Righteous Fury: A Natural Rights Approach to the Individual Right to Bear Arms under the Ninth and Fourteenth Amendments

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Righteous Fury: A Natural Rights Approach to the Individual Right to Bear Arms under the Ninth and Fourteenth Amendments

submitted to
Professor George Thomas

by
Nikhil Agarwal

For
Senior Thesis
Spring 2024
April 22, 2024
Abstract

The individual right to bear arms for self-defence has been grounded by the modern Supreme Court in the Second Amendment and incorporated against the States by the Due Process Clause of the Fourteenth Amendment. However, a close examination of both the majority and dissenting opinions in each of the three landmark gun-rights cases decided by the Supreme Court this century—DC v. Heller, McDonald v. Chicago, and New York State Rifle & Pistol Association v. Bruen—reveal how difficult is to determine the original meaning of the Second Amendment, and expose weaknesses in the Court’s current substantive due process jurisprudence. Subsequently, the right in question stands on precarious legal grounds. This thesis seeks to re-orient our understanding of the individual right to bear arms for self-defence by treating it as an unalienable natural right retained by the people upon entering civil society, protected by the Ninth Amendment, and incorporated against the states by way of the Fourteenth Amendment’s Privileges or Immunities Clause. In doing so, this thesis will shed light on the natural rights philosophy cherished by the Founding Fathers, explain why the Constitution must be read in light of that philosophy, provide a standard by which natural rights may be enforced by courts, and examine permissible gun legislation under that standard. Considerations of natural rights have been eschewed by the modern Court, but this thesis will hopefully serve as a blueprint for a constitutional jurisprudence rooted in natural rights and spark an important dialogue about the significance of natural rights in our constitutional republic.
Acknowledgements

A huge thank you to Professor George Thomas, who has helped me become a more open-minded and well-rounded thinker during my time at CMC, and has always made himself available to discuss the most fascinating and intellectually stimulating debates in American constitutional law.

I also want to thank my colleagues in Constitutional Law: Civil Liberties, who have never been afraid to challenge my views, and have forced me to strengthen my arguments in response to their incisive and insightful critiques.
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Introduction

The Second Amendment was ratified as part of the Bill of Rights in 1791, and in the proceeding 233 years, it has been debated at length by those who disagree profoundly on its meaning and the right it protects. On one side are those who believe it protects the right of individuals to bear arms in defense of themselves, their family, and their state. Others view it as federalism provision protecting the right of states to organize and maintain militias aimed at combatting the potential threat posed by a federal standing army. The Supreme Court first weighed in on the debate in 1939, holding in United States v. Miller that short-barreled shotguns had no ‘reasonable relationship to the preservation of efficiency of a well-regulated militia,’ and thus the right to carry such an instrument wasn’t protected by the Second Amendment of the Constitution.¹ Both individual and collective right theorists have claimed Miller in support of their view,² but in 2008, the Court held in the landmark D.C v. Heller case that the Second Amendment protected an individual right to bear arms for self-defense in the home³, and subsequently incorporated that right against the states two years later in McDonald v. Chicago.⁴ In 2022, the Court extended that right to self-defense beyond the confines of one’s home and held that all future gun-control legislation be evaluated by courts in light of the ‘historical tradition of fire-arm regulations.’⁵ Gun homicide rates and mass shooting episodes have brought

¹ U.S v. Miller, 307 U.S. 174 (1939), 178
⁴ McDonald v. City of Chicago, 561 U.S. 742 (2010)
⁵ New York State Rifle & Pistol Assn., Inc v. Bruen (Supreme Court of the United States June 23, 2022)
discussions of the right to bear arms to the forefront of political discourse in America, yet these debates largely forego any consideration of the history, philosophy, and context which informed the Second Amendment, focusing instead on the public policy implications of gun-control legislation. This, however, is a grave oversight.

Chapter 1 of this thesis will show that every single formulation proposed by Justices for determining how the individual right to bear arms for self-defense ought to be protected by the bill of rights, and subsequently incorporated against the states, is flawed. The originalists who penned the majority opinions in each of the three landmark Second Amendment cases have employed an historical approach which seeks to determine the original public meaning of the Second Amendment, but instead allows judges to hide their personal preferences behind a cloak of objectivity. Their approach has opened the door for judicial cherry-picking of the historical record in order to reach a preferred conclusion and has failed to elaborate concrete standards for how the historical record ought to be determined. A rejection of the majority opinions, however, isn’t an endorsement of the dissenters, who have advanced views of the Second Amendment that are utterly at odds with the nature of individual liberty and the limited government philosophy upon which this country was founded. Furthermore, their incorporation doctrine would allow judges to exercise subjective judgement unmoored from the text and philosophy of the Constitution in determining the fundamental nature of the right in question. In a violation of the principle of separation of powers, this approach ask judges to consider the needs and values of an evolving society, a consideration best left to the legislative branch. It is a shocking indictment of our recent Supreme Court that a right held so dearly by millions of Americans across the country hasn’t been treated with the respect and consideration it deserves. The goal of this thesis is to do what our Supreme Court has failed to do:
craft a coherent argument for the existence of the individual right to bear arms for self-defense in the Constitution.

The second chapter will argue that this right should be protected as a natural right and in doing so, make the affirmative case for a jurisprudence rooted in natural law and natural rights theory. Natural law jurisprudence has been criticized by the foremost advocates of originalism such as Justice Antonin Scalia, Chief Justice William Rehnquist, and Judge Robert Bork, all of whom believed that the Constitution was a document of philosophically neutral principles, and that its protections gained their legitimacy solely from the democratic act of ratification. They also believed, just as Justice Hugo Black did, that any consideration of supposedly abstract natural law principles would allow judges to read their personal philosophies of justice into the Constitution. Those who believe that constitutional interpretation must evolve with the times have also criticized natural law theory, arguing that to meet the needs of an ever-evolving society, we mustn’t be held captive by the dead hand of the past. These critiques, however, pay short-shrift to the role that natural rights played in the formation of this country. The founding generation sought independence because they believed first and foremost that the British had infringed upon their natural rights. The Declaration of Independence, perhaps the most significant document in American political life, clearly embodied the natural rights philosophy which John Locke espoused and the Founders wholeheartedly embraced. Following the Revolution, the framers sought to create a government that


7 Adamson v. California, 332 U.S. 46 (1947), 72
8 Rochin v. California, 342 U.S. 165, 172
would adequately protect the natural rights of the people. Critics argue that the absence of a clear textual enumeration of natural rights in the Constitution reflects the Founders’ ambivalence towards them, but nothing could be further from the truth: it is precisely because there was such a clear consensus on the importance of natural rights among both the federalists and antifederalists that they didn’t want to enumerate them, because they understood that doing so would flip the logic of limited government on its head.\textsuperscript{10}

Natural rights illuminated debates during the Reconstruction Era regarding the scope of the Fourteenth Amendment, because leading black activists in Congress understood that natural rights were civil rights. When they spoke of the privileges and immunities entitled to all free men they drew on the natural rights tradition and sought to turn moral claims of national citizenship into concrete rights of United States citizens protected under the law.\textsuperscript{11} This chapter will acknowledge that individuals give up many of the natural rights they have in a state of nature once they enter civil society\textsuperscript{12} but argue that the natural right of self-defence is a special right which is retained by the people even after the creation of government and is thus inalienable. After showing that a natural right of self-defence implies a right to bear arms for that purpose, this chapter will argue that this right ought to be judicially enforceable-while acknowledging that it may be impossible for every natural right to be judicially enforceable-then propose a standard for how it may be enforced and consider the status of prior and future gun-control legislation under this new standard.

\textsuperscript{11} Barnett, Randy E. “Natural Rights as Liberty Rights: Retained Rights, Privileges, or Immunities.” In Restoring the Lost Constitution: The Presumption of Liberty, REV-Revised., 64
\textsuperscript{12} Locke, John, and Peter Laslett. Two Treatises of Government. London: Cambridge U.P., 1967, 275
Having recognized the significance of natural rights both to the Founders and to our understanding of the Constitution, chapter three will make the case that the individual right to bear arms for self-defence is protected by the Ninth Amendment of the Constitution and incorporated against the states by way of the Privileges or Immunities Clause of the Fourteenth Amendment. In so doing, it will unpack arguments by Randy Barnett and Kurt Lash, who offer different models of Ninth Amendment interpretation, and conclude that the individual natural rights model of Barnett is perfectly reconcilable with the federalism model proposed by Kurt Lash. The Fourteenth Amendment’s Privileges or Immunities Clause, a long-neglected clause of the Constitution has been similarly scrutinized by legal scholars and judges seeking to uncover its meaning. This chapter will conclude that just like the Ninth Amendment, this clause sought to protect individual natural rights too lengthy to enumerate. In critiquing alternative understandings of the Privileges or Immunities Clause, this chapter will show that Ilan Wurman’s anti-discrimination reading fails to grasp the significance of the Citizenship Clause and doesn’t adequately consider the broader intent of the Fourteenth Amendment to limit the power of the states in the aftermath of the Civil War.

This thesis presents a critical argument which may have serious ramifications for the future of gun-control legislation. Will a re-evaluation of the right in question impact the types of firearms which can be regulated, and the contexts in which they can be regulated? On a constitutional level, this thesis appears on its face to address merely one right among many in the Constitution: the individual right to bear arms. But in reality, it forces us to re-consider how we view American constitutional law and our civil liberties by critiquing the modern Court’s Second and Fourteenth Amendment jurisprudence and making the case for a constitutional jurisprudence
rooted in natural law. Thus, it will ask us to compare different methods of constitutional interpretation to uncover both their strengths and weaknesses, reconcile the various roles and responsibilities of the different branches of government, determine the appropriate balance of state and federal power, grapple with the most significance debates that shaped the Constitution’s various Amendments, and consider the meaning of abstract terms such as liberty and equality. It will bring to the fore provisions of the Constitution historically neglected by the Court—such as the Ninth Amendment and the Privileges or Immunities Clause—and seek to determine their meaning and purpose.

Embarking on these enquiries will help provide us the answers to some of the most basic, yet fundamental questions that the Framers wrestled with at the time of the Founding and thinkers have taken up since: how should a respect for individual liberty be reconciled with a desire for an efficient and energetic government? How do we distinguish between different classes of rights, and adequately afford each the protection it deserves? Can we rely merely on parchment barriers to maintain our constitutional order? Answering these questions will not only give us a better understanding of the nature of our rights, our government, and our Constitution, but provide us with a blueprint for answering tricky constitutional questions going forward.
Chapter 1: The modern Court’s flawed jurisprudence

A Brief Overview of Second Amendment Jurisprudence

At issue in *Heller* was the District of Columbia’s Firearms Control Regulation Act, which was passed in response to increasing gun violence and contained the most stringent gun regulations in the country. The Act banned ownership of handguns, sawed-off shotguns, machine guns, short-barreled rifles, and assault weapons, making exceptions for police officers and those guns registered before December 1976. While individuals were allowed to keep pistols within their home for self-defense purposes, they were required under the Act to register for a license, and if granted, keep that weapon unloaded and disassembled, or bound by a trigger lock or similar device.\(^\text{13}\)

After D.C policeman Dick Heller had his application for handgun registration denied by the city, he filed a suit against the city, arguing that the handgun ban and the requirement that firearms within the home be rendered unfunctional violated the individual right to bear arms guaranteed by the Second Amendment. After the District Court ruled in favor of the District of Columbia, the Court of Appeals for the D.C Circuit voted 2-1 to reverse the lower court’s ruling.\(^\text{14}\) The Court granted certiorari and voted 5-4 along ideological lines in favor of Heller, affirming the view that the Second Amendment protected an individual right to bear arms for traditionally lawful purposes unconnected from militia service. Insofar as self-defense within the home was considered a ‘lawful purpose,’ Justice Antonin Scalia, joined by Chief Justice John Roberts, and Justices Anthony Kennedy, Clarence Thomas, and Samuel Alito,

\(^{13}\) *DC v. Heller*, p.570
\(^{14}\) Ibid., 575-6
found that the handgun ban and trigger-lock requirement ‘as applied to self-defense’ violated the Second Amendment. Similarly, they found that because D. C.’s total ban on handgun possession in the home eliminated an ‘entire class of arms that Americans overwhelmingly choose for the lawful purpose of self-defense,’ this prohibition failed to pass constitutional muster under the Second Amendment. The Court’s opinion was met with strong resistance by the liberal justices. Justice John Paul Stevens provided his own survey of Founding era debates and documents to show that the right guaranteed by the Second Amendment was collective in nature. In his view, the Amendment reflected the Founders’ desire to protect the states from the threat posed by a federal standing army by providing them the right to keep and maintain a well-regulated militia. A close analysis of this fascinating debate between Justices Scalia and Stevens will help us determine if the individual right to bear arms ought to be located within the Second Amendment of the Constitution, or elsewhere.

During his 30 years on the Court, Justice Scalia was famous for pioneering an originalist methodology which has since been adopted by several Justices sitting on the Court today, and his opinion in *Heller* was a perfect demonstration of how he relied on Founding era dictionaries and sources to precisely determine the original public meaning of the Constitutional text in question. He began by dividing the Second Amendment into two parts: The prefatory clause, which stated that ‘a well-regulated militia, being necessary to the security of the free state,’ and the operative clause, which held that ‘the right of the people to keep and bear Arms shall not be infringed.’ While this construction was unique within the Constitution, Scalia argued that other legal documents of the era frequently utilized a prefatory statement of

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15 Ibid., 571
purpose, which contrary to the claims of petitioners and dissenters, neither expanded nor limited the scope of the operative clause, but merely provided a logical link to it.\textsuperscript{16} Scalia then broke down each phrase within the Second Amendment to determine how they would have each been understood by people at the time: the phrase ‘right of the people’ when analyzed in the context of other Constitutional provisions which contain it- the First Amendment’s Assembly-and-Petition Clause and the Fourth Amendment’s Search-and-Seizure Clause-was best understood to refer to individual rather than collective rights, exercised by the entire political community rather than just a subset of people, as a militia would imply.\textsuperscript{17} Citing Samuel Johnson’s 1773 Dictionary of the English Language, Scalia found that ‘arms’ were defined as those weapons which weren’t designed for military use nor employed in a military capacity.\textsuperscript{18} Scalia saved his most extensive linguistic analysis for the phrase ‘keep and bear arms,’ which following a review of both state constitutions and dictionaries of the era, he concluded simply meant to ‘carry,’ and in a manner unrelated to militia service. In doing so, he criticized petitioners for assigning to the phrase ‘bear arms’ an idiomatic meaning which-while used at the time-specifically related to one’s ability to ‘serve as a soldier, do military service, fight,’ or ‘to wage war,’ and was proceeded by the word ‘against’ to specify the military nature of the phrase.\textsuperscript{19} Given that the Second Amendment simply said ‘bear arms,’ however, rather than ‘bear arms against,’ Scalia argued that that the regular definition of the phrase-to simply carry-would be more appropriate than a definition connoting military service. Taken altogether, Scalia

\textsuperscript{16} Ibid., 577 \\
\textsuperscript{17} Ibid., 579-80 \\
\textsuperscript{18} Ibid., 581 \\
\textsuperscript{19} Ibid., 586
concluded that the operative clause guaranteed ‘the individual right to possess and carry weapons in case of confrontation.’

Moving onto the prefatory clause, Scalia argued that the militia referenced here was the same militia referenced in the First Amendment, which makes clear that ‘the’ militia is a pre-existing body rather than a creation of Congress, which Congress can then organize as it sees fit. The militia is, therefore, consistent with its ordinary definition, ‘all able-bodied men,’ and is distinct from armies or navies, which consist of merely a subset of the able-bodied population and are created by Congress. Finally, the phrase ‘security of a free state’ as used in 18th century political discourse referred to the ‘security of a free polity’ rather than the security of each of the states as the dissent argued. Here, Scalia again referred to the structure of the Constitution’s provisions, noting that where the text refers to the several states, it uses phrases such as ‘each state’ and ‘particular states.’ The phrase ‘well-regulated’ was understood to refer to discipline and training, and not prohibitions on who was and wasn’t allowed to access firearms, as we might interpret it today. Putting the pieces together, the well-regulated militia necessary for the security of a free state wasn’t a military organization akin to the National Guard designed to address state security concerns arising from federal threats. Instead, it was the entire able-bodied population of the political community, trained to arms so they could protect themselves from government tyranny. The final piece of the jigsaw puzzle was a brief overview of the historical context of the Founding, which showed that in England, tyrants such as the

\[\text{\textsuperscript{20}}\text{Ibid.}, 592\]
\[\text{\textsuperscript{21}}\text{Ibid.}, 596\]
\[\text{\textsuperscript{22}}\text{Ibid.}, 597\]\n
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Stuarts suppressed their political opponents not by banning the organized militia, but simply by taking away people’s arms and disarming the citizens’ militia.  

In his dissent, Justice Stevens declined to frame the debate as one between an individual vs a collective right, arguing instead that the debate instead rested on the scope of the right. In other words, did it extend to nonmilitary purposes? For Stevens, the answer was a clear no, even if there were valid reasons why one might want to use a firearm for such purposes. He also criticized what he described as the Court’s ‘atomistic’ approach to construing the meaning of the Second Amendment, likening it to the parable of the six blind men and the elephant. In it, each man touches a different part of the elephant, and reaches different conclusions about the elephant. In the same way that each man fails to grasp the true nature of the creature, the Court fails to grasp the real meaning of the Second Amendment when it analyzes each phrase in isolation. Stevens therefore eschewed such a specific grammatical and definitional analysis of the text.

He believed, like William Blackstone, the English jurist whose commentaries would prove hugely influential in American law, that the ‘the fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by signs the most natural and probable.’ To that end, Stevens placed great weight on the preamble of the Amendment, ‘a well-regulated Militia, being necessary to the security of a free State,’ arguing that it reflected a desire to preserve state militias, the main purpose of the Amendment. This interpretation, Stevens argued, was reinforced by proposals on the topic put forward
during state ratification conventions. Stevens notes how James Madison, the principal draftsman of the Second Amendment who had received and analyzed every state’s list of proposed amendments, specifically modeled the amendment on the Virginia proposal, a proposal which made no mention of firearm use for non-military purposes. The proposal protected the right to keep and bear arms and mentioned a well-regulated Militia but did so in the context of the threat posed by standing armies, noting that ‘standing arms are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the Community will admit.’ That the right is embedded within ‘a group of principles that are distinctly military in meaning’ reflects the narrow scope that Madison intended for that right to have.

The intent of the framers is further illuminated by proposals which expanded the right to keep and bear arms to peacetime conditions or non-militia contexts but were ultimately rejected in state ratification conventions. For example, a rejected New Hampshire proposal read: ‘Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion,’ while in a Pennsylvania, a rejected proposal read: ‘the people have a right to bear arms for the defense of themselves and their own State, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them unless for crimes committed.’ Similarly, in Massachusetts, a motion which said ‘[That] the said Constitution never be construed to authorize Congress to…prevent the people of the United States, who are peaceable citizens, from keeping their own arms’ failed to garner sufficient support. Stevens’ historical inquiry shows that during the Founding era there was a clear textual distinction made between bearing an arm for the defense of oneself or for

27 Ibid., 656
28 Ibid., 657
29 Ibid., 658
personal reasons and bearing an arm for the defense of one’s State. Insofar as state proposals which argued for a right to the former were largely rejected and Madison himself choose to make no mention of this right in the text of the Second Amendment, Stevens argued that the Amendment was clearly intended to only protect the right to keep and bear arms in a militia context for the purpose of protecting one’s State against the threat of a federal standing army. Individuals may have wanted to keep and bear arms for personal use, but their desires-no matter how valid- were never intended to be enshrined as a right by the Second Amendment.

Problems with the Court’s Second Amendment Jurisprudence

While achieving the purpose of defending the individual right to bear arms, the history cited by the majorities, not just in _Heller_, but in _McDonald_ and _Bruen_ too, is flimsy, easily refutable, and reflective of a methodology which is deeply flawed. Thus, the right as it currently stands, does so on precarious ground.

Beginning with _Heller_, a case characterized by competing originalist opinions from Justices Stevens and Scalia, legal historian Saul Cornell argued that Scalia’s opinion was ‘little more than a lawyer’s version of a magician’s parlor trick,’30 one that cherry picked quotes and presented ‘amateurish research as systematic historical inquiry.’31 Among Cornell’s critiques of Scalia is his gripe with the unequal treatment and arbitrary levels of deference afforded to various sources in Scalia’s opinion. Cornell criticizes Scalia for dismissing the views of nineteenth century legal commentator Benjamin Oliver, who is described by Scalia as being the only legal

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31 Ibid., 627
commentator of his time who conditioned the right to bear arms on militia service. Far from being the outlier Scalia would have us believe he is, Cornell describes Oliver as one of the ‘most prolific and influential legal writers of his day,’ a protégé of Justice Joseph Story and a profound influence on American legal thought.\(^{32}\) While Oliver’s *Rights of an American Citizen* are deemed irrelevant by Scalia, the *Dissent of the Pennsylvania Minority* is given significant weight, even though it was written by the Anti-Federalist minority of a single state.\(^{33}\)

Similar critiques are made of *Bruen*, in which Justice Thomas argued that relying on history is, ‘in our view, more legitimate, and more administrable, than asking judges to make difficult empirical judgements about the costs and benefits of firearm restrictions, especially given their lack of expertise in the field.’\(^{34}\) This is a fair critique which will be taken up shortly, but the same logic applies his own historical standard: judges aren’t historians any more than they are sociologists or public policy experts and asking ‘courts to assess whether modern firearm regulations are consistent with the Second Amendment’s text and historical understanding’\(^{35}\) will require courts to make difficult empirical judgements on the merits of historical evidence. Justice Breyer pointed out in dissent how impractical this standard was and argued that the exclusive reliance on history raised many questions the majority didn’t answer. Among them, ‘what historical regulations and decisions qualify as representative analogues to modern laws? How will judges determine which historians have the better view of close historical questions? Will the meaning of the Second Amendment change if or when new historical evidence becomes available?’\(^{36}\)

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\(^{32}\) Ibid., 628  
\(^{33}\) Ibid., 629  
\(^{34}\) *New York State Rifle & Pistol Assn., Inc v. Bruen*, 16  
\(^{35}\) Ibid., 17  
\(^{36}\) Ibid., 26
Additionally, how many regulations will suffice to show a ‘tradition’ of gun-control regulation existed? The Court uses empty phrases such as ‘analogues,’ ‘dead ringer’ and ‘twin’ which lack meaning and thus don’t give judges much to work with.\(^{37}\)

Thomas argues that this historical inquiry will involve ‘reasoning by analogy—a commonplace task for any lawyer of judge.’\(^{38}\) But the most guidance he provides is that two regulations must be ‘relevantly similar.’\(^{39}\) How either of these two terms is to be defined is left to the reader’s imagination. It is impossible to determine, therefore, if under the Court’s ‘historically analogous’ standard judges have impartially parsed through the historical record or if they’ve ‘pick[ed] their friends out of history’s crowd.’\(^{40}\) The inconsistency inherent in this historical approach was pointed out by the dissenters in *Dobbs vs Jackson Women’s Health Organization*, who noted that Justice Alito’s reliance on evidence from the 13\(^{th}\) century to show that the right to an abortion pre-viability wasn’t deeply rooted in this nation’s history and tradition was at odds with *Bruen’s* claim that ‘historical evidence that long predates [ratification] may not illuminate the scope of the right’ and that ‘it is better not to go too far back into antiquity, except if olden ‘law survived to become our Founder’s law.’\(^{41}\)

Additionally, Scalia’s methods of construction and constitutional interpretation themselves have no basis in Founding Era practice, notably his method of interpreting the Preamble, which ‘ignores the Founding Era’s Blacksonian rules of construction’\(^{42}\) by limiting its influence and relegating it to a mere ‘justification’ rather than ‘purpose’ clause. Under this view, championed by Eugene Volokh, when

\(^{37}\) Ibid., 21  
\(^{38}\) Ibid., 19  
\(^{39}\) Ibid., 20  
\(^{40}\) Ibid., 31  
\(^{41}\) *Dobbs v. Jackson Women’s Health Organization* (Supreme Court of the United States June 24, 2022)  
\(^{42}\) Saul Cornell, "Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller," 633
the words of the operative clause are capable of being clearly understood, ‘recourse must not be had to the preamble.’ However, this approach substitutes in nineteenth century discussions of constitutional interpretation for eighteenth century discussions and wasn’t even the unanimous view of the time. For example, in Justice Story’s influential *Commentaries on the Constitution of the United States*, published in 1833, he argued that ‘the importance of examining the preamble, for the purpose of expounding the language of a statute, has long been felt,’ and that ‘the preamble of a statute is a key to open the mind of the makers’ and determine what they sought to achieve. Cornell argues that Scalia’s methodology ‘turns history on its head’ by interpreting the operative clause of the Amendment first and cites Justice Stevens’ critique that Scalia sought to ‘denigrate the importance’ of the prefatory clause of the Amendment’ by reading it last. The irony for Cornell is that in interpreting a Founding-era gun regulation in Boston which regulated the storage of a loaded gun in a dwelling, Scalia relies on the preamble of the statute to show that the prohibition in question was intended as a fire regulation rather than a gun-control law. Pointing out that the Congress which drafted the Second Amendment intentionally re-arranged Madison’s draft of the Amendment to ensure that the preamble preceded the operative clause, Cornell accuses of Scalia of engaging in the worst sort of judicial activism to reach his conclusion. Cornell concludes that Scalia’s opinion forgoes an

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45 Saul Cornell, “Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller, 636

46 *DC v. Heller*, 643

47 Saul Cornell, “Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller, 635
‘intellectually rigorous application of a neutral, interpretative methodology’ in an attempt to find a single ‘monolithic’ meaning of the terms of the Constitution, despite the fact that the Founding era was ‘not characterized by harmony, but by bitter division over virtually every major constitutional issue.’ In sum, while Scalia’s findings may echo the sentiments of the Founders, his decision to forgo their established interpretational techniques and instead rely on 19th century methods of preamble interpretation led to an opinion which Cornell describes as ‘a Bach concerto being played on a kazoo.’ Given that Blackstone’s influence on American lawyers and legal interpretation through guides such as the Conductor Generalis was indisputably important, Cornell argues that Justice Steven’s ‘Blackstonian model’ which defers significantly to the preamble of the Second Amendment is a better historical approach.

It doesn’t logically follow, however, that the failures of the majority prove the dissenters’ view of the Second Amendment correct. Stevens may be engaging in the correct method of constitutional construction, but his understanding of the right—that it confers an individual right to bear arms in the context of militia service—is problematic when we consider the content of such a right. To recall, Stevens in Heller chose not to frame the debate as one between an individual and collective right, writing in the very first paragraph of his dissent ‘surely it protects a right that can be enforced by individuals…a conclusion that the Second Amendment protects an individual right does not tell us anything about the scope of that right.’ In doing so, Stevens chose

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48 Ibid., 635
49 Ibid., 631
50 Ibid., 632
51 Ibid., 638
52 DC v. Heller, 636
not to endorse a line of argumentation popular among Second Amendment critics, that the Amendment serves as a federalism provision which protects the states’ ability to maintain or arm state militias.\textsuperscript{53} This view of the Second Amendment dominated lower court jurisprudence during the second half of the 20\textsuperscript{th} century, following the Supreme Court’s ruling in \textit{United States v. Miller}. While the \textit{Heller} Court interpreted the decision as one which limited the types of firearms protected by the Second Amendment to those which have a ‘reasonable relationship to the preservation or efficiency of a well-regulated militia’\textsuperscript{54} and those which were in common use at the time, the view taken by lower courts was that the Amendment protected the right of states to maintain their militias in the face of a potential threat posed by the Federal Government. In \textit{United States vs Tot} (1942), the Third Circuit Court of Appeals held that the Second Amendment, ‘unlike those providing for protection of free speech and freedom of religion, was not adopted with individual rights in mind.’\textsuperscript{55} Although Stevens is sympathetic to this view and acknowledged in \textit{Heller} that ‘hundreds of judges have relied on the view of the Amendment we endorsed there (\textit{Miller})’\textsuperscript{56} he understands the Amendment slightly differently, arguing that it protects what may best be described as an ‘individual militia right.’

But if the right is inherently tied to militia or military service, Fordham University School of Law Professor Nicholas J. Johnson asks if it can even seriously be called a right.\textsuperscript{57} Soldiers and militiamen regularly take orders: they are instructed

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\textsuperscript{53} Johnson, Nicholas J. "Rights Versus Duties, History Department Lawyering, and the Incoherence of Justice Stevens's Heller Dissent." \textit{Fordham Urb. LJ} 39 (2011): 1507
\textsuperscript{54} DC v. Heller, 622
\textsuperscript{56} DC v. Heller, 638
\textsuperscript{57} Johnson, Nicholas J. "Rights Versus Duties, History Department Lawyering, and the Incoherence of Justice Stevens's Heller Dissent, 1510
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to use their firearms for specific purposes, in a specific manner, at a specific time, at a specific location, and can have their firearm taken away from them if their commander deems them unfit for combat. If they disobey, they risk imprisonment or involuntary discharge. Johnson points out that militia service is therefore a duty rather than a right, the distinction being that ‘rights are things we can insist upon’ while ‘duties are things that can be demanded of us.’ In militias, demands are quite clearly made of soldiers, who are asked to put their lives on the line as a duty to their state. If the individual militia right was truly a right, we would expect that during a specific mission, individual militiamen would insist they be in charge of deciding how they ought to use their weapon, a patently ludicrous notion to anyone who understands how crucial hierarchy and authority are to military operations and armies more broadly. The phrase ‘individual militia right’ is, therefore, an oxymoron, and even if such a right were to exist, it would be an incredibly shallow right which protected very little of substance.

Such an interpretation also runs counter to how rights are generally understood, by suggesting that an individual can be punished for not exercising their right in accordance with how the state dictates they should. Johnson cites Patrick Charles as a leading advocate of the individual militia right, whose article *The 1792 National Militia Act, the Second Amendment and Individual Militia Rights* argues that the 1792 Militia Act is crucial to understanding the rights protected by the Second Amendment. In it, Charles notes that what stands out from the Act is Congress’

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58 Johnson, Nicholas J. “Rights Versus Duties, History Department Lawyering, and the Incoherence of Justice Stevens’s Heller Dissent,” 1511
‘respect for the States’ authority over the militia.’ Among the responsibilities left to the states was the determination of who may be exempted by militia service. But if this is correct, then as the *Heller* Court pointed out, it doesn’t make sense to limit an individual’s right to own a firearm to an organization in which the state has plenary authority to exclude them. Charles goes on to argue that the Act provided the States the power to arm the militia, giving them ‘latitude to establish the rules, penalties, and fines’ for individual firearm possession and usage."62 Looking beyond the Second Amendment, would we accept such a standard for any other right listed in the Bill of Rights? If the State determined that the right of free speech was limited to professional orators, and then imposed a variety of restrictions on the content and manner of speech by this class of individuals, accompanied by a risk of exclusion for failing to adhere to those restrictions, we would hesitate to even label the right as such.

In unpacking the legislative debates surrounding the Act to ascertain its true meaning and intent, Charles lays out the legal principle driving his individual militia right, a principle which flips the promise of inalienable rights on its head. He quotes William Tudor, who argued ‘when a man assumes a soldier, he lays aside the Citizen and must be content to submit to a temporary relinquishment of some of his civil rights,’ and that a militia requires every free citizen to subject themselves to martial law. In other words, individuals are born with an inalienable duty to submit themselves to coercive rule which strips them of rights when their state deems them

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60 Charles, Patrick J. "The 1792 National Militia Act, the Second Amendment, and Individual Militia Rights: A Legal and Historical Perspective," 331
61 *DC v. Heller*, 600
62 Charles, Patrick J. "The 1792 National Militia Act, the Second Amendment, and Individual Militia Rights: A Legal and Historical Perspective," 332
63 Ibid., 335
worthy of carrying a firearm for militia service. Charles falls into the trap Johnson described, failing to recognize that his individual militia right is nothing but a duty imposed on a citizen against their will for a larger cause. He cites James Jackson, a Georgia politician serving in the House of Representatives, who himself described militia service as a duty, saying that each individual capable of bearing arms was ‘duty bound to perfect himself in the use of them, and thus become capable of defending his country.’\textsuperscript{64} He also argued that it ‘may provide burdensome on some individuals to be obliged to arm themselves,’ but ‘the advantages were justly estimated,’\textsuperscript{65} the advantages in this case being the preservation of the United States. ‘In a republic,’ he argued, ‘every man \textit{ought} (emphasis added) to be a soldier, and prepared to resist tyranny and usurpation, as well as invasion-and to prevent the greatest of all evils a standing army.’\textsuperscript{66}

In summary, the individual militia right supported by Justice Stevens is truly incoherent: it labels what is clearly a duty a right, allowing the state to determine arbitrarily and coercively how, when, where, and who is to exercise the right, and require its citizens to partake to perform a duty they may not want to, all in the name of the greater good of their state. Thankfully this understanding of the Second Amendment isn’t enshrined in the law.

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Ultimately, the historical record doesn’t demonstrate clearly, one way or another, whether the Amendment was intended to protect an individual right to bear arms, or a collective right of the people to bear arms as part of a state militia. There is

\textsuperscript{64} Ibid \\
\textsuperscript{65} Ibid \\
\textsuperscript{66} Ibid., 335
clear disagreement over the meaning and application of the Amendment’s phrases, and the broader context in which the Amendment was crafted. David Hardy argues that the Amendment can be divided into two portions, ‘the first referring to a militia necessary to a free state, the second of a right of the people to keep and bear arms,’ each designed to address different concerns. During the Founding Era, different states were split on which portion they believed to be important: Pennsylvania declared the natural right all men had to defend their life which government was instituted to support, and that the people have a right to bear arms for the defense of themselves. This was in contrast to the Virginia model inspired by George Mason, which stressed the need for a ‘well-regulated militia, composed of the body of the people, trained to arms…the proper, natural, and safe defense of a free state.’ Hardy argues that the Second Amendment embodies both Virginia and Pennsylvania’s views of the right to bear arms but accuses the Courts of ‘treating its description of the militia as its exclusive purpose,’ and nullifying the individual right to arms provision.” Those who value the significance of the preamble would argue otherwise.

Akhil Amar takes a more holistic approach. He points out that while both sides of the debate can find support in the Amendment’s text, which mentions both ‘the militia’ and ‘the people,’ both positions have their drawbacks: the collectivists must wrestle with the fact that the Constitution routinely makes distinctions between the States and the people, and that the militia referred to in the Amendment wasn’t

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68 Hardy, David T. "The Unalienable Right to Self-Defence and the Second Amendment," 99
69 Ibid., 110
like today’s National Guard. Libertarians, on the other hand, must recognize that the phrase ‘bear arms’ has a distinctly military flavor to it, and that the drafting history of the Amendment speaks of the right in that context.\textsuperscript{71} Amar instead argues for a more complex understanding of the right which requires us to read the Second Amendment in light of the other provisions in the Bill of Rights. He describes his reading as ‘a small-r republican reading’ which argues that at the heart of the Amendment is ‘the link between democracy and the military: We the People must rule, and must assure Ourselves that Our military will do Our bidding rather than its own.’\textsuperscript{72} Amar notes that the ‘collective connotation is primary,’ but chides statists who ‘anachronistically’ read the ‘militia’ to refer to a government controlled and organized military rather than the ordinary citizens, those who voted and exercised political power. While Amar does chide the statists for their failure to recognize that the Second Amendment confers the right of a collective to act against state governments in their capacity as private citizens, he is careful to note also that libertarians wrongly ‘privatize’ what is an inherently a collective and political right.\textsuperscript{73}

If the correct interpretation of the Second Amendment lies somewhere in-between the individual and collective camps, we cannot rely on the Second Amendment to protect the right of an individual, acting in a private capacity, to bear arms to defend themselves from everyday harms rather than government tyranny. Amar recognizes this and argues that instead of trying to reconcile the individual right of self-defence with the classical republican view that saw arms as necessary to assure the collective self-defence of the people against tyranny within the Second Amendment, we should seek to locate that individual right within the Fourteenth

\textsuperscript{71} Amar, Akhil Reed. “The Second Amendment: A Case Study in Constitutional Interpretation,” 891
\textsuperscript{72} Ibid., 892
\textsuperscript{73} Ibid., 895
Amendment’s Privileges or Immunities Clause. This is an argument we will take up in greater detail later.

**The right to bear arms under the Fourteenth Amendment**

In the preceding section, we explained why the *Heller* court failed to adequately justify its belief that the Second Amendment protected an individual right to bear arms for lawful non-militia related purposes and then unpacked the incoherent interpretation of the Second Amendment by Justice Stevens. We now turn to the deficiencies of the Court’s Fourteenth Amendment jurisprudence, which fails to convincingly explain why the individual right to bear arms ought to be protected against state infringement. Two years after the *Heller* decision, the Court in *McDonald v. Chicago* reiterated its belief that the right to keep and bear arms for lawful, non-militia purposes such as self-defense within one’s home was protected by the Second Amendment and incorporated the Amendment against the states through the Due Process Clause of the Fourteenth Amendment. While appearing on their faces to be very similar, the two cases addressed two very different issues: whereas *Heller* determined if the Second Amendment guaranteed a right to self-defense, *McDonald* considered if that general right on its own warranted protection against the states via the Fourteenth Amendment.

Prior to the ratification of the Fourteenth Amendment in 1868, the Court had held in *Barron vs Baltimore* (1833), that the Bill of Rights limited the powers of only the Federal government. Since then, debates over competing theories of

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74 Ibid., 907
75 *Barron vs the Mayor and City Council of Baltimore*, 32. U.S. 243 (1833)
incorporations have been waged, with two theories in particular gaining traction during the 20th century: the first, championed by Justice Hugo Black suggested that the Fourteenth Amendment commanded the states to obey every provision of the Bill of Rights. Black, writing in dissent in *Adamson v. California*, claimed that the framers of the Fourteenth Amendment sought to nullify *Barron*, arguing that they ‘proclaimed its purpose to be overturn the constitutional rule that case had announced.’ Furthermore, Justice Black was vehemently opposed to any ‘natural law’ formula which invited the Court to incorporate against the states any right not explicitly protected by the Bill of Rights. He believed that such an approach was a ‘violation of our Constitution, as it took power over public policy away from the legislature and gave it to the judicial branch.’

The second theory assumes that the Fourteenth Amendment has its own inner logic which protects a variety of rights against state action, not all of which are explicitly mentioned in the Bill of Rights. While the Supreme Court has over the past 100 years incorporated much of the Bill of Rights against the states, it has done so not via the total incorporation doctrine of Justice Black, but by ‘selectively’ incorporating the provisions of the Bill of the Rights they have deemed as being either deeply rooted in this nation’s history and tradition, or implicit in the concept of ordered liberty. While the vast majority of rights in the Bill of Rights have been incorporated against the states by one of these two methods, the Court has made it clear that textual enumeration in the Bill of Rights alone will not suffice for incorporation. For this reason, the Court in *Palko v. Connecticut* choose not to incorporate the Fifth Amendment right to protection against double jeopardy against the states, holding that

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76 *Adamson v. California*, 72
77 Ibid., 46
it was neither ‘essential to a scheme of ordered liberty’ nor a ‘principle of justice so
rooted in the traditions and conscience of our people as to be ranked as
fundamental.’ In comparison, rights protected by the First Amendment, for example,
are absorbed by the Fourteenth Amendment because ‘neither liberty nor justice would
exist if they were sacrificed.’ The flip side of this approach was that because the
incorporation of any liberty turned on either its merit or historical pedigree rather than
its textual enumeration, a variety of unenumerated rights, including the rights to same-
sex marriage, contraception, and up until recently, abortion, had found protection
under the Court’s Due Process Fourteenth Amendment jurisprudence.

Justice Alito, writing for the majority, incorporated the right to bear arms for
self-defense against the states on substantive due process grounds, arguing that the
right was ‘deeply rooted in this Nation’s history and tradition,’ per the test laid down
by Washington v. Glucksberg, and ‘fundamental to the American scheme of ordered
liberty’ as stipulated by Duncan v. Louisiana. Alito’s argument rested on a historical
survey of the ratification debates of 1788, which showed that both federalists and anti-
federalists alike agreed that ‘the right to bear arms was fundamental to the newly
formed system of government,’ and of Founding-era legal documents which reflect
the view of Englishmen and early Americans that the right to bear arms was, as St.
George Tucker argued, ‘the true palladium of liberty.’ While conceding that the
initial fear behind the Second Amendment’s ratification-‘that the national government
would disarm the universal militia’-had subsided, Alito turned to the post-Civil War
era to demonstrate the significance of the right to bear arms in the eyes of the Framers

78 Palko v. Connecticut, 302 U.S. 319 (1937), 325
79 Ibid., 326
80 McDonald vs City of Chicago, 767
81 Ibid., 769
82 Ibid., 770
and ratifiers of the Fourteenth Amendment. In the immediate aftermath of the Civil War, the states of the old Confederacy passed laws which systematically attempted to disarm newly freed men and African Americans more broadly, while parties of ex-Confederate soldiers would find freedmen and forcibly take away their firearms. The 39th Congress, recognizing the seriousness of the situation, passed the Freedmen’s Bureau Act of 1866, which sought to secure to all citizens the rights to personal liberty and security, ‘including the constitutional right to bear arms,’ and later passed the Civil Rights Act of 1966, which similarly guaranteed the ‘full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens.’

Alito argued that both the ratification debates and the post-ratification period of the Fourteenth Amendment also reflected a desire to protect the right to keep and bear arms. He cited Senator Samuel Pomeroy, a Radical Republican and U.S. Senator, who described among the three ‘indispensable’ safeguards of liberty the right to keep arms, arguing ‘every man….should have the right to bear arms for the defense of himself and family and his homestead.’ Similarly, fellow Radical Republican, Representative Thaddeus Stevens, believed that the Fourteenth Amendment settled the question of potentially disarming communities, arguing that taking away their weapons of defense robbed them of their inalienable right to defending liberty.

Finally, Alito points out that at the time of the ratification of the Fourteenth Amendment, 22 of the 37 states in the Union protected the right to keep and bear arms in their state constitutions, with some doing so explicitly in the context of self-

\[\text{\footnotesize 83 Ibid., 773}\]
\[\text{\footnotesize 84 Ibid., 774}\]
\[\text{\footnotesize 85 Ibid., 775-6}\]
defense.\textsuperscript{86} For Alito and the majority therefore, the right to keep and bear arms for self-defense was rooted in the history and tradition of the nation, and fundamental to its scheme of ordered liberty.

As he did in \textit{Heller}, Justice Stevens wrote another lengthy dissent but launched a fresh critique on the individual right to bear arms found by the majority, arguing that firearms themselves have little relation with liberty. Justice Stevens criticized the majority’s historical approach, arguing that ‘to imply that the historical pedigree of a right is the exclusive or dispositive determinant of its status under the Due Process Clause’\textsuperscript{87} is a mistake. Stevens instead preferred to rely on the test put forth by Justice Benjamin Cardozo in \textit{Palko v. Connecticut}, that a right must be ‘implicit in the concept of ordered liberty’ for it to be protected under the Due Process Clause.\textsuperscript{88} Justice John Marshall Harlan II expanded on the concept of ordered liberty in \textit{Poe v. Ullman}, writing that substantive due process ‘includes a freedom from all substantial arbitrary impositions and purposeless restraints,’ and that the full scope of the Due Process Clause’s protections had to be sought in part in ‘legal principle.’\textsuperscript{89} While sounding similar on its face to the standard elucidated in \textit{Duncan}, Justice Stevens argued that the majority had misinterpreted \textit{Duncan} by treating it as a break from \textit{Palko}, one that incorrectly substituted liberty out for history. Stevens argued that the \textit{Palko} standard had long been the guide for rights related to ‘the primary conduct of free individuals,’\textsuperscript{90} and had protected rights such as the right to free speech because they are essential to free government, not because the States had historically protected them. In determining what was a sufficient liberty interest, Stevens argued that the

\begin{footnotes}
\item[86] Ibid., 777
\item[87] Ibid., 874
\item[88] \textit{Palko v. Connecticut}, 325
\item[89] \textit{Poe v. Ullman}, 367 U.S. 497 (1961), 543
\item[90] \textit{McDonald vs Chicago}, 843
\end{footnotes}
Court had settled on a ‘conceptual core,’ determining that the liberty safeguard in the Fourteenth Amendment protects the ‘ability independently to define one’s identity,’ specifically in the areas of marriage, procreation, contraception, family planning, and education.

In this instance, Stevens argued that firearm possession was different in kind from the liberty interests protected in the post-

Lochner era, and that even if it weren’t, there is no evidence that owning any type of firearm was ‘critical to leading a life of autonomy, dignity, or political equality,’ especially when the market offered substitutes. While Justice Stevens was sympathetic to the argument that protection of one’s home is a significant liberty interest in line with the conceptual core identified by earlier Courts, he disagreed with the idea that that right implied an auxiliary right to own a certain type of firearm, on the grounds that firearms have a tenuous relationship at best with liberty. Engaging in a liberty-interest balancing test, Stevens argued that just as a firearm is useful for self-defense, it is just as capable of facilitating death and destruction. If the marginal cost to society of firearms possession is deemed to be greater than its marginal benefit, then the states have a right to regulate such weapons as part of their reserved police powers, as long as the measures taken aren’t considered arbitrary. As such, the states have a ‘long and unbroken’ record of regulating firearms, placing licensing requirements on firearms, and restricting the public carriage of weapons, amongst other regulations.

Following a similar line of reasoning, Justice Stephen Breyer penned dissents of his own in all three of the Court’s major 21st Century Second Amendment cases, with his dissents in *Heller* and *Bruen* arguing for an interest-balancing approach that

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91 Ibid., 797
92 Ibid., 893
93 Ibid., 899
would weigh protections of the right guaranteed by the Second Amendment against the legitimate interests of the government to pass legislation in response to rising crime.

Justice Thomas, however, writing for the Court in *Bruen*, rejected the two-step approach adopted by the Courts of Appeals, which first demanded a test rooted in the Second Amendment’s text, as informed by history, and then an interest-balancing inquiry of the type supported by Justices Stevens and Breyer. The Court in *Bruen* retained the first step but rejected the second, arguing that both *Heller* and *McDonald* rejected interest-balancing enquiries akin to intermediate scrutiny. Whereas Justices Stevens and Breyer wanted to weigh various liberty and governmental interests against each other to determine the extent to which the right can be qualified by legislation and regulation, Justice Thomas argued that the very enumeration of the right in the Constitution renders the government powerless to determine on a case-by-case basis if the ‘right is really worth insisting upon.’

Problems with the Court’s Fourteenth Amendment Jurisprudence

Interestingly, the early Supreme Court’s substantive due process jurisprudence was heavily rooted in natural rights. In the *Slaughter-House Cases*, the Court held that the creation of a monopoly over slaughterhouse operations in Louisiana neither abridged the privileges or immunities of butchers who risked losing their livelihood, nor deprived them of liberty without due process of the law. Justice Stephen Field, dissenting, argued that every individual had a natural right to their own property and

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94 Ibid., 14  
95 *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873)
was ‘entitled to pursue his happiness by following any of the known established trades and occupations of the country.’96 According to Field, the ‘immortal’ Declaration of Independence, which declared as a self-evident truth that men were endowed by their Creator ‘with certain inalienable rights,’ undoubtedly encapsulated the privilege of choosing one’s own occupation.97 Justice Joseph Bradley believed similarly, and after quoting the Declaration himself, argued that this liberty could only be taken away under the Due Process Clause by lawful regulations necessary or proper for the mutual good of all.98 Bradley’s argument that the right to choose one’s own occupation was so essential that it couldn’t be ‘arbitrarily assailed’99 by government legislation added a substantive component to the Due Process Clause, but that substance was informed by an understanding of the natural rights philosophy upon which the nation was founded.

Substantive due process, therefore, can incorporate natural rights, but the Court’s current substantive due process jurisprudence has neglected to do so. The McDonald Court instead sought to determine if the right was sufficiently rooted in this nation’s history and tradition to receive protection under the Due Process Clause. Subsequently, it suffers from the same problems as the originalist approaches in Heller and Bruen, namely that history can be cherry-picked by politically motivated Justices in order to reach a certain conclusion. The approach put forward by Justice Stevens in dissent in McDonald not only also suffers from the same problem of affording justices’ discretion to read their personal preferences into the Constitution, but runs the risk of relegating fundamental, inalienable natural rights to the trashcan.
of history by virtue of their perceived insignificance to modern society and tension with legislative priorities.

To recall, Justice Stevens’ approach has its roots in Justice Benjamin Cardozo’s *Palko* opinion, in which Cardozo argued that the Court’s decision had been ‘dictated by a study and appreciation of the meaning, the essential implications of liberty, of liberty itself.’ Justice Stevens in *McDonald* elaborated on the framework for decision-making established by *Palko* and other precedents, arguing that they required ‘judges to apply their own reasoned judgement,’ without relying on ‘an exercise in abstract philosophy.’ He believed that the inquiry was grounded by ‘historical and empirical data…textual commitments laid down elsewhere in the Constitution, judicial precedents, English common law, legislative and social facts, scientific and professional developments, practices of other civilized societies, and above all else, the traditions and conscience of our people.’ He believed that such a lengthy and stringent list of requirements would hem in Justices and reveal ‘which rights really are vital to ordered liberty.’ Central to this approach is the idea that there is no catch-all definition of liberty, and that we mustn’t attempt to precisely define the term either. Stevens argued that such attempts were bound to end in failure and that the Framers themselves didn’t have a clear understanding of the term either. Citing the now-repudiated case of *Lochner v. New York*, he argued that the line of cases following on from that one which read a liberty to contract into the Fourteenth Amendment ‘attest to the dangers of judicial overconfidence in using substantive due process to advance a broad theory of the right or good.’

100 Ibid., 326
101 *McDonald v. City of Chicago*, 872
102 Ibid., 878
There is a glaring problem with this approach however: if we don’t have a
definition of the term, and don’t attempt to find one either, how do we determine
between two differing conclusions which one is correct? Justice Felix Frankfurter in
his concurrence in Adamson argued that even if judges differed among themselves
whether a certain law or procedure violates accepted standards of justice, this
disagreement doesn’t reflect poorly on the standards themselves necessarily, nor does
it suggest that judges are relying on ‘the idiosyncrasies of a merely personal
judgement.’\textsuperscript{103} The first point may be true, but we will never know how individual
judges are choosing to weigh each of the many criteria put forward by Justice
Stevens, nor why they choose to do so in that manner, in large part because there is no
constitutionally provided methodology to guide this inquiry. While Stevens argues
that the Courts’ precedents had established ‘guideposts’\textsuperscript{104} which would constrain
judges and lead to ‘responsible decision-making,’ Scalia in his concurrence in
McDonald took Stevens to task, pointing out that ‘the notion that the absence of a
coherent theory of the Due Process Clause will somehow curtail judicial caprice is at
war with reason. Indeterminacy means opportunity for Courts to impose whatever rule
they like: it is the problem, not the solution.’\textsuperscript{105} To his credit, Justice Stevens
acknowledged that his approach leaves some room for subjective judgements but
argued that under his approach the ‘judge’s cards are laid on the table for all to see,
and critique.’\textsuperscript{106}

While greater transparency may be achieved by this approach than by a
historical approach, which attempts to disguise subjectivity by appealing to cold, hard

\textsuperscript{103} Adamson v. California, 68
\textsuperscript{104} McDonald v. Chicago, 794
\textsuperscript{105} Ibid., 795
\textsuperscript{106} Ibid., 805
historical fact, that transparency doesn’t serve much purpose if we lack a clear
definition of liberty that would help us assess a judge’s conclusion and methodology.
Scalia’s concurrence-trained largely on Stevens’ dissent- also exposes the
inconsistency of Stevens’ approach by pointing out how many of the rights he has
historically believed ought to be protected by the Due Process Clause wouldn’t pass
muster under the *Palko* test. Stevens believed that the ‘conceptual core’ of the Due
Process Clause required courts to safeguard ‘the ability to define one’s own identity,’
and ‘the individual’s right to make certain unusually important decisions that will
affect his own, or his family’s, destiny’\textsuperscript{107} specifically in the areas of marriage,
procreation, and contraception. Yet, under the *Palko* standard which requires the
protection of those rights which are indispensable for a system of liberty and justice,
would a right to sodomy, for example, be covered? Would we seriously struggle to
imagine a fair and enlightened system of justice without it? Furthermore, Stevens’
critique of the *Lochner* and its progeny for cramming down a very specific conception
of the liberty protected by Due Process-namely that it protects the economic liberty of
contract-calls into question the grounds upon which he so confidently substitutes
personal liberty for economic liberty. If the Liberty clause-as he calls it-shouldn’t be
limited to ‘to provide any all-purpose, top-down, totalizing theory’\textsuperscript{108} of liberty, then
why is he trying to do exactly that by limiting the scope of the Clause to certain
personal liberties?

If Justice Stevens took a page out of Scalia’s book by penning an originalist
dissent in *Heller*, his approach to incorporation and Due Process cases reflected a
willingness to adapt the Constitution to the realities of contemporary life. In

\textsuperscript{107} Ibid., 879-80

\textsuperscript{108} Ibid., 878
McDonald, he critiqued the majority for adopting an approach that was not only deceptively subjective and susceptible to personal judgement, but illogical. He argued that it “makes especially little sense to answer questions like whether the right to bear arms is ‘fundamental’ by focusing on the past, given that both the practical significance and the public understandings of such a right often change as society changes.” What if the evidence had found that, whereas at one time firearm possession contributed substantially to personal liberty and safety, nowadays it contributes nothing, or even tends to undermine them? Would it still have been reasonable to constitutionalize that right?’ This argument is inadvertently strengthened by the admission of the majority that over fifty years after its ratification, the main fear that motivated the adoption of the Second Amendment—the fear that the National Government would disarm the universal militia—had been assuaged. If that is the case, then Stevens would ask why we ought to still be protecting a right in 2010 that even in 1850 was no longer considered fundamental? If Americans historically held a view, which has since changed or proven to be demonstrably true, why should we be forced to swear fealty to it? As Stevens says, ‘the fact that we have a written Constitution does not consign nation to a static legal existence.’ Justice Breyer in McDonald argued that the Court in incorporation cases had ‘never stated that the historical status of a right is the only relevant consideration,’ and that ‘the right in question has remained fundamental over time.’

Justice Frankfurter advanced a similarly dynamic vision of due process in Rochin v. California, arguing that evaluating claims under the Due Process Clause required ‘an evaluation based on a disinterested inquiry pursued in the spirit of

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109 Ibid., 909
110 Ibid., 910
111 Ibid., 917
science,’ one which was ‘mindful of reconciling the needs both of continuity and of change in a progressive in society.’¹¹²

There are problems with a dynamic approach to Due Process Clause jurisprudence. If constitutional interpretation requires an extensive inquiry into the values of an evolving society, it doesn’t necessarily follow that the Court ought to be entrusted with this task. Scalia rightly points out that if the Constitution wasn’t law, and therefore ought to be interpreted with societal values in mind, it wouldn’t make any sense to assume that this would be the duty of the Court.¹¹³ Societal values aren’t established by government fiat, they are established through the debates, dialogues, and interactions that the political community engages in daily, which shape our understanding of what we expect from our government, and how we view abstract principles of freedom, justice, and liberty. Therefore, it we were to incorporate societal standards into our interpretation of the Constitution, it would make the most sense to entrust that duty to the legislative branch, the branch which represents the people and is therefore likely to be the ‘best expositor of social values.’¹¹⁴ The judicial branch on the other hand was designed to be insulated from public opinion. Its members are appointed by the President and confirmed by the Senate and serve lifetime terms on the bench. If we wanted constitutional interpretations of the law which reflect evolving societal standards, why would we entrust this duty to the branch of government that is easily the least democratic, and therefore the least likely to be in touch with the citizens?

¹¹² *Rochin v. California*, 172
¹¹⁴ Ibid
Acknowledging its institutional inability to appropriate the role of the legislature, the Court has on many occasions employed a deferential test which provides broad latitude to the legislature to pass laws which could rationally be thought to advance a legitimate government interest. In *United States v. Morrison*, for example, a case concerning Congress’ power to legislate on domestic violence under the Interstate Commerce Clause, Justice David Souter in dissent noted how Congress had received a ‘mountain of data’ showing the effects of violence against women in interstate commerce, from hearings, expert testimony, and Congressional reports, all of which suggested that Congress had at the very least a rational basis in passing the legislation it did. Similarly, Justice Breyer pointed out that in a society in which ‘scientific, technological, commercial, and environmental change’ created a more complex, integrated society, the judiciary ‘cannot easily gather the relevant facts,’ and would have to rely on ‘more general legal rules and categories’ that would hamper the legislative agenda in nonproductive ways. In the line of cases produced by *Lochner*, the Court repeatedly protected the unenumerated liberty of contract against legislative findings which prompted the passage of economic regulations across the country.

And yet, in other areas, the Court has taken it upon itself to second-guess legislative judgement in defense of rights which aren’t enumerated but still deemed ‘fundamental.’ Thus, in *Meyer v. Nebraska*, the Court held that the ‘proper determination of state police power must be made by the Courts,’ and subsequently struck down a prohibition against the teaching of German as an infringement of the unenumerated right of parents to control the education of their children protected by the Due Process Clause of the Fourteenth Amendment. At the turn of the 20th century...

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115 *U.S. v. Morrison*, 529 U.S. 598 (2000), 628
116 Ibid., 660
century, the Court began protecting rights related to procreation, contraception, and sexual intimacy under a broader right to privacy—which itself isn’t specified by the text of the Constitution—against legislation which infringed on individual liberty in this area.

Paradoxically, the heightened scrutiny applied to acts which constrain unenumerated rights hasn’t always been extended to textually enumerated rights in the Bill of Rights. At the same time the Court was reading liberty of contract into the Fourteenth Amendment, it was restricting the First Amendment’s protection of free speech by applying the ‘clear and present danger’ standard to punish potentially seditious speech during wartime. The muddled approach of the Court towards the protection of rights is exemplified by a comparison of Justice Frankfurter’s concurrence in *Rochin* with his concurrence in *Dennis v. United States*. Whereas Frankfurter in *Rochin* engaged in a disinterested but rational inquiry of liberty in determining that the liberty protected by the Fourteenth Amendment extended to a prohibition of acts which ‘shocks the conscience,’\(^\text{118}\) he was far more deferential in *Dennis*, a case which sustained the conviction of eleven communists leaders under the Smith Act for conspiring to organize as a society which encouraged, advocated and taught the duty of overthrowing governments in the United States by force or violence. In it, Frankfurter argued that ‘it is not for us to decide how we would adjust the clash of interests which this case presents,’ and that the ‘primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress.’\(^\text{119}\) Finally, he asked, ‘can we hold that the First Amendment deprives Congress of what it deemed necessary for the government’s protection?’\(^\text{120}\) The

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\(^{118}\) *Rochin v. California*, 172

\(^{119}\) Ibid., 550-1

\(^{120}\) Ibid., 494
answer to this question should be a resounding yes given that the First Amendment explicitly says ‘Congress shall make no law…. abridging the freedom of speech.’ If textual enumerations can’t restrain the power of the government, then it stands to reason that abstract notions of liberty unmoored from the text of the Constitution shouldn’t be able to either. And yet in Rochin, governmental procedures which shocked the conscience were deemed a violation of liberty under the Fourteenth Amendment.

Putting these problems together, we have a Court which on institutional grounds shouldn’t be second-guessing legislative judgement, is by its own admission ill-equipped to do so, but still chooses to do so from time to time on an ad hoc basis anyway. Worst still, the Court makes no distinction between enumerated and unenumerated rights. It’s one thing to say that certain unenumerated rights are more fundamental than others—even if that determination is rooted in nothing but personal opinion—it is another to afford those rights even more protection than rights which are enumerated. As Chief Justice Roberts noted in his dissent in Obergefell v. Hodges, ‘the Fourteenth Amendment does not enact John Stuart Mill’s On Liberty any more than it enacts Herbert Spencer’s Social Statics.’ And yet, the Court’s substantive due process jurisprudence—especially the jurisprudence stressed by Justice Stevens—effectively allows Justices to read whichever philosophy they want into the Constitution by neglecting to clearly define ‘liberty’ under the Fourteenth Amendment, and reach whatever conclusion they want by arbitrarily weighing text, history, modern-day considerations, precedent, scientific developments, and whatever else they think may be important.

121 Obergefell v. Hodges (Supreme Court of the United States June 26 2015), 22
A Fourteenth Amendment jurisprudence rooted in natural rights would be a significant upgrade in this regard, because as we will show in chapter 2, the natural rights philosophy espoused by John Locke and later adopted by the Founders was a very specific one which rationally deduced the existence of certain individual rights in a state of nature and clearly explained the extent to which those rights were retained upon entering civil society. Natural rights won’t provide us with a strict formula with which we can mathematically determine every right belonging to individuals in a state of nature. Even if we adopt a jurisprudence rooted in natural law, there will still be debate and discussion over what those natural rights are, and how they may be regulated by legislatures. We take up those debates in chapter 3 in recognition of the fact that a certain level of judicial discretion is unavoidable, regardless of a judge’s interpretative method. However, a jurisprudence rooted in natural rights would provide a far more substantive limit on a judge’s ability to exercise subjective discretion than one which seeks to determine which rights are implicit in the concept of ordered liberty.

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There are currently two distinct legal protections of the right to keep and bear arms for purposes of self-defense: at the federal level, the Second Amendment as it was understood by those who ratified the Amendment was intended to protect the individual right to bear arms for lawful purposes unconnected to militia service, and at the state level, the right to bear arms for self-defense is one that is both deeply rooted in this nation’s history and tradition, and fundamental to this nation’s scheme of ordered liberty. Not only do these approaches fall short, but so too do the approaches put forward by the dissenters in *Heller* and *McDonald*. In sum:
- The historical approach of the Court in *Heller* and *McDonald* allows justices to wear a cloak of objectivity while cherry-picking the historical record to reach the conclusion they want.

- The alternative interpretation of the Second Amendment—that it confers an individual militia right—turns the right in question into a duty and is thus logically incoherent.

- Determining if the right in question is implicit in the concept of ordered liberty provides judges far too much latitude to determine for themselves which rights are considered fundamental.

- Asking judges to consider the values and public-policy needs of an ever-evolving society requires the Court to unconstitutionally usurp legislative power and take on a task it lacks the capacity to carry out.

These approaches have their merits and can be adopted to answer a variety of constitutional questions, but they are ill-suited to adequately protect the individual right to bear arms. Chapters 2 will argue that a better way of protecting that right would be to recognize it as one that is implied from the natural right of self-defence, which is retained by the people upon entering civil society. Such an approach would insulate the right from the demands and considerations of modern society, and the results of a potentially inaccurate and biased historical survey, while at the same time cabining judicial discretion by forcing judges to stick within the bounds of the natural rights philosophy understood by the Founding generation. Before making that case however, we must first understand the natural rights philosophy itself.
Chapter 2: The significance of natural rights

This chapter is the most significant one, as it makes the case for a jurisprudence rooted in natural rights. It will do the following:

1. Establish the significance of natural rights to the Founding generation and their desire to accommodate them within the new system of government
2. Identify the specific natural right in question, and explain why it implies a right to bear arms
3. Discuss the extent to which this natural right is either retained or modified upon entering civil society
4. Explain why this right ought to be judicially enforceable, and how the Court might go about enforcing it
5. Examine gun-control legislation at issue in prior cases under the standard we’ve proposed, and consider permissible types of gun-control legislation going forward

The Significance of Natural Rights to the Founding Generation and the Constitutional Convention

Natural rights have been treated with scorn by both original public meaning and original intent originalists such as Justice Antonin Scalia, Chief Justice William Rehnquist, and Judge Robert Bork, who insist that the consideration of such rights invites judges to exercise personal discretion in determining cases arising under the Constitution. Natural law philosopher Harry V. Jaffa argued that for these jurists, the Constitution was a ‘purely positivist document, a procedural instrument that is
indifferent to the results…in their view, constitutional jurisprudence should be one of neutral principles.¹²² The Constitution, thus, took no sides on thorny moral questions. The Chief Justice believed that the constitutional ‘safeguards for individual liberty…. assume a general social acceptance neither because of any intrinsic worth nor because of any unique origins in someone’s idea of natural justice, but instead because they have been incorporated in a constitution by the people.’ In their view, moral determinations ought to be made democratic majorities, which in the absence of consensus on moral first principles, substitutes out morality for the will of the people.¹²³ The potential for legislative tyranny in the absence of clear Constitutional guidance was of no concern to these jurists, whose concern first and foremost was with cabining judicial discretion.

However, this approach fails to consider the Founders’ suspicion of majority rule. In Federalist 10, James Madison wrote at length about tyranny of the majority and expressed his belief that only a large republic encompassing many different factions could provide relief to minority groups who risked having their rights infringed upon and prevent the majority from pursuing interests at odds with the public welfare.¹²⁴ In a letter to Thomas Jefferson regarding the proposed inclusion of the Bill of Rights into the Constitution, Madison argued that ‘invasion of rights is chiefly to be apprehended not from acts of government contrary to the sense of its constituents, but from acts in which the government is the mere instrument of the major number of the constituents.’¹²⁵ Putting aside the view that Courts ought to defer

¹²² Jaffa, Harry V. *Storm over the Constitution*, 35
¹²³ Ibid., 36
to majoritarian politics when the Constitution was unclear, the idea that the Constitution is a document of philosophically neutral values promotes a moral relativism that is at odds with the intent of the Founding generation.

That leading intellectuals placed heavy emphasis on natural rights during the Founding era is undeniable: in 1774, the Fairfax Resolves, written at the behest of George Washington, and authored primarily by George Mason, indicated that the most important rights of Fairfax County citizens were those secured to them ‘by the laws of nature.’\textsuperscript{126} They claimed that the taxation policies of the British Parliament violated not only the ‘original compacts’ by which the colonists were dependent on the British Crown, but were ‘totally incompatible with the privileges of a free people and the natural rights of mankind,’ for they reduced the colonists from a state of freedom to one of slavery. The following year, Fairfax County organized the Fairfax Independent Company, which passed more resolutions reiterating their desire to defend natural rights, and wrote in a letter to citizens of Williamsburg, ‘we are determined to act on that occasion as men of spirit ought to do in defense of their natural rights and country’s cause.’\textsuperscript{127}

In 1776, the Virginia Convention adopted the Declaration of Rights, which stated unequivocally ‘that all men…have certain inherent natural rights,’ and was ‘the first deliberate adoption of the natural rights philosophy as the basis for political organization anywhere in the world.’\textsuperscript{128} The same year the Virginia Declaration of Rights was written, Thomas Jefferson authored the Declaration of Independence, perhaps the most significant foundational document in American politics, which


\textsuperscript{127} Ibid

\textsuperscript{128} Ibid
heavily invoked the natural rights philosophy inherent in George Mason’s Fairfax Resolves and the movements in Fairfax County. The Declaration famously holds that ‘we hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights,’ (emphasis added), and in its very first sentence, argues that its call for separation from the British hinges on the ‘Laws of Nature and of Nature’s God.’  

No interpretation of the Constitution is complete without a consideration of the Declaration of Independence, which according to Jaffa, served ‘as a statement of regime principles, the ground not only of American constitutionalism but of the moral and political life of Americans.’ He believed that the Declaration’s natural law principles were embodied in the Constitution, and that contrary to the belief of jurists such as Black and Bork that consideration of such principles were extratextual, ‘we do not look outside the Constitution but rather within it for the natural law basis of constitutional interpretation.’ The Declaration did more than just call for the independence of the colonies from Britain. It instead echoed the teachings of Locke, arguing that the King had violated the colonists’ natural rights to life, liberty, and property, and destroyed the ability of colonists to govern themselves. Where the British had relied on coercion and physical compulsion to govern, the Founders sought to create a society governed by reason and truth, one in which free men could follow the dictates of their reason to pursue the values necessary to advance their lives.

129 Thomas Jefferson, et al, July 4, Copy of Declaration of Independence. -0704, 1776
130 Jaffa, Harry V. Storm over the Constitution, 34
131 Ibid
In adopting Locke’s view that no one had a natural jurisdiction or dominion over anyone else, and that everyone was instead born equal in their freedom and independence, scholar C. Bradley Thompson argues that the Framers founded a nation not on ‘accident on force, but on reflection and choice……they established a government rooted in moral and intellectual principles rather than in orders, clans, or castes.’ Jaffa argues that ‘if the Constitution is a wonderful structure, its foundation is the Declaration. Within that whole structure is sheltered the justice, the power, the success of this greatest of modern nations.’

Jefferson had at that point already elaborated on the natural rights philosophy which would later illuminate the Declaration of Independence in his 1774 *Summary View of the Rights of British*, arguing that ‘the evidence of this natural right, like that of our right to life, liberty, the use of faculties, the pursuit of happiness, is not left to the feeble and sophistical investigations of reason….we do not claim these under the charters of kings or legislators, but under the King of kings.’ Not only did Jefferson claim that the British had no power to encroach ‘upon those rights which God and the laws have given equally and independently to all,’ but that in creating its own government, Americans were obliged to follow ‘those moral rules which the Author of our being has implanted in man as the law of his nature to govern him.’ Heeding Jefferson’s call, twelve of the thirteen states following independence explicitly cited natural rights either in the drafts of their own state constitutions, or in amendments proposed to the federal Constitution.

133 Ibid., 73
134 Jaffa, Harry V. *Storm over the Constitution*, 19
135 Antieau, Chester James. "Natural Rights and the Founding Fathers--The Virginians," 46
136 Ibid
The support for natural law was universal among both Federalists and Anti-Federalists. According to one Anti-Federalist, ‘no people under Heaven are so well acquainted with the natural rights of mankind, with the rights that ever ought to be reserved in all civil compacts, as are the people, indicating that the natural rights tradition was not only understood clearly by the American people, but accepted wholesale by them too.’ Another claimed that natural rights had transcended to the status of ‘fundamental principles underlying society and civil government,’ which had become ‘accurately known and universally diffused.’ It is clear therefore, that the Founding generation cherished the natural rights philosophy: it served as the basis for their disillusionment with the British, their desire to seek independence, and the establishment of their own government. Behind this backdrop, it strains credulity to argue that the Constitution-the charter for our representative democracy-doesn’t and wasn’t intended to reflect natural law principles.

Constitution law scholar Terry Brennan takes to task scholars who believe that despite their affinity for natural law, the Founders never intended for it to upset positive law. John Hart Ely, a leading proponent of such a view, argued in his book *Democracy and Distrust*, that rather than natural law, the ratifiers believed that society had its origins in ‘applicable statutes and well-settled precedent as well as…constitutional provisions.’ Brennan cites Robert Cover’s *Justice Accused: Antislavery and the Judicial Process* as the book which provides most support for this view, specifically its discussion of how specific delegation and allocation of power—what Brennan describes as human law—was more significant to the Founders than

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137 Brennan, Terry. “Natural Rights and the Constitution: The Original “Original Intent,”” 973
138 Ibid
natural law.¹⁴⁰ But Brennan points out that among the over 1600 ratifiers of the Constitution, Cover cites only nine, many of whom made statements to the contrary. For example, John Adams believed that natural rights were antecedent to any ‘earthly government,’ and couldn’t be ‘repealed or restrained by human law.’ Similarly, Alexander Hamilton believed that ‘when human laws contradict…the essential rights of any society, they defeat the proper end of all laws, and so become null and void.’ Two years prior to the Fairfax Resolves, George Mason had written about the relationship between natural rights and government, arguing that ‘all acts of legislature apparently contrary to natural right and justice, are, in our laws, and must be in the nature of things, considered as void.’¹⁴¹ Taking one of the most popular critiques of legal positivists-that resorts to natural law signaled a judge’s belief that the law wasn’t as he felt it should be-Brennan argues that that is exactly the point of natural rights: they served as a significant metric by which all human law ought to be measured and scrutinized. Not only is human law incapable of conferring natural rights, but if it should by fear or coercion deprive individuals of their natural rights, the people reserved the right to withdraw from society or dissolve the social compact.¹⁴² This was the logic which prompted the dissolution of the band between the British Empire and the colonists, and it stands to reason that that logic would hold following the creation of the American government.

Brennan also critiques those who believe that considerations of abstract notions of justice were eschewed during the Constitutional convention by those who sought to create a pragmatic government which secured civil rights. Under this theory,

¹⁴² Ibid
the framers intended to merge natural rights into government institutions, but even if they failed to do so, that was ‘no limitation upon the legislative power.’ According to Brennan however, this flips the relationship between natural rights and republican government on its head: where proponents of this theory believed that republican government superseded natural justice, the Framers believed the opposite, convincing the American people during the Constitutional Convention that their natural rights weren’t being placed at risk by the creation of a new government. Virginia ratifier George Nicholas argued that no natural rights or privileges were being lost by a process that sought to redistribute the existing powers of government, while Pennsylvania ratifier Benjamin Rush reassured Americans that the Constitution opened up no avenue by which a tyrannical government could strip them off their natural rights.144

Critics of a natural rights jurisprudence argue that if natural rights were of paramount importance to the Founders, they would’ve been explicitly protected by the text of the Constitution. Subsequently, these critics dismiss the attempts made to smuggle natural rights into open-ended provisions of the Constitution. However, their importance to the Founders was precisely why they didn’t believe enumeration was necessary. The Federalists and the Anti-Federalists sparred over the extent to which natural rights required protection within the Constitution: Patrick Henry introduced amendments intended to explicitly protect natural rights during the Virginia Convention, while in Rhode Island, dozens of declarations serving the same purpose were introduced and approved. Federalists however believed that such amendments were unnecessary because the Constitution provided no textual basis upon which the

143 Ibid., 984
144 Ibid., 989
government could infringe on natural rights, and Brennan describes how the notion ‘that a national government could somehow confer the rights of nature by annexing amendments was condemned as a glaring absurdity.’ Similarly, Rush pointed out that it was ridiculous to assume that the recognition of rights that had been conferred before any social state depended on organic acts for their recognition. In Pennsylvania, James Wilson stated his belief that natural rights were possessed ‘neither by grant nor contract,’ while in North Carolina, James Iredell and Archibald Maclaine reassured ratifiers that enumeration wasn’t required for the retention of natural rights.

Even in state conventions which explicitly recognized natural rights in their texts, those declarations were ‘merely for greater caution’ intended to supplement the idea that natural rights were retained by the people. Madison’s own resolutions which laid the early groundwork for the Ninth and Tenth Amendments reiterated that enumerations were a useful ‘double security,’ but didn’t serve as the source of natural rights. The Federalists believed that the Amendments were a declaration of rights, not an act of creation, and as such, the people were secure in them regardless of whether they were declared or not.

Given the intrinsic value of natural rights, textual enumeration might have done more harm than good, a position which in the context of the Bill of Rights was explicated by James Wilson and James Madison, and by Alexander Hamilton in Federalist 84. According to Hamilton, the recognition by the Declaration of Independence that ‘we the people of the United States, to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the

145 Ibid., 994
146 Ibid., 995
147 Ibid., 996
United States of America,’ was by itself a better protection of popular rights than any type of bill of rights. He went even further, arguing that a bill of rights would be dangerous, as it would ‘contain various exceptions to powers which are not granted; and on this very account, would afford a colorable pretext to claim more than were granted.’ In other words, a bill of rights would not only fail to regulate the power of the Federal government, but it would also furnish to those disposed to usurp power a ‘plausible pretense’ to do just that. Wilson believed similarly and argued that a bill of rights incorrectly placed the burden on the people to show why certain rights deserved protection, when in reality, a limited government of enumerated powers ought to carry the burden of explaining why they require certain powers. Even James Madison, who eventually came around to the idea of a Bill of Rights, didn’t see it as being essential, and pointed that out defining a right rigidly in text might limit its scope more than it would’ve been limited had it remained unenumerated. These debates don’t cast doubt on the claim that natural rights and those listed in the Bill of Rights deserved protection in the eyes of the Founders, Instead, they speak to the high value placed on these rights by both sides. Massachusetts Anti-Federalist James Winthrop believed as much, pointing out that ‘both parties…found their arguments on the idea that these rights ought to be held sacred.’

Beyond the philosophical objections to textual enumeration of natural rights, the Founders recognized the impracticality of enumerating every single right imagined in the Constitution. James Wilson argued that ‘all the political

149 Ibid
150 Wilson, James. “Speech at a Public Meeting in Philadelphia (1787).” National Constitution Center
152 Brennan, Terry, “Natural Rights and the Constitution: The Original “Original Intent,”” 991
writers...have treated on this subject; but in no one of those books, nor in the aggregate of them all, can you find a complete enumeration of rights appertaining to the people.' Other Federalists described such a task as being ‘impossible,’ and in one case, ‘as the highest absurdity.’ They believed as such because the rights of nature ‘were as numerous as sands upon the seashore.’ Even the Anti-Federalists who demanded a comprehensive enumeration of natural rights employed normative language which reflected their belief that there ought to have been enumeration, but according to Brennan, there’s no evidence that a single Anti-Federalist succeeded in doing so. Originalists fret that a natural rights philosophy would empower judges to create new natural rights out of thin air, which according to Walter Berns, would’ve been regarded as contrary to natural rights by the Framers. But this presupposes the existence of an array of unenumerated rights unbeknownst to the Framers, a dubious proposition. Brennan lists several natural rights put forward by state conventions—the right of conscientious objection, freedom of information and inquiry—which were considered but ultimately failed to find protection in the Bill of Rights. Brennan describes the recognition of such natural rights by judges as an act of vindication, rather than creation, as originalists would describe it.

At this point, readers may rightly observe that we are going through the historical record to determine how the Founding generation understood natural rights, and how they intended natural rights to be protected. If this is the case, then we are no better than Scalia and Thomas, for we too may be cherry-picking the historical record.

153 Ibid., 998
154 Ibid., 999
155 Ibid., 1002
156 Ibid., 1005
to reach our favored conclusion. Nothing could be further from the truth. For starters, we are cognizant of when it is appropriate to speak broadly, and when it is appropriate to narrow the scope of inquiry. We first parse through the historical record to support a rather uncontroversial claim, that the Founding generation placed stock in natural rights as a general matter. To contest this would be as absurd as contesting the claim that the Founders didn’t believe broadly in individual liberty, or freedom. Regardless, we don’t cite obscure statutes and writings from the era, instead we cite, amongst others, the Declaration of Independence, and *The Federalist*, two of the most significant documents explaining the nature and structure of the United States government.

In the subsequent sections, however, we focus specifically on the natural right of self-defence, logically deducing its existence in a state of nature by employing Locke’s methods of reasoning. Furthermore, our conclusion that this right is deserving of judicial enforcement by the Court by no means suggests that every natural right is entitled to such treatment. Instead, we hope it encourages readers to consider how we ought to distinguish between various natural rights and ponder the extent to which legislatures may limit the scope of certain natural rights in pursuance of the public good. We take seriously critics of natural law who ask how moral claims can be transformed into legally-protected rights enforceable against the government, and endeavor to address their concerns by proposing a strict scrutiny standard of review. Finally, while the discussion of enumeration seeks to explain why it wasn’t necessary by faithfully citing the leading thinkers of the time, we acknowledge that history isn’t dispositive, and in recognition of powerful arguments in favor of explicit textual enumeration, we will seek to locate natural rights within the Constitution’s text anyway.
What are the natural rights in question that pertain to the right to bear arms?

The decision to root our understanding of natural rights in the context of American constitutionalism in the philosophy of John Locke isn’t a random one. Locke was perhaps the most influential political philosopher in late 18th century America, and Thompson argues that ‘America’s revolutionary mind is virtually synonymous with John Locke’s mind.’ The principles he elucidated in Locke’s *The Second Treatise on Civil Government*, in particular, ‘profoundly shaped the worldview of eighteenth-century Americans,’ who were ‘unadulterated Lockeans.’

Thomas Jefferson cited Locke, along with Francis Bacon and Isaac Newton as the three ‘greatest men that have ever lived, without any exception.’ John Locke was similarly effusive in his praise, professing that those three men were the most important to his intellectual development. However, he specifically singled out Locke for praise, comparing him to Christopher Columbus and claiming that Locke had discovered a ‘new world’ by steering ‘his Course into the enlightened regions of the human mind.’

At the heart of Locke’s work was a belief that there were moral laws of nature which could be discovered by man’s faculties of reason and helped guide their conduct. In discovering these laws, men would determine how best to live a life that would help them find happiness. Building on the Enlightenment’s rejection of faith, revelation, and mysticism, Locke argued for evidence-based reasoning in the pursuit of moral knowledge. Because these laws were discernible only by unprejudiced

157 Thompson, C. Bradley. *America’s Revolutionary Mind*, 41
158 Ibid., 42
159 Ibid., 23
160 Ibid., 24
rational inquiry, he embraced the idea of tabula rasa, that man’s mind at birth is a blank slate, devoid of any innate ideas.  

Employing the methods of Baconian and Newtonian science which stressed experience and observation, Locke believed that objective moral laws of nature could be discovered and could subsequently serve as the foundation for politics.

What were those moral laws? Locke’s Second Treatise implores us to first consider man in a state of nature, a state of perfect freedom where individuals are free to order their actions and dispose of their possessions and persons as they see fit, without depending on the will of any other man. Consequently, liberty isn’t necessarily the right of a person to do whatever he wants without being restrained by the law, but the freedom to follow one’s will in all things, ‘and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man.’ It follows then that the state of nature is also a state of equality, in which ‘all power and jurisdiction is reciprocal,’ and that ‘creatures of the same species and rank…should also be equal one amongst another without subordination or subjection.’ Because all men are created equally, Locke believed that the law of nature which governs the state of nature teaches that ‘all being equal and independent, no one ought to harm another in his life, health, liberty, or possessions.’ Instead, man has a duty to ‘love others than themselves,’ and if he is to have any of his desires satisfied, he must be ‘careful to satisfy the like desire, which is undoubtedly in other men, being of one and the same nature.’ Locke believed that men were ‘the workmanship of one omnipotent, and

161 Ibid., 28
162 Ibid
164 Ibid., 269
165 Ibid., 271
166 Ibid., 270
infinitely wise maker; all the servants of one sovereign master…they are his property…made to last during his, not one another’s pleasure.’ Because everyone’s bodies belonged not to themselves, but to God, man ‘has not liberty to destroy himself, or so much as any creator in his possession.’ Therefore, there couldn’t be ‘supposed any such subordination among us, that may authorize us to destroy one another, as if we were for another’s uses, as the inferior ranks of creatures are for ours.’

Subsequently, he believed strongly in an individual’s right to preserve his life, arguing that this was among the only two reasons an individual could lawfully do harm to another, the other being to punish an offender such that he or anyone else is deterred from committing an offence. Locke argued that man reserved the right ‘to restrain, or where it is necessary, destroy things noxious to them…to make him repent the doing of it, and thereby deter him and, by his example others, from doing the like mischief.’ In short, ‘every man has a right to punish the offender and be executioner of the law of nature,’ because if he didn’t, the offender will ‘be sure to destroy him whenever he falls into their power.’ The law of nature would be in vain ‘if there were no body in the state of nature had a power to execute that law, and thereby preserve the innocent.’

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167 Ibid., 271
168 Ibid., 272
169 Ibid
170 Ibid., 279
171 Ibid., 271
Alienable vs inalienable rights: why the natural right of self-defence is retained in civil society, and why it implies a right to bear arms for that purpose

In exploring Locke’s philosophy, we slowly see a natural right of self-defense emerging. A core tenet of Locke’s philosophy, however, was that individuals forfeited many of their rights when they left the state of nature and mutually consented to join a civil society, specifically those pertaining to their executive power. Recall that Locke believed that in a state of nature every man retained the right to punish those who transgress the law of nature. But Locke points out that ‘ill-nature, passion and revenge will carry them too far in punishing others,’ and that ‘self-love will make men partial to themselves and their friends.’ In the state of nature, the right of everyone to executive power leads to nothing but confusion and disorder, and thus government is necessary ‘to restrain the partiality and violence of men.’ To secure their life, liberty, and property, men actively seek the safety of an established government, under which, ‘the first power of doing whatsoever he thought for the preservation of himself, and the rest of mankind, he gives up to be regulated by the laws made by society.’

The natural right of self-defence, however, is unalienable in those situations where man cannot appeal to the laws for redress and there is no ‘common Superior on Earth to appeal for relief.’ Locke offers the example of a thief, who despite having done no physical harm to the individual’s life, still declares war on him by seeking to

172 Ibid., 275
173 Ibid., 276
174 Ibid., 352
175 Ibid., 280
take him under his control by way of force. Locke argues that the individual may still kill him, because the law which was designed to preserve his life, ‘where it cannot interpose to secure my life from present force…permits me my own defense, and the right of war, a liberty to kill the aggressor.’ In other words, when faced with a present and imminent attack on one’s life, the apparatus that individuals have chosen to rely on for their preservation by entering civil society are inaccessible: the aggressor ‘allows not time to appeal to our common judge, nor the decision of the law, for remedy in a Case.’\(^{176}\) The lack of a Judge, or common authority as Locke puts it, is what distinguishes the state of war from the civil society, and in the state of war, ‘every man upon this score, by the right he has to preserve mankind in general, may restrain, or where it is necessary, destroy things noxious to them.’\(^{177}\) Not only that, but the victim had a ‘right to destroy that which threatens me with destruction: for, by the fundamental law of nature, man being to be preserved as much as possible, when all cannot be preserved, the safety of the innocent is to be preferred.’\(^{178}\)

Looking at it from another perspective, the alienability of a natural right also turned on the effect its exercise would have on the public good. James Wilson argued that individuals were free to exercise their natural right ‘provided he does no injury to others; and provided some publick (sic) interests do not demand his labors.’\(^{179}\) For this reason, Steve Heyman argues that freedom of belief is an inalienable right, because holding any belief doesn’t inflict any injury upon one’s fellow citizens. On the other hand, Heyman argues that the use of a weapon against a fellow citizen may impact their rights and security and is therefore alienable because the general welfare

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\(^{176}\) Ibid
\(^{177}\) Ibid., 272
\(^{178}\) Ibid., 279
stands to gain from individuals surrendering that right. However, Heyman is determining ‘injury’ too simplistically, and fails to recognize that natural rights are either retained, alienated, or modified with the public good in mind. Locke argues that in a state of war, the aggressor has declared that he is unbound ‘from the ties of the Common Law of Reason,’ and having no other rule but that of force and violence, ‘so may be treated as Beasts or Prey, those dangerous and noxious Creatures, that will be sure to destroy him, whenever he falls into their Power.’ Because all cannot be preserved and the safety of the innocent is to be preferred, a man who uses an arm to exercise their right of self-defence may be doing a public good by killing an aggressor.

Putting the pieces together, the natural right of self-defence is retained in a civil society during situations in which an individual is faced with a threat to his life, liberty, or property, and cannot appeal to the law or any common authority to resolve the conflict and seek reparations for the harm he has suffered. Even though the individual does ‘harm’ in a formalistic sense, they are harming or killing someone who believes he is above the commonly agreed upon rules and acts accordingly. Thus, he promotes the public good by creating a safer, more secure community through his actions, the goal of civil society in the first place. The conclusion, therefore, that the right to self-defense is an inalienable one which is retained within civil society sounds similar to the Heller Court’s conclusion that the core component of the Second Amendment is a right to armed self-defense.

Heyman recognizes that an individual when assaulted and without recourse to the law may ‘use all necessary force to defend himself,’ but argues that firearms fall

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181 Locke, John and Peter Laslett. Two Treatises of Government, 279
on the ‘alienable’ side of the line, because legislatures can reasonably determine that a community would be safer without firearms and thus prohibit firearm possession to protect lives.\textsuperscript{182} But this is somewhat paradoxical: if the government has proscribed certain methods of self-defence, then individuals consequently cannot use all necessary force to defend themselves. Perhaps banning the use of certain \textit{types} of firearms may be permissible—as we will discuss later—but to ban firearms entirely would be to deny the logical connection between the right of self-defense and the right to keep and bear arms recognized by Founding era thinkers.

Blackstone described self-defense as the primary law of nature, and argued that ‘arms for their defense, suitable to their condition and degree,’ made possible ‘the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.’\textsuperscript{183} In line with Locke, Blackstone limits the right of self-defense to those situations where the government and its laws are incapable of protecting the individual but reaches the more sensible conclusion that firearms give force to the natural right in question. Baron de Montesquieu, an influential philosopher cited several times in \textit{The Federalist}, similarly condemned laws against firearms as infringing the natural right of self-defence.\textsuperscript{184}

Don Kates points out that ‘as inheritors of these ideas, the Founders believed that the right to arms was a necessary ingredient of the moral duty of self-defence.’\textsuperscript{185} Even John Adams, a skeptic of the individual right to bear arms, argued that to protect

\begin{footnotesize}
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\item \textsuperscript{182} Heyman, Steven K. “Natural Rights and the Second Amendment,” 245
\item \textsuperscript{183} Schmidt, Christopher J., “An International Human Right to Keep and Bear Arms.” \textit{Wm & Mary Bill Rts J.} 15 (2006): 995
\item \textsuperscript{184} Kates Jr, Don B. “The Second Amendment and the Ideology of Self-Protection.” \textit{Const. Comment.} 9 (1992), 91
\item \textsuperscript{185} Ibid
\end{itemize}
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the right of individuals to use arms at their discretion would ‘demolish every
constitution,’ but made an exception for ‘private self-defense.’ Thomas Jefferson
didn’t support laws which forbade the carrying of arms on the grounds that they
‘sacrifice a thousand real advantages for one imaginary of trifling inconvenience,’ and
in a draft bill of rights for the state of Virginia, included a simple provision stating
that ‘no freeman shall ever be debarred the use of arms.’ Kates points out that the
notion that individuals were somehow doing a service to the public by foregoing the
individual right of self-defence and instead relying on the police would have been
foreign to the Founders. In fact, Kates argues that it was a ‘crucial element’ of a
man’s moral character that he be armed and willing to defend himself and his family
against crime. Individuals therefore took on criminals both individually and in groups
when necessary and were seen as serving both their families and their communities.

Heyman’s argument suffers from the flaw of assuming that society is
composed almost entirely of rational individuals, and thus places too much faith in the
power of legislation restricting or banning firearm possession. But it’s precisely
because we can’t rely on individuals to follow the law that firearm possession must be
linked to the right of self-defence, because if firearms are outlawed, then only outlaws
will have firearms. Thomas Paine understood this, arguing that no law could prevent
‘the invader and the plunderer’ from owning arms. Thus, ‘since some will not, others
dare not lay them aside.’ In conclusion, the possession of arms was viewed during
the Founding era as a ‘positive social good, as well as an indispensable adjunct to the

186 Ibid
187 Ibid., 91
188 Kates Jr, Don B. “The Second Amendment and the Ideology of Self-Protection,” 92
189 Ibid., 90
individual right of self-defence. The right to bear arms is therefore best understood as
an implied right flowing from the broadly recognized natural right to self-defense
which ought to be recognized and protected.

The protection of such implied rights by the Supreme Court isn’t
unprecedented. For example, in *NAACP v. Alabama*, the Court held that ‘the freedom
to engage in in association for the advancement of beliefs and ideas is an inseparable
aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth
Amendment, which embraces freedom of speech.*190 The freedom of association is
therefore an implied right flowing from the broader right of free speech. In *Bates v.
City of Little Rock*, Justice Black, whose rigid textualist approach would be the least
favorable for the theory of implied rights, wrote in his concurrence that ‘freedom of
assembly, includes of course freedom of association; and it is entitled to no less
protection than any other First Amendment right as *NAACP v. Alabama* held.*191 The
logic of implied rights was best elucidated by Chief Justice John Marshall in his
opinion for the Court in *Gibbons v. Ogden*, speaking in the context of Congress’
implied powers under the Interstate Commerce Clause. In that case, Marshall argued
that while the powers of Congress are enumerated, the means Congress pursues to
exercise those limited powers need not be specifically enumerated and are legitimate
if Congress deems them to be, unless they expressly violate the text of the
Constitution. He argued instead that the words of the grant of power import, usually
understood, certain powers to the government. A narrow construction of the
government’s powers would ‘cripple’ the government, and render it incapable of
meeting its ends, as stated in the Constitution.*192 Marshall made the same argument

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190 *N.A.A.C.P v. Alabama*, 357 U.S. 449 (1958), 450
191 *Bates v. Little Rock*, 361 U.S. 516 (1960), 528
192 *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), 188
in *McCulloch v. Maryland*, where he argued that the nature of the Constitution was such that ‘only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the object themselves.’ It doesn’t fly in the face of reason to apply the same logic to the natural right of self-defense, in fact, it could be reasonably argued that a prohibition of an entire class of weapons inextricably connected to the natural right of self-defense would cripple that right and render individuals incapable of exercising that right.

**Why judicial enforcement is necessary for this specific right**

At the time of the Founding, there was substantial debate about the extent to which individuals may exercise their natural rights upon entering civil society: were they fully retained, or could they be abridged entirely by the government? The answer for many was somewhere in the middle: natural rights were mostly retained, but they could be regulated, and thus modified, if such regulations promoted the public good and were passed by representative legislatures. Civil society itself imposed certain duties on citizens, requiring them to accept a limitation on their natural rights in order to promote the public good. Thus, Heyman’s discussion of how legislatures may consider the public good is consistent with Blackstone’s view that natural liberty could be ‘so far restrained by human laws…as is necessary and expedient for the general advantage of the public.’ It forces us to consider, then, how they may do so

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194 Campbell, Jud. “Natural Rights and the First Amendment,” 275
195 Ibid., 276
without disturbing the core of the natural right of self-defence we’ve established, and
the right to bear arms implied from it. Jud Campbell discusses government limitations
on the natural rights of speech and expression, pointing out that blasphemy and
profanity laws were ‘commonplace’ because swearing was regarded as harmful to
society, even if it didn’t interfere directly with the rights of others. Similarly, some
states banned theatre performances because were deemed to be a ‘morally corrupting
influence.’ Campbell argues that because the scope of natural rights turns on
‘assessments of public policy’ and because decisions about the public good are made
by the people and legislatures and not judges, natural rights serve merely as
‘constitutional lodestars.’ They are a truism reminding legislatures that the people
retain certain rights, but they don’t serve as an absolute or substantive barrier to
government legislation. In the absence of legal enforcement, natural rights are little
more than moral claims.

Adopting Campbell’s approach, however, would allow legislatures to engage
in the same interest-balancing test that Justices have engaged in to determine which
rights are ‘implicit in the concept of ordered liberty’ under the Fourteenth
Amendment and allow them to disregard the effect their legislation would have on
natural rights. Given that the Founders believed that individuals retained many natural
rights upon entering civil society, it could be argued that asking legislatures to
accommodate every single one of them would paralyze the government and prevent
the efficient functioning of society. Distinguishing the significance of various natural
rights is therefore necessary, but our survey of quotes from the foremost Founding
fathers and the debates surrounding the Second Amendment have already

196 Ibid
197 Ibid
demonstrated how much the right of self-defence was valued. However, it is worth noting how universal that sentiment was.

Thomas Hobbes—whose belief in absolute monarchy was entirely at odds with the limited government position of Locke that the Founders ultimately adopted—recognized that the state of nature was one of civil war because individuals had the right to everything necessary to assure their self-preservation. While citizens in the Commonwealth were required to obey the sovereign, they retained the liberty to disobey ‘if the Sovereign command a man (though justly condemned), to kill, wound, or maim himself; or to resist those that assault him.’ 198 Similarly, A.J. Ashworth writing for the Cambridge Law Journal notes that while legal systems allow varying levels of social and political inequality between its citizens, they all ‘equalize’ human beings by recognizing as the most basic claim of every human being ‘the right to life and the physical security.’ 199 British case law since as far back as the 14th century recognized the right to use deadly force against home invaders, and thus, the Declaration of Rights—which would serve as a predecessor to the Second Amendment—stated unequivocally that ‘the right to arms for defense was a true, ancient, and indubitable right.’ 200 Legal scholar David Kopel notes that the Founders drew inspiration from a variety of sources, from the Ancient Greeks and Romans to the Huguenots in France, all of which demonstrated to them how universally valued the right of self-defence had been throughout history. 201

201 Ibid., 247
Given the significance of the natural right of self-defence, and the implied right to bear arms which flow from it, an interest-balance test of the type which legislatures engage in would subsequently ‘underweight the importance of self-defense.’ Subsequently, Kopel asks, ‘surely nothing could be more fundamental than a natural right?’ He points out that the Declaration of Independence doesn’t start off with a statement of rights conferred by positive law, rather it ‘starts with natural, inherent rights,’ and he argues that the very purpose of government is to protect these rights. Thus, it is precisely when these rights are being infringed that a ‘rigorous judicial review’ is most important.202

Randy Barnett has argued that if the Ninth Amendment places natural rights on equal footing with the enumerated rights listed in the first eight amendments—an argument we will take up and support later on-then they should be protected by the Court as such: their exercise may be regulated by the government, and where their exercise violates the equal rights of others, they may be prohibited. But in accordance with a strict scrutiny standard of review, Barnett argues that if any attempt be made to restrict the exercise of these rights, the burden of proof falls on the government to justify its regulation by showing a compelling state interest and proof of narrow tailoring to ensure that the right is being transgressed in the least intrusive way.203 This would have profound implications for the relationship between the natural rights and public policy: rather than the latter illuminating the former as Campbell proposes, in some cases it would now be the other way around.

Applying this standard to the legislation struck down in Heller yields a more straightforward explanation for reaching the same conclusion reached by the majority:

202 Ibid
the handgun ban violates the natural right of self-defence because it prohibits an ‘entire class of arms that Americans choose for the lawful purpose of self-defence,’ and thus isn’t narrowly tailored to meet the compelling interest D.C had in assuring public interest. The requirement that firearms in the home be disassembled similarly placed too much of a burden the core right in question, while also failing to serve any compelling state interest. Under this standard however, prohibitions on certain types of firearms may be permissible. A state’s interest in prohibiting civilian possession of tanks or even fully automatic weapons is an undoubtedly compelling one, and if they can show that such arms aren’t primarily used for self-defence, their prohibition would be a narrowly tailored one which doesn’t significantly burden that right. Looking more broadly, restrictions on firearm possession in public institutions with armed security-banks, prisons, courtrooms-wouldn’t fall foul of the natural right we’ve identified, because these are places where citizens under threat have recourse to law enforcement officers who will follow the legally prescribed rules of engagement to defuse the conflict.

The most significant implication of our inquiry for gun-control legislation may be its effect on hunting, the most common use of arms in the United States. Proponents of both the individual and collective right views of the Second Amendment are generally in agreement that the scope of the Amendment does not extend to what they derisively describe as a ‘recreational activity.’ Even the National Rifle Association (NRA), perhaps the foremost organization dedicated to representing the interests of gun-owners across the country, has over time switched its

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204 D.C. v. Heller, 571
focus from promoting hunting, to defending the constitutionality of the right to bear arms for self-defence.\textsuperscript{207} Law Professor Joseph Blocher in fact argues that gun-control advocates often find themselves in agreement with gun-rights advocates who believe that the outsized emphasis on hunting dilutes the significance of the Second Amendment in protecting the right to bear arms for self-defence and in resistance of tyranny.\textsuperscript{208} \textit{Heller} made it clear that self-defence was at the core of the right, but Blocher points out that Scalia opens the door for hunters to claim protection under the Second Amendment by neglecting to read the prefatory clause as a purpose clause which limits the scope of the Amendment to militia contexts.\textsuperscript{209} Furthermore, given that tens of millions of Americans identify themselves as hunters, and that hunting has always held a \textquoteleft special cultural salience\textquoteright\textsuperscript{210} in the United States, it could be argued that the right of armed hunting ought to be incorporated against the states as a practice deeply rooted in the nation’s history and tradition. Under our formulation, however, the right to bear arms is implied from, and inextricably tied to the natural right of self-defence, without any regard to the history and traditions of the nation. Thus, regulations proscribing the time, place, and manner of armed hunting are completely permissible, as are laws prohibiting the use of shotguns, absent any showing that this class of firearms, or that hunting more broadly, is essential for individual self-defence.

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\textsuperscript{207} Blocher, Joseph. \textquoteleft\textit{Hunting and the Second Amendment},\textquoteright 143
\textsuperscript{208} Ibid., 148
\textsuperscript{209} Ibid., 137
\textsuperscript{210} Ibid., 135
This chapter explained the significance of natural rights to the Founding generation, deduced the existence of a natural right of self-defence, explained when it is retained in civil society, and showed why a right to bear arms is implied from that natural right. It explained why this right is of such significance as to warrant judicial enforcement and proposed a strict scrutiny standard for that purpose. Despite showing that textual enumeration of natural rights is unnecessary, Madison’s early resolutions which laid the groundwork for the Ninth Amendment suggest that natural rights do have a home in the Constitution located in that Amendment. An inquiry into the Ninth Amendment is therefore warranted, for it would give us both the philosophical and textual basis upon which to craft a robust natural rights jurisprudence and dismiss claims that we are Lochnerizing. Chapter 3 will take on that task and transform what is right now just a moral claim into a legally-protected right enforceable under the positive law of the Constitution.
Chapter 3: Locating natural rights within the text of the Constitution

The status of natural rights on the Supreme Court

First, we consider how natural rights have been treated by the Supreme Court. If the Constitution reflects the natural rights philosophy of the Declaration of Independence as Professor Jaffa argues, and if the delegates at the Constitutional Convention were careful to ensure that natural rights—being of transcendent status—weren’t infringed upon by the text of the Constitution, then the Court should at the very least take natural rights into consideration when exercising their power of judicial review. Yet, natural rights haven’t been accorded the significance and precedence they deserve.

The first noteworthy Supreme Court opinion on the significance of natural rights in Constitutional interpretation was penned by Justice Samuel Chase in *Calder v. Bull*, a case decided in the early days of the Republic in which the Court held that the Ex Post Facto Clause of the Constitution applied to criminal but not civil cases. Critiquing the Connecticut legislature, Justice Chase wrote ‘an Act of the legislature (for I cannot call it a law) contrary to the first great principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on an express compact, and on republican principles, must be determined by the nature of the power, on which it is founded.’211 This view—entirely consistent with the Founding generation’s view that natural law transcended human law—was addressed by Justice James Iredell, who critiqued the reliance on natural justice, and argued that natural rights weren’t judicially enforceable. In his

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211 *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), 388
view, ‘the ideas of natural justice are regulated by no fixed standard,’ and thus judges rely merely on their own opinions on abstract principles when voiding an act of the legislature. Instead, judges must look to the Constitution, which defines ‘with precision the objects of the legislative power,’ and restraints ‘its exercise within marked and settled boundaries.’

Perhaps the most vociferous opponent of natural law jurisprudence was Justice Black, who decried both *Lochner* and *Griswold v. Connecticut* for relying on natural reasoning to protect rights not textually rooted in the Constitution. In his *Griswold* dissent, Black quoted Justice Iredell’s concurrence from *Calder*, and reiterated his belief that the same natural law formula which should’ve been put to rest once and for all in *West Coast Hotel v. Parrish* was dangerous. But as Professor of Law James Fleming points out, a case like *Lochner* ‘rightly understood doesn’t embody reasoning from natural law or natural rights at all.’ Therefore, *Lochner* ‘may read a ‘problematic economic or political theory into the Constitution, but not as a matter of natural law or natural rights.’ Natural law or natural rights have therefore become a catch-all term, a slur used by those who wish to castigate judges for taking extra-textual considerations into account.

Even Black’s ideological rival, Justice Frankfurter made the mistake of mischaracterizing natural rights in his opinion for the Court in *Rochin*. While responding to Justice Black’s argument that the Court was resorting to natural law formulations to protect unenumerated rights, Frankfurter retorted that such a formulation would require the understanding of Due Process to be frozen ‘at some

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212 Ibid., 399  
213 *Griswold v. Connecticut*, 381 U.S. 479 (1965), 522  
fixed stage of time or thought,’ and that if we were to rely on natural law, constitutional adjudication would be ‘a function for inanimate machines and not for judges.’ But such a description treats the natural law tradition as belonging to a specific era of history, when in reality, the natural rights flowing from natural law are timeless, and apply with equal force to every individual living in every period of American history. That natural rights were likely of more significance to the Founding generation than they were to Americans of the mid-20th century doesn’t make them a dated consideration unworthy of recognition as Frankfurter believes.

Frankfurter’s critique is closer to Stevens’ critique of Scalia’s over-reliance of history than it is to a fair critique of natural law, but natural law and the historical approach couldn’t be further apart. Unlike a natural right, a right protected on historical grounds gets its protection from its recognition by the people of a specific era, specifically the Founding era. Natural rights, however, need no such recognition. For example, the right of self-defense might’ve gone unrealized and unprotected by federal and state governments for over 200 years prior to *Heller*, yet it would’ve stood on its own two-feet as a natural right anyway. Scalia’s opinion in *Heller* does allude to the natural rights foundation of the right to bear arms for self-defence: it cites *United States v. Cruikshank*’s assertion that that right isn’t granted by the Constitution because it didn’t depend on that instrument for its existence and quotes thinkers like Blackstone and Wilson who described the right as a natural one. However, it foregoes an extensive analysis of the natural rights tradition of the type this thesis has undertaken, and instead engages in a word-by-word linguistic breakdown of the Second Amendment using historical sources. Natural rights are, however, of more

215 Rochin v. California, 171
216 U.S. v. Cruikshank et al., 92 U.S. 542 (1876), 542
importance than history and tradition. Similar to the relationship between natural rights and public policy, natural rights don’t obtain their content from historical practices, rather natural law discovered through objective reason provide a lens through which historical practices ought to be critiqued.

Current Status of the Ninth Amendment on the Supreme Court

The Ninth Amendment, which states that ‘the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people,’ had rarely been invoked by the Supreme Court as a source of individual rights, and was considered an incredibly weak check on the power of the Federal Government. Although legal scholars have cited Justice Arthur Goldberg’s concurrence in Griswold as the first substantive explication of the Ninth Amendment which breathed life into the otherwise neglected Amendment, Law Professor Kurt Lash argues that a ‘surprisingly rich history of legal interpretation and judicial application of the Ninth Amendment’ existed prior to Goldberg’s opinion. Lash argues that as a tool intended to limit the power of the Federal government, courts relied on the Ninth Amendment-and the Tenth-as ‘one of the twin guardians of state autonomy’ during both the Reconstruction and Progressive Eras. However, following the dramatic re-balancing of power between the states and the Federal Government during the New Deal era, Lash argues that the Ninth Amendment was reduced to a truism which lacked the power to stymie the expansion of Federal power. As the Court gradually incorporated the Bill of Rights against the States under the Due

217 U.S. Const. amend. IX
218 Lash, Kurt T. “The Lost Jurisprudence of the Ninth Amendment.” Tex L. Rev. 83 (2004), 600
219 Ibid., 601-02
Process Clause of the Fourteenth Amendment, the force of the Ninth Amendment weakened. In *United Public Workers v. Mitchell*, the Court found that the Hatch Act of 1939 violated ‘the right of citizens under the Ninth Amendment to act as a party official or worker to further his own political views,’ but held that Ninth Amendment protections were subordinate to the exercise by the Federal Government of its enumerated powers. For a plurality of just three Justices, Justice Stanley Reed wrote ‘when objection is made that exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed towards the granted power under which the action of the Union was taken. If granted power is found, necessarily, the objection of invasion of those rights, reserved by the Ninth and Tenth Amendment, must fail.’

In *Griswold*, Justice Douglas writing for the majority argued that the Ninth Amendment was among those in the Bill of Rights which together created a zone of privacy that protected the right of married couples to access contraceptives. Justice Goldberg’s concurrence in *Griswold*, however, explored the Amendment in greater detail and sought to revive its original meaning. He argued that James Madison-the Amendment’s primary architect-along with the other Framers ‘did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people.’ Where the Bill of Rights did not explicitly protect such fundamental rights-for example the right to marital privacy-the Ninth Amendment would fill that role. He cited Joseph Story, who stated that ‘this clause was manifestly introduced to prevent any perverse or ingenious misapplication

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221 Ibid., 85
222 *Griswold v. Connecticut*, 484
223 Ibid., 490
of the well-known maxim, that an affirmation in particular cases implies a negation in all others. While Goldberg didn’t speak specifically of ‘natural rights,’ labelling the right to marital privacy instead as a ‘fundamental and basic’ or ‘personal’ right retained by the people, his opinion opened the door for a consideration of how natural rights could be protected by the Ninth Amendment.

Dissenting in the case, both Justices Black and Stewart focused their aim on Goldberg’s novel theory and interpretation of the Ninth Amendment. Black argued that Goldberg’s approach would not only invite judges to consult ‘their personal and private notions’ when determining if legislation violated fundamental principles of liberty and justice or was contrary to the traditions and conscience of the people, but that it was at odds with the history of the Amendment. In Black’s view, the Amendment was intended to limit the power of the Federal Government by reminding it that those rights which weren’t enumerated were still precluded from infringement by that body. To therefore read the Ninth Amendment as providing Federal Courts-departments of the Federal Government-veto powers of democratically enacted legislation was counterintuitive. Stewart was equally dismissive, arguing that for Goldberg to say that the Ninth Amendment was relevant to this case was ‘to turn somersaults with history.’ Stewart believed that the Ninth Amendment was intended to serve as a simple reminder that the Federal Government was ‘one of express and limited powers, and that all rights and powers not delegated to it were retained by the people and the individual States. To suggest that the Ninth Amendment had the force to void laws of the legislature ‘would have caused James

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224 Ibid
225 Ibid., 486
226 Ibid., 493
227 Ibid
Madison no little wonder,’ according to Stewart.228 The Ninth Amendment has subsequently been invoked in cases pertaining to rights to personal privacy. In Roe vs Wade, a three-judge District Court found that Texas statutes criminalizing abortion violated both Ninth Amendment, incorporated against Texas via the Fourteenth Amendment. Despite locating the right in the Fourteenth Amendment, the Supreme Court didn’t contest the lower Court’s interpretation. 229

Legal scholar Randy Barnett argues that since 1983, five distinct originalist models of the Ninth Amendment have emerged:230

1. The state law rights model
2. The residual rights model
3. The individual natural rights model
4. The collective rights model
5. The federalism model

Barnett argues that Russell Caplan’s article advancing the state law rights model was the first attempt to determine the original public meaning of the Ninth Amendment. Under this theory, the Ninth Amendment was intended to protect the rights guaranteed by state laws and constitutions ‘derived from both natural law theory and the hereditary rights of Englishman.’231 But in arguing that national legislation passed under the enumerated powers of the government may affect these state law rights, Caplan renders the Ninth Amendment irrelevant in practicality. The residual rights model advanced by Thomas McAfee argues that the Ninth Amendment sought to

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228 Ibid., 529
229 Roe v. Wade, 410 U.S. 113 (1973), 153
prevent the government from taking advantage of the ‘incompleteness’ of the enumeration of rights in the Bill of Rights and claiming federal powers beyond those expressly delegated.232 Barnett, however, believes that this model from a similar problem as the state law rights model, which is that they both believe the Ninth Amendment has ‘the sole purpose of responding to a single potential misconception of the Constitution: for Caplan it’s the potential displacement of state law rights, for McAfee it’s the claim that the Congress has broader rights under the Constitution. Barnett points, however, out that during Madison’s speech to the House about the National Bank, he used the Amendment outside these contexts.233

Arguing as Brennan did, Barnett believes that the Ninth Amendment protects individual natural rights, those which pre-existed the creation of the government, were enforceable before the enactment of the Bill of Rights, and thus retained by the people after its enactment. Under this interpretation, the Ninth Amendment was intended to “ensure the equal protection of unenumerated individual natural rights on a par with those individual natural rights that came to be listed ‘for greater caution’ in the Bill of Rights.”234 Barnett responds to critics such as Caplan who argue that the Ninth Amendment cannot be read as a ‘cornucopia of undefined rights,’ pointing out that the Amendment isn’t the ‘source’ of natural rights, for these rights precede the Constitution.235 The collective rights model advanced by Akhil Reed Amar appears on its face to contradict the individual natural rights model, but Barnett argues that they needn’t be mutually exclusive: it is possible that the rights retained by the people are

232 McAfee, Thomas B. “Original Meaning of the Ninth Amendment. Colum. L. Rev. 90 (1990) quoted by Barnett, Randy E., 12
234 Ibid., 14
235 Ibid
of both an individual and collective nature.\textsuperscript{236} In suggesting this possibility, Barnett makes the case that competing understandings of the Ninth Amendment needn’t be exclusive, and as such, he argues that his individual natural rights model is perfectly compatible with the final model, the federalism model advanced by Lash himself.

Lash argues that ‘although the Ninth and Tenth Amendments both limited federal powers, they did so in different ways. The Tenth insured that the Federal Government would exercise only those powers enumerated in the Constitution. The Ninth Amendment went further, however, and prohibited an expanded interpretation of those enumerated powers.’\textsuperscript{237} Lash presents his own summary of Ninth Amendment theories by broadly placing them in two general categories: the first is the libertarian reading of the Ninth Amendment, an active reading which argues that the Ninth Amendment protects judicially enforceable unenumerated rights. The second is the federalist reading, which links the Ninth and Tenth Amendments together and is a ‘passive expression of limited government power.’\textsuperscript{238} The federalist view argues that the Ninth Amendment was a response to concerns that the enumeration of rights limited enumerated authority, and thus sought to limit the construction of federal power, a view shared by McAffee, who described the Amendment as simply a ‘hold harmless’ provision forbidding the expansion of federal power by implication.\textsuperscript{239} Lash, however, blends the libertarian and federalist theories by arguing for an active, judicially enforceable understanding of the Ninth Amendment which protects the collective right of the people to self-government free

\textsuperscript{236} Ibid., 16
\textsuperscript{237} Lash, Kurt T. “The lost original meaning of the Ninth Amendment.” \textit{Texas L. Review}. 83 (2004), 399
\textsuperscript{238} Ibid., 343
\textsuperscript{239} Ibid., 346
from federal government interference. This view incorporates the collective rights model of Amar while maintaining the federalist thrust that Lash believes in.\textsuperscript{240}

Lash and Barnett analyze many of the same debates, documents, and correspondences which informed the original meaning of the Ninth Amendment and reach reconcilable conclusions. For example, both Lash and Barnett discuss Edmund Randolph’s objection to the Ninth Amendment. According to Lash, Randolph believed that the Ninth Amendment ought to protect against Congress extending its powers rather than attempt to protect rights ‘reducible to no definitive certainty.’ Hardin Burnley, believed that the distinction was irrelevant, that a protection of individual rights would naturally lead to a limitation of ‘improper extension of power.’\textsuperscript{241} Madison agreed with Burnley, and thus left out language prohibiting the constructive enlargement of Congress’ powers, believing it was redundant. Randolph was concerned by the seemingly open-ended nature of the Necessary and Proper Clause, even though he believed that the principle of limited delegated power protected the reserved power of the states. A separate clause reiterating that principle would prove insufficient if the authority of the Federal Government under its enumerated power became unlimited. A rule of construction expressly limiting the scope of enumerated power was therefore necessary, but the Ninth Amendment as proposed by Madison only did so implicitly.

The Virginia Senate, comprised of antifederalists, repeated many of Randolph’s objections to the Ninth Amendment, but noted that several other amendments were sufficient to secure ‘political and natural rights.’\textsuperscript{242} This, according to Lash, suggests that the Ninth Amendment was never intended to protect such

\textsuperscript{240} Ibid
\textsuperscript{241} Ibid., 373
\textsuperscript{242} Ibid., 381
rights. But the frequent lamenting by both Randolph and the antifederalists that the usage of the word ‘retained’ rather than the phrase ‘no extension of power’ as used in Virginia’s seventeenth proposal suggests on the other hand that the meaning of that proposal—a limitation of the Federal Government’s construction of its powers—is ultimately different from the meaning of the actual Ninth Amendment, which reflects the libertarian vision of Barnett.

Lash believes that it’s possible to read the Ninth Amendment as either restricting federal power or protecting the rights of the people and argues that both the majority and minority in the Virginia Senate were uncertain. Barnett however quotes the majority report in the Senate, which specifically states that the proposed language of the Ninth Amendment ‘respects personal rights,’ and that if the Amendment isn’t effective, Congress may be seen as ‘denying certain rights of the people.’

Barnett is quick to acknowledge as Lash does, that ‘this change in meaning does not, however, preclude the federalism model’s rule of construction.’ Even though Lash believes that the constructive expansion of federal power is itself a violation of the retained rights of people, this doesn’t preclude the possibility of the Ninth Amendment protecting natural rights, as he himself admits.

Lash and Barnett both discuss Madison’s speech on the Bank of the United States, made a few months after Secretary of the Treasury Alexander Hamilton had submitted a plan to Congress for the chartering of the Bank. Echoing the concerns of Randolph, critics of the Bank were worried that the chartering of the Bank, justified on the grounds that it was necessary and proper to advance Congress’ Article I Section 8 powers of taxation and regulating interstate commerce, represented an

244 Ibid., 51
245 Lash, Kurt T. “The lost original meaning of the Ninth Amendment,” 399
overly broad construction of power which hurt the principle of enumerated powers.\textsuperscript{246}

Randolph himself weighed in on the controversy, arguing with regard to the Bank that ‘a similar construction on every specified federal power, will stretch the arm of Congress into the whole circle of state legislation.’\textsuperscript{247} Against this backdrop, Madison delivered a speech on the Bank, in which he debunked various interpretations of the Constitution which granted Congress the power to establish an incorporated bank. Madison primarily argued that the implied power of chartering bank was so great and significant-the Bill provided the government the power to purchase and hold lands and establish a monopoly-that it required express enumeration itself. Any interpretation to the contrary ‘destroys the very characteristic of the government,’ and ‘cannot be just.’\textsuperscript{248}

These arguments had a distinctly federalist flavor to them, for they specifically touched on fears that the charter ‘would give to Congress an unlimited power; would render nugatory the enumeration to particular powers; [and] would supersede all the powers reserved to the state governments.’\textsuperscript{249} In this regard, they support Lash’s view that the Ninth Amendment—which was still being debated in Virginia—was intended to limit the broad construction of the Federal Government’s enumerated powers. Lash argues that Madison’s letter at the behest of President Washington definitively dismisses any possibility that the Ninth Amendment objections considered individual rights. In it, Madison first speaks to the Bill’s constitutionality, reiterating his belief that it contravened the principle of enumerated powers, and then speaks to the merits of the Bill, noting the pernicious effects monopoly has on the equality of citizens.\textsuperscript{250}

\begin{flushright}
\textsuperscript{246} Ibid., 384  \\
\textsuperscript{247} Ibid., 386  \\
\textsuperscript{248} Ibid., 387  \\
\textsuperscript{249} Ibid., 388  \\
\textsuperscript{250} Ibid., 390
\end{flushright}
The primary constitutional argument therefore is the federalist one. Barnett contests Lash’s interpretation, pointing out first that Madison had no problem with an exercise of enumerated power even if superseded state powers, and that federalism per se wasn’t Madison’s primary concern. Second, in a separate speech concerning the advantages and disadvantages of the Bill, Madison after reviewing the inequalities arising under the Bill noted that in discussing the merits of the bill, ‘he had reserved to himself, the right to deny the authority of Congress to pass it.’\textsuperscript{251} Therefore, the constitutionality of the Bill as it pertained to an infringement of individual rights was certainly considered by Madison.

Again, Barnett seeks to reconcile both his individual natural rights model with Lash’s federalism model. In his view, Madison’s invocation of the Ninth Amendment reflected his general opposition-in line with rules for constitutional interpretation-to a broad construction of enumerated powers but doesn’t tell us specifically what the original meaning of the Ninth Amendment was. In fact, Madison in his speech doesn’t really cite the Ninth Amendment, noting merely that both the Ninth and Tenth Amendments proceed along the principle he elucidated. If that is the case, then the Ninth Amendment could be construed as protection against a construction of enumerated power which harms both the individual rights and reserved powers of the state. We don’t need pick and choose. Lash appears to be less reconciliatory than Barnett, but his view that protection of the rights retained by the people went hand-in-hand with a limitation of the Federal Government’s power indicates his belief that the Ninth Amendment does protect more than just states’ rights. The question is, for Lash, are the rights retained by the people individual, or collective in nature?

\textsuperscript{251} Barnett, Randy E., “The Ninth Amendment: It Means What it Says,” 59
Lash acknowledges that a belief in individual natural rights was widely held by the Founding generation but argues that Roger Sherman’s draft bill of rights and North Carolina’s proposals follow a similar approach in favor of the federalism model: they begin with a ‘general declaration of natural rights, followed by a specific declaration of enumerated power and a rule of construction preserving the principle of state autonomy.’ If the Blackstonian model of interpretation discussed earlier which emphasized the significance of the preamble was indeed the favored approach of the Founding Era, then decoupling the operative elements of these draft bills from their preambles emphasizing individual natural rights doesn’t make sense. But Lash doesn’t do so to suggest that the Ninth Amendment doesn’t protect individual natural rights, but instead to argue that the structure of the proposals doesn’t foreclose the possibility that collective right were intended to be protected as well. For Lash, the federalism model and the collective rights model go hand in hand, because, quoting John Taylor, an opponent of the National Bank, ‘states’ rights are rights of the people.’ According to Lash, the Founding generation believed ‘federalism was a liberty of the people,’ and thus the Ninth Amendment was phrased in the language of rights rather than limitation of federal power. As discussed earlier, Madison and Burnley believed these were merely two sides of the same coin.

That being said, Lash argues that the Ninth Amendment ‘does not establish the character (collective or individual) of the rights so retained.’ Consequently, it was possible to embrace both individual natural rights and the collective right of self-government. North Carolina, for example, began its ratifying convention by declaring

252 Lash, Kurt T. “The lost original meaning of the Ninth Amendment,” 366
253 Ibid., 399
254 Ibid., 395
255 Ibid., 364
that ‘there are certain natural rights, of which men, when they form a social compact, cannot deprive or divest their posterity.’ They also proposed an amendment declaring ‘that each state in the Union shall respectively retain every power, jurisdiction, and right, which is not by this Constitution delegated to the Congress of the United States.’\(^{256}\) Similarly, New York’s proposed amendments spoke of rights retained by both ‘the People of the several States, or to their respective State Governments to whom they may have granted the same.’\(^{257}\)

Lash cites St. George Tucker’s Notes on the Constitution to show that the Ninth and Tenth Amendments worked together to prevent interference with an individual’s obligation to the state, and cites scholars such as Joseph Story and Edward White who believed that Tucker’s work represented the states’ right perspective of the Constitution.\(^{258}\) Barnett doesn’t contest Lash’s interpretation of Tucker’s ‘decidedly Federalist’\(^{259}\) understanding of the Ninth Amendment, noting that his justification for the Ninth Amendment was the uncontroversial claim that the reserved police powers of the states could only be transferred to the Federal Government by express delegation. Barnett, however, notes that justification is different to the original public meaning, which was squarely focused on individual natural rights. He quotes Tucker’s view on strict construction, that ‘in cases not enumerated; it follows, as a regular consequence, that every power which concerns the right of the citizen, must be construed strictly, where it may operate to infringe or impair his liberty.’\(^{260}\)

\(^{256}\) Ibid., 363  
\(^{257}\) Ibid., 355  
\(^{258}\) Ibid., 397  
\(^{259}\) Barnett, Randy E., “The Ninth Amendment: It Means What It Says,” 73  
\(^{260}\) Ibid., 70
question-personal security, private property—were individual in nature. Again, Lash doesn’t deny this possibility. He quotes Tucker’s belief that the principles undergirding the Ninth and Tenth Amendment require the delegated powers of the Federal Government to receive ‘the most strict construction that the instrument will bear, where the rights of a state or of the people, either collectively, or individually, may be drawn in question.’

Tucker’s reputation as a states’ right advocate therefore didn’t prevent him from addressing concerns over individual rights.

Ultimately, Lash doesn’t contest libertarian theories that the language of ‘retained rights’ represented a desire to protect individual natural rights but argues that such a view merely ‘unduly limits the scope of the Ninth Amendment.’

Incorporating the natural rights model within the federalism model, Lash shows how a states’ right protective rule of construction could coexist with a strong embrace of natural rights. Beginning with Calder v. Bull, Lash interprets Justice Chase’s opinion as invoking the principles of both limited delegated power (Tenth Amendment) and narrow construction of such powers (Ninth Amendment) to protect against federal interference with state power. Undelegated powers are retained by either the people or the states, and the people are free to delegate those powers to the states, but in the context of natural rights, the people are assumed not to have done so. Chase argues for such an assumption because in the context of laws which impair private contracts or make men judges in their own cases, it would be ‘against all reason and justice, for a people to entrust a legislature with such powers.’

Lash’s proposed interpretive method is problematic, however, because it gives precedence to the right of the people to decide for themselves how natural right

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261 Lash, Kurt T. “The lost original meaning of the Ninth Amendment,” 396
262 Ibid., 399
263 Calder v. Bull, quoted in Lash, Kurt T. “The lost original meaning of the Ninth Amendment,” 405
issues ought to be settled over the intrinsic worth of the natural right in question. Lash believes that this is perfectly consistent with the first principles of the Founders. For example, when the Alien and Sedition Acts were passed, Madison and Jefferson were more concerned with the Federal Government infringing on the retained right of the states to determine free speech regulations than they were with the actual limitation of speech, even though they viewed it as a natural right. Justice Iredell’s concurrence in *Calder* hammers home the point that even if a law interferes with the Court’s understanding of natural rights, if the legislature acts on authority vested in them by the people to regulate natural rights, the Court has no grounds to invalidate the law. Only if the legislature infringes on a natural right without the authorization of the people is a law invalid. Under Lash’s methodology therefore, natural rights are protected from majoritarian politics at the federal level, but not at the state level. If natural rights were of paramount importance in the eyes of the Founders however, the distinction between federal and state level infringement should be irrelevant in this regard, even if the guiding principle of the Ninth and Tenth Amendments were strict limitation and construction of Federal power. Barnett also acknowledges that the Ninth Amendment only applied to the Federal government, and thus could not be used to limit the states.

**Protecting natural rights from state infringement by way of the Privileges or Immunities Clause**

Consideration of how restrictions on federal powers can be applied to the states require us to revisit the Fourteenth Amendment. Having determined the

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264 Lash, Kurt T. “The lost original meaning of the Ninth Amendment,” 402

inadequacies of substantive due process approaches which ask us to emphasize either the ‘history and traditions’ of this nation or determine what is ‘implicit in the concept of ordered liberty,’ we must instead turn our attention to the Privileges or Immunities Clause as Akhil Amar suggested. Throughout its history, the Court has relied almost entirely on the Due Process Clause to selectively incorporate the Bill of Rights and recognize certain unenumerated rights, while the *Slaughter-House Cases* and *United States v. Cruikshank* rendered the Privileges or Immunities Clause largely superfluous.

In *Slaughter-House*, the Court made a distinction between national and state citizenship and held that the bulk of fundamental individual rights were dependent on the latter rather than former. Insofar as the as the Privileges or Immunities Clause only protected rights derived from national citizenship, the Court couldn’t step in to regulate fundamental political rights which fell under the purview of the States. While the Bill of Rights on its face circumscribed a set of rights which were national in character, the Court in *Cruikshank* held that some of its protections—in this case the First and Second Amendments—were rights which pre-existed the adoption of the Constitution, and therefore weren’t privileges associated with national citizenship that could be protected against state infringement by way of the Privileges or Immunities Clause. The Court to this day has not overruled *Slaughter-House*, and as such, it protects merely a handful of obscure rights, including for example, the right to free access to U.S. seaports, the right of free access to federal courts, and right to use navigable waters of the United States. Although legal scholars agree that *Slaughter-House* was an ‘egregiously’ incorrect interpretation of the Clause, Justice Alito in

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266 *Slaughter-House Cases*, 37
267 *United States v. Cruikshank*, 553
*McDonald* pointed out that neither petitioners nor scholars opposed to *Slaughter-House* can identify the full scope of the Clause.\(^{268}\) Thus, the Court has declined to disturb the *Slaughter-House* holding. The foremost advocate of reviving the original meaning of the Privileges or Immunities Clause on the Supreme Court is Justice Clarence Thomas, who has argued extensively for the Court to overrule *Slaughter-House* and incorporate the Bill of Rights against the states via the Privileges or Immunities Clause.

His concurrence in *McDonald* provided a litany of evidence from the both the Founding and Reconstruction Eras to demonstrate that the privileges and immunities of citizens extended to natural rights. He first argued that by the time of Reconstruction, “the terms ‘privileges’ and ‘immunities’ had been established in America as synonyms for rights,” and were used interchangeably with ‘freedom’ and ‘liberty’ as well.\(^{269}\) Going back to even before the Founding Era, a Maryland law from 1639 declared ‘all the Inhabitants of this Province…. shall have and enjoy all such rights, liberties, immunities, priviledges (*sic*), and free customs within this Province.’\(^{270}\) In 1774, the First Continental Congress employed similar language in decrying King George III, arguing that he had denied the colonists ‘the rights, liberties, and immunities of free and natural-born subjects.’\(^{271}\)

Regarding the content of these privileges and immunities, he cites Blackstone’s understanding of the two terms, quoting a passage from Blackstone’s Commentaries in which he describes ‘private immunities’ as a ‘residuum of natural liberty,’ and ‘civil privileges’ as those ‘which society hath engaged to provide, in lieu

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\(^{268}\) *McDonald v. Chicago*, 758  
\(^{269}\) Ibid., 813  
\(^{270}\) Ibid., 816  
\(^{271}\) Ibid., 818
of the natural liberties so given up by individuals.' These privileges and immunities had their roots in the British legal tradition, which declared certain fundamental, natural rights in documents such as the Magna Carta and the English Bill of Rights, but only became legally enforceable after being codified into law. As English subjects, the colonists believed they were entitled to the same natural rights as Englishmen in Britain. The Massachusetts Resolves, for example, declared ‘that there are certain essential rights of the British Constitution of Government, which are founded in the Law of God and Nature, and are the Common Rights of Mankind,’ and that along with the right to own property, ‘that this inherent Right, together with all other, essential rights, liberties, privileges and immunities of the People of Great Britain, have been fully confirmed to them by the Magna Carta.’

Further evidence for the natural rights meaning of the Privileges or Immunities Clause can be found in Article IV, which similarly provides that ‘the Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States,’ and which Thomas reasonably infers must have informed the Privileges or Immunities Clause of the Fourteenth Amendment. The clearest explanation of Article IV’s protections was provided by Justice Bushrod Washington in Corfield v. Coryell, a case heard by the U.S. Circuit Court for the Eastern District of Pennsylvania in which the Court held that a New Jersey law prohibiting non-residents from gathering oysters didn’t violate the Privileges and Immunities Clause. Justice Washington, writing for the Court, explained that the Clause didn’t require a State to extend every right to non-citizens, but only those ‘which are, in their nature, fundamental; which

273 McDonald v. Chicago, 817
274 U.S. Const., art IV § 2
belong, of right, to the citizens of all free governments.'

These rights could be lumped into a few general categories, one of which the natural right of self-defense may find refuge in, for example, ‘the enjoyment of life and liberty,’ or the pursuit and obtainment of ‘happiness and safety.’ Constitutional scholar Robert G. Natelson argues that Justice Washington’s opinion ‘cited no supporting authority’ and ‘suffered from a number of blatant shortcomings,’ but his natural rights understanding of the Clause would serve as an inspiration for the drafting of the Privileges or Immunities Clause in the Fourteenth Amendment, as we shall see. The question, therefore, is what were the privileges or immunities of citizens of the United States?

Representative John Bingham, the principal draftsman of Section 1, believed the Amendment was necessary to provide Congress the tools to secure ‘to all citizens in every State all the privileges and immunities of citizens, and to all the people all the sacred rights of person.’ Specifically, Section 1 was intended to arm Congress ‘with the power to enforce the bill of rights as it stands in the Constitution today.’

Insofar as we’ve established that natural rights are protected by the Ninth Amendment, and the Ninth Amendment is part of the Bill of Rights, natural rights were therefore intended to be protected against state infringement by way of the Privileges or Immunities Clause.

This understanding of the Amendment was adopted by the people by way of extensive press coverage: The New York Times, for example, reproduced Bingham’s first draft in full, along with his comment that an amendment to enforce ‘the immortal bill of rights was absolutely essential to American nationality.’ Similarly, a speech

275 Corfield vs Coryell, 6 F. Cas. 546 (1823), 6
276 Natelson, Roberts G. ‘The Original Meaning of the Privileges and Immunities Clause.’ Georgia Law Review. 43 (2008), 1123
277 McDonald v. Chicago, 829
278 Ibid., 830
delivered by Bingham a few months later in which he again reiterated Congress’ need to enforce the Bill of Rights by way of constitutional amendment was printed in pamphlet form and covered again by The Times on its front page.

Senator Jacob Howard, who introduced the second draft of Section 1 omitted any mention of the Bill of Rights, referring instead only to the first eight amendments. But unlike Bingham, he didn’t limit the scope of the Clause to just the Amendments—whichever ones they may have been—and instead saw Corfield’s protections as a starting point. He said, ‘to these privileges and immunities…should be added the personal rights guaranteed and secured by the first eight amendments.’

Republican Congressman Frederick Woodbridge similarly argued more directly that the purpose of the Amendment was to give Congress the power to enact laws protecting ‘the natural rights which pertain to citizenship,’ or as he put it, ‘those privileges and immunities which are guaranteed to him under the Constitution of the United States.’ The drafting record therefore suggests that the Privileges or Immunities Clause was intended and understood as protecting natural rights, either by incorporating the entire Bill of Rights against the States, or by adopting Justice Washington’s natural rights understanding of privileges and immunities.

Congressional legislation from the period also supports the idea that the Clause was intended to protect natural rights. Senator Lyman Trumbull, principal draftsman of both the Thirteenth Amendment and the Civil Rights Act of 1866 saw Article IV’s Privileges and Immunities Clause as more than just a comity clause and took Washington’s opinion as a blueprint for protecting the fundamental rights belonging to every free person. Critically, when asked for examples of natural,

279 Ibid., 832
280 Barnett, Randy E. “Natural Rights as Liberty Rights: Retained Rights, Privileges, or Immunities.” In Restoring the Lost Constitution: The Presumption of Liberty, REV-Revised., 66
inalienable rights, among those Trumbull listed was ‘the right of personal security.’ Representative James F. Wilson, co-author of the Thirteenth Amendment and manager of the Civil Rights Bill in the House argued that ‘civil rights are the natural rights of man; and these are the rights which this bill proposes to protect every citizen in the enjoyment of throughout the entire dominion of the Republic.’ Consequently, many of the rights guaranteed by the Civil Rights Act were natural liberty rights, as Randy Barnett points out.

While the phrasing of the Clause suggests that Article I of the Fourteenth Amendment was intended to place a substantive limitation on the States by prohibiting them from abridging the privileges or immunities of national citizenship, others have suggested otherwise. Justice Thomas points out that Washington’s opinion read the Privileges and Immunities Clause of Article IV as anti-discrimination provision which requires the State to make a certain suite of fundamental rights available to out-of-state citizens, but it ‘did not indicate whether Article IV required States to recognize these fundamental rights in their own citizens.’ If the Clause didn’t, then Justice Iredell’s view of natural rights enforcement at the State level espoused in Calder may be correct. Scholars such as Ilan Wurman have indicated that the Fourteenth Amendment’s Privileges or Immunities Clause serves a similar purpose. In his book The Second Founding, he argues that it ‘operates like many traditional privileges and immunities clauses’ by guaranteeing equality with respect to certain state-defined privileges and immunities. Under this reading, the Citizenship clause serves primarily to provide comity rights to newly freed slaves under Article

[281] Ibid., 64
[282] Ibid
[283] McDonald v. Chicago, 821
IV, while the privileges or immunities clause provides constitutional grounding for the Civil Rights Act of 1866. According to Wurman, the original bill reflected Trumbull’s desire to ensure equality between blacks and whites in each of the states, and an unwillingness to ‘dictate to the Southern governments what privileges to contract, to sue, and so forth, they had to provide to their citizens.’ Because, however, both Democrats and Republicans doubted the constitutionality of an Act which gave Congress the power to impose equality requirements on state governments, a constitutional amendment was required. Contrary to the evidence cited above, Wurman argues that ‘the Civil Rights Act describes the privileges and immunities of citizens of the United States as including a whole host of state-defined privileges and immunities,’ and argues that these could be the only class of rights protected by the clause because those were the only privileges or immunities the state had the power to abridge in the first place.

But Wurman’s emphasis on ‘state-defined’ privileges and civil rights inverts the logic of the Fourteenth Amendment, a radical Amendment which, as Justice Swayne dissenting in *Slaughterhouse* noted, rose ‘to the dignity of a new Magna Carta’ because it-along with the Thirteenth and Fifteenth Amendments-was a ‘new departure’ that ‘mark[ed] an important epoch in the constitutional history of the country.’ The Bill of Rights was intended to limit the power of the Federal Government, and ‘had its origin in a spirit of jealousy on the part of the States.’ The Reconstruction Amendments, however, were unprecedented because they represented

285 Ibid., 95
286 Ibid
287 Ibid
288 *The Slaughter-House Cases*, 125
289 Ibid., 124
the first significant constitutional limit on state power and sprung from the failure of
the Southern states to guarantee fundamental liberties for their black populations.

Wurman’s emphasis on equality between blacks and whites is short-sighted,
because it wrongly assumes that blacks would’ve accepted an equality of misery with
whites in which every citizen had access to the same limited set of rights. Of course,
equality of the races was a key component of Reconstruction Era politics, but there
was a substantive component which Wurman fails to grapple with, and it stems from
his misunderstanding of the Citizenship Clause. To recall, he believes that the
Citizenship Clause provided comity rights, entitling newly freed men to the privileges
and immunities of the several states. As Timothy Sandefur explains, however,
Wurman’s conception of privileges or immunities “embrace[s] a states’ rights theory
of federalism and citizenship that the Fourteenth Amendment was crafted to
overturn.”290 Instead, the Citizenship Clause declared that newly freed men, and
Americans more broadly, were entitled to fundamental rights, privileges, and
immunities by virtue of their national citizenship, independent of their state
citizenship, which states couldn’t infringe upon.

Justice Miller, writing for the majority in Slaughterhouse, feared that such a
radical understanding of the Fourteenth Amendment would ‘destroy the main features
of the general system’291 by allowing the Federal government to usurp the domestic
and local power of the States. But Sandefur points out that ‘legitimate state authority
wasn’t threatened by the language of the Fourteenth Amendment, as it still left the
bulk of routine government power to the states.’292 Furthermore, Justice Field in
dissent acknowledged that states exercising their legitimate police power may incidentally affect the degree to which such rights were exercised and enjoyed but noted that these rights didn’t depend on state citizenship, legislation, or power for their existence.\(^{293}\) Thus, the Fourteenth Amendment was intended ‘to transfer the security and protection of all the civil rights…from the States to the Federal government.’\(^{294}\) Field argued that limiting the scope of the clause to ‘such privileges and immunities as were before its adoption specially designated in the Constitution or necessarily implied as belonging to citizens of the United States’ would render the Amendment a ‘vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage.’\(^{295}\) As Sandefur points out, ‘the Supremacy Clause already forbids the states from interfering with federal authority.’\(^{296}\)

Field’s observation strengthens the natural rights view of the clause because it presumed that there were certain fundamental natural-and common law-rights which weren’t enumerated in the Constitution, that citizens retained from birth. This is reinforced by his invocation of the Declaration of Independence, discussed in chapter 2. Wurman cites a statement provided by a convention of Blacks in Alabama from 1867, in which they asserted their claim to ‘exactly the same rights, privileges and immunities as are enjoyed by the white man…color can no longer be pleaded for the purpose of curtailing privileges, and every public right, privilege and immunity is enjoyable by every individual member of the public.’\(^{297}\) To argue as Wurman does that they’re merely arguing for equality is to miss the forest for the trees. They

\(^{293}\) *The Slaughter-House Cases*, 96
\(^{294}\) Ibid., 77
\(^{295}\) Ibid., 96
\(^{296}\) Sandefur, Timothy. “Privileges, Immunities, and Substantive Due Process,” 119
\(^{297}\) Wurman, Ilan. *The Second Founding: An Introduction to the Fourteenth Amendment*, 109
believed that by virtue of their status as United States citizens, they were entitled to certain privileges and immunities which couldn’t be denied by the State on the basis of their race. Insofar as white Americans were enjoying those privileges and immunities, it is true that black Americans sought equality with them. But the earlier quotes from Trumbull, Woodbridge, and Wilson demonstrate their belief that national citizenship conferred a substantive set of fundamental rights, both natural and positive, that states couldn’t infringe upon. Thus, it makes more sense to present the argument of the Reconstructionists as follows: because black Americans were citizens of the United States, they were entitled to certain privileges and immunities, including natural rights, which couldn’t be abridged by the state, and they believed their enjoyment of such privileges and immunities would make them equal to white Americans. Interestingly, Wurman doesn’t reject the unenumerated fundamental rights theory posed by Randy Barnett that we are interested in. He acknowledges that it is a ‘possible’ reading\textsuperscript{298}, but not as strong as the pure antidiscrimination reading. That reading, however, places too heavy an emphasis on equality at the expense of substance, fails to consider the dramatic re-balancing of power between the states and the federal level intended by the Fourteenth Amendment, and downplays the significance of the Citizenship Clause.

Lastly, the argument that the Clause makes no reference to natural rights and was therefore never intended to protect them is an easy, but necessary one, to refute. The phrase ‘privileges and/or immunities’ covers natural rights, but that’s not all it covers, and Justice Washington’s opinion spells this out clearly. Among those rights he described as fundamental were the right ‘to claim the benefit of habeas corpus; to

\textsuperscript{298} Ibid., 118
institute and maintain actions of any kind in the courts of the state… and an exemption from higher taxes or impositions than are paid by the other citizens of the state.’ 299

These are positive rights granted by the government which can only exist in a civil society, yet they too are of paramount importance, and are among the privileges and immunities of citizens. The phrase is therefore a catch-all term encompassing different classes of rights. Representative William Lawrence held the same view arguing that even though the Constitution didn’t define the privileges and immunities under Article IV specifically, they ‘are of two kinds, to wit, those which I have shown to be inherent in every citizen of the United States, and such as may be conferred by local law and pertain only to the citizen of the State.’ 300

Justice Washington also argued that the fundamental principles he referred to ‘would perhaps be more tedious than difficult to enumerate,’ 301 the same argument made by the Framers for not enumerating natural rights in the Constitution. The difficulty of listing them all out, combined with their significance to the Founders should lead to a presumption in favor of their protection. Instead of asking natural rights proponents to prove their position, we should flip the burden of proof on critics, and ask them to show definitively that natural rights weren’t covered by all-encompassing terms such as ‘privileges’ and ‘immunities.’

299 Corfield v. Coryell, 6
300 Barnett, Randy E. “Natural Rights as Liberty Rights: Retained Rights, Privileges, or Immunities,” 65
301 Corfield v. Coryell, 6
Conclusion

Putting the pieces together, this thesis has made several pertinent observations of modern Supreme Court jurisprudence and advanced a powerful argument for an alternative approach rooted in natural rights. First, it demonstrated that we cannot rely on the Second Amendment to protect the individual right to bear arms for self-defence. While there is evidence to suggest that the Founders recognized the significance of such a right, the historical record doesn’t demonstrate clearly that the Second Amendment was intended to protect that right. If we follow Blackstone’s rules of construction and accept the role of constitutional preambles during the Founding era, it is equally likely that the Amendment was intended to protect the right of states to organize militias aimed at countering the threat posed by a federal standing army. Simply put, there is too much disagreement about the meaning and purpose of the phrases used in the Amendment for us to definitively say which right it protects. The fundamental flaw of the Court’s Second Amendment jurisprudence, however, is its failure to grasp the eternal and timeless quality of the natural right to bear arms for self-defence. Therefore, even if the historical record showed exactly what Scalia believed, the historical approach would still be inadequate, because a natural right’s existence should not, and does not turn on its recognition by the people. Even if there was no record of the ratifiers or framers considering such a right, the right would still exist, albeit undiscovered.

Because natural rights are of such paramount importance, they cannot be left to the vicissitudes of judges under the current Court’s rootless, malleable, and freewheeling substantive due process jurisprudence. An evaluation of whether rights are either deeply rooted in this nation’s history and tradition or implicit in the concept
of ordered liberty allows judges to read their preferred social, economic, and political philosophies into the text of the Constitution. The latter approach in particular empowers judges to usurp legislative power by weighing the right in question against the values and needs of a contemporary society. In the absence of a top-down theory of liberty, the Court has arbitrarily elevated or marginalized certain rights, protecting unenumerated rights to contract and privacy while deferring generously to the legislature when it infringes the right of free speech specified in the First Amendment, for example. The individual right to bear arms in exercise of the natural right of self-defence is far too significant to be left to the mercy of judges’ personal whims.

Recognizing the natural right of self-defence serves several purposes. It corrects the fatal flaw of the historical approach—the inability to objectively determine from the historical record whether an individual right to bear arms existed—by employing history to instead reach a far less contestable conclusion: that the Founding Fathers believed firmly in the existence of natural rights and sought to protect them in the Constitution. It then cites John Locke—the most influential political philosopher on the Founders—to show that in a state of nature, there must exist by way of logical reasoning, an unalienable right to self-defence. Addressing common critiques of a natural rights jurisprudence, this thesis did the significant work of explaining the extent to which this right is retained in civil society and why it logically implies a right to bear arms. It also explained why this right is deserving of judicial enforcement and proposed a strict scrutiny standard by which future gun-control legislation may be analyzed.

Locating our right within the Ninth Amendment imbues that historically neglected Amendment with a meaning which reconciles the Founders’ belief that natural rights needn’t be enumerated with their desire to limit the power of the Federal
Government to expansively construct its delegated powers. Finally, incorporating the right against the states by way of the Privileges or Immunities Clause rather than the Due Process Clause would not only insulate the right from the current Court’s muddled substantive due process jurisprudence, but would provide an interpretation of privileges and immunities which respects the traditional understanding of those terms and the desire of Reconstructionists to limit the power of the states following the end of the Civil War.

Many questions still abound following this inquiry, some of which have been briefly addressed in this thesis. The types of firearms proscribable by legislatures under this standard, and the contexts in which firearms suited for self-defence may be used will require a more extensive study. On a broader level, will the litany of natural rights held dearly by the founders each be treated with equal significance? Even if some of them are recognized as being more than just constitutional lodestars, to what extent may they be judicially enforced without interfering with the legislature’s duty to promote the public good? How should courts go about striking that balance? Will a strict scrutiny standard be required for those which are deemed to be judicially enforceable, or will rational basis scrutiny suffice? If we believe the Constitution’s natural rights foundation is rooted in the Declaration of Independence, can Courts use that document as the basis for striking down legislation? How will a revised understanding of the Ninth Amendment and the Privileges or Immunities Clause of the Fourteenth Amendment affect the Court’s current jurisprudence and precedents with regard to those clauses?

Questions pertaining to the judicial enforceability of natural rights and the extent of permissible government regulation under the strict scrutiny standard we proposed were briefly addressed but are beyond the scope of this thesis. Instead, this
thesis sought to call attention to the natural rights philosophy which held sway during the Founding era, understand its influence on the Constitution, and examine how that philosophy could be applied, in theory, to one of the rights protected by the Constitution. Natural rights have been criminally minimized by the Supreme Court, but this thesis has demonstrated just how significant they were to the Founding Fathers and to the constitutional republic they created. Thus, scholars, lawyers, judges, and the American people more broadly, have a duty to understand the natural rights philosophy upon which this country was founded in greater detail. These questions don’t illicit easy answers, and they will likely lead to serious debate among those who take them up. However, we shouldn’t shy away from them. In an era of intense polarization, it is imperative for the maintenance of our ever-weakening social fabric that we can at least come to a consensus on the moral underpinnings of our constitutional order, even if we don’t reach an agreement on how, and which natural rights ought to be protected by the Constitution. I hope this thesis will lay the groundwork for a constitutional jurisprudence rooted in natural law and spark a meaningful and substantive discussion on the topic more broadly.
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