

# The Amazing Vanishing Second Amendment

[Prof. Eugene Volokh, UCLA Law School](#)

(forthcoming 73 NYU L. Rev. \_\_\_\_ (1998))

I'm deeply flattered that David Williams chose to reply to my article. His response is thoughtful, gracious, and, most important, direct: It frankly sets forth its conclusion, which is that the Second Amendment is "outdated" and "meaningless." [1](#) This part of the Bill of Rights has mysteriously vanished.

This is a remarkable proposition. After all, supposedly "The very purpose of a Bill of Rights is to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." [2](#) As the Court said when defending another unpopular right, "If it be thought that [a right] is outmoded in the conditions of this modern age, then the thing to do is to take it out of the Constitution, not to whittle it down by the subtle encroachments of judicial opinion. Nothing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process." [3](#) And yet by an interpretive feat, a right specifically guaranteed by the Bill of Rights is gone. How is this vanishing act accomplished, and which rights can it turn to next? [4](#)

## I. "The Body of the People" and the Operative Clause

Professor Williams begins by claiming that, *even setting aside the justification clause*, [5](#) the Second Amendment's operative clause -- "the right of the people to keep and bear arms shall not be abridged" -- doesn't confer a right on individual persons. Rather, he argues, it protects only "the right of `the Body of the People,'" "the people considered as a unified, homogeneous, organic, collective body devoted to the Common Good." And "[b]ecause we no longer have a Body of the People, . . . the amendment simply cannot mean what once it meant." [6](#)

That's a creative theory, but is it supported by the evidence? The clause itself speaks of a "right of the people," the same language that's used immediately before in the Petition Clause and shortly after in the Fourth Amendment. This seems like a strong suggestion that the right to keep and bear arms likewise belongs to each individual person.

Of course this suggestion might be rebutted by contrary evidence from other sources, such as the operative clause's historical antecedents. None of them, though, mention any "Body of the People." The English Bill of Rights provision on which the clause is based speaks of the right of "subjects." [7](#) The North Carolina (1776), Pennsylvania (1776), Vermont (1777), and Massachusetts (1780) Constitutions speak simply of "the right of the people," with no hint of a "Body of the People"; the Pennsylvania (1790) and Kentucky (1792) Constitutions even more unambiguously speak of "the right of the citizens"; the Tennessee (1796) Constitution speaks of

"the right of the freemen"; the Mississippi (1817), Connecticut (1818), Maine (1819), and Alabama (1819) Constitutions refer to the right of "every citizen." [8](#)

All the material I've seen suggests that these provisions were considered at the time to be basically similar. I know of no evidence that some were seen as creating an individual right and some as creating a right of a "Body of the People." [9](#) This suggests that "the right of the people" means the same as the right of "subjects" or "the citizens" or "every citizen" -- not of some "Body of the People."

What about the commentators? Sir William Blackstone (1765) described the English right as the "right of the subject." [10](#) St. George Tucker (1803) treats Blackstone's "right of the subject" as equivalent to the Second Amendment's "right of the people." [11](#) William Rawle (1829) likewise treats the Second Amendment as an expansion of the English right of "subjects," and implicitly assumes the right can be exercised even "by a single individual." [12](#) Justice Joseph Story (1833) calls the American right a "right of the citizens." [13](#) Nowhere is there any hint that the right belongs not to each person, subject, or citizen, but to some "Body of the People."

Finally, would it have made sense, in the legal environment of the time, for the Framers to recognize a constitutional right possessed by a "Body of the People"? Professor Williams admits, as he must, that the right does *not* belong to the states. [14](#) He claims it does not belong to individuals. But if that's so, how can some intermediate entity -- an entity with no independent legal existence and no official spokespeople who could assert the right -- have a constitutionally guaranteed right that individual citizens do not have? I've seen no evidence that the Framers envisioned constitutional rights operating this way.

## II. "The Body of the People" and the Justification Clause

So where does this "Body of the People" come from? Well, it does appear in one related state constitutional provision of the time, the Virginia Militia Clause: "That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State." [15](#) The Virginia Constitution lacked a right to keep and bear arms until 1971, but the Virginia Militia Clause indeed seems to have been a forebear of the Second Amendment's justification clause. The Virginia ratifying convention included it in its proposals for a federal Bill of Rights, and the North Carolina, New York, and Rhode Island proposals -- which were generally based on the Virginia proposal -- copied this provision. [16](#)

I'm not persuaded that the "Body of the People" here means "the people considered as a unified, homogeneous, organic, collective body, devoted to the Common Good." [17](#) It seems to me to stand only for the bulk or great majority of the people. [18](#) But in any event, these provisions merely show that the *militia* consists of the body of the people. And the operative clause speaks of a "right of the people," not a right of the militia.

So to get to his conclusion, Professor Williams must take two extra steps: (1) He must conclude that the operative clause, which recognizes a right of "the people" (equivalent, as I argue above, to a right of each citizen or subject), should be read in light of the justification

clause as creatomg a right of "the body of the people." (2) He must conclude that, though the body of the people still literally exists, it no longer serves the purpose that was supposedly envisioned by the framers of the justification clause: Arming the body of the people is no longer necessary, or even helpful, to the security of a free state.

Thus, the argument must go, because the assumptions underlying the justification clause are no longer true, the right created by the operative clause has disappeared. This is basically the argument I attribute to Professor Williams in my article: [19](#) Professor Williams does indeed argue, under his "unitary" method of interpretation, that the right exists only so long as the justification remains valid.

Here is where I would have liked to see Professor Williams confront my core observation -- the existence of the other state constitutional provisions that contain justificatory clauses. Would his "unitary framework" apply to the state Speech and Debate Articles or the New Hampshire Venue Article? Are they also "meaningless" now because their justifications are no longer valid? Do the state Liberty of the Press Articles vanish because we no longer have a virtuous, republican press? [20](#)

Madison's original draft of the Seventh Amendment's Civil Jury Trial Clause read "In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate." [21](#) Has this right also become "meaningless" or "outdated" as enlightened opinion has retreated from the premise that the civil jury trial is indeed "one of the best securities to the rights of the people"? [22](#) After all, if the people have lost the virtue needed to possess arms, maybe they've also lost the virtue needed to serve on juries. [23](#)

As I argue in my article, the state constitutional provisions show that many operative clauses will be overinclusive and underinclusive with respect to their justificatory clauses: Checks on government authority often take the form of bright-line rules that don't perfectly fit their justifications. [24](#) If I'm right in this, then a "unitary" framework that insists on trying to "make the two clauses as consistent as possible" [25](#) -- thus ignoring the possibility of intentional over- and underinclusiveness -- is the wrong way to deal with justification clauses.

But even if I'm wrong, it might have been profitable for Professor Williams to "test[] [his] interpretive approach [by] applying it to a wide array of texts of different political valences. It's easy enough to craft an interpretive trick which reaches the result one wants in the case for which it was crafted. But when one tests it against other provisions, one sees more clearly whether it's a sound interpretive method." [26](#)

### **III. The Unchanged Changed Circumstances**

Professor Williams conjures with more than just the text and original meaning; he also makes a changed circumstances argument. The Second Amendment, he concedes, once recognized a right that was a potent check on the government, but today, things are different. The Second Amendment "by its own terms . . . makes sense only so long as pretty much everyone has arms, and so long as the arms-bearers are virtuous," because otherwise the arms will "necessarily be [used] in the interests of a slice of the population, rather than for the

common good." And "today, the American citizenry is so fractured that [a true] Revolution [made by the Body of the People for the common weal] is impossible." [27](#)

Rather than "pretty much everyone [having] arms," [28](#) "gun ownership today is markedly demographically skewed." "Today, because of social changes, we can see [as the Framers did not] the possible contradiction between [the people as individuals and the Body of the People], as American citizens are more individual than ever, but they have given up aspirations to peoplehood in the strong republican sense." Today, "we no longer possess" the "organic collectivity" on which the Second Amendment is based. "[T]he Framers did intend to guarantee a right for all Americans to own guns, but . . . they presupposed that Americans would have a collective identity that they do not now have." [29](#) Americans once had this right, but things are different today, so the right is gone.

But Professor Williams provides no evidence that the circumstances on which he relies have actually changed. Sure, American society today is to some extent fractured. So was American society in the late 1700s, when Americans divided in their loyalties in the Revolutionary War, [30](#) in their private economic and religious interests, [31](#) along geographical lines, and in other ways. [32](#) Now as then, many look out for the common good, and aspire to "peoplehood in the strong republican sense." Then as now, many people instead focused on individual or factional interests. The notion of a virtuous "organic" republican past, as contrasted to a fragmented collective-identity-less present, is myth. [33](#)

Likewise, gun ownership today is indeed not universal -- about 35-50% of all households now have guns [34](#) -- but Professor Williams gives no evidence that things were ever different. In fact, historian Michael Bellesiles (who opposes the individual rights theory of the Second Amendment) has estimated that gun ownership levels in the late 1700s were *lower* than today, perhaps 15% of all households. [35](#) Professor Bellesiles estimates that in 1810, no more than 5% of Americans, or 20% of adult white males, were armed. [36](#) Today, 25-30% of adult Americans, and about 40-50% of adult males, own guns. [37](#) And even without these estimates, is it likely that more than 35-50% of late 1700s households would have possessed what was at the time quite an expensive piece of technology?

Similarly, gun ownership today is indeed demographically skewed; for instance, 48% of white households and only 30% of black households own guns. [38](#) But we have no reason to believe ownership wasn't skewed in the late 1700s, whether by race, ethnicity, or geography. [39](#)

The Framers well understood human selfishness and the tendency of society to "fracture." The drafter of the Second Amendment, after all, also wrote about the inevitability of "faction" -- "citizens . . . united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." [40](#) I suspect the Framers knew that their neighbors were not "a unified, homogeneous, organic, collective body, devoted to the Common Good," [41](#) and saw that they did not all own guns. How then can it be said that the Second Amendment "by its own terms . . . makes sense only so long as pretty much everyone has arms, and so long as the arms-bearers are virtuous" [42](#) -- a supposed condition precedent that was false even when the Amendment's "own terms" were written? [43](#)

Professor Williams' argument reinforces my skepticism about reading justification clauses as excuses to nullify rights. If we authorize judges to conclude that, because of some supposed historical change, a constitutionally guaranteed right is "outdated," we seriously jeopardize all constitutional liberties -- including those secured by the Speech and Debate Articles, the Liberty of the Press Articles, the Civil Jury Trial Clause, and any other constitutional provision which indicates, explicitly or even implicitly, [44](#) its justification. Is this how a Bill of Rights should be read?

#### IV. Avoiding Amazing Vanishing Acts

My interpretive approach is built on the notion that Bills of Rights are aimed at constraining the government. This is why operative clauses are often overinclusive and underinclusive with regard to their justifications; and why we shouldn't adopt interpretive methods that let courts read justification clauses as implicit authorizations for making rights vanish. [45](#) I try to support my approach by giving examples from other constitutional provisions, ones I like and ones I dislike, ones that appeal to the Left and ones that appeal to the Right. There's a certain discipline that comes from recognizing that the interpretive method we sow today for one provision might be reaped by us tomorrow for another.

My approach, as my article concedes, has its difficulties. [46](#) But at least it doesn't lead to a right mysteriously vanishing on the grounds that certain people find it "meaningless" and "outdated." That, it seems to me, is a point in favor of my method -- especially when there are other rights that many would happily read out of our Constitution.

---

[1.](#) David C. Williams, *The Unitary Second Amendment*, 73 NYU L. Rev. \_\_\_\_, \*6 (1998). See also David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 Yale L.J. 551, 615 (1991) (arguing that because of changed circumstances, "the Amendment has little or no direct meaning for judges"; "[a]t most, it can influence the interpretation of other provisions"); *id.* at 555 (contending that the Amendment has been "effective[ly] nullifi[ed]" by changing circumstances).

[2.](#) West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624, 638 (1943).

[3.](#) Ullmann v. United States, 350 U.S. 422, 427 (1956) (Frankfurter, J.) (internal quotation marks and citation deleted) (writing about the privilege against self-incrimination). See also *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 338 (1979) (Rehnquist, J., dissenting) ("It may be that if this Nation were to adopt a new Constitution today, the Seventh Amendment guaranteeing the right of jury trial in civil cases in federal courts would not be included among its provisions. But any present sentiment to that effect cannot obscure or dilute our obligation to enforce the Seventh Amendment, which was included in the Bill of Rights in 1791 and which has not since been repealed in the only manner provided by the Constitution for repeal of its provisions.").

[4.](#) If it's time for rights to vanish, I vote for the right defended in the *Ullmann* quote: the privilege against self-incrimination, in my view an unjustified and anachronistic restraint on accurate fact-finding. See David Dolinko's excellent *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. Rev. 1063 (1986).

[5.](#) Williams, *The Unitary Second Amendment*, *supra* note 1, at \*5.

[6.](#) *Id.* at \*4, \*6.

[7.](#) 1 W. & M. sess. 2, c. 2, § 7 (1689) ("That the subjects which are protestants may have arms for their defence suitable to their conditions and as allowed by law.").

[8.](#) Ala. Const. art. I, § 23 (1819); Conn. Const. art. I, § 17 (1818); Mass. Const. pt. 1, art. 17 (1780); Ky. Const. art. XII, § 23 (1792); Maine Const. art. I, § 16 (1819); Miss. Const. art. I, § 23 (1817); N.C. Const. Bill of Rights § 17 (1776); Penn. Const. Decl. of Rights, cl. XIII (1776); Penn. Const. art. IX, § 21 (1790); Tenn. Const. art. XI, § 26 (1796); Vt. Const. ch. I, art. 15 (1777).

[9.](#) Professor Williams himself implicitly suggests the same, at least as to the pre-1791 provisions, when he says "the Second Amendment was copied from right to arms provisions in state constitutions, and the debates at the time reveal no suggestion that the scope of the right changed when adopted into the federal Bill of Rights." Williams, *Civic Republicanism and the Citizen Militia*, *supra* note 1, at 590 (footnote omitted).

[10.](#) 1 William Blackstone, *Commentaries on the Laws of England* \*143, \*144 (1765).

[11.](#) St. George Tucker, *Blackstone's Commentaries: With Notes of Reference* 143 & n.40 (1803).

[12.](#) William Rawle, *A View of the Constitution of the United States of America* 126 (1829). Rawle says the law may properly punish "the carrying of arms abroad by a single individual, attended with circumstances giving just reason to fear that he purposes to make an unlawful use of them"; but he does so by pointing out that "This right ought not . . . be abused to the disturbance of the public peace," rather than by arguing that the right belongs only to collective bodies. Had Rawle viewed the right as being collective, then the question of "a single individual" "carrying . . . arms abroad" would presumably have been easily settled on that basis.

[13.](#) 3 Joseph Story, *Commentaries on the Constitution* § 1890 (1833).

[14.](#) See Williams, *Civic Republicanism and the Citizen Militia*, *supra* note 1, at 590; Volokh, *supra* note 16, at \*10 n.28 (pointing out that the Second Amendment is based on "right[s] of the people" in state constitutions, rights that restrain state governments and thus cannot belong to the states themselves). Professor Williams has also described the right as "a right of the militia," Williams, *supra*, at 590, but I take it this means a right of the "Body of the People," not a right of the state-run and state-organized entity: If it were the latter, then the right *would* be a right of the

state, because the Governor was generally the commander-in-chief of the militia. *See, e.g.*, Penn. Const. art. II, § 7 (1790); Va. Const. Form of Government, ¶ 34 (1776).

[15.](#) I believe Professor Williams is mistaken in claiming that one can "read 'People' [to mean the 'Body of the People'] for reasons independent of the purpose clause: for example, state provisions on which the amendment was based referred to the 'Body of the People,' as did draft versions of the Second Amendment itself." Williams, *The Unitary Second Amendment*, *supra* note 1, at \*5. Only one state provision included this term, and both it and the draft versions were sources for the Militia Clause, not the operative clause. How is this "reasons independent of the purpose [*i.e.*, Militia] clause"?

[16.](#) *See* Eugene Volokh, *The Commonplace Second Amendment*, 73 NYU L. Rev. \_\_\_\_, \*11 n.30 (1998).

[17.](#) Williams, *The Unitary Second Amendment*, *supra* note 1, at \*5.

[18.](#) *Cf.* David C. Williams, *The Militia Movement and Second Amendment Revolution: Conjuring with the People*, 81 Cornell L. Rev. 879, 908 (1996) (discussing use of "the term 'Body of the People' as a synonym for 'a majority of the people' or the 'greater part of the people'"); Mass. Const. pt. II, ch. V, § II ("Wisdom and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties" -- this suggests that "the body of the people," whatever that may be, is not considered to be innately virtuous or "devoted to the Common Good," though of course it would be good if it were).

[19.](#) Volokh, *supra* note 16, at \*5 n.11.

[20.](#) *See* Volokh, *supra* note 16, at \*2-\*3 (discussing these provisions).

[21.](#) *Id.* at \*4 n.9. This was in turn based on the Virginia and North Carolina proposals, *see id.* at \*23 n.68.

[22.](#) The Seventh Amendment's justificatory clause never made its way into the final text, but the term "the body of the people," so relied on by Professor Williams, never made its way into the text either.

[23.](#) *Cf.* David B. Kopel & Christopher Little, *Communitarians, Neorepublicans, and Guns: Assessing the Case for Firearms Prohibition*, 56 Md. L. Rev. 438, 486 (1997); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 Tenn. L. Rev. 461, 486-87 (1996).

[24.](#) Volokh, *supra* note 16, at \*14.

[25.](#) Williams, *The Unitary Second Amendment*, *supra* note 1, at \*10.

[26.](#) Volokh, *supra* note 16, at \*21.

[27.](#) Williams, *The Unitary Second Amendment*, *supra* note 1, at \*5, \*6, \*11.

[28.](#) *Id.* at \*6. Here Professor Williams is quoting my words, but he adopts them as his own. "Volkh is right that I find the amendment 'meaningless' and 'outdated,' because by its own terms it makes sense 'only so long as pretty much everyone has arms, and so long as the arms-bearers are 'virtuous.'" *Id.*

[29.](#) *Id.* at \*6, \*7, \*11.

[30.](#) See Howard Zinn, *A People's History of the United States* 76 (1980) (recounting John Adams' estimate that one third of the population supported the Revolution, one third opposed it, and the remaining third was neutral); Williams, *The Militia Movement and Second Amendment Revolution*, *supra* note 18, at 922 ("Even in 1776, the people might not have been unified; Americans disagreed viciously over the wisdom of the War for Independence itself, that great icon of American unity.").

[31.](#) One of *The Federalist's* chief arguments in favor of the Constitution rested precisely on the fact that the nation consisted of disharmonious factions. "Whilst all authority in [the United States] will be derived from and dependent on the society, the society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority. In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects." *The Federalist* No. 51, at 350 (usually attributed to Madison) (Carl van Doren ed. 1945).

[32.](#) See David B. Kopel & Christopher Little, *supra* note 23, at 483 n.237. See also X *The Works of John Adams, Second President of the United States: With a Life of the Author* 283 (Charles Francis Adams ed. 1850-56) ("The Colonies had grown up under constitutions of government so different, there was so great a variety of religions, they were composed of so many different nations, their customs, manners, and habits had so little resemblance, and their intercourse had been so rare, and their knowledge of each other so imperfect, that to unite them in the same principles in theory and the same system of action, was certainly a very difficult enterprise.").

[33.](#) Elsewhere, Professor Williams suggests that, while the Framers believed this myth and "felt [that] American citizens were a republican People -- homogeneous, virtuous, and committed to the common good," they "may have been wrong" in this belief. Williams, *The Militia Movement and Second Amendment Revolution*, *supra* note 18, at 949. I strongly doubt that the pragmatic politicians who designed our Constitution were so deluded about their countrymen; consider the material from *The Federalist* quoted in notes 31 and 40, and *cf.* *The Federalist* No. 6, at 33 (Carl Van Doren ed. 1945) ("Is it not time to awake from the deceitful dream of a golden age, and to adopt as a practical maxim for the direction of our political conduct that we, as well as the other inhabitants of the globe, are yet remote from the happy empire of perfect wisdom and perfect virtue?").

But in any event, surely a court may not refuse to enforce a constitutional right on the grounds that its framers were deluded about human nature, and that, now that the wise among us know better, the amendment should be ignored.

[34.](#) Gary Kleck, Point Blank tbl. 2.2 (1991) (describing surveys from 1959 to 1990, all giving results in the range of 40% to 52%, and most in the range of 45% to 50%); Philip J. Cook & Jens Ludwig, *Guns in America: National Survey on Private Ownership and Use of Firearms* (Police Foundation 1997) (giving estimate of 35%).

[35.](#) Michael Bellesiles, *The Origins of Gun Culture in the United States, 1760 -- 1865*, 83 J. Am. Hist. 425, 427 (1996). Professor Bellesiles deduces this number from probate records; he concedes that "probate records are not a perfect source for information," but believes that "they do provide much information on common household objects and can be used as a starting point for determining the level of gun ownership" -- he points out, for instance, that probate records of the time tended to include "everything from acreage to broken cups." *Id.* at 427, 428.

[36.](#) *Id.* at 431 (using estimates from a census by the then-Secretary of War).

[37.](#) Kleck, *supra* note 34, tbl. 2.5 (50%); Cook & Ludwig, *supra* note 34 (42%).

[38.](#) Kleck, *supra* note 34, tbl. 2.5 (data from 1980-94); *see also* Cook & Ludwig, *supra* note 34 (27% of whites and 16% of blacks -- individuals rather than households -- own guns).

[39.](#) Professor Williams asserts that the significant difference isn't just in the fraction of owners, but in "white gun owners . . . outnumber[ing] black gun owners in absolute terms." Williams, *Civic Republicanism and the Citizen Militia*, *supra* note 1, at 591 & n.217. If that's so, then the absence of demographic skewing -- the supposed precondition of the Second Amendment -- is actually mathematically impossible: Gun owners in some larger demographic groups would always outnumber in absolute terms the gun owners in some small demographic groups.

[40.](#) The Federalist No. 10, at 55 (Madison) (Carl Van Doren ed. 1945). "The latent causes of faction," Madison wrote, are "sown in the nature of man . . . . A zeal for different opinions concerning religion, concerning government . . . ; an attachment to different leaders ambitiously contending for pre-eminence and power; . . . have . . . divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good." *Id.* at 56. "It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part." The Federalist No. 51, at 349 (usually attributed to Madison) (Carl Van Doren ed. 1945). Not much faith there in "a unified, homogeneous, organized, collective body [of the People], devoted to the Common Good."

Curiously, Professor Williams acknowledges that James Madison, among others, "recognized that the American people were dividing into what we would today call interest groups"; but, anthropomorphizing, Professor Williams concludes that "It [the Second Amendment] does not, however, seriously examine whether a [virtuous and united] People

actually does exist in America." Williams, *The Militia Movement and Second Amendment Revolution*, *supra* note 18, at 908-09 & n.128. Omitted is any acknowledgement that the first point undercuts the second -- that the Second Amendment's drafter didn't share the naiveté that Professor Williams ascribes to the Amendment and its supposedly "nostalgic[]" civic republican enthusiasts.

[41.](#) Williams, *The Unitary Second Amendment*, *supra* note 1, at \*5.

[42.](#) *Id.* at \*6.

[43.](#) One could, of course, argue (but Professor Williams in his response to me does not focus on this argument) that another circumstance has changed -- that today the government no longer maintains the militia. But in addition to the fact that the right still remains a right of *the people*, not of the militia, it strikes me as unsound to conclude that a right can vanish because of *the government's* own dereliction. See David B. Kopel & Christopher Little, *supra* note 23, at 480-81. Nor can one argue that the right is only a right against the federal government, and that the failure to maintain the militia was the fault of the states: It is quite clearly part of Congress's role "To provide for organizing, arming, and disciplining, the Militia." U.S. Const. art. I, § 8, cl. 16.

[44.](#) Professor Williams' argument doesn't rest solely on the text of the justification clause, but imports language -- "the body of the people" -- from the provision's history. One can make a similar argument about the First Amendment, by just importing justification language from its antecedents, such as the various state Liberty of the Press Articles. See Volokh, *supra* note 16, at \*22-\*23.

[45.](#) *Id.* at \*12-\*13.

[46.](#) See, e.g., *id.* at \*15.

