CONSTITUTIONAL STRUCTURE AND THE SECOND AMENDMENT: A DEFENSE OF THE INDIVIDUAL RIGHT TO KEEP AND BEAR ARMS

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I. INTRODUCTION

The Bill of Rights, as ratified by the several States in 1791, provides in part, "A well-regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed."[1] As with many of the provisions added to the new federal framework, the meaning and implications of this single sentence have inspired spirited debate from all quarters of the American political spectrum.[2] In recent years, constitutional treatises and law reviews have swelled with speculation as to the intent of the Framers when drafting the Second Amendment.[3] Incongruously, however, the right to bear arms has not historically gathered the attention of the federal courts, unlike other notable freedoms such as the right to free speech and the protection against unreasonable searches and seizures.[4]

Consequently, much confusion continues to surround the nature of the Second Amendment, confusion that has only been exacerbated by the courts' reluctance to examine the issue.[5] This reticence is likely to be shattered by the proliferation of new federal gun-control laws and the increasing amount of legal scholarship on the subject of the Second Amendment. Moreover, a 1999 federal district court decision threatens to require the United States Supreme Court to

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1. U.S. CONST. amend. II.
2. *See* Richard Willing, *Texas Case Could Shape the Future of Gun Control*, USA TODAY, Aug. 27, 1999, at A1 (discussing the various interpretations of the Second Amendment).
3. *See*, *e.g.*, William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236 (1995) (listing the numerous scholarly works on the Second Amendment published in recent years).
4. *See id.* at 1237–39.
5. *See id.* at 1239.

decide this important constitutional issue after a significant period of adroit evasion.

United States v. Emerson[6] marked the first time in almost sixty years[7] that a federal court struck down a law passed by Congress as violative of the Second Amendment. In so ruling, Judge Sam Cummings of the United States District Court for the Northern District of Texas held that the Constitution recognizes the personal right of each citizen to keep and bear arms, and that a federal law prohibiting possession of a handgun by an individual under a restraining order during a divorce proceeding illegally denied this constitutional right.[8] As the District Court noted, this was a case of first impression in the Fifth Circuit. Other circuits that have considered the matter have unanimously determined, either in their respective holdings or in dicta, that the right to bear arms is bestowed upon the states and not individuals.[9] The Court of Appeals for the Fifth Circuit heard argument in *United States v. Emerson* in June 2000.[10]

Based on the overwhelming case law from other jurisdictions contradicting the holding of Judge Cummings, it would seem that *Emerson* is destined for reversal.[11] However, there is a distinct possibility that *Emerson* is less an aberrant interpretation of the Constitution than the logical result of a wealth of recent legal scholarship that has seriously scrutinized the Second Amendment. This collective academic lucubration has developed a compelling consensus that concurs with the conclusion of *Emerson*.[12] These commentators submit that the Second Amendment was intended to recognize a personal right to keep and bear arms, and that the federal case law of the past half-century has gotten the matter entirely wrong.

Much of the debate over the Second Amendment revolves around the provision's text and history.[13] Consequently, the prevailing consensus is that *Emerson* will be affirmed or reversed on these constitutional bases. The purpose of this Note is to evaluate *Emerson*'s prospects on appellate review from a *structural* basis; that is, to determine whether *Emerson*'s holding and rationale are consistent with the conceptual model of the Constitution that the Framers envisioned. Part II of this Note will examine the rise in academic scholarship involving the Second Amendment and the significant gains made in contemporary understanding of the

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6. 46 F. Supp. 2d 598 (N.D. Tex. 1999).

7. *See* United States v. Miller, 26 F. Supp. 1002 (W.D. Ark. 1939), *rev'd by* United States v. Miller, 307 U.S. 174 (1939) (holding that the National Firearms Act violated the Second Amendment).

8. *See* Emerson, 46 F. Supp. 2d at 610–11.

9. *See id.* at 607–08.

10. *See* Carl Baldauf, *Texas Case Could Redefine Gun-Control Laws*, THE CHRISTIAN SCI. MONITOR, June 20, 2000, at 3.

11. *See infra* note 133 and accompanying text.

12. In his opinion, Judge Cummings cited several law review articles in support of his holding. *See* United States v. Emerson, 46 F. Supp. 2d 598, 602–05 (1999).

13. *See generally*, *e.g.*, Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

meaning of the Amendment. Part III devotes attention to the structural paradigm that emerges from the scholarship on the matter. A conceptual view of the citizen's relationship with his state and federal governments makes the intended purpose of the right to keep and bear arms much more lucent. Furthermore, a structural examination will test the analytical soundness of the competing theories of interpretation of the Second Amendment. Finally, Parts IV and V of this Note will scrutinize *Emerson* itself and will attempt to discern whether Judge Cummings has succeeded in putting forth a rationale that can withstand the withering attacks that will be leveled against it.

II. Second Amendment Theorists and Their Arguments

A. Background

One commentator has noted, "[F]or whatever reason, the past five years or so have undoubtedly seen more academic research concerning the Second Amendment than did the previous two hundred."[14] A mere six years before, yet another academic opined that the Second Amendment is largely dismissed by many of the most prominent legal scholars.[15] He notes that the esteemed Laurence Tribe gives the Amendment only nominal consideration, a literal "footnote" in his lengthy and comprehensive treatise on constitutional law.[16]

One cannot blame Professor Tribe for failing to devote attention to the right to keep and bear arms. After all, only one twentieth-century United States Supreme Court case has addressed the issue, and its meaning is less than clear.[17] Lower courts have heretofore interpreted the Second Amendment uniformly, holding that the right to bear arms is conferred upon the state governments, and not the people themselves.[18] Despite this doctrinal trend, Professor Tribe's upcoming fourth edition of *American Constitutional Law* represents an interesting academic revision. Tribe explains his reexamination of the Second Amendment and is even prepared to depart from federal case law in favor of a new perspective

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14. Glenn Harland Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 461 (1995).

15. *See* Levinson, *supra* note 13, at 639–40. It is worth noting that Levinson's description of the Second Amendment as "embarrassing" is not intended to disparage the right to bear arms. Rather, Levinson refers to those academics who adopt an expansive reading of the First and Fourth Amendments, yet seek to constrict the Second Amendment through the strictest of constructions. "For too long, most members of the legal academy have treated the Second Amendment as the equivalent of an embarrassing relative, whose mention brings a quick change of subject to other, more respectable, family members. That will no longer do." *Id.* at 658.

16. *Id.* at 640.

17. *See generally* United States v. Miller, 307 U.S. 174 (1939).

18. *See*, *e.g.*, Cases v. United States, 131 F.2d 916 (1st Cir. 1942).

of the right to bear arms.[19] Tribe's actions are indicative of how academic focus, and even some attitudes, have changed concerning the Second Amendment.

The emergence of a renewed understanding of a right enshrined in the first ten Amendments to our Constitution is not a new phenomenon. Just as the courts are reluctant to enforce the Second Amendment today, the Supreme Court was equally skeptical in enforcing the free speech provision of the First Amendment at the turn of the twentieth century.[20] As one commentator declared: "[The Second Amendment] is at least as well anchored in the Constitution…as were the essential claims with respect to the First Amendment's protection of freedom of speech as first advanced on the Supreme Court by Holmes and Brandeis, seventy years ago."[21] The expansive views of Holmes and Brandeis on the First Amendment, once confined to dissenting opinions in such cases as *Abrams v. United States*,[22] are now seemingly settled in the annals of constitutional law. It remains to be seen if the current members of the Court will view the new constitutional understanding of the Second Amendment with the hospitality their earlier brethren showed the First.[23]

B. Competing Understandings of the Second Amendment

Recent scholarship divides the two schools of thought on the Second Amendment between "collectivist" or "states' rights" theorists, and their intellectual foils, the proponents of an "individual rights" theory. Those who espouse a collectivist theory of the Second Amendment contend that the Constitution "guarantees a right to bear arms only for those individuals who are part of the 'well regulated Militia'—today's stateside National Guard."[24] Far from

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19. *See* Tony Mauro, *Scholar's Views on Arms Rights Anger Liberals*, USA TODAY, Aug. 27, 1999, at A4 (discussing Professor Tribe's revised position on the Second Amendment). Despite his shift toward the individualist interpretation of the Second Amendment, Tribe is not prepared to take a definitive stance on the scope of the Amendment and its effect on federal gun-control legislation. *See id.*

20. *See* Reynolds, *supra* note 14, at 464.

21. Van Alstyne, *supra* note 3, at 1255.

22. 250 U.S. 616 (1919) (Holmes, J., dissenting) (arguing that the First Amendment protects the right of the individual to criticize government policy).

23. There is some evidence that the court is in fact prepared to consider the question of the individual's right to bear arms. Most notably, Justice Thomas, concurring in *Printz v. United States*, wrote:

> The Second Amendment…appears to contain an express limitation on the government's authority [to regulate the interstate sale or possession of firearms]….Perhaps, at some future date, this Court will have the opportunity to determine whether Justice Story was correct when he wrote that the right to bear arms "has justly been considered, as the palladium of the liberties of a republic."

Printz v. United States, 521 U.S. 898, 938–39 (1997) (Thomas, J., concurring) (quoting 3 JOSEPH STORY, COMMENTARIES § 1890 (1833)).

24. Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57, 57 (1995).

being a right of "the people," "the right was to extend only so far as necessary for the several states to establish and maintain militias."[25] In support of their proposition, collectivist judges and academics rely on the opening clause of the Second Amendment ("A well-regulated militia, being necessary for the security of a free state…."). The pervasive modern case law supports the collectivist theory, as well as what the collectivists believe to be the troubling consequences of a society immersed in the horrors of the gun.[26] The implication of this view with respect to federal legislation restricting the ownership of firearms is clear: the Second Amendment "poses no obstacle to gun control."[27]

The collectivists' opponents are known as the individual rights theorists. These partisans, traditionally politically conservative but with growing numbers on the political left, contend that the Second Amendment confers a right to keep and bear arms directly upon the individual citizen.[28] Citing the text of the Amendment—particularly the second, independent clause ("the right of the people to keep and bear arms, shall not be infringed")—as well as offering a persuasive analysis of the Amendment's historical antecedents, the individual rights theorists seek to rebut the modern case law that rejects this perspective.[29] The theory that the Second Amendment recognizes a personal right to bear arms has become known as the Standard Model.[30]

Despite their radically divergent conclusions, both the collectivist theorists and the proponents of the Standard Model look to the text of the Amendment for support.[31] Furthermore, both camps contend that Anglo-American history is important for understanding the meaning and scope of the right to bear arms. The Standard Model cites the English origins of the right, as well as the common understanding of the Amendment at the time of its ratification.[32] Conversely, the collectivists' use of history relies largely on recent case law, examining the interpretations of the Amendment since the U.S. Supreme Court handed down its seminal, yet vague, decision in *United States v. Miller*.[33]

The Standard Model also employs the structure and location of the Amendment for support, whereas the collectivist theories largely ignore these arguments, instead focusing on the potential consequences of a personal right to

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25. David E. Johnson, *Note: Taking a Second Look at the Second Amendment and Modern Gun Control Laws*, 86 KY. L.J. 197, 198 (1997).

26. *See generally* Herz, *supra* note 24.

27. Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 206 (1983).

28. *See* Levinson, *supra* note 13, at 642–43. Levinson addresses the reader as an acknowledged political liberal and urges his fellow liberals to reassess their views on implications of the Second Amendment. *Id.*

29. *See generally* Van Alstyne, *supra* note 3.

30. The term "Standard Model" will be used for the remainder of this Note.

31. *See generally*, *e.g.*, Herz, *supra* note 24; Van Alstyne, *supra* note 3.

32. *See infra* note 37 and accompanying text.

33. 307 U.S. 174 (1939); *see* Herz, *supra* note 24, at 68–75.

bear arms.[34] As will be noted, the constitutional structures that emerge from each of these schools of thought are intriguing, at least in terms of their respective implications. Yet before their structural results can be fully appreciated, one must give proper attention to the textual and historical arguments behind each theory. Each of these areas contribute to the political structure that develops from the Standard Model and the collective rights theory.

III. INTERPRETING THE TEXT

The text of the Second Amendment, a single sentence containing a mere twenty-seven words, occupies volumes of recent law reviews and journals in which academics seek to understand its true meaning. As one analyst has noted, "No one has ever described the Constitution as a marvel of clarity, and the Second Amendment is perhaps one of the worst of all its provisions."[35] This conclusion is hardly provocative; that both collectivists and Standard Model theorists claim that the plain meaning of the Amendment supports their conclusions demonstrates the cryptic quality of this constitutional provision. Yet the key debate seems to center on the words "militia" and "the people."[36] Understanding these terms will shed light on both the meaning of the Amendment and the controversy surrounding it.

A. Who Are "the Militia?"

Both collectivists and adherents to the Standard Model venture beyond the text of the Constitution for an understanding of what exactly the Framers envisioned when referring to "the militia." Standard Model advocates rely primarily on history to support their interpretation of the term "militia." The evolving concept of the militia, deriving from its use in England,[37] has caused much consternation among scholars of the Second Amendment. Standard Model scholars contend that the word refers to the *whole body* of the people, or at least to those men "between the age of majority and a designated cut-off date."[38] These theorists summarize their view by citing the words of George Mason, delegate to the Constitutional Convention in Philadelphia and supporter of the Bill of Rights. "Who are the militia?," asked Mason rhetorically, and answered, "They consist now of the whole people."[39] However, Mason's view alone should not be automatically dispositive of the intentions of the Framers. For a better appreciation of the concept of the militia at the time of the Second Amendment's ratification, it is necessary to revisit the history of the militia in the English and early American political traditions.

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34. *See* Herz, *supra* note 24, at 60.
35. Levinson, *supra* note 13, at 643.
36. *See generally id*.
37. *See* JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS 48 (1994).
38. Kates, *supra* note 27, at 215.
39. *Id.* at 215 n.51 (quoting *Debates in the Convention of the Commonwealth of Virginia*, *reprinted in* 3 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS 425 (3d. ed. 1937) (statements of George Mason, June 14, 1788)).

An armed populace, prepared to defend both self and country, is certainly consistent with the legal comprehension of the militia from authorities on English law.[40] As Blackstone stated in his *Commentaries*, "[The right] is indeed a public allowance, under due restriction, of the natural right of resistance and self-preservation, when the sanctions of society and laws are insufficient to restrain the violence of repression."[41] Yet Blackstone went well beyond simply enumerating the right to arms as another important political right. It was, in Blackstone's opinion, to preserve every other right of the Englishman that the right to bear arms existed.[42]

Blackstone's notion of a common law/natural right foundation for the bearing of arms was not merely the product of a creative intellect, but rather was firmly rooted in the British experience. Blackstone enjoyed life in England after the passage of the English Bill of Rights, which protected many of the basic civil and political liberties of both nobility and commoner alike. Before the Bill of Rights, the English understanding of the militia allowed for the regulation of firearms by the state, including the outright negation of such a right to certain populations on the British Isle.[43] While the customary targets of such despotism were Catholics, the restrictions on ownership would often extend further. The Game Acts of 1671 outlawed firearm ownership among common Englishmen, leading to the abrogation of the right to keep arms of an estimated ninety percent of the British population.[44]

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40. *See* United States v. Miller, 307 U.S. 174, 179 (1939) (quoting WILLIAM BLACKSTONE, 2 COMMENTARIES, Ch. 13, at 409, and ADAM SMITH, WEALTH OF NATIONS, Book V, Ch.1).

41. SIR WILLIAM BLACKSTONE, I COMMENTARIES ON THE LAWS OF ENGLAND 143 (Thomas M. Cooley, ed., 1884). After outlining the general need for the right to bear arms, Blackstone proceeded to issue a prescient warning. He stated that the right to arms is "highly necessary to be perfectly known and considered by every man of rank and property, lest his ignorance of the points whereon they are founded should hurry him into faction and licentiousness on the one hand, or a pusillanimous indifference and criminal submission on the other." *Id.*

42. *See id.* It should be noted that Blackstone's interpretation of the right to bear arms was not absolute, and he recognized "necessary restraints," yet cautioned that such restraints be "in themselves so gentle and moderate, as will appear, upon farther inquiry, that no man of sense or probity would wish to see them slackened." *Id.* In his commentary on this passage of Blackstone, Judge Cooley examined both the right and its necessary restraints under the American system of government, writing:

> In the United States this right is preserved by express constitutional provisions. But it extends no further than to keep and bear those arms which are suited and proper for the general defence of the community against invasion and oppression, and it does not include the carrying of such weapons as are specially suited for deadly individual encounters, and therefore the carrying of these, concealed, may be prohibited.

Id.

43. *See* MALCOLM, *supra* note 37, at 11.

44. *See id*.

The demise of the Stuart monarchy in the Glorious Revolution of 1688 heralded the accession of William and Mary, as well as passage of the English Bill of Rights. This enactment, as mentioned above, sought to enshrine basic civil and political liberties in Great Britain and place them beyond the reach of both Parliament and the Crown. One such liberty was the protection of individual ownership of arms. As the English Bill of Rights states, "That the subjects which are Protestants may have arms for their defence suitable to their condition and as allowed by law."[45] Despite its restriction to Protestants, the provision clearly provides for individual ownership of weapons.

This right afforded to Englishmen was carried across the Atlantic to the colonial settlements in North America. As the Supreme Court noted in *Miller*, militia service then extended to "able-bodied men," often by colonial statute.[46] Such was the case in, according to at least one source cited by the Court, "all the colonies."[47] Militia service did not end with the American Revolution. Acts passed in Virginia, New York, and Massachusetts after the Treaty of Paris all required militia service from the able-bodied males in their populations, with each man required to furnish his own musket.[48] Despite the derision of some concerning the enforcement of these provisions, their existence makes clear that citizen ownership of firearms was recognized by colonial and state governments as not only permissible, but necessary.[49]

Given this history, supporters of the collectivist interpretation are impelled to demonstrate that the Second Amendment in fact restricts the individual right to bear arms far more than the English Bill of Rights of 1689 and the colonial laws before the Revolution did. Reason demands that collectivists show, to some extent, that the militia mentioned in the Second Amendment is something less than the whole people, and that therefore, the dependent clause of the Amendment limits its effect. No such evidence exists. Indeed, such a restriction, if true, would be one of the more remarkable discoveries from the Eighteenth Century.[50] If anything, the language of the Second Amendment extends beyond the guarantee of its English counterpart, setting forth no religious requirement and substituting the vague provision of "as allowed by law" with "shall not be infringed." Such a

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45. ENGLISH BILL OF RIGHTS § 7.
46. United States v. Miller, 307 U.S. 174, 179–80 (1939).
47. *Id.* (citing OSGOOD, 1 THE AMERICAN COLONIES IN THE 17TH CENTURY, ch. XIII).
48. *Id.* at 180.
49. *Cf.* MICHAEL BELLESILES, THE ARMING OF AMERICA 72 (2000). Recently, several historians and academics have severely questioned the scholarship of Michael Bellesiles. These scholars contend that Bellesiles misquoted and miscited primary documents, as well as incorrectly tabulated colonial probate records. *See* Kimberly A. Strassel, *Scholars Take Aim at Gun History*, WALL STREET JOURNAL, April 9, 1999, at A28. One scholar offered the following conclusion: "From what I've seen, the evidence [of error] is so overwhelming that it is incumbent upon Bellesiles as a serious scholar to respond. He either has to admit error, or somehow show how is work is right." *Id.* (quoting Gerald Rosenberg).
50. Reynolds, *supra* note 14, at 493.

command can be no less forceful than the words in the preceding Amendment, "Congress shall make no law…." As William Rawle, a venerated jurist at the time of ratification and early commentator on the American constitution noted, "The prohibition is general. No clause in the Constitution could by any rule of construction be perceived to give to Congress a power to disarm the people."[51]

B. An Aside on the National Guard

Before quitting the subject of the militia, one final point of contention often raised should be addressed. Historically inaccurate, yet increasingly prevalent in collectivist political and legal discussion, this argument claims that the militia of the Second Amendment refers to an organized group, such as the modern-day National Guard.[52] As the argument proceeds, the existence of the National Guard both fulfills the maxim of the Second Amendment and renders a personal right to keep and bear arms, at best, obsolete.[53] The National Guard, in the collectivist model, has effectively replaced the earlier militia that was comprised of Mason's whole body of the people. This view ignores two important facts.

First, the origin of the National Guard is of an entirely different character than the militia contemplated by the Second Amendment. The National Guard was formed in response to an opinion by the United States Attorney General in 1912.[54] When the President sought advice as to whether the militia could be employed outside of the United States, Attorney General Wickersham concluded that such non-domestic use would be an unconstitutional exercise of the President's powers as commander-in-chief, and was beyond even authorization by the Congress under Article I, Section 8.[55] Therefore, the National Guard was created to serve both domestic and non-domestic functions, deriving its ultimate authority from the federal government. Second, the Guard continues to be funded, trained, and operated by the United States government, not by the several States.[56] For this reason, any comparison of the National Guard with the militias contemplated by the founders in the Second Amendment is fatally flawed, and directly rebuts the collectivist contention that the Second Amendment grants powers to the States to form their own militia units. Clearly, the National Guard is not funded in such a way, and does not serve this role.

Yet the National Guard does have an historical forefather, one older than even the colonial militias of Lexington and Concord. English barristers and legal

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51. STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 91 (1984) (quoting William Rawle).

52. *See* Carl T. Bogus, What Does the Second Amendment Restrict? A Collective Rights Analysis, at 2 (2001) (unpublished manuscript, on file with Author).

53. *See generally* Herz, *supra* note 24.

54. *See* Reynolds, *supra* note 14, at 476. (explaining the historical and conceptual origins of the National Guard).

55. *See id.*

56. *See id.* at 477.

theorists of the Seventeenth and Eighteenth Centuries recognized a distinction between the general militia, consisting of all able-bodied male subjects of the English crown, and the so-called *select* militia.[57] The select militia was comprised of commoners, with members of the nobility often serving as officers, but did not constitute the whole of the people.[58] Rather, the select militia was chosen by the King to enforce his laws and protect the realm on a local level.[59] Although rarely used in defense of the nation, the select militia provided local law enforcement at a time when the modern police were non-existent.[60] It is not without irony that the select militia played a pivotal role in the enforcement of the Game Acts, which as mentioned above, resulted in the disarming of nine-tenths of the British people.[61] Nevertheless, it is clear that the National Guard is similar to the select militia in its character and duties. The question then becomes, could it have been the select militia to which the founders were referring when writing of a "well-regulated militia"? This would certainly seem inconsistent with Mason's definition of a militia.[62] For a more complete answer, one must look to the meaning of "the people" referred to in the Second Amendment.

C. Who Are "the People"?

1. The Textual Approach

By defining the "militia" of the Second Amendment as an entity comprised of the body of the American people, the Standard Model provides symmetry to the Amendment, as it establishes that the "right of the people to keep and bear Arms shall not be infringed." Collective rights theorists, on the other hand, contend that the very use of the word "people," as opposed to "person" or "citizen," demonstrates a community-based collective predicate for the right to bear arms and implies that the right is to only be exercised in the context of a state-wide, state-organized body.[63] If this is the meaning that the Founders wished to include in the Constitution, it is reflected by neither the language of the Constitution nor any corroborative evidence. Proponents of this theory offer scant evidence to support this conclusion, other than to assert that the word "people" connotes a group of citizens, as opposed to an individual.[64]

Standard Model theorists have weightier evidence in support of their interpretation of the phrase "the people"; this evidence is rooted in both the language of the Constitution and the history behind ratification of the Bill of Rights. With regard to the language of the Second Amendment, and the proper

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57. *See id.* at 475–76; *see also* Kates, *supra* note 27, at 248–49.
58. *See* Kates, *supra* note 27, at 235–37.
59. *See* MALCOLM, *supra* note 37, at 63.
60. *See id.*
61. *See id.* at 74.
62. *See supra* note 38 and accompanying text.
63. *See* MALCOLM, *supra* note 37, at 112.
64. *See* Bogus, *supra* note 52, at 13 (arguing that "the people" implies a collective right to bear arms).

understanding of the words "the people," one commentator offers a cogent analysis.[65] He notes that the "right of the people" is used in the First Amendment when guaranteeing the right of the individual to peaceably assemble, and again in the Fourth Amendment to guarantee protection from unreasonable searches and seizures.[66] As he concludes, it would be preposterous to determine that the Fourth Amendment's protections extend only to "the people" as a whole and are inapplicable to the individual.[67] A similar argument applies to the First Amendment right of assembly. The Second Amendment should not suffer a contrary interpretation: "[t]o hold otherwise…is to do violence to the Bill of Rights since, if one 'right of the people' could be held not to apply to individuals, then so could others."[68]

Federal case law supports this analysis. As held by the Supreme Court in *United States v. Verdugo-Urquidez*,[69] "[T]he people' protected…by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community."[70] The significance of the Court's language cannot be overstated. First, the Court establishes that "the people" of the First Amendment are indistinguishable from the people of the Second Amendment. No one disputes that the First Amendment affords an individual right to speak, publish, or worship.[71] The symmetry between the two Amendments seriously undermines the collectivist argument that the phrase "the people" must be analyzed apart from the other provisions in the Bill of Rights. Second, the Court's reasoning makes much of the powers reserved to the people in the Ninth and Tenth Amendments. As will be discussed below, this acknowledgment of the people as an independent political entity has significant structural implications that lend support to the Standard Model.

2. The Historical Approach

In addition to the textual and doctrinal mandate, the history of the Second Amendment supports the conclusion that "the people" was meant to recognize individual Americans. In an exhaustive study of pre-Second Amendment liberties in early America, David E. Young found provisions relating to the right to bear arms in several state constitutions or charters at the time of the ratification of the Bill of Rights.[72] In each of these documents, the provisions relating to gun ownership was contained within the listing of constitutional guarantees of

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65. *See* Reynolds, *supra* note 14, at 466.
66. *See id.*
67. *See id.*
68. *Id.*
69. 494 U.S. 259 (1990).
70. *Id.* at 265.
71. *See id.*
72. THE ORIGIN OF THE SECOND AMENDMENT: A DOCUMENTARY HISTORY OF THE BILL OF RIGHTS 1787–1792, at 74–75 (David E. Young ed., 1995).

individual freedom.[73] All used similar language, and some spoke to the need of the individual citizen to protect both himself and his state.[74]

Therefore, if the collectivists are correct, and the "right to keep and bear arms" gives discretion to the government, then not only does the Second Amendment eliminate a freedom explicitly recognized in most states at the time of ratification, but it also affirmatively grants to the states a power that they denied themselves explicitly in writing: the power to control, and potentially eliminate, all gun ownership. Yet again, American legal history does not support this conclusion, given that the states with right-to-bear-arms provisions ratified the Bill of Rights, and no objection was raised to the Second Amendment that would indicate its intent to be anything other than what it recognized in the constitutions of Virginia, Massachusetts, and Pennsylvania (among others): that the individual had the right to own firearms.[75]

Moreover, to interpret "the people" to denote anything other than the individual American would be inimical to the English Bill of Rights of 1689, which confers a *personal* right to keep and bear arms "for their [the individuals'] defence."[76] Blackstone's *Commentaries* explain this right to be a "right of the subject" designed for "self-preservation,"[77] and while he mentions one of the purposes of the right to be for the defense of the country, personal protection against lawlessness and oppression is a further consideration.[78] Because the English Bill of Rights recognized an historically important individual right, the collectivist interpretation is fatally flawed, for to subscribe to such a theory would be to brand the Bill of Rights as regressive, a step backward in the pursuit of personal freedom. A collectivist Second Amendment guarantees less than its English antecedent. This is, of course, entirely inconsistent with the historical understanding of the Second Amendment.[79]

IV. PARADIGMATIC DEFENSE OF THE STANDARD MODEL

The textual and historical exegesis of the Second Amendment recounted above is more than mere academic exercise. Rather, the theories that result from such an analysis have enormous influence on the structural implications of both the collective and Standard models. Put otherwise, the conclusions of the collectivists and Standard Model theorists both create a structural understanding of the American constitutional system. One way to assess the different models is to examine the resulting constitutional structures and compare these structures with the original constitutional framework envisioned by the Framers. In so doing, one

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73. *See id.*

74. *See id.*

75. *See* David Harmer, *Securing a Free State: Why the Second Amendment Matters*, 1998 B.Y.U. L. REV. 55, 62 (1998).

76. ENGLISH BILL OF RIGHTS, § 7.

77. BLACKSTONE, *supra* note 41, at 143.

78. *See supra* note 40 and accompanying text.

79. *See supra* notes 43–44 and accompanying text.

would expect that the better interpretation of the Second Amendment would be the theory whose structure most resembles the intent of the Founders.

When arguing that the Second Amendment reserves a right to the States and not to the individuals that comprise them, collectivist advocates adopt a view of our constitutional system presumed to have died with the end of the Civil War.[80] This view, or at least the logical implication of the views that comprise the collectivist argument, holds that the American political system is bipolar. Stated differently, collectivists contend that the several states form the national government, and thus the former are the only constitutional check on the power of the latter. In contrast, the Standard Model proponents utilize the framework of the *entire* Bill of Rights to establish yet another argument for the Second Amendment as a guarantee to the individual and not the states. To better explore the validity of the two theories, each should be analyzed for its structural implications.

A. American Constitutional Government Through a Collectivist Lens

A suitable and equally succinct expression of the collectivist consciousness is found in the American Civil Liberties Union policy declaration of 1980: "The setting in which the Second Amendment was proposed and adopted demonstrates that the right to bear arms is a collective one existing only in the collective population of each state for the purpose of maintaining an effective state militia."[81] Therefore, under this understanding of the Amendment, the Constitution would effectively read, "A well regulated militia, being necessary for the security of a free State, the right of the *State* to keep and bear arms shall not be infringed."[82] Under such a structure, the only entity capable of, yet restricted from, infringing on the right to keep and bear arms is the federal government. For purposes of regulating and maintaining a militia, the right belongs exclusively to the states.

Such a constitutional reality would not only place every federal gun control law at the mercy of each state, but would represent such a radical departure from constitutional norms that the Founders could never have contemplated it. The collectivist understanding of the Second Amendment would provide each State with a *de facto* veto over federal gun control laws that rivals only the radical nullification doctrine proposed by John C. Calhoun in the 1830s.[83]

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80. *See infra* notes 81–87 and accompanying text.

81. *See* Kates, *supra* note 27, at 207–08 n.15 (quoting ACLU's 1980 summary of its national board's action).

82. United States v. Emerson, 46 F. Supp. 2d 598, 601 (N.D. Tex. 1999).

83. *See* WILLIAM CALEB LORING, NULLIFICATION AND SECESSION 14 (1893). From his seat on the floor of the United States Senate, South Carolina Senator John C. Calhoun argued that the United States was in fact a confederation of States, and that consequently, each State in the Union could determine whether it was obliged to follow federal law. *Id.* Calhoun's doctrine challenged the holding of *McCulloch v. Maryland*, 17 U.S. 316 (1819), was one of the principal intellectual issues involved in the Civil War, and was explicitly refuted by the United States Supreme Court in *Texas v. White*, 74 U.S. 700

Consider a federal gun control law that bars possession of a certain assault rifle by individuals. Consider then that a state, which recognizes its militia to be every able-bodied person over the age of sixteen residing in the state, explicitly passes legislation that authorizes (but does not require) individual possession of the same assault rifle concomitant with state militia service. Such a scenario would give rise to an extraordinary constitutional crisis, the result of which can only be speculated. If the Second Amendment guarantees the states the exclusive authority to craft own gun control laws, then any federal action would necessarily be subrogated by its state-fashioned counterparts. This is a peculiar situation, in that the collectivist paradigm gives rise to a states' rights domain in which the federal government cannot interfere under any circumstance.[84] The result is a form of inverse preemption, whereby the federal government may only act in the absence of contravening state mandates. One commentator criticized the collectivist case thus:

> [T]he states' right theory is based on a discredited (and always unsound) notion of relationships within our federal system. Under the classical view of the Constitution, authority is delegated by the people to two kinds of governments, state and federal. State governments are not creations of the federal government, nor is the federal government the creature of the states. Both exercise authority delegated to them by the true sovereigns, the people.[85]

No other provision in the Bill of Rights could be interpreted to afford state governments the power to negate a federal law. Indeed, no other provision in the Bill of Rights offers any affirmative grant of power to the several states. The Tenth Amendment *reserves* power to the states, meaning that the federal government will not encroach on state prerogatives beyond the powers granted to it in the Constitution.[86] The final Amendment in the Bill of Rights is, as described by Justice O'Connor, essentially a tautology, given that the Framers intended for

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(1869). Interestingly, Calhoun never cited the Second Amendment as an example of the power of nullification imbued within the Constitution, a provision that would have served to persuade his colleagues had it meant what collectivist theorists and courts now contend. *See generally* LORING, *supra* note 83.

84. *See* Reynolds, *supra* note 14, at 490.

85. *Id.* at 491. That the collectivist school sets forth a model of constitutional government that bears remarkable similarity to that advocated by the Southern states during the Civil War is ironic. After Reconstruction, many of these same states used gun control legislation to deprive their African American populations of the right to keep and bear arms. *See* Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, GEO. L.J. 309, 343–44 (1991). The United States Supreme Court considered this issue in *United States v. Cruikshank*, 92 U.S. 542 (1875), and ruled, consistent with pre-incorporation jurisprudence, that the Second Amendment protects only against federal encroachment upon the right to keep arms, and that the States were free to regulate such a right as they wished. *See* Reynolds, *supra* note 14, at 491.

86. U.S. CONST. amend. X.

the federal government to be an entity of limited powers.[87] The Second Amendment, as read by the collectivists, would seem to suggest that the Founders wished to place even greater emphasis on the reservation of the right to bear arms to the states, and that this right was so important that it merited special recognition in the Constitution. There is simply no evidence to support this proposition, yet it must be supported if the Second Amendment means what the collectivists contend.

Not only is there an absence of proof for the collectivists, their structural theory is left in an untenable position. The collectivist structure cannot, in addition to the *rights* reserved to the people by the Constitution, account for the reservation of *powers* to the people in the Tenth Amendment. Under the collectivist model, if the federal government must be checked, it is the right of the states—and the states only—to do so. Yet this structure entirely ignores the explicitly referenced powers that the people themselves enjoy in our constitutional government. Either the Founders did not contemplate a role of the people as a distinct political entity (thereby rendering the Tenth Amendment mere trickery), or the collectivist model is woefully incomplete.

B. American Constitutional Government Through a Standard Model Lens

The bipolar constitutional model of the collectivist school is countered by the paradigm offered by the Standard Model. Standard Model theorists, through their insistence that the Second Amendment affords the individual right to keep and bear arms, envision a tripartite structure of constitutional government, a model that is supported by the writings of the Founders, both within the Constitution and without.[88] Simply put, the Standard Model recognizes three critical entities in the American framework: the federal government, the state government, and the people themselves.[89] This final component—the people as a distinct entity—distinguishes the collectivist and Standard models.

Furthermore, it is this difference that leads to the disagreement between the two camps on the meaning of the Second Amendment. One adherent to the Standard Model describes the difference between the two theoretical bases, stating:

> [The collectivist] argument assumes that there are only two basic components in the vertical structure of the American polity—the national government and the states. It ignores the implication that might be drawn from the Second, Ninth, and Tenth Amendments: the citizenry itself can be viewed as an important third component of republican governance insofar as it stands ready to defend

87. *See* New York v. United States, 505 U.S. 144, 149 (1992) (holding that the Tenth Amendment forbids commandeering of state legislatures to enact federal law).

88. *See* Levinson, *supra* note 13, at 651 (arguing that the structure of the Constitution contemplates the people as a separate political entity).

89. *See id.*

> republican liberty against the depredations of the other two structures, however futile that might appear as a practical matter.[90]

Drawing from this conception, the next inquiry must be whether the Constitution supports the proposition that the people exist as a third, distinct entity in the American constitutional framework.

It would seem that this thesis is corroborated by the very text of the Bill of Rights.[91] The Ninth Amendment refers to the reservation of rights to the people that are not to be disparaged because of their omission from the explicit text of the Bill of Rights.[92] The collectivist paradigm cannot account for this provision, given its bipolar limitations. The federal Constitution would be powerless to reserve any rights to the people themselves, if the states were the only other entity in the constitutional scheme. The Standard Model, which recognizes "the people" to refer to the whole citizenry, accounts for the Ninth Amendment reservation as part and parcel of a larger structure that recognizes the individual citizen as distinct from the several States.

The tripartite scheme inherent in the Standard Model is even more evident in the Tenth Amendment, which reads, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[93] Here, the aims of the Founders and the nature of the structure which they created becomes apparent: *powers*, not only rights, are reserved *both* to the *States* and *the people*. This is perhaps the strongest argument serving as a theoretical basis for the Standard Model. With powers reserved to two distinct entities, the Second Amendment affirmation of the right of the individual to keep and bear arms is all the more probable. The language of the Tenth Amendment recognizes the people as a separate and distinct political entity. This revelation is coupled with the fact that when the term "the people" is used in the Constitution, it has always been interpreted (except, of course, when pertaining to the Second Amendment) to mean the citizens of the United States, not the states.[94] Had the Founders sought to reserve the right to bear arms to the states, consistent with their use of language throughout the Constitution, they would have used the phrase "the right of the states to keep and bear arms shall not be infringed." Clearly, this was not the language used, and therefore, it is reasonable to presume that the Founding Fathers—deliberate, careful statesmen—employed language commensurate with their intent.

Beyond its language, the very ratification of the Constitution evinces a recognition of the American people as a distinct political entity. Alexander

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90. *Id.*

91. *See id.* (citing the Ninth Amendment as illustrative of the role of the people in the federal government).

92. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

93. U.S. CONST. amend. X.

94. *See* Reynolds, *supra* note 14, at 466; *see also* United States v. Verdigo-Urquidez, 494 U.S. 259, 265 (1990).

Hamilton wrote in *Federalist No. 22* of the people as the bedrock on which American constitutional government rested.[95] Hamilton spoke of:

> [t]he necessity of laying the foundation of our national government deeper than in the mere sanction of delegated authority. The fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority.[96]

In *Federalist No. 46*, James Madison expanded upon this theory of popular consent.[97] More importantly, Madison on several occasions distinguished between "the people and the States" and "the governments and the people of the States."[98] Echoing Hamilton's earlier assertions, Madison wrote, "The federal and State governments are in fact but different agents and trustees of the people."[99] Madison also distinguished between European governments, which seek to disarm their subjects, and the American political tradition, which extols the virtues of an armed citizenry. "Besides the advantage of being armed, which the Americans possess over the people of almost every other nation…[in] the military establishments in the several kingdoms of Europe…the governments are afraid to trust the people with arms."[100] Interestingly, Madison noted that *the people* in America are trusted with arms, not the states. This further corroborates the existence of the people as a separate political entity.

The only collectivist response to Madison's observations in *Federalist No. 46* has been that he was "arguing arguendo" and responding to a concern that "bordered on paranoia."[101] Without reference to the author's normative conclusions, the remainder of this response is mere speculation. As made clear above, the *Federalist Papers* often distinguished between the people and their respective governments. That Madison may have been "arguing arguendo" (a convenient but unverifiable charge) is inapposite. What is of greater value is the point entirely ignored by the collectivist argument: the people are recognized as the fountain of the federal government's powers, not the states.[102] Therefore, it is consistent that the Framers envisioned that popular possession of arms would protect the citizenry from its agent. This cannot help but lead to the conclusion that

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95. *See* THE FEDERALIST NO. 22 (Clinton Rossiter ed., 1961) (writings of Alexander Hamilton).

96. *Id.* at 152.

97. *See* THE FEDERALIST NO. 46 (Clinton Rossiter ed., 1961) (writings of James Madison).

98. *Id* at 298–99.

99. *Id* at 297.

100. *Id.*

101. Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309, 402 (1998) (claiming that Madison sought only to abate anti-federalist concerns of a strong central government).

102. *See* THE FEDERALIST NO. 22, *supra* note 95.

the Second Amendment identifies "the people" for a reason, and did not leave the power to check the federal government with the states alone.

In its formative years, the Supreme Court supported the *Federalist*'s interpretation of the Constitution as receiving its power directly from the people. In *Martin v. Hunter's Lessee*,[103] the Court held that "the constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by 'the people of the United States.'"[104] *McCulloch v. Maryland*[105] reaffirms this constitutional structure, emphasizing the role of the ratification conventions as exercising not the authority of the State, but that of the people.[106] As the decision states, "From these [ratification] conventions, the constitution derives its whole authority. The government proceeds directly from the people; is 'ordained and established,' in the name of the people….The government of the Union, then…is, emphatically and truly, a government of the people."[107]

The significance of the Constitution's ratification by the people is important to Second Amendment jurisprudence, because it recognizes the American public as independent of the several States. If the historical understanding of the Constitution differentiates between "the people" and "the state," such a distinction should be respected in the text of the Constitution. The operative clause of the Second Amendment declares that "the right of the people to keep and bear Arms, shall not be infringed." As with the First, Fourth, Fifth, Seventh, Ninth, and Tenth Amendments, the Second should be interpreted as pertaining to the separate and distinct political entity, the people.[108]

V. TOWARD A STRUCTURAL THEORY OF INTERPRETATION

Second Amendment scholarship has suffered from a constant and impenetrable debate over the meaning of the Constitution's text, as well as a somewhat immaterial discussion of the repercussions of a personal constitutional right to firearm ownership.[109] However, little has been said of the structure of the Constitution and its role in supporting or refuting the arguments set forth by advocates of the Standard Model. As presented above, the structure of the Constitution indeed supports the Standard Model position. The Constitution—in

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103. 14 U.S. 304 (1816).

104. *Id.* at 324.

105. 7 U.S. 316 (1819).

106. *Id.* at 403–04.

107. *Id.* at 403, 405.

108. *See* Reynolds, *supra* note 14, at 466.

109. For example, scholar Andrew D. Herz devotes the first five pages of his thesis analyzing the Second Amendment in light of the "startling" number of handgun deaths in the United States. *See* Herz, *supra* note 24, at 57–62. These arguments serve no purpose other than to proffer an emotional appeal against the personal right to bear arms. By analogy, the Fourth Amendment's meaning is no more or less affected by the number of individuals who, using the prohibition against unreasonable searches and seizures to avoid prosecution, resume their criminal conduct.

both language and historical context—recognizes a tripartite scheme of government in which the people themselves, apart from either the state or the federal government, have certain rights and powers within this system. One such liberty, as set forth explicitly in the Bill of Rights, is the right to keep and bear arms. In this sense, the republican structure of the Constitution supports—and is supported by—the very text of the document.

Before applying this structural interpretation of the Second Amendment to the Court's analysis in *Emerson*, whether structural analysis is a viable and recognized method of constitutional interpretation must be addressed. The use of structure by the federal courts is not a serious matter of dispute. Chief Justice Marshall, in both *Marbury v. Madison*[110] and *McCulloch v. Maryland*, made heavy use of the structure of the federal government to support the Court's decisions.[111] In each case, the Court determined the nature of federal-state relations from doctrines not explicit in the Constitution, but essentially through a structural derivation of the text. More recently, the Court in *Printz v. United States*[112] determined that a federal law's enforcement mechanism violated the constitutional doctrine of federalism.[113] In striking down the pertinent portion of the law, which required state law enforcement officials to administer a federal program for background checks, the Court held that the federal law "compromise[d] the structural framework of dual sovereignty."[114] While relying heavily on *The Federalist Papers* and other corroborating documents, the Court went beyond the text of the Constitution to arrive at its opinion.[115] As the dissent noted, "There is not a clause, sentence, or paragraph of the entire text of the Constitution of the United States that supports the proposition [offered by the majority]."[116] Nevertheless, the Court looked to the *structure* of the Constitution to develop its argument and deduce a conclusion.

Interpreting the Second Amendment from a structural vantage would seem at least as favorable to the Court, if not more so, than the issues discussed in *Printz*. In *Printz*, there were no explicit textual provisions on which the Court could rely, whereas with the Second Amendment, there is such language. A structural argument for the personal right to keep and bear arms would be less a primary consideration, and more a secondary (though no less important) element. Nevertheless, the salient point to derive from *Marbury*, *McCulloch*, and *Printz* is that the Court is willing to analyze the structure of the Constitution to arrive at a

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110. 5 U.S. 137 (1803).

111. *See id.*; *see also McCulloch*, 17 U.S. 316 (1819). Indeed, in *Marbury*, Chief Justice Marshall makes extensive use not only of the structure of the American Constitution, but of the structural nexus that unites *all* written constitutions. *Marbury*, 5 U.S. at 155 (1803).

112. 521 U.S. 898 (1997).

113. *See id.* (holding that the structure of the Constitution forbids congressional legislation that required local law-enforcement officers to execute its provisions).

114. *Id.* at 931.

115. *Id.*

116. *Id.* at 944 (Stevens, J., dissenting).

decision when there is no textual basis for its conclusion. It would only stand to reason that the Court, if willing to let the structural argument take a preeminent position in its reasoning, would allow structure to serve as yet another pillar in concluding that the Second Amendment confers a personal right to firearms.

A. Structure and **Miller**

While the Supreme Court may recognize the importance of structure in extrapolating the various provisions of the Constitution, the influence of the structural argument would suffer should it conflict with the important body of Supreme Court decisions interpreting the relevant language. Given the sparse case law on the Second Amendment, only one U.S. Supreme Court decision need be examined. In *United States v. Miller*,[117] the Supreme Court considered the constitutionality of the National Firearms Act of 1934 ("the Act"), which banned, among other items, the transportation of "sawed-off" shotguns in interstate commerce.[118] Defendants Jack Miller and Frank Layton were prosecuted under the Act after carrying such a gun with them from Claremore, Oklahoma to Siloam Springs, Arkansas.[119] In his motion to dismiss the claim, Miller's chief defense was that the Act violated his Second Amendment right to keep and bear arms. The U.S. District Court agreed, taking judicial notice that the shotgun was a firearm, and therefore, the congressional act violated Miller's constitutional right to own such a weapon.[120]

The Supreme Court heard the case on appeal by the federal government. In its decision, the Court confined itself to a very narrow issue.[121] Instead of determining the breadth or scope of the Amendment, the Court considered the role of the bench in such cases: whether a court could exercise judicial notice that the weapon fell under the auspices of the Second Amendment.[122] The Supreme Court disagreed with the lower court's conclusion that because the shotgun was a firearm, it must necessarily be covered by the Constitution. Rather, the Court held that the defendant must demonstrate, outside of judicial notice, that the weapon in question bore a "reasonable relationship to the preservation or efficiency of a well regulated militia."[123] The Court further held that the shotgun was not presumed to bear such a relation, and therefore, the case was remanded for adjudication of the issue.[124]

The *Miller* Court set forth a "reasonable relation" test to evaluate arms, in which the defendant, as stated above, bears the burden of proving that the weapon

117. 307 U.S. 174 (1939).
118. *See id.*
119. *See id.* at 175.
120. *See* United States v. Miller, 26 F. Supp. 1002 (W.D. Ark. 1939), *rev'd*, United States v. Miller, 307 U.S. 174 (1939).
121. Miller, 307 U.S. at 178.
122. *See id.*
123. *Id.*
124. *See id.* at 183.

in question is reasonably related to militia service.[125] The Court justified its test by citing the historical underpinnings of the Second Amendment and *general* militia service.[126] The *Miller* Court did not use the language of "general militia" explicitly, yet its description of a militia adequately yields such a conclusion. In addition to citing various colonial statutes defining the militia in expansive terms, the Court found that the writings "show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense."[127] This operational definition is an important proposition made by the Court, in that it recognized that the Second Amendment is predicated on the general militia, which as mentioned previously, is distinct from and far more inclusive than the *select* militia.[128]

The Supreme Court did not settle the issue of whether the Second Amendment recognizes a personal right to keep and bear arms. However, it can be reasonably presumed that the Court did not subscribe to the notion that the Amendment affords protection only to the States, either in the form of the National Guard or some other entity.[129] Had this been the Court's view, the decision would have been relatively simple: Miller was not in the active service of a State militia, and therefore had no right to possess a firearm. Yet the Court did not adopt this reasoning. Therefore, it would seem that the only other option, that of a personal right—perhaps with ill-defined modifications—can be inferred from the *Miller* opinion.

The true question after *Miller* is whether the decision of the Court can be reconciled with the tripartite structural model. Given the refusal of the Court to adopt an orthodox collectivist position, as well as its discussion of the antecedents of the Second Amendment in the general militia, the tripartite paradigm is arguably congruous with the Court's opinion. As stated above, the collectivist position—that the state is the sole beneficiary of the Second Amendment's protection—would have resulted in a succinct opinion. Therefore, the *Miller* opinion does not foreclose the viability of the tripartite model. On the contrary, the Court's decision actually *promotes* the structural lens of the Standard Model, in that it recognizes the role of the general militia in the Founders' conception of the right to bear arms.[130] The general militia, composed of each American of regular age and not discussed in conjunction with a state-funded organization, supports through its sheer mechanics the personal right to bear arms.[131] Members of the general militia were expected to provide their own weaponry; therefore, the personal right to bear arms was essential to the maintenance of a general militia.[132]

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125. *Id*. at 178.
126. *See id*. at 177–81.
127. *Id.* at 179. The Court looked to several state statutes from the post-colonial period defining the militia as all able-bodied men. *See id.* at 180–81.
128. *See supra* note 56 and accompanying text.
129. *See* Kates, *supra* note 27, at 251.
130. *See id.*
131. *See* MALCOLM, *supra* note 37, at 74.
132. *See id.* at 117.

The general militia was also, because of its technical (though not logistical) independence from the state and federal governments, an emblem of the distinct role of the people in the American constitutional system. The general militia supports the proposition that serves as the basis of the tripartite model, and the Court's recognition of the general militia reconciles the opinion in *Miller* with the structural lens of the Standard Model.[133]

Surprisingly, the "reasonable relation" test set forth in *Miller* was largely ignored, explicitly or otherwise, by the circuit courts considering the issue of firearm ownership over the past fifty years.[134] Some courts explicitly rejected the controlling nature of the *Miller* test, while still others concentrated on the *Miller* Court's use of the term "militia" and proceeded to equate the militia with the modern National Guard.[135] This is perhaps more unfortunate than simply defying the "reasonable relation" standard, because it misinterprets the history behind the general militia and the idea that it represents. In misconstruing the notion of the general militia, these lower federal courts have eliminated the viability of the tripartite model, many of them in no uncertain terms.[136] Such reasoning adopts the collectivist, bipolar constitutional model, a paradigm inconsistent with the Founders' view of the constitutional system and inimical to the Standard Model.

B. Applying the Tripartite Model to **Emerson**

Despite the Standard Model's deep roots in the text and history of the Constitution, several federal courts have explicitly rejected the proposition that the Second Amendment confers a personal right to bear arms.[137] However, the adoption of the collectivist position in the federal courts has not been uniform. The Fifth Circuit, until now, has not had occasion to address the Second Amendment.

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133. One significant ramification of the *Miller* Court's "reasonable relation" test is that it seemingly would support what are viewed as the more dangerous kinds of firearms, while allowing the regulation (if not prohibition) of the least dangerous. Few could argue that, in defense of one's community, an M-16 would not be a preferred choice of a general militia, and thus bear a "reasonable relation" to militia service. Yet a musket, however common at the time of the framing of the Constitution, could no longer be legitimately termed a weapon of such effectiveness as to pass the reasonable relation test. *See* Levinson, *supra* note 13, at 654–55.

134. *See* Harmer, *supra* note 75, at 64.

135. Harmer notes that in *Thompson v. Dereta*, the U.S. District Court for Utah declared that it was "unaware of a single case which has upheld a right to bear arms under the Second Amendment to the Constitution, outside of the context of the militia." Harmer, *supra* note 75, at 64 (citing Thompson v. Dereta, 549 F. Supp. 297, 299 (D. Utah 1992)); *see also* United States v. Hale, 978 F.2d 1016 (8th Cir. 1992) (holding there is no individual right to firearm ownership).

136. *See generally* Hickman v. Block, 81 F.3d 98 (9th Cir. 1996).

137. *See e.g.*, United States v. Emerson, 46 F. Supp. 2d 598, 600 (N.D. Tex. 1999); *see also supra* note 128 and accompanying text.

United States v. Emerson,[138] now on appeal in the Fifth Circuit, involved a motion to dismiss entered by Timothy Joe Emerson against a federal criminal indictment.[139] Emerson was prosecuted in federal court for violating a federal law that made possession of a firearm illegal for one under a restraining order during a divorce proceeding.[140] Emerson's wife alleged that Emerson threatened over the telephone to kill her lover, and the court issued a restraining order against him.[141] Without notice from the court that Emerson could not own a weapon, the restraining order implicated 18 U.S.C. § 922(g)(8), which would render Emerson "subject to federal criminal prosecution merely for possessing a firearm while being subject to the order."[142]

Emerson was indicted in the U.S. District Court for the Northern District of Texas for violation of § 922(g).[143] In his motion to dismiss, Emerson claimed that the statute under which he was prosecuted was an unconstitutional exercise of congressional power.[144] In supporting this contention, Emerson proffered that the statute exceeded Congress's power under the Commerce Clause and violated the Second, Fifth, and Tenth Amendments.[145] The memorandum opinion of Judge Sam Cummings rejected Emerson's Commerce Clause and Tenth Amendment challenge, yet granted the motion to dismiss on grounds that the statute violated the Second and Fifth Amendments to the United States Constitution.[146]

The *Emerson* opinion offers an exhaustive defense of the Standard Model, based largely on textual and historical analysis. Beyond these suppositions, Judge Cummings devoted one paragraph to the structural component of the Constitution, recognizing that "the citizenry itself can be viewed as an important third component of republican governance as far as it stands ready to defend republican liberty against the depredations of the other two structures, however futile that might appear as a practical matter."[147] While Judge Cummings did not dedicate much attention to the structural argument, he did consider it a theory worthy of consideration and supportive of the personal right to keep and bear arms.[148]

Therefore, the question becomes: does the ruling in *Emerson* withstand analytical scrutiny under the tripartite structural model? The answer, based on the conclusions of this Note, is clearly in the affirmative. This congressional statute,[149] which prohibits possession of a firearm by an individual not convicted of any

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138. 46 F. Supp. 2d 598 (N.D. Tex. 1999).
139. *See id*. at 598–99.
140. *See id*. at 599.
141. *See id.*
142. *Id.*
143. *See id.* at 598.
144. *See id*.
145. *See id.*
146. *See id*. at 614.
147. *Id*. at 607 (*citing* Levinson, *supra* note 13, at 651).
148. *See id.*
149. *See* 18 U.S.C. § 922(g)(8) (1994).

crime, exceeds the structural boundaries of the federal government as established by the Constitution.[150] The statute imposes a blanket prohibition on gun ownership, which is clearly the type of legislation the Second Amendment attempted to prevent. From a structural perspective, the issue must be posed as to whether Congress, through its enactment, has impeded the ability of the people as a distinct entity to exercise their rights and responsibilities in their particular province. Section 922(g)(8) prevents those persons falling within its purview from exercising their liberty as members of the general militia. As Judge Cummings noted, "It is absurd that a boilerplate state court divorce order can collaterally and automatically extinguish a law-abiding citizen's Second Amendment rights."[151] Should the federal government be allowed to deprive a citizen of the ability to exercise his constitutional liberties, without a showing of a peculiar danger arising from that specific exercise of the liberty, and without demonstration of a previous tendency to do social harm, then Congress has essentially transcended the boundaries set forth within the Constitution. Those boundaries are the very structure of our constitutional system, and if such a violation occurs, the tripartite model collapses.

Violations of the structural boundaries of the Constitution, when determined by the Court, are never permitted. These violations most notably occur between the federal and the state governments. In *McCulloch*, the state government exceeded its structural limitations and the Supreme Court held it had violated the Constitution.[152] In *New York* and *Printz*, the federal government was found to have exceeded the constitutional boundaries, and its laws were found unconstitutional.[153] Second Amendment jurisprudence, under the tripartite model, calls for no different an analysis, only for recognition of a third boundary—that of the sphere of the citizenry. The Second Amendment sets forth one such boundary, and it is incumbent upon the judiciary to recognize the separation of *all* powers, including preventing the encroachment of the federal government on those rights and powers that remain vested not in any government, but in the people themselves.

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150. Judge Cummings correctly notes that the constitutional dimensions of the Act would be different had Emerson been found guilty of assault or some other crime arising out of this episode. As he explained:

> § 922(g)(8) is different from the felon-in-possession statute…because once an individual is convicted of a felony, he has by his criminal conduct taken himself outside the class of law-abiding citizens who enjoy the full exercise of their civil rights.

Emerson, 46 F. Supp. 2d at 611.

151. *Id.* at 611.

152. *See generally* McCulloch v. Maryland, 17 U.S. 316 (1819) (holding that state governments may not tax the United States government).

153. *See* New York v. United States, 503 U.S. 144 (1992) (holding that Congress may not mandate action by a state legislature); *see also* Printz v. United States, 521 U.S. 898 (1997).

VI. CONCLUSION

For the past fifty years, the tripartite model of constitutional government has suffered greatly at the hands of federal circuit courts, which have consistently interpreted the Second Amendment under the collectivist, bipolar constitutional paradigm.[154] This is not the first time that states' rights theories have dominated the national debate over constitutional meaning. Nullification and secession were both theories predicated on the idea that the national government was the creation of the states, and that consequently the states were the only check on federal power.[155] These concepts were not only repudiated by the text of the Constitution, the history of ratification, and the Supreme Court, but were defeated on the field of battle, beginning at Fort Sumter and concluding at Sayler's Creek.[156]

Yet old ideas die hard. The bipolar constitutional structure now serves as the basis for the collectivist model of the Second Amendment and American government. Ignoring the republican ideal of the people as a distinct political entity, these theorists suggest that the Second Amendment is the right of the states, and therefore, an historical oddity in a Bill of Rights dedicated to personal freedom. Shunning the text and juridical history that overwhelmingly indicate that the right to bear arms is recognized as inherent in the individual, these advocates seek gun-control Valhalla by denying this constitutional right.[157] Yet their quest is as ultimately fruitless as their intellectual ramifications are frightening. Instead of clearing a path for federal gun-control legislation, the collectivists erect the most daunting of all obstacles: federalism itself. In the collectivist model, the states provide for their militias, and in so doing, may ignore any congressional measure to their disliking. In their opposition to an individual right that could be reasonably limited as with any other constitutional liberty, the collectivists read radical nullification into the federal Constitution. What died at Appomattox Courthouse is reborn in the ACLU's proclamation that arms are the concern of the several States.[158]

Adherents to the Standard Model and its tripartite structure recognize the repercussions of such a reading, and instead advocate an interpretation of the Amendment consistent with the internal logic of the Bill of Rights in toto: that as with the freedom of speech and religion, the Second Amendment recognizes a personal right; that as with all liberties enshrined in this charter, the right to bear arms is free of the sophistry that would demand a different constitutional reading for the same phrase in different textual provisions; and that the Standard Model recognizes that the Bill of Rights presents a radically different conception of constitutional government than the constricted view of the collectivists. By acknowledging the role of the citizens in their own government—that in addition

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154. *See* Harmer, *supra* note 75, at 63–64.

155. *See* LORING, *supra* note 83, at 27 (arguing that nullification incorrectly presumes heightened state power).

156. *See id.*

157. *See generally* Herz, *supra* note 24.

158. *See* Kates, *supra* note 27, at 207 n.15.

to liberty, the individual has certain *powers*—the federal government also acknowledges that its continuation rests on the solid support of the people themselves.[159]

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159. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 708, § 1001 (Carolina Academic Press, 1987) (1833). In his discussion of the Second Amendment, Story described the provision thus:

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

Id.