Dr. Emerson moved to dismiss the indictment by challenging 18 U.S.C. § 922(g)(8) as an unconstitutional exercise of congressional power under the Commerce Clause and the Second, Fifth, and Tenth Amendments to the United States Constitution.[28]

United States District Judge Sam Cummings held that 18 U.S.C. § 922(g)(8) violated both the Second Amendment and Dr. Emerson's

23. *See id.*

24. *See id.*

25. *See* Volokh, *supra* note 2, at A23.

26. *Id.*

27. 18 U.S.C. § 922(g)(8) (1992).

28. *See Emerson*, 46 F. Supp.2d at 599, 614.

Fifth Amendment due process rights to be subject to prosecution without proof of knowledge that he was violating the statute.[29]

The decision has taken many, on both sides of the firearm debate, by surprise. President Reagan appointed Judge Cummings to the federal bench and he has since had a reputation as being a "middle-of-the-road" jurist, who rarely sets aside indictments.[30] Many people recognized the importance of the case. The National Association of Criminal Defense Lawyers and the National Rifle Association filed briefs in support of Dr. Emerson's argument that there is an individual right to own a gun, while a collection of forty-five law professors and legal historians filed briefs in support of the states' rights side of the argument.[31]

III. COMPETING SCHOOLS OF THOUGHT: STATES' RIGHTS v. INDIVIDUAL RIGHT

In relying on the Second Amendment, the only way for Dr. Timothy Emerson to prevail on appeal is if the Second Amendment is construed to actually guarantee him a personal right to own a firearm. For the Fifth Circuit, this is an issue of first impression.[32] The district court opinion refers to the competing positions as the "[t]wo main schools of thought."[33] This portion of the Note will discuss these polar schools of thought and determine which is more constitutionally sound.

There are various ways in which to critique a constitutional argument. Phillip Bobbit offers a typology of the types of constitutional arguments which are found in judicial opinions, hearings, and briefs.[34] Phillip Bobbit advocates that arguments are conventions and that the most important thing is that the Supreme Court hears arguments, reads arguments, and ultimately writes arguments, all with specific conventions.[35] "It is not relevant for the time being whether constitutional arguments decide cases or *are* the decision itself, by which I mean that they form the structure of meaning the case ultimately achieves as precedent."[36] Bobbitt offers

29. *See id.* at 612.
30. *See* Willing, *supra* note 5, at 1A.
31. *See id.*
32. *See Emerson*, 46 F. Supp.2d at 600.
33. *Id.*
34. *See* Bobbitt, *supra* note 10, at 6.
35. *See id.* at 6-7.
36. *Id.* at 6.

five types of constitutional argument, which he refers to as archetypes, because many arguments take on aspects of more than one type.[37]

The first form of argument is the historical argument. The historical argument approaches a constitutional issue by marshalling the intent of draftsmen of the Constitution and the individuals who subsequently adopted it.[38] Historical argument focuses largely on the thoughts, beliefs, and motivations of specific time periods in order to discern intent. These arguments begin with assertions regarding "the controversies, the attitudes, and decisions of the period during which the particular constitutional provision to be construed was proposed and ratified."[39]

The second argument is the textual argument, which is extracted from examining the current sense of the words of the debated provision. "At times textual argument is confused with historical argument, which requires the consideration of evidence extrinsic to the text."[40] Textual argument appears to have potential to be misleading if taken by itself because the present sense of words can often have differing meanings over the course of time. As such, it would seem logical to always consider other forms of argument in connection with textual analysis. Those who strictly subscribe to the textual argument, however, read the contemporary meaning of the text without regard to any peripheral sources.

The third argument is the structural argument. "Structural arguments are claims that a particular principle or practical result is implicit in the structures of government and the relationships that are created by the Constitution among citizens and governments."[41]

The fourth form of constitutional argument, according to Bobbitt, is the prudential argument. This form of argument "is self-conscious to the reviewing institution and need not treat the merits of the particular controversy (which itself may or may not be constitutional), instead advancing particular doctrines according to the practical wisdom of using the courts in a particular way."[42]

The last type of constitutional argument covered is the doctrinal argument. The doctrinal argument professes principles originating

37. *See id.* at 7.

38. *See id.*

39. *Id.*

40. *Id.* (citation omitted).

41. *Id.*

42. *Id.*

from precedent or from judicial or academic commentary on that precedent.[43] For example:

> [o]ne will not find in the text of the Constitution the phrases 'two-tier review' or 'original package' or any of the other necessary and ephemeral modes of analysis by which the Constitution is adapted to the common law case method, yet these doctrines are every bit as potent as those phrases originally printed in Philadelphia.[44]

Bobbitt stresses that his typology of constitutional arguments is not inclusive, nor a list of wholly independent forms, nor the only plausible division of constitutional arguments.[45] Disputes may arise in the weight that should be given to each respective argument. Depending on which school of thought a person subscribes, that person will likely prefer certain arguments over others. Nonetheless, these forms of arguments provide a road map and a logical structure to analyze and compare both the individual right and states' right theories.

A. HISTORICAL ARGUMENT

Analyzing the Second Amendment by way of a historical argument requires an accurate determination of the original understanding of the Second Amendment. To be complete, this analysis should cover the historical context under which the Second Amendment was written.

"Historically, the right to keep and bear arms has been closely intertwined with questions of political sovereignty, the right of revolution, civil and military power, military organization, crime and personal security."[46] This Second Amendment was written with a purpose, not by accident; "it was the product of centuries of Anglo-American legal and political experience."[47] In order to fully explore the historical argument, it is necessary to address the origin of the Second Amendment in English history and trace its development through the revolutionary era in America and the subsequent ratification of the amendment in the Constitution.

43. *See id.*

44. *Id.*

45. *See id.* at 8.

46. Weatherup, *supra* note 6, at 964.

47. *Id.*

1. English History

Examining English history provides some explanation of the Founding Fathers' intent in writing the Second Amendment. As early as 690 AD, Englishmen were required to possess arms and to serve in the military.[48] This trend continued for centuries, requiring the noble, and later, even the commoners, to keep and bear arms and participate in the militia.[49] The origin of the need to keep and bear arms was not only to provide military service but also to provide police service locally and to protect their villages in self defense.[50]

By the middle of the seventeenth century, any individual right to keep and bear arms in England was eroding. Foreign wars had made the development of a standing army inevitable and it reached 16,000 men by the end of the reign of Charles II.[51] As a result, guns were seized from the hands of the common people. Specifically, a 1670 statute stated that no person other than the heirs of nobility, could have a gun unless he owned land which had a value of 100 pounds per year.[52]

In 1685, the Catholic Duke of York ascended to the throne of James II.[53] Shortly thereafter, the new king was able to crush a rebellion, and in the process succeeded in almost doubling the standing army to 30,000 men. Moreover, this huge army was quartered in private homes. James II was similar to Charles II in that they both urged abandonment of the militia in favor of standing armies. Gun rights were not the only rights which were being eroded by the tyranny. Protestants and Catholics were forbidden from holding high positions politically or militarily. English parliament was not supportive of these ideas and as a result the King's policies were achieved "through extraparliamentary means."[54] The courts armed the King with the ability to dispense with statutes as he saw fit and subsequently his desire to abandon the militia was attainable.

"Eventually James II fled England during what was later termed

48. *See* David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL'Y 559, 562 (1986).

49. *See id.* at 563-65.

50. *See* CLAYTON E. CRAMER, FOR THE DEFENSE OF THEMSELVES AND THE STATE: THE ORIGINAL INTENT AND JUDICIAL INTERPRETATION OF THE RIGHT TO KEEP AND BEAR ARMS 24-25 (1994).

51. *See* Weatherup, *supra* note 6, at 970.

52. *See id.* (citing Game Preservation Act, 22 Car.2, c. 25, § 3 (1670)).

53. *See id.* at 971.

54. *Id.* at 972.

the Glorious Revolution."[55] Soon thereafter, English parliament passed the English Bill of Rights that codified the individual right to bear arms. Specifically it read:

> "5. That the raising or keeping a Standing Army within the Kingdom in Time of Peace unless it be with the Consent of Parliament is against Law.
>
> 6. That the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions, and as allowed by Law."[56]

The purpose and meaning of this right to have arms is clear given the historical context in which it was written. "A paramount aim of the Glorious Revolution of 1688 was to abolish the standing army of James II and to reinstate the right of Protestants to keep and carry arms."[57] England had been at odds with James II and his position with respect to individual gun rights. James II did not support an individual right and a principle complaint of the new Bill of Rights was the "refusal to allow Protestants the right to carry arms for self-defense."[58] Therefore, after England had ridden itself of James II and his ideals regarding gun rights, parliament drafted the English Bill or Rights so as to guarantee the individual right.

Some argue that the new English Declaration of Rights merely confirmed prior rights that had existed. Under this view it is can be said that an individual right to bear arms existed all along, and Charles II and James II were blatantly violating it throughout their rule. The result is the same. Either the individual right existed prior to, or, was created by the English Bill of Rights. Nonetheless, the individual right existed in England and was adopted in America as well.

2. American Revolutionary History

"Like other Bill of Rights freedoms, the personal right to keep and bear arms gained constitutional recognition, in great part, from the abuses of power that led to the American Revolution."[59] Initially, England's success in enticing Englishmen to America was largely due to the guarantee that they and their children would possess "all the

55. *Emerson*, 46 F. Supp.2d at 602-03 (citing Hardy, *supra* note 48, at 579).

56. Weatherup, *supra* note 6, at 973 (citing Bill of Rights, 1 W. & M., sess. 2, c. 2 (1689)).

57. STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED 43 (1984).

58. *Id.* at 46 (citing W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 241 (7th ed. 1956)).

59. *Id.* at 58.

rights of natural subjects, as if born and abiding in England."[60] This naturally included the individual right to bear arms, which not only provided self-defense capabilities, but also provided England with a reserve military force.[61] However, following the French and Indian War, England raised taxes and began to occupy the colonies with a large standing army.[62] By 1775 the military occupation of Boston had completely cut off its citizens from anyone outside. British General Gage refused to allow citizens to leave unless they turned in their firearms.[63] Just as in England under James II, individuals were being stripped of the individual right to possess firearms.

"As the size and the repressive character of the standing army increased, many Americans began to arm and to organize themselves into independent militias."[64] George Washington and George Mason created the Fairfax County Militia Association in 1774. Likewise, in New England, Samuel Adams "urged 'our Friends to provide themselves without Delay with Arms [and] Ammunition, get well instructed in the military Art, embody themselves [and] prepare a complete Set of Rules that they may be ready in Case they are called to defend themselves against the violent Attacks of Despotism.'"[65] It was about this time when George III asked General Gage why the rebels had not been disarmed. In reply, Gage wrote: "'Your Lordship's ideas of disarming certain provinces . . . neither is nor has been practicable without having recourse to force, and being master of the country.'"[66] This difficulty could be attributed to the fact that the provinces "swarmed with thousand of what were called 'minute men' 'i.e., to be ready at a minute's warning with a fortnight's provision, and ammunition and arms.'"[67] This period was fraught with English "attempts to disarm the rebellious Americans through arbitrary searches and seizures and a ban on exports of arms and

60. *Emerson*, 46 F. Supp.2d at 602 (citing JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 138 (1994)).

61. *See id.*

62. *See* Halbrook, *supra* note 55, at 59.

63. *See id.*

64. *Id.* at 60.

65. *Id.*

66. *Id.* (citing J. GALVIN, THE MINUTE MEN 102 (1967)). "Indeed, that summer Gage had written Dartmouth: 'In Worcester they keep no terms; openly threatening resistance by arms; have been purchasing arms; preparing them; casting balls; and providing powder . . . .'" *Id.* at 55.

67. *See* Halbrook, supra note 55, at 60.

ammunition from England to the colonies."[68]

Ultimately, the British attempt to seize and destroy colonial arms and ammunition at Lexington is what precipitated the revolutionary shot heard around the world.[69] It was the individual who possessed a gun that made it possible for the American Revolution to succeed. "A mass of farmers, mountaineers, and other commoners provided the arms and backbone to defeat the British: 'every man capable of bearing arms must use them in aid or in opposition to the country of his birth.'"[70] Indeed, "[i]n theory and practice, the American Revolution had both as an objective and as an indispensable means the *individual right* to keep, bear, and use arms to check governmental oppression."[71]

The existence of an individual right is also evident from an historical perspective due to the fact that the colonies passed declarations of rights during the Revolution that explicitly recognized the individual right to have arms.[72] More specifically, Thomas Jefferson advocated that the Virginia Constitution contain the provision, "'No freeman shall be debarred the use of arms,'" and in the Declaration of Independence "he vindicated the imperative of an armed uprising of the people, in times of oppression, against the standing army and the established government."[73] Moreover, the North Carolina and the Vermont Declaration of Rights contained the clauses respectively, "that the people have a right to bear arms for the defense of the State," and "that the people have a right to bear arms for the defence of themselves and the State."[74]

The historical context under which these documents were drafted, was shortly after the British attempt at disarmament. This timing strongly indicates that the colonies held the individual's right to possess a gun as an important right that deserved protection.

a. Ratification of the Constitution

"Before the proposal of the Constitution, the newly independent colonies had existed in a state of nature with each other, and with the defeat of the British, no one feared that the natural and common-law

68. *Id.* at 62.
69. *See id.*
70. *Id.* at 63.
71. *Id.* at 64.
72. *See id.*
73. *Id.* at 64.
74. *Id.*

right to have arms was any long in danger."[75] Nonetheless, after the Constitution was offered for ratification in 1787, the controversies and debates that arose in state conventions revealed "two basic positions: the Federalist view that the Bill of Rights was unnecessary because the proposed government had no positive grant of power to deprive individuals of rights, and the anti-Federalist contention that a formal declaration would enhance protection of those rights."[76] More specifically, on the subject of arms, the anti-Federalists feared that militia of the people would be overpowered by a superior standing army, unless there was "specific recognition of the individual right to keep and bear arms."[77] As for the Federalists, they promised that the people would never be disarmed. Moreover, the Federalists advocated that the people be armed adequately enough so as to check any oppressive standing army.[78] Thus, both the Federalists and Anti-Federalists respected the individual right theory.

i. "Anti-Federalist Fears: The People Disarmed, A Select Militia"[79] (Standing Army)

The concern of the Anti-Federalists was that with no protection of a bill of rights the creation of a standing army would inevitably result in the disarmament of first, the militia and next, the populace.[80] The clear solution was to have a bill of rights which guaranteed the individual right to bear arms.

Richard Henry Lee was the most influential writer advocating ratification of the Constitution only if it contained a Bill of Rights.[81] Lee was the author of *Letters from the Federal Farmer.*[82] Most of Lee's proposals for the specific provisions of the bill of rights were

75. *Id.* at 65.

76. *Id.* at 65-66.

77. *Id.* "Relevant state constitutional provisions at this time were as follows: 'That the people have a right to bear arms for the defence of themselves and the state....' Pennsylvania Declaration of Rights, XIII (1776); Vermont Declaration of Rights, XV (1777), XVIII (1786). 'That the people have the right to bear arms for the defense of the State...' North Carolina Declaration of Rights, XVIII (1776)... The following provision was adopted during the same period in which the Bill of Rights to the U.S. Constitution was being ratified: 'That the right of the citizens to bear arms in defense of themselves and the State shall not be questioned.' Pennsylvania Declaration of Rights, XXI (1790); Kentucky Declaration of Rights, XII (1792)." *Id.* at 218 n. 80.

78. *See id.*

79. *Id.* at 69.

80. *See id.*

81. *See id.* at 70.

82. *See id.*

adopted in the Bill of Rights, some were even identically worded.[83] As a result, these writings offer an excellent commentary on the historical meaning of the provisions in the Bill of Rights that were so vehemently fought for by the Anti-Federalists.[84] "In predicting the early employment of a standing army through taxation, Lee contended:

> 'It is true, the yeomanry of the country possess the lands, the weight of property, possess arms, and are too strong a body of men to be openly offended—and, therefore, it is urged, they will take care of themselves, that men who shall govern will not dare pay any disrespect to their opinions. It is easily perceived, that if they have not their proper negative upon passing laws in congress, or on the passage of laws relative to taxes and armies, they may in twenty or thirty years be by means imperceptible to them, totally deprived of that boasted weight and strength: This may be done in a great measure by congress; if desposed to do it, by modeling the militia. Should one fifth or one eighth part of the men capable of bearing arms, be made a select militia, as has been proposed, and those the young and ardent part of the community, possessed of but little or no property, and all the others put upon a plan that will render them of no importance, the former will answer all the purposes of an army, while the latter will be defenceless.... I see no provision made for calling out the *posse comitatus* for executing the laws of the union, but provision is made for congress to call forth the militia for the execution of them—and the militia in general, or any select part of it, may be called out under military officers, instead of the sheriff to enforce an execution of federal laws, in the first instance, and thereby introduce an entire military execution of the laws.'[85]

The Anti-Federalist position was further illustrated in the subsequent series of *Letters* written by Lee. In those Letters, Lee made a list of fundamental rights which included: "the rights of free press, petition, religion; the rights to speedy trial, trial by jury, confrontation of accusers and against self-incrimination; the right not to be subject to 'unreasonable searches or seizures of his person, papers or effects'; and, in addition to the right to refuse quartering of soldiers, 'the militia ought always to be armed and disciplined, and the usual defense of the country....'"[86] This list should look familiar

83. *See id.*

84. *See id.*

85. *Id.* at 70-71. (citing R. LEE, LETTERS OF A FEDERAL FARMER 305-6 (1787-88)).

86. *Id.* at 71 (citing R. LEE, ADDITIONAL LETTERS FROM A FEDERAL FARMER 53 (1788)).

to anyone who has read the Bill of Rights.

The Anti-Federalist fear was that Congress, through the "'power to provide for organizing, arming, and disciplining the militia'" under Article I § 8 of the proposed Constitution, would result in the creation of a select militia to be used as a tool for federal supremacy.[87] The contemporary argument that is set forth by states' rights theorists is that "it is impractical to view the militia as the whole body of the people, and that the militia consists of the select corps now known as the National Guard," which also existed in Lee's time.[88] In response to states' rights theorists who claim the right to bear arms exists only in the context of a state militia, Lee "refuted it in these terms:

> 'But, say gentlemen, the general militia are for the most part employed at home in their private concerns, cannot well be called out, or be depended upon; that we must have a select militia; that is, as I understand it, particular corps or bodies of young men, and of men who have but little to do at home, particularly armed and disciplined in some measure, at the public expense, and always ready to take the field. These corps, not much unlike regular troops, will ever produce an inattention to the general militia; and the consequence has ever been, and always must be, that the substantial men, having families and property, will generally be without arms, without knowing the use of them, and defenseless; whereas, *to 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*; nor does it follow from this, that all promiscuously must go into actual service on every occasion. The mind that aims at a select militia, must be influenced by a truly anti-republican principle; and when we see many men disposed to practice upon it, whenever they can prevail, no wonder true republicans are for carefully guarding against it.'[89]

The subsequent debate and resulting compromise demonstrate that a "bill of rights would guarantee broad rights without being overly detailed . . . [and that] the demand for a bill of rights was as strong as the demand for independence had been a decade before."[90] The one consistency throughout the ratification debate was the "general understanding of the right to keep and bear arms as an individual right."[91]

87. *Id.*

88. *Id.*

89. *Id.* (citing R. LEE, *supra* note 88, at 170 (emphasis added)).

90. *Id.* at 72.

91. *Id.*

ii. "Federalist Promise: To Trust the People with Arms"[92]

In The Federalist, No. 28, Alexander Hamilton wrote, "If the representatives of the people betray their constituents, there is then no recourse left but in the exertion of that original right of self-defense which is paramount to all positive forms of government. . . ."[93] The Federalist position was that the Constitution conferred no federal power to deprive the people of their rights. The government could not seize the arms of the people. Their reasoning was simple. There was no explicit grant of such power and therefore the state declarations of right would prevail.[94] As a result, it was the existence of an armed populace, each with an individual right to be so armed, that would be superior in its forces to the standing army, and not a paper bill of rights that would check despotism.[95] Since the Constitution did not allow it, the government could not do it. People who possessed arms had nothing to fear with respect to their individual right to bear arms.

Today it would be a stretch of the imagination to say that any militia of the people would stand a chance against the armed forces of the United States. Despite the slim probability of such an occurrence, the historical context surrounding the ratification debates of the Second Amendment remains unchanged and should not be ignored because it indicates the intended and original rationale behind the Amendment. No less deference should be given to the underlying rationale of the Federalist position just because it is old or because today's standing armies have greater relative strength with respect to an armed populace. Approaching the analysis from an historical standpoint, it is clear that the Federalists, like the Anti-Federalists, supported the individual right theory.

Another interesting historical approach of the Second Amendment which deserves mention, is the approach advocated by Carl T. Bogus. Bogus goes beyond the ratification debates. Bogus' view is that the bulk of the individual right historical approach is grounded upon "a particular wing commonly called 'insurrectionist theory.'"[96] Professor Bogus claims that the historical insurrectionist

92. *Id.* at 67.

93. *Id.* at 67 (citing Madison, Hamilton, and Jay, THE FEDERALIST PAPERS 180 (Arlington House ed. n.d.)).

94. *See id.* at 68.

95. *See id.*

96. Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309, 318 (1998).

theory is "premised on the idea that the ultimate purpose of an armed citizenry is to be prepared to fight the government itself."[97] According to Professor Bogus, the amendment was not "enacted to provide a check on government tyranny; rather, it was written to assure the Southern states that Congress would not undermine the slave system by using its newly acquired constitutional authority over the militia to disarm the state militia to disarm the state militia and thereby destroy the South's principal interest of slave control."[98] Thus, the amendment was a supplement to the slavery compromise made at the Constitutional Convention in Philadelphia.[99]

Regardless of what Bogus advocates, the fact remains that the ratification debates suggest that there is an individual right inherent in the Second Amendment. The Federalists and the Anti-Federalists had different ideas about what the Constitution should contain and what it should mean, however one unifying theme between the two sides was that there existed an individual right to bear arms. "The nature of the controversy over ratification of the Constitution and the various proposals for and debate over the Bill of Rights also buttress the individual right view, for the one thing all the Framers agreed on was the desirability of allowing citizens to arm themselves."[100] An historical argument supports the decision that the district court reached in *United States v. Emerson.*

B. TEXTUAL ARGUMENT

Textual arguments are in contrast to, but often confused with, historical arguments.[101] Historical arguments extract their legitimacy from the social contract negotiated from an original position.[102] Conversely, textual arguments are often mistaken for "similar contractual arguments with the parol evidence rule strictly applied."[103] There is no consideration given to the circumstances surrounding the written text being examined. Textual arguments can be thought of as resting on a sort of perpetual social contract, whose terms receive their "contemporary meanings continually reaffirmed by the refusal

97. *Id.* at 318-19.

98. *Id.* at 321.

99. *See id.*

100. Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L.R. 204, 220-221 (1983).

101. *See* Bobbitt, supra note 10, at 25.

102. *See id.* at 26.

103. *Id.*

of the People to amend the instrument."[104] A true master of the textual argument, according to Bobbit, was Justice Hugo Black.[105] The textual argument is powerful for those who wish to provide a valve through which contemporary values can be intermingled with the Constitution.[106] Conversely, textual arguments can be inappropriate modes for accommodating positions in areas where concepts may have changed faster than their terms have been accepted.[107] Moreover, textual arguments do not accommodate "the mid-course corrections that are the indispensable navigational devices of common law development; language simply does not change that quickly."[108] The underlying theme of the textual argument is that one should never accept an interpretation that is incompatible with the words of the text.[109]

With respect to the Second Amendment and textual argument, states' rights and individual rights theorists attempt to hang their hats on different words within the amendment. Certain words contained within the amendment will no doubt carry different weight, depending on the school of thought to which you subscribe. "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."[110]

In looking at the words of the Second Amendment it is easy to see why reasonable minds could differ on its meaning from a textual approach. This note will not limit the textual debate to solely the contemporary meaning of the words, but instead expand the argument on how and where these words are placed within the amendment, therefore excepting the parole evidence nature of the strict textual approach. In going beyond the contemporary meaning of the words, it is important to look at how the amendment is structured.[111] "The Second Amendment is widely seen as quite unusual, because it has a justification clause as well as an operative clause."[112] According to Eugene Volokh, a unique aspect of the

104. *Id.*

105. *See id.*

106. *See id.* at 36.

107. *See id.*

108. *Id.* at 37.

109. *See id.* at 38.

110. U.S. CONST. amend. II.

111. Not to be confused with structural arguments. *See* Bobbitt, supra note 10, at 7.

112. Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998).

Second Amendment is that it contains both a statement of purpose as well as a guaranteed right to bear arms.[113]

States' rights theorists often suggest that the justification clause of the Second Amendment sets forth a built-in expiration date for the right to bear arms. The argument would sound something like,

> So long as a well-regulated militia is necessary to the security of a free state (or so long as the right to keep and bear arms contributes to a well-regulated militia, or so long as the militia is in fact well-regulated), . . .the people have a right to keep and bear arms; but once circumstances change and the necessity disappears, so does the right.[114]

Problematic with this contention is the actual reading of the text of the amendment. The Second Amendment does not read, "so long as a militia is necessary"; it reads, "being necessary."[115] There is no "only when" clause in the text. If the right was to be so conditioned, as states' rights theorists suggest, the text would be clearer on that limitation. It would not have been difficult to make the text of the amendment conditional if that was what was intended. Since the text has no such clear condition it stands to reason that the existence of any condition on the right to bear arms is not as obvious as most states' rights theorists advocate.

It is also important to recognize the fact that "the people" are two words which are contained within the amendment. From a strict textual analysis, "the people," means "the people." "The operative clause [of the amendment] says that the right to keep and bear arms belongs to "the people."[116] At the risk of offending the parole evidence rule that is usually applied to the textual argument, it is impossible not to look at similar texts and their structure. "Given that the 'the right of the people' is likewise used to describe the right to petition the government, the right to be free from unreasonable

113. *See id.*

114. *Id.* at 797 (citing David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 Yale L.J. 551 (1991)). "Professor Williams argues that the well-regulated militia protects the security of a free State only so long as pretty much everyone has arms, and so long as the arms-bearers are 'virtuous,' *id.* at 554; because this is not longer the case, he argues that the right is essentially 'meaningless' and 'outdated,' *id.* at 554-55." *Id.* at 821. "*See also* Christopher L. Eisgruber, *The Living Hand of the Past: History and Constitutional Justice*, 65 FORDHAM L. REV. 1611 n.23 (1997) (suggesting that Second Amendment's justification clause may mean that Amendment protects only those gun rights that support state security, which today may mean no gun rights at all)." *Id.*

115. Volokh, *supra* note 112, at 797.

116. *Id.* at 800.

searches and seizures, and the rights to keep and bear arms recognized in various contemporaneous state constitutions—all individual rights that belong to each person, not just to members of the militia—'the people' [ ] refer[s] to the people generally."[117] Why should "the people" in the Second Amendment refer to anything different than "the people" in the other amendments within the Bill of Rights? It should not, and any argument otherwise is highly speculative and bears a heavy burden of demonstrating how and why "the people" means something different exclusively within the Second Amendment.

It is clear whose rights are to be secured by the Amendment's text. The Second Amendment clearly reads, "the right of the people," just as the First, Fourth, and Ninth Amendments use this phrase to refer to an individual right.[118] Again, excepting the parole evidence rule, the early Kentucky, Massachusetts, North Carolina, Pennsylvania, and Vermont Bill of Rights, read of "the right of the people to bear arms."[119] "Since these provisions secure rights against the state governments, they must recognize a right belonging to someone other than the state or entities whose membership is defined by the state—this likewise suggests that 'the right of the people to bear arms' refers to the right of individuals."[120] The justification clause cannot "transform this rather unambiguous term into 'the right of the States' or the 'right of the militia.'"[121] The right to bear arms was more than just an opportunity to bear arms under state controlled militias. After all, "under the Militia Clauses, the federal government could at any time take direct command of the militia away from the states."[122] Thus, "[i]f the right was only a right to possess arms under the supervision of one's militia superiors—who might well be under federal command—then the right would impose little constraint on the federal government."[123]

The burden that the state's right theorist must bear in demonstrating that no individual right was intended in the text of the Second Amendment consists of showing not just that there was a desire to protect the states, but that there was no desire to protect

117. *Id.*
118. *See id.*
119. *See id.*
120. *Id.*
121. *Id.*
122. *Id.* at 811.
123. *Id.*

individuals — "despite the most natural reading of the amendment's phraseology."[124] A states' rights theorist will often attempt to cling to the word "militia," as previously mentioned. From a textual argument, the states' rights theorist will ignore the previous analysis set forth by Volokh on how to read the amendment and instead stress a strict textual approach based solely on the word "militia." This means that "militia" will take on the contemporary meaning of the word which is the federalized National Guard.[125] As a result, they claim, there is no need for any individual to even have a gun. This illustrates the flaw in the strict textual argument when read alone.

The meanings of words change over time. The 18th century definition of militia was the whole body of able-bodied citizens declared by law as being subject to call to military service.[126] "Invariably [the Founders] defined it in some phrases like 'the whole body of the people,'[127] while their references to the organized-military-unit usage of militia, which they called a 'select militia,' were strongly pejorative."[128] The end result was that the Framers guaranteed the arms of the militia by guaranteeing the arms of the individuals who made up the militia.[129]

Not all the constitutional scholars share Volokh's textual views on the Second Amendment. Saul Cornell argues that the individual rights approach "suffers from the problem that mars so much law office history: a failure to adequately contextualize constitutional texts."[130] He contends that "[t]o understand what a particular historical actor meant when he wrote about the right to bear arms requires scholars to immerse themselves in the surviving evidence from this period and to analyze published and unpublished sources, private comments as well as public statements."[131] Moreover, he claims the individual right argument from a textual perspective has "treated the recurring use of particular constitutional terms as

124. *See* Kates, *supra* note 100, at 213.

125. *See id.*

126. *See id.*

127. *Id. See*, e.g., VA. CONST. art. I, §13 (1776); DEBATES IN THE CONVENTION OF THE COMMONWEALTH OF VIRGINIA, *reprinted in* 3 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS 425 (3d ed. 1937).

128. *See* Kates, *supra* note 100, at 216.

129. *See id.* at 217.

130. Saul Cornell, *Commonplace Or Anachronism: The Standard Model, The Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 CONST. COM. 221, 225 (1999).

131. *Id.*

examples of commonplaces."[132] According to Cornell, the approach ignores "the profound difference between our modern notion of the commonplace and the way in which the eighteenth century understood t[he] term[s]."[133]

It is hard to disagree with the notion that some of the terms used in drafting and debating the Constitution have changed over time. However, Cornell uses the meaning of the word "republicanism"[134] as an example of a word that had no clear definition to those who used it historically. With this in mind, he advocates to extend the uncertainty that is inherent in words like "republicanism" to other words used found in the Constitution. He writes that "[a] systematic survey of the full range of American ideas about rights in the Revolutionary era examining the broad range of relevant sources would be a monumental undertaking."[135]

It is difficult to subscribe to Cornell's approach because it seems to advocate an approach which ignores many valuable sources. It is based on the assumption that certain sources are just too risky to use, unless of course you can use them in arguing for a collective right. Moreover, the words used by an individual rights theorist are words like "the people" and "the militia." While being open to debate, these words do not possess the same degree of vagueness as does the word "republicanism." Moreover, the search for truth should not exclude delving into history just because it may be a difficult endeavor.

Regardless of what the original meaning of these words were, it is safe to say that the meaning of the word "militia" has changed more over the course of the last two or more centuries than words such as "people." From a strict textual approach, the opposing sides can point to either "the people" or "the militia." In doing so, they can pound their fists and say that one word is more essential to the amendment than the other. But when expanding the textual argument and excepting the parole evidence concept, it becomes clear that the text of the amendment points to an individual right more than it does a states' right.

The *Emerson* decision shares this approach. The decision seizes on the opportunity to point out that if the Second Amendment really means what states' rights advocates propose, "then the text would

132. *Id.*

133. *Id.* at 225-26.

134. *See id.*

135. *Id.* at 227.

read '[a] well regulated Militia, being necessary to the security of a free State, the right of the States to keep and bear Arms, shall not be infringed.'"[136] Moreover, the district court explained that the plain language of the amendment, "without attenuate inferences therefrom, shows that the function of the subordinate clause was not to qualify the right, but instead to show why it must be protected. The right exists independent of the militia. If this right were not protected, the existence of the militia, and consequently the security of the state, would be jeopardized."[137] The Emerson decision also utilizes the Supreme Court's interpretation of the phrase, "the people." It has been held that this phrase means the same thing in the Second Amendment as it does in "both the Preamble to the Constitution and in the First, Fourth, Fifth, and Ninth Amendments."[138] The Supreme Court held that the phrase "the people" seems to have been a term of art employed in select parts of the Constitution.[139] Moreover, the Emerson decision points to the fact that the Supreme Court has also held that "the amendments of the Bill of Rights should be read *in pari materia*, and amendments which contain similar language should be construed similarly."[140] Thus, "a textual analysis of the Second Amendment clearly declares a substantive right to bear arms recognized in the people of the United States."[141]

C. DOCTRINAL ARGUMENT

"Doctrinal argument does not depend so much on how the drafters actually intended a specific passage to be applied as on the application of the doctrines which serve or can be assumed to serve general purposes sought by the drafters."[142] The doctrinal ideology requires that court "decisions be based on premises of general applicability, otherwise they would be 'ad hoc' or 'legislative.'"[143] In other words, the doctrinal argument asks, "[w]hat is the rationale underlying this rule, issue, or amendment?" The doctrinal argument has its largest challenge "when the old purposes for the development

136. *Emerson*, 46 F. Supp. 2d at 601.

137. *Id.*

138. *Id.* (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)).

139. *See id.*

140. *Emerson*, 46 F. Supp. 2d at 601 (citing *Patton v. United States*, 281 U.S. 276, 298 (1930)).

141. *Id.*

142. Bobbitt, supra note 10, at 57.

143. *Id.*

of the doctrine have been obscured or mooted, or have simply withered away, or when there is no consensus as to the discernible purpose."[144] Since, "[i]t is reasoning from purpose that gives doctrinalism its power; it can't provide purpose," alone.[145] The doctrinal argument seems to have a flaw in that it will inevitably bring the two opposing sides back to the same place in which they started—arguing about the purpose behind the doctrine. After all, "the debate over constitutional purposes is generally the issue in Constitutional law."[146]

If there is any place where a doctrinal argument will fail, it is Second Amendment debate. Individual rights theorists will say that the purposes behind the doctrine of allowing people to bear arms goes beyond the existence of a well-regulated militia. States' rights theorists will say that the purpose underlying the doctrine was to secure a free state by preserving the existence of the militia. According to the states' rights argument, the people do not need to bear arms since a well regulated militia exists. How will these two opposing sides decipher a purpose behind the doctrine? Most likely, they will resort to historical and textual analyses as a means of proving the rationale underlying their position. Hence, standing alone, the doctrinal argument is not as useful with respect to the Second Amendment as it may be in other areas of debate.

Nevertheless, the purpose of personal security, that is defense of self, should not go without mention when discussing the rationale of the doctrines underlying the Second Amendment. It is undisputed that the Second Amendment, at the very least, guarantees a militia the right to bear arms. The rationale for this was clearly protection and personal security from a tyrannical federal government. Personal security and protection are non-partisan rationales underlying the right to bear arms. With this in mind, would it make sense that the Framers would ensure protection against a tyrannical government but nevertheless leave the average American unprotected from criminal attack at a local level? Should the source of the tyranny matter, whether it be a local criminal or a criminal federal government? The rationale is the same. The guarantee was "an individual right to possess firearms for personal security, so that people could use firearms against both lone criminals and criminal governments."[147]

144. *Id.* at 55.

145. *Id.*

146. *Id.*

147. David B. Kopel, *It Isn't About Duck Hunting: The British Origins of the Right to*

From a personal security rationale, the individual rights theorists have a superior position. The idea that personal security includes security from criminal governments and criminal individuals is evidenced by the fact that the U.S. Senate rejected a proposal to limit the right to bear arms by adding the phrase, "for the common defense" at the end of the Second Amendment.[148] Moreover, John Adams, who drafted the Massachusetts declaration, defended the right to carry arms in self defense and "in his study of American state constitutions, wrote that 'arms in the hands of citizens [may] be used at individual discretion . . . in private self-defence. . . .'"[149] This indicates that security, to the Framers, meant more than just security from tyrannical government but that it also meant security in the form of self-defense.

As a result, the doctrinal argument appears to be best utilized in concert with another form of argument, and should be used as a form of support while employing one of the other forms of argument. It is impossible to discern a purpose of a doctrine without looking back into the history of that doctrine. In the context of the Second Amendment, the underlying rationale is clearly security. The debate will then be left as to how narrowly we should interpret the word "security." It seems obvious, from an historical perspective, that the doctrine behind the Second Amendment does more than protect and ensure security from government. As such, the doctrinal argument also supports an individual right under the Second Amendment.

D. PRUDENTIAL ARGUMENT

Prudential argument is the constitutional argument that is actuated by the political and economic circumstances surrounding the decision.[150] "Thus prudentialists generally hold that in times of national emergency even the plainest of constitutional limitations can be ignored."[151] Justice Hugo Black sketched a caricature of this approach in effort to show how ridiculous he thought the prudential approach was.[152] He wrote a hypothetical opinion of "Judge X" with "pompous and convoluted tones," in which the Court justifies the

Arms, 93 MICH. L. REV. 1333, 1361 (1995).

148. *See* HALBROOK, supra note 55, at 65 (citing 3 J. ADAMS, A DEFENSE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 475 (1787-88)).

149. *See id.*

150. *See* Bobbitt, supra note 10, at 61.

151. *Id.*

152. *See id.* at 59.

taking of a family farm by the Defense Department without compensation "since the takings clause of the Fifth Amendment must be *balanced* against the provision for the war power in Article I."[153] Justice Black's ridicule of this type of argument is especially interesting due to the fact he satiriz[es] the prudentialist's favorite passage from Marshall, and Judge X is, if anyone doesn't know, Justice Frankfurter."[154] The *Emerson* court opinion shares Justice Black's impatience with the prudential argument.

"Some scholars have argued that even if the original intent of the Second Amendment was to provide an individual right to bear arms, modern-day prudential concerns about social cost outweigh such original intent and should govern current review of the amendment."[155] The district court, just like Justice Black, sees a glaring problem with this type of reasoning. After all, "[i]f one does accept the plausibility of any of the arguments on behalf of a strong reading of the Second Amendment, but, nevertheless, rejects them in the name of social prudence and the present-day consequences produced by finicky adherence to earlier understandings, why do we not apply such consequentialist criteria to each and every part of the Bill of Rights."[156] The *Emerson* district court decision shares this concern by quoting Justice Scalia's argument:

> that even if there would be 'few tears shed if and when the Second Amendment is held to guarantee nothing more than the state National Guard, this would simply show that the Founders were right when they feared that some future generation might wish to abandon liberties that they considered essential, and so sought to protect those liberties in a Bill of Rights. We may tolerate the abridgment of property rights and the elimination of a right to bear arms; but we should not pretend that these are not reductions of rights.'[157]

Conversely, Sanford Levinson addresses the prudential argument and agrees that "it appears almost crazy to protect as a constitutional right something that so clearly results in extraordinary social costs with little, if any, compensating social advantage."[158] He added that it

153. *Id.*

154. *Id.* at 60.

155. *Emerson*, 46 F. Supp. 2d at 609.

156. *Id.* (citing Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 661, 658 (1989) (citing D. Kates, Minimalist Interpretation of the Second Amendment 2 (draft Sept. 29, 1986) (unpublished manuscript available from author))).

157. *Emerson*, 46 F. Supp. 2d at 610.

158. Sanford Levinson, *supra* note 156, at 655.

would be "almost impossible to imagine that the judiciary would strike down a determination by Congress that the possession of assault weapons should be denied to private citizens."[159] Moreover, it has become easy to say that we live in a different era and that there is no justifiable reason to "continue enforcing an outmoded, and indeed dangerous, understanding of private rights against public order."[160] The argument can be made that the rise of professional police forces who enforce the law has made "irrelevant, and perhaps counter-productive, the continuation of a strong notion of self-help as the remedy for crime."[161] This type of argument is the best approach available to those who advocate a states' rights approach.

This note concludes, as did the district court in *Emerson*, that the prudentialist argument is quite disturbing. The premises upon which states' rights prudentialists base their arguments are flawed. First, I strongly agree that it is "foolhardy to assume that the armed state will necessarily be benevolent."[162] Is history not any indication that the states have not always been a pillar of integrity and righteousness? I share the sentiment that "[t]he American political tradition is, for good or ill, based in large measure on a healthy mistrust of the state."[163] Ideally, I would like to believe that the state, either local or federal, is of no threat to my own values or liberty, however it is a stretch of the imagination to see how "one can argue that circumstances have so changed as to make mass disarmament constitutionally unproblematic."[164]

In furtherance of this point, Levinson points to the Chinese student demonstrations in Tiananmen Square as proof that an unarmed citizenry is more prone to abuse than an armed one.[165] It is absurd to make the argument that had those students been armed, the massacre would have been avoided. Nonetheless, it is also absurd to say that individuals who bear even small arms are irrelevant to the state.[166]

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159. *Id.*

160. *Id.* at 656.

161. *Id.* Levison writes that the point is presumably demonstrated by the increasing public opposition of police officials to private possession of handguns (not to mention assault rifles).

162. *Id.*

163. *Id.*

164. *Id.*

165. *See id.* at 656-57.

166. *See id.* at 657.

> Witness contemporary Northern Ireland and the territories occupied by Israel, where the sophisticated weaponry of Great Britain and Israel have proved almost totally beside the point. The fact that these may not be pleasant examples does not affect the principal point, that a state facing a totally disarmed population is in far better position, for good or ill, to suppress popular demonstrations and uprisings than one that must calculate the possibilities of its soldiers and officials being injured or killed.[167]

This note acknowledges the personal experiences of many who have discovered that so called "professional police forces" are not always so professional. "Circumstances may well have changed in regard to individual defense, although we ignore at our political peril the good-faith belief of many Americans that they cannot rely on the police for protection."[168] In fact some Americans will say with vigor that they often need protection from the police. Like Levinson, I am not of the opinion that the state is always going to be tyrannical; "I am not an anarchist."[169] But I am also not someone who is oblivious to history or so trustful of the politicians who supposedly represent my interests so as to begin giving up the rights that are provided in the Bill of Rights.

Prudentially speaking, the district court in *Emerson* decided that the fact that Dr. Emerson was under a temporary restraining order was not enough to justify the stripping of his individual right to possess a firearm. The decision states that "[t]he rights of the Second Amendment must be outweighed by the considering the lengths to which federal courts have gone to uphold other rights in the Constitution."[170] The balance of Dr. Emerson's constitutional right outweighed any interest that Texas had with respect to the temporary restraining order. The decision cites Ronald Dworkin who advocates that,

> what it means to take rights seriously is that one will honor them even when there is significant social cost in doing so. If

167. *Id.* "The decision to use military force is not determined solely by whether the contemplated benefits can be successfully obtained through the use of available forces, but rather is determined by the *ratio* of those benefits to the expected costs. It follows that any factor increasing the anticipated cost of a military operation makes the conduct of that operation incrementally more unlikely. This explains why a relatively poorly armed nation with a small population recently prevailed in war against the United States, and it explains why governments bent on the oppression of their people almost always disarm the civilian population before undertaking more drastically oppressive measures." *Id.*

168. *Id.* at 656.

169. *Id.*

170. *Emerson*, 46 F. Supp. 2d at 610.

> protecting freedom of speech, the rights of criminal defendants, or any other part of the Bill of Rights were always (or even most of the time) clearly costless to the society as a whole, it would truly be impossible to understand why they would be as controversial as they are. The fact that there are often significant costs—criminals going free, oppressed groups having to hear viciously racist speech and so on—helps account for the observed fact that those who view themselves as defenders of the Bill of Rights are generally antagonistic to prudential arguments.[171]

E. STRUCTURAL ARGUMENT

"Structural arguments are largely factless and depend on deceptively simple logical moves from the entire Constitutional text rather than from one of its parts."[172] Bobbitt stresses that we should not neglect the importance of this form of argument. "Indeed it is a measure of how habitual our recourse to the text has been that the most important structural case in Constitutional law, *McCulloch v. Maryland*,[173] is commonly thought to base its holding on two textual passages on which the opinion does not in the main rely—the Necessary and Proper Clause and the Supremacy Clause."[174] Likewise, the debate over the right to bear arms can also take a structural format. The district court in *Emerson* makes slight mention of the structural approach, nonetheless it still remains a very plausible and commonsensical approach to the interpretation of the Second Amendment.

The *Emerson* decision states, that "[t]he structure of the Second Amendment within the Bill of Rights proves that the right to bear arms is an individual right, rather than a collective one."[175] The fact remains that the Bill of Rights is a list of rights that belong to the individual, not to the states. "The very inclusion of the right to keep and bear arms in the Bill of Rights shows that the framers of the Constitution considered it an individual right. 'After all, the Bill of Rights is not a bill of states' rights, but the bill of rights retained by the people.'"[176] The Bill of Rights is a list of individual rights with the

171. Levinson, *supra* note 156, at 658.

172. *See* Bobbitt, supra note 10, at 74.

173. 17 U.S. 316 (1868).

174. Bobbitt, supra note 10, at 75.

175. *Emerson*, 46 F. Supp. 2d at 607.

176. *Id.* (quoting David Harmer, *Securing a Free State: Why the Second Amendment Matters*, 1998 BYU L. REV. 55, 60 (1998)).

exception of the Tenth Amendment which "concerns itself with the rights of the states, and refers to such rights in addition to, and not instead of, individual rights."[177] Structurally, the states' rights advocates have a tough burden to bear. Why would the Framers put a right that, according to the states rights theorists, belongs to the states directly in the middle a list of individual rights?

IV. LIMITATIONS BY THE STATE ON THE RIGHT TO BEAR ARMS

A number of philosophies are available when discussing the possible origin and rationale for the right to bear arms. The possibilities include, but are not limited to: defense of self, defense of others, collective defense, defense of the state, sport, and/or maybe even the enablement of the citizenry to overthrow a tyrannical government. Regardless of the reasoning behind the Second Amendment, it should not be viewed differently than any other right within the Bill of Rights. The Second Amendment, like any other right should be subject to certain limitations. Just because a right is enumerated within the Bill of Rights, does not make the right absolute in a sense that the individual is isolated from government interference with respect to that right. That raises the question of what showing must the State make in order to limit, or in some cases deprive, the individual's right to bear arms.

Initially, it is important to define who possesses the right to bear arms. The *Emerson* decision does this when it states, "[w]hile this textual exegesis is by no means conclusive, it suggests that 'the people' protected by the Fourth Amendment, and by the First and Second Amendments, . . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[178] With respect to the Second Amendment, the individuals who possess this individual right to possess a firearm should be defined as the law-abiding members of the community. Law-abiding members of society in this context are those individuals who have not demonstrated any reason to have that right restricted or limited.

Judicial limitations on rights that are enumerated in the Bill of

177. David Harmer, *supra* note 176, at 60.

178. *Emerson*, 46 F. Supp. 2d at 601 (citing United States ex rel. Turner v. Williams, 194 U.S. 279, 292 (1904)).

Rights are by no means unheard of. The First Amendment is a good illustration of the different forms of analysis that are available when testing the government's ability to limit an individual's right. "Some categories of speech are unprotected; others receive minimal protection, and still others are jealously protected."[179] After categorizing the speech or conduct and the right involved, there are different showings the government must make in limiting it. With respect to the First Amendment, there is an abundance of case law available to provide a road map for the analysis. No such road map is available for Second Amendment analysis.

One of the more well known Supreme Court decisions dealing in Second Amendment jurisprudence was *United States v. Miller*.[180] In that decision the Court unanimously upheld a federal statute that made it a crime to transport a sawed-off shotgun in interstate commerce. In authoring the opinion, Justice McReynolds emphasized that there was no evidence showing that a sawed off shotgun "at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia."[181] Furthermore, he noted that "[c]ertainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense."[182] Surprisingly, Miller would have had "a tenable argument had he been able to show that he was keeping or bearing a weapon that clearly had a potential military use."[183] As a result, a literal reading of *Miller* can be read to support a citizen's right to keep and bear bazookas, rocket launchers, and machine guns because they are "ordinary military equipment... that... could contribute to the common defense."[184] Obviously, this logic is not the best argument for either side in the collective versus individual right debate.

The result is that *Miller* does not answer the "crucial question of whether the Second Amendment embodies an individual right or collective right to bear arms"[185] nor does it provide a clear test for reviewing government infringement of that right. The *Miller* decision chose to address "a very narrow way to rule on the issue of gun

179. CALVIN R. MASSEY, CONSTITUTIONAL LAW ROAD MAP 468-69 (1997).

180. 307 U.S. 174 (1939).

181. *Id.* at 178.

182. *Id.*

183. *Emerson*, 46 F. Supp. 2d at 608.

184. *Id.* (citing *Miller*, 307 U.S. at 174).

185. *Emerson*, 46 F. Supp. 2d at 608.

possession under the Second Amendment, and left for another day further questions of Second Amendment construction."[186]

Equal Protection analysis might provide some guidance as to what may be a permissible level of review for statutory limitations imposed on the right to bear arms. The three tiers of scrutiny are available to evaluate under equal protection are minimal scrutiny, strict scrutiny, and intermediate scrutiny.[187] Under minimal scrutiny, "a challenger must prove that the classification is *not rationally related to any conceivable legitimate state interest.* Any legitimate state interest, however hypothetical, will suffice."[188] Minimal scrutiny "*applies to all classifications* except those that are constitutionally suspicious."[189] Strict scrutiny analysis should be applied whenever a law "employs a suspect classification or substantially infringes upon a fundamental right."[190] Under this standard of review, the law is presumed invalid and the government must demonstrate that the law "is *necessary to accomplish a compelling governmental interest.*" Moreover, the government must show that it has chosen the least restrictive way to accomplish the objective.[191] Lastly, under intermediate scrutiny, the government must demonstrate that that the law is "*substantially related to an important government interest.*"[192] It is important under this standard of review that the government's actual purpose in creating the classification matters, which is not the case under minimal scrutiny.[193]

In developing a permissible level of review for statutory limitations imposed on the right to bear arms, the Supreme Court will be free to develop a new standard or possibly use one of the standards mentioned above. Given the unique nature of the Second Amendment and the current concern with respect to gun ownership and violence, I would propose adopting a new standard that is specifically tailored to the Second Amendment. This new standard should balance the individual's right against the State's interests.

Initially, it is important to determine the scope and nature of this supposed individual right. In the preceding discussion of possible

186. *Id.* at 608-09.

187. *See* MASSEY, *supra* note 179, at 297.

188. *Id.*

189. *Id.*

190. *Id.*

191. *See id.*

192. *Id.*

193. *See id.*

purposes behind the Second Amendment, there is one theme which is consistent. The notion of defense is commonplace in Second Amendment discussion. In my view, the amendment is, and should continue to be broad enough to protect the right of defense, whether it be of self, of others, or of one's country. It is a lawful justification. There is nothing illegal or peculiar in ensuring that a citizen has a reasonable means of defense. As such, the scope of the right to bear arms should be broad enough to meet the needs of defending one's self, family, or the collective defense of country, but at the same time narrow enough not to compromise the government's interest. Naturally, it would be too broad to say that every citizen has the right to possess any kind of firearm and can carry it wherever he wants. Conversely, it would be too narrow to the define the scope of the right as one only existing when the individual is practicing maneuvers in a state run militia. The middle ground is what needs to be determined.

I propose that the law-abiding individual has a constitutional right to own a firearm only for lawful uses and purposes and that this right may only be limited by a compelling government interest. Furthermore, only when the state materially frustrates that lawful use, should the limitation at issue lose its presumption of validity. Then, the government should bear the heavy burden of justifying the limitation of a lawful use by demonstrating a compelling government interest. The individual has an interest in possessing a firearm for lawful purposes and uses. The State has an interest in protecting its citizens from violent crime and gun abuse. Specifically, the State has a compelling interest in preventing citizens who are non-law abiding from possessing firearms.

There is a presumption of constitutionality inherent in the laws passed by Congress.[194] However, this presumption should be abandoned, and the burden should be shifted when there is a "material frustration on a lawful use and purpose" of a firearm by a law-abiding citizen. What is a lawful purpose? What is a material frustration? What is a law-abiding citizen? What is a compelling governmental interest in this context? Though these concepts may develop over time, the following definitions are useful places to begin.

A. Lawful Use and Purpose

The meaning of "lawful use and purpose" cannot be left to the

194. *See id.*

legislatures because the result could be evisceration of the individual right. The legislature could define "lawful use and purpose" as being only for use in world wars that have been declared by Congress. As a result, the individual right would clearly be compromised. "Lawful use and purpose" should be defined with respect to the historically legal uses of firearms. Examples of "lawful use and purpose" would be the aforementioned defense of self, others, and the collective defense of country. It would also include, but not be limited to, other lawful uses such as hunting and target shooting. The individual should be able to use a firearm, so long as the use and purpose is lawful and he is not interfering with a compelling government interest. Once an individual has used a firearm in an unlawful manner, the individual's right is subject to limitation by the State.

B. Materially Frustrate

The State should not be able to "materially frustrate" a "lawful use and purpose" of gun ownership unless there is a "compelling government interest." Under this formulation, the individual must demonstrate more than a *de minimis* infringement of the right, but less than substantial infringement or evisceration of the right. Hence, "material frustration." In addition, the government must bear a heavy burden in limiting the lawful uses or purposes of gun ownership. Most importantly, the individual must abide the law before the right will even exist.

In applying this standard, for example, outlawing bazookas would not be a material frustration on the lawful use of a firearm to legally hunt a deer during deer season. Moreover, the government has no compelling interest in preventing someone from hunting a deer. A hunter would still be able to legally achieve his end without jeopardizing any state interest. Likewise, the government is not materially frustrating the hunter's ability to achieve his end. In achieving their end, hunters need only attain licenses, pass background checks for firearms, buy deer tags, and have a legal place to hunt. This is hardly a material frustration. However, from a commonsense/historical approach, it would be a material frustration of the Second Amendment to require a deer hunter to throw rocks or shoot arrows, rather than use a rifle.

What about assault rifles? From a commonsensical/historical approach to deer hunting, would a ban on assault rifles "materially frustrate" the "legal use" of a firearm to kill a deer? Under, my proposed approach, a ban of assault rifles, like bazookas, would not materially frustrate deer hunters from legally achieving their end.

What about waiting periods? A ten-year waiting period for a deer rifle would obviously materially frustrate a law-abiding citizen from lawfully using a firearm. A ten-year waiting period on a handgun would likewise materially frustrate the lawful use of target shooting or home defense. However, the existing 14-day waiting period for a background check, could hardly be said to materially frustrate a lawful use of a firearm. Especially when the citizen has notice of the existence of such a waiting period. Requiring a citizen to plan ahead, if a firearm is needed by deer season, is certainly not a material frustration.

Another example of this standard being applied could be with respect to "smart guns." Smart gun technology is the term used for a specific type of firearm. Smart guns possess an internal chip which allow the gun to be fired only by a person possessing a corresponding chip that is worn in a removable wristband. Should Congress pass a law requiring handguns to possess this technology, we would have to ask whether this materially frustrates the legal use of the handgun by the law-abiding citizen. The gun may cost more and require the owner to keep track of his chip, but it would not materially frustrate any plausible legal use of the gun.

C. Non Law-Abiding Citizen

What is a non law-abiding citizen? A non law-abiding citizen, in the context of this analysis, is an individual who has demonstrated that they are a threat to the public order. Examples would be individuals who have been convicted of violent felonies or any gun related crime. However, conviction of a crime should not be the only reason to curtail gun rights of an individual. When there has been a sufficient factual finding that an individual is a threat to public order by way of gun violence, the right should be able to be limited. I envision this process being similar to a detention hearing where the State attempts to demonstrate that the defendant is a threat to public safety in order to convince the court to raise or deny bail. Once established as a non-law-abiding citizen and a threat to the public order, the individual will lose their individual right to possess a firearm.

A ramification of this proposed approach, is a case by case determination of the individual, the use, and the limitation at issue. As, a result, judicial economy will not be promoted initially. However, the rights found in the Bill of Rights should not be cast aside for judicial economy. Besides, should the Supreme Court adopt a test similar to my proposal, guidelines for application of this analysis

will be developed over time. For example, certain "uses and purposes" will be determined to be unlawful from a commonsensical/historical approach. Certain crimes will establish a person as non-law abiding for purposes of the analysis. Certain government interests will be determined to be compelling. As a result, there will be a line of per se uses, crimes, and interests that will allow judges to dispense with in depth judicial examination. Thus judicial economy will not suffer to the degree one might initially contemplate.

V. CRITIQUE OF THE EMERSON DECISION AND APPLICATION OF THE NEW STANDARD

There is an individual right to bear arms, but that right is not absolute and the government may limit or take away that right upon a determination that the individual no longer deserves to possess it. Under the standard which I have advocated, Dr. Emerson might be the very the type of individual who should be disarmed. The only problem is that we do not know what kind of person he is. Since there was no determination that Dr. Emerson was not law-abiding, the administration of the statute was clearly unconstitutional. The restraining order, along with the limitation on his individual right to bear arms, was forced upon him without any evidence of a dangerous propensity for violence. The petition for the order stated no factual basis for relief other than the necessary recitals required under the Texas Family Code regarding domicile, service of process, dates of marriage and separation, and the "insupportability" of the marriage. Moreover, the state divorce court made no findings of any sort of violence or threats of violence by Dr. Emerson.[195] The divorce court also failed to admonish Dr. Emerson that he would be subject to federal criminal prosecution for doing nothing more than possessing a firearm while being subject to the temporary restraining order.[196]

I would see no argument against limiting Dr. Emerson's gun rights if the state court would have found certain facts demonstrating his propensity to engage in gun related violence. For instance, if he had specifically said that he was going to shoot his wife or her lover, he would no doubt suffice as the type of person who should be disarmed under my proposed standard. I support the District Court opinion with respect to its determination that an individual right

195. *Emerson*, 46 F. Supp. 2d at 600.

196. *See id.* at 610.

exists, however I'm not convinced either way that Dr. Emerson should be armed or disarmed.

The application of 18 U.S.C. §922(g)(8) still needs to be evaluated under the proposed standard. The District Court's decision closely resembles the type of analysis that a court would need to employ in applying the new proposal. The court wrote that the statute "is unconstitutional because it allows a state court divorce proceeding, without particularized findings of the threat of future violence, to automatically deprive a citizen of his Second Amendment rights." The District Court shares my concern over the requirement that the individual be determined to be non-law-abiding. Since the statute "allows, but does not require, that the restraining order include a finding that the person under the order represents a credible threat to the physical safety of the intimate partner or child" it is capable of materially frustrating a law-abiding individual from lawfully using a firearm.

The protection of an intimate partner or child from the likely threat of gun violence would no doubt suffice as a compelling government interest. However, that threat needs to be established to the requisite degree of certainty before the State can abridge the individual right.

> If the statute only criminalized gun possession based upon court orders with particularized findings of the likelihood of violence, then the statute would not be so offensive, because there would be a reasonable nexus between gun possession and the threat of violence. However, the statute is infirm because it allows one to be subject to federal felony prosecution if the order merely 'prohibits the use of physical force against [an] intimate partner.[197]

The fact remains that all that is required for prosecution under the statute is "a boilerplate order with no particularized findings. Thus, the statute has no real safeguards against an arbitrary abridgement of Second Amendment rights.[198]

The District Court opinion also reflects the proposed standard's position that an individual may forfeit their Second Amendment rights. The *Emerson* court compares the statute at issue with other statutes. "By contrast, § 922(g)(8) is different from the felon-in-possession statute, 18 U.S.C. § 922(g)(1), because once an individual is convicted of a felony, he has by his criminal conduct taken himself outside the class of law-abiding citizens who enjoy full exercise of

197. *Id.* at 610-11 (citing 18 U.S.C. § 922(g)(8)(c)(ii) (1992)).

198. *See id.* at 611.

their civil rights."[199] Moreover, under the felon-in-possession statute, the felon is admonished in the state and federal courts that such a conviction results in the loss of the right to bear arms, along with other civil rights.[200] The clear problem with the statute in *Emerson* is that an individual can "lose his Second Amendment rights not because he has committed some wrong in the past, or because a judge finds he may commit some crime in the future, but merely because he is in a divorce proceeding."[201] The individual may not resemble a criminal at all, but nonetheless, the statute at issue will strip that individual of his civil right to bear arms, as if they were a criminal.

"There must be a limit to government regulation on lawful firearm possession. The statute in *Emerson* exceeds that limit, and therefore it is unconstitutional."[202] What the new limit will be is unknown at this time. Perhaps *Emerson*, or a case like it will find its way to the Supreme Court and we will finally be told whether an individual right to bear arms exists. Furthermore, we may also be provided with a standard or showing that the government must make before it may curtail the right to bear arms. There is evidence that the Supreme Court may be willing to address the issue. Bogus writes that the "campaign to have the Supreme Court reconsider the Second Amendment may be winning converts within the Court . . . ."[203] Moreover, in Justice Thomas' concurring opinion in *Printz v. United States*,[204] he took notice of the "'growing body of scholarly commentary' supporting the view that the Second Amendment grants an individual right."[205] Justice Thomas hinted that he agrees with the individual rights position and suggested that "[p]erhaps, at some future date, this Court will have the opportunity to determine" the meaning of the Amendment.[206] Only time, along with the political makeup of the Supreme Court, will determine what the Second Amendment means.

199. *Id.*
200. *See id.*
201. *Id.*
202. *Id.*
203. Bogus, *supra* note 96, at 320-21.
204. 521 U.S. 898 (1997).
205. *See* Bogus, *supra* note 96, at 321.
206. *Id.*