

THE PERFECT WORD: DUTY FULFILLMENT, SERVICE  
PROVISION, AND THE MEANING OF *KEEP* IN THE SECOND  
AMENDMENT

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Abstract

*In its 2008 District of Columbia v. Heller decision the Supreme Court interpreted the Second Amendment for the first time in the Court's history as protecting an individual right to possess a handgun in the home for self-defense, unassociated with militia service. The word possess does not appear in the text of the Second Amendment, but the Court found its meaning in a fundamentally different word that is in the text: keep. This was a major misinterpretation, the examination of which reveals a tremendous amount about the original meaning of the Second Amendment. This Article discusses the use of keep in numerous statutes and resolutions written contemporaneously with the Amendment, including more than eighty appearances of the word in the enactments of the First Congress, which drafted the Amendment and proposed it to the states for ratification. Throughout these texts, the meaning of keep is remarkably consistent: to maintain or hold in fulfillment of a duty to provide a service. The way a tavern keeper maintains a tavern as a service to patrons, a treasurer holds monies as a service to the public, and a lighthouse keeper maintains a lighthouse as a service to those at sea. The service contemplated in the Second Amendment could not be more clear: militia service. The inclusion of keep in the Second Amendment provides powerful evidence that what the Amendment granted was one's right to maintain arms in fulfillment of his duty to provide militia service, nothing more.*

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## INTRODUCTION

Despite former Chief Justice Warren Burger's description of it as "one of the greatest pieces of fraud, I repeat the word fraud, on the American public by special interest groups that I have ever seen in my lifetime,"<sup>1</sup> the prevailing interpretation of the Second Amendment<sup>2</sup> as ultimately set down in the United States (U.S.) Supreme Court's *District of Columbia v. Heller*<sup>3</sup> decision and its progeny remains the law of the land.<sup>4</sup> Decided in 2008, *Heller* interpreted the Second Amendment for the first time in the Supreme Court's history as protecting an individual right to possess a handgun in the home for self-defense, unassociated with militia service.<sup>5</sup> The word *possess* does not appear in the text of the Second Amendment, but the Supreme Court found its meaning in a fundamentally different word that is in the text: *keep*.<sup>6</sup> This was a major misinterpretation, the further exploration of which reveals an immense amount about the original meaning of the Second Amendment.<sup>7</sup> Its framers were the members of the first U.S. Congress, who drafted, marked up, and adopted the Amendment along with numerous other resolutions and pieces of legislation between 1789 and 1791. Throughout their term, the First Congress consistently used the words *keep* and *kept* not to mean *possess*, but rather to maintain or hold in fulfillment of a duty to provide a service.<sup>8</sup> That is, the way a record keeper keeps records by maintaining them as a service to those who will refer to the documents, a customs official keeps goods by holding them as a service to the buyer and seller in a transaction, and a treasury officer keeps accounts by maintaining them as a service to the public. In fact, in September 1789, just two

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1. PBS NewsHour, *WATCH: Special Interest Push Behind 2nd Amendment 'Fraud,' Former Chief Justice Said in 1991*, YOUTUBE (Apr. 11, 2023), <https://www.youtube.com/watch?v=hKfQpGk7KKw>.

2. U.S. CONST. amend. II.

3. 554 U.S. 570 (2008).

4. Saul Cornell & Nathan Kozuskanich, *Introduction: The D.C. Gun Case, in THE SECOND AMENDMENT ON TRIAL: CRITICAL ESSAYS ON DISTRICT OF COLUMBIA V. HELLER* 1, 8 (2013).

5. *See Heller*, 554 U.S. at 635.

6. *Id.*; *see also* U.S. CONST. amend. II.

7. This Article is not an endorsement of "originalist" or "textualist" theories of constitutional interpretation, but rather examines uses of language contemporaneous with the Second Amendment as a means of engaging with *Heller* on the decision's own terms. *See* Louis E. Wolcher, *A Philosophical Investigation into Methods of Constitutional Interpretation in the United States and the United Kingdom*, 13 VA. J. SOC. POL'Y & L. 239, 253–55 (2006) (describing and discussing originalism).

8. *See* PATRICK J. CHARLES, *THE SECOND AMENDMENT: THE INTENT AND ITS INTERPRETATION BY THE STATES AND THE SUPREME COURT*, 33–34 (2009).

days before adopting the Second Amendment and submitting it to the states for ratification, the First Congress passed a resolution about jail keeping that used the word *keep* exactly this way: to maintain the facility and hold inmates in it as a service to the public.<sup>9</sup> In no instance did the First Congress use the word *keep* simply to mean *possess* or *have*.<sup>10</sup> To accept the current interpretation as set down in *Heller* is to believe that the use of *keep* in the Second Amendment—that one time—was meant to carry a uniquely different meaning from the more than eighty other occasions in which the First Congress used the word.<sup>11</sup> Such an interpretation strains credulity.

Even outside the enactments of the First Congress, numerous other texts contemporaneous with the Second Amendment consistently used *keep* this way. To keep a tavern, a lighthouse, a ferry, a journal, an inn, a toll gate, the accounts, the monies, a medicine chest, the books, a standard, the seal, the records, the peace, a jail, the time, and even the door.<sup>12</sup> None of these expressions means to *possess*. Each and every one of them involves the fulfillment of a duty to provide a service, incompatible with any individual right of use. It would be difficult to imagine, for example, a congressional clerk tasked with *keeping* the House or Senate journal, as required in Article I of the Constitution, who would claim possession over that document or an individual right to use it for their own purposes.<sup>13</sup> Providers of ferry, lighthouse, inn, and tavern services, moreover, were also described in contemporaneous statutes as those who would keep a ferry, keep a lighthouse, and keep an inn.<sup>14</sup> One cannot operate a ferry for one's own use, because in that case the vessel would no longer be a ferry—it would be a private boat. To *keep* is to fulfill one's duty to provide a service: transportation across the water, navigation along the coast, and lodging on the trails and roads, to name only a few examples. As for the well-regulated militia referenced in the Second Amendment itself, the service its members had a duty to provide was fundamental to colonial life, and could not be more clear: militia service.<sup>15</sup> The need was for arms to be in the militiamen's hands when they were called into

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9. See *The Public Statutes at Large of the United States of American from 1789 to March 1845*, vol. I., 98–99 (Richard Peters 1845), <https://tile.loc.gov/storage-services/service/l1/l1sl/l1sl-c1/l1sl-c1.pdf> [hereinafter 1 Peters, *Statutes at Large*].

10. See *infra* Section I.B.3.

11. See 1 Peters, *Statutes at Large*, *supra* note 9.

12. See *infra* Sections I.B.2.a; 3; 4.b–e.

13. U.S. CONST. art. I, § 5, cl. 3 (“Each House shall *keep* a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy.”) (emphasis added).

14. See *infra* Sections I.B.4.a, d.

15. See *District of Columbia v. Heller*, 554 U.S. 570, 650–51 (Stevens J., dissenting) (discussing state militia laws contemporaneous with the Second Amendment and interpreting the phrase “keep and bear arms”).

action, and the inclusion of *keep* in the Second Amendment is powerful evidence that what it granted was the right to maintain arms in fulfillment of one's duty to provide militia service, the Amendment contemplates no service other than that. In choosing *keep*, the framers truly found the perfect word. For the very archetype of colonial militia service was the Minute Man,<sup>16</sup> whose hallowed duty was to maintain arms so as to be ready for service at a moment's notice.<sup>17</sup>

Misconstrued in *Heller* and compounded in its progeny, the meaning of *keep* in the Second Amendment is nevertheless quite evident in the texts written contemporaneously with it. In two parts, this Article discusses many of them, which, while lesser examined than others in this context, reveal much about the intended use of *keep* in the Second Amendment. Part I of this Article provides background on the nature of the militia in the early United States and colonies and discusses the uses of *keep* in the Declaration of Independence, Articles of Confederation, and militia and arsenal statutes, as well as the militia's ultimate evolution into the National Guard. Part I continues by discussing the uses of *keep* outside the militia and arsenal contexts, including the Land Ordinance of 1785 and the Northwest Ordinance of 1787, the "Journal Clause" and the clause limiting state military power in Article I of the Constitution, numerous enactments passed in the First Congress, and colonial and state statutes related to the keeping of ferries, toll gates, the peace, taverns, inns, standards, and lighthouses. Finally, Part I discusses major Second Amendment cases decided by the Supreme Court.

Part II argues that to *keep* arms was not to *possess* them but rather to fulfill one's duty to provide militia service, and that the contemporaneous use of *keep* supports this overwhelmingly. Specifically, Part II argues that this usage of *keep* is consistent throughout the legislation of the First Congress and other enactments at the time of the Second Amendment's adoption, an inherent readiness exists in *keeping* that is absent from *possession*, and the *Heller* interpretation of *keep* would absurdly authorize criminal conduct in other contexts, such as treasuries and jails. Part II argues that the hallmark of *keeping* is its limitation on permissible use—as in the record keeper who has no authority to use records beyond his role in maintaining them for reference—and that in this sense the Amendment functions largely like a licensing provision designed to

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16. See *The Militia and Minute Men of 1775*, NAT'L PARK SERV., <https://www.nps.gov/mima/learn/historyculture/the-militia-and-minute-men-of-1775.htm> (last updated Nov. 6, 2021) (using the term "Minute Men" and "Minute Man" in contrast to "minuteman"); Sam Smith, *The Citizen Soldier: Passion, Fury, Fidelity*, AM. BATTLEFIELD TR., <https://www.battlefields.org/learn/articles/citizen-soldier> (last visited Nov. 9, 2023) (using the spelling "Minute Man").

17. SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* 2–3 (2006).

ensure that an important need is satisfied. Finally, Part II argues that the use of *keep* in the Second Amendment is a vestige of the pre-industrial Constitution, and that waves of the industrialization subsequently loosened its meaning and usage in many contexts, including ferries, lighthouses, toll gates, and arms.

### I. BACKGROUND

The Second Amendment is only one sentence long, opens with a preamble referencing the militia, and uses the word *keep* but neither *possess* nor *have*. It reads as follows:

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.<sup>18</sup>

Over time two main theories have emerged about its meaning.<sup>19</sup> A “states’ rights” theory developed out of debates over the Constitution in which Anti-Federalists and Jeffersonians interpreted the Amendment as empowering state-controlled militias to serve as a critical check on the federal government’s power.<sup>20</sup> This evolved into a “collective rights” theory limiting the scope of the Second Amendment right to public defense through the militia, and later through the National Guard.<sup>21</sup> On the other hand, an “individual rights” theory, which first appeared in the Jacksonian era out of a backlash to state level efforts to impose gun control measures, posited that the Second Amendment provided an individual right to have and use a gun for self-defense.<sup>22</sup> The states’ rights and later collective rights theory prevailed in the courts until *Heller* adopted the individual rights interpretation in 2008, but neither approach provides a fully accurate understanding of the Second Amendment’s original meaning.<sup>23</sup>

At the time of ratification, everyday men were legally obligated to fulfill a *civic duty* to participate in the militia and often to equip themselves with the arms necessary to do so.<sup>24</sup> The Second Amendment protected their right to maintain arms in order to fulfill this duty to provide militia service.<sup>25</sup> While it is difficult

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18. U.S. CONST. amend II.

19. See MICHAEL WALDMAN, *THE SECOND AMENDMENT* 68 (2014); CORNELL, *supra* note 17, at 7.

20. See CORNELL, *supra* note 17, at 5.

21. *Id.* at 5–6; WALDMAN, *supra* note 19, at 68.

22. CORNELL, *supra* note 17, at 4–7.

23. *Id.* at 7; WALDMAN, *supra* note 19, at 68.

24. Members of the militia were not professional soldiers but rather men drawn from the public, usually between the ages of sixteen and sixty years old. See WALDMAN, *supra* note 19, at 6.

25. See CORNELL, *supra* note 17, at 2.

to imagine a system like this today, the civic duty to serve in the militia was an accepted aspect of American life and, as discussed below, provided a critical backdrop to the Second Amendment's conceptualization, adoption, and ratification.<sup>26</sup>

#### A. *The Evolution of the Militia*

Although virtually unknown today, militias were an important part of American society during colonial times and throughout the Revolutionary War.<sup>27</sup> Militias were very different from modern military forces. The U.S. military today uses professional soldiers paid for their service who collectively operate as a “standing army” by remaining in force even during times of peace.<sup>28</sup> In contrast, militias consisted of everyday citizens who served as non-professional soldiers and were called into action only when needed.<sup>29</sup> Adam Smith actually described this in his famous 1776 treatise *Wealth of Nations*, explaining that “in a militia, the character of the labourer, artificer, or tradesman, predominates over that of the soldier: in a standing army, that of the soldier predominates over every other character; and in this distinction seems to consist the essential difference between those two different species of military force.”<sup>30</sup> Americans deeply distrusted standing armies out of a fear that governments were predisposed to use them against their own people.<sup>31</sup> In fact the Declaration of Independence directly addresses this deeply held apprehension in a sentence that also uses the word *kept*. Listed in the Declaration among the grievances against the King of Great Britain, it states, “He has *kept* among us, in times of peace, Standing Armies without the Consent of our legislatures.”<sup>32</sup> Americans were much less afraid of

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26. *Id.* at 2, 13.

27. This Article uses the term “militia” to describe the legally authorized, non-professional forces composed of citizen soldiers that provided for the public defense in the United States before, during, and for a short time after the nation’s founding period. Today, the term is often misused to describe armed groups of private individuals who share anti-government ideologies, but a group like this would have no legal authority to operate as a militia and would be more accurately described as a mob. *Id.* at 3. Moreover, the real militias that operated with legal authority during and around the founding period commonly did so in the government’s defense, by helping put down invasions and insurrections. *Id.* at 3–4.

28. See WALDMAN, *supra* note 19, at 7–8.

29. *Id.*

30. *United States v. Miller*, 307 U.S. 174, 179 (1939) (quoting ADAM SMITH, *WEALTH OF NATIONS*, bk. V, ch. 1 (1776)).

31. See CHARLES, *supra* note 8, at 34–37; see also WALDMAN, *supra* note 19, at 8 (explaining that in 1775, the army was seen “as tyranny in the making, authoritarianism on the march”).

32. THE DECLARATION OF INDEPENDENCE para. 13 (U.S. 1776) (emphasis added).

the militia, many members of which were farmers, who usually had to be men between the ages of sixteen and sixty.<sup>33</sup> Participation in the militia was not optional, but rather their civic duty.<sup>34</sup> It was their legal obligation to join and to train intermittently.<sup>35</sup> Militiamen would gather together in what were known as musters, to which they were often required to bring their own muskets, and their role was to defend the public against invasions and insurrections.<sup>36</sup> Police forces did not exist at the time and communities relied on militias to preserve order and quell public disturbances.<sup>37</sup> Notably, while the militias were not organized like standing armies, they were also not lawless mobs.<sup>38</sup> They were legitimate, recognized entities that operated under legal authority to protect the public; colonial and state statutes regulated them.<sup>39</sup>

An important aspect of the militia's appeal was that it was far better suited than an army to carry out a "passive veto" over state abuses of force because, unlike professional soldiers, members of the militia could refuse to muster, or to gather.<sup>40</sup> Governments could call out the militia whenever they wanted to, but it was ultimately up to the citizen militia members themselves to decide whether to actually take up arms and assemble.<sup>41</sup> Militias could simply choose not to come out, a concept known as "militia nullification," in situations they perceived to be unjust governmental uses of force.<sup>42</sup> Militias would be unlikely to participate in such efforts because they consisted of the people themselves.<sup>43</sup> A militia could be trusted to exercise this nullification power if it saw fit. This occurred during the events of Shay's Rebellion, starting in 1786 when the

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33. See WALDMAN, *supra* note 19, at 6.

34. CORNELL, *supra* note 17, at 2–3; WALDMAN, *supra* note 19, at 13.

35. CORNELL, *supra* note 17, at 2–3; WALDMAN, *supra* note 19, at 13.

36. See CORNELL, *supra* note 17, at 3–4; WALDMAN, *supra* note 19, at 6; CHARLES, *supra* note 8, at 31.

37. CORNELL, *supra* note 17, at 13; see WALDMAN, *supra* note 19, at 16.

38. See CORNELL, *supra* note 17, at 3.

39. *Id.* As an institution, the militia was an entity analogous to the jury. See *id.* at 81–82, 129–30. Also provided for in the Bill of Rights, juries are groups of people legally empowered to make consequential decisions in civil and criminal cases. See U.S. CONST. amend. VI, VII. In the same way that a group of people outside the context of a jury has no legal authority, for example, to pronounce someone guilty or not guilty of a crime, a group of armed citizens operating outside the militia had no legal authority to defend the public. See CORNELL, *supra* note 17, at 81–82. A group like that would be better known as a gang or a mob. See *id.* at 81–82. Like juries, however, militias did act on legal authority, in their case to provide for the public defense.

40. CORNELL, *supra* note 17, at 81–83, 105.

41. See *id.* at 81–82.

42. *Id.*

43. See *id.*



Massachusetts governor called out the militia to put down a group of insurgent farmers who had blocked state courts from foreclosing on farm properties hit hard by policies designed to pay down debt from the Revolutionary War effort.<sup>44</sup> Not only did many militia members decline to march against the farmers, some instead joined the farmers' ranks to support the rebellion.<sup>45</sup>

### 1. Militia Statutes

Colonial and state statutes regulated the militias, and although the majority in *Heller* asserted that the phrase ““*keep arms*”” was “not prevalent in the written documents of the founding period” that the majority itself had found,<sup>46</sup> the phrase actually appears throughout the colonial and state militia statutes contemporaneous with the Second Amendment. These provisions have frequently been cited in arguments and debates about the Amendment's meaning.<sup>47</sup> An example is a 1785 militia statute in Virginia stating that “every one of the said officers, non-commissioned officers, and privates, shall constantly *keep* the aforesaid arms, accoutrements, and ammunition, ready to be produced whenever called for by his commanding officer.”<sup>48</sup> Governments needed guns to be in the hands of the militia members so they would be ready when called into action.<sup>49</sup> This was accomplished in several different ways. In some cases, the state would require citizens to buy guns themselves, similar to imposing a tax, and to keep the guns ready in their homes.<sup>50</sup> In other cases, states would own the guns and issue them to members of the militia, who would then keep them in their homes.<sup>51</sup> And in other cases, the states themselves owned the guns and kept them in public armories or magazines.<sup>52</sup> These methods appear throughout the militia statutes.<sup>53</sup> An illustrative example is from the State of Maryland, which changed its militia law in 1799 so that the state would provide muskets, bayonets, and cartridge boxes to its militia regiments.<sup>54</sup> The amended statute also expressly restricted the uses of those weapons by imposing penalties

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44. *Id.* at 31–33.

45. *See id.*

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

47. *See id.* at 650–51 n.12 (Stevens J., dissenting).

48. *Id.* at 650 (Stevens J., dissenting) (emphasis added) (citing An Act for Regulating and Disciplining the Militia, 1785 Va. Acts ch. 1, § III, p. 2) (emphasis added).

49. *See* CORNELL, *supra* note 17, at 2.

50. *See* CHARLES, *supra* note 8, at 73, 78.

51. *See id.* at 78.

52. *See id.*

53. *See id.*

54. *Id.*

on militia members who received the weapons and used them “in hunting, gunning, or fowling, or shall not keep his arms and accoutrements clean and in neat order.”<sup>55</sup> Often governments would also provide guns to individuals who were too poor to buy them on their own.<sup>56</sup> Delaware did this, but then in 1796 required its counties to “collect all the public arms” that the state had previously distributed to those who were “unable to equip themselves.”<sup>57</sup> At the state’s direction, the “arms were moved to a ‘convenient place where they may be safely kept,’” and every musket was “‘branded, on the butt of the stock,’ with the words ‘State of Delaware.’”<sup>58</sup>

Provisions related to the use of magazines, armories, and arsenals appear in contemporaneous statutes as well. At the federal level, the Second Congress allocated funds in 1793 for the compensation “of the *storekeepers* at the several arsenals, rent[] for the buildings . . . [used] as magazines,” and “payment of the labourers, coopers, armorers and other persons employed in taking care of the ordnance, arms and military stores.”<sup>59</sup> The following year the Third Congress passed a statute to build and repair arsenals and magazines.<sup>60</sup> This law established “three or four arsenals with magazines,” for the “*safe keeping* of the military stores,” in locations that the president would choose to best accommodate the different parts of the country, at least one or two of which had to be either or both of the existing arsenals in Springfield, Massachusetts and Carlisle, Pennsylvania.<sup>61</sup> The statute also created superintendent and master-armourer positions to be appointed by the president, as well as an officer position under the direction of the Department of War,<sup>62</sup> whose *duty* it would be to “superintend the receiving, *safe-keeping*, and distribution of the military stores of the United States.”<sup>63</sup> Ultimately, George Washington chose Springfield,

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55. *Id.*

56. *Id.* at 32–33.

57. *Id.* at 77.

58. *Id.* (emphasis added).

59. See *The Public Statutes at Large of the United States of America from 1789 to March 1845*, vol. I, 328 (Richard Peters 1845), <https://tile.loc.gov/storage-services/service/l1/l1sl/l1sl-c2/l1sl-c2.pdf> [hereinafter 2 Peters, *Statutes at Large*] (emphasis added).

60. See *The Public Statutes at Large of the United States of America from 1789 to March 1845*, vol I, 352 (Richard Peters 1845), <https://tile.loc.gov/storage-services/service/l1/l1sl/l1sl-c3/l1sl-c3.pdf> [hereinafter 3 Peters, *Statutes at Large*] (emphasis added).

61. *Id.* (emphasis added).

62. The Department of War is now known as the Department of Defense.

63. 3 Peters, *Statutes at Large*, *supra* note 60 (emphasis added).

Massachusetts and Harpers Ferry, Virginia<sup>64</sup> for the first two arsenals.<sup>65</sup> The Springfield armory had existed since the outset of the Revolutionary War, but the arsenal and magazine at Harpers Ferry was built upon Washington's selection.<sup>66</sup>

The colonies and then the states also had their own statutes related to magazines, armories, and arsenals. The Virginia Assembly, for example passed "[a]n act for erecting a Magazine" in 1714, stating that "a considerable quantity of arms and ammunition," bestowed by Queen Anne, was "in danger to be imbezzled and spoilt, for want of a convenient and proper place to *keep* them in."<sup>67</sup> The statute provided for the appointment of "a person to look after and take charge of the magazine, and the ammunition which shall be lodged therein; which person so appointed, shall be called the *keeper of the magazine*, who shall have and receive the yearly salary of twenty pounds."<sup>68</sup> As a precaution against fires, the Virginia General Assembly passed a statute in 1772 allowing the borough of Norfolk to impose a tax for the building of a magazine to store and keep gunpowder.<sup>69</sup> The statute also allowed for the appointing of "a *keeper of such magazine*" to attend at the magazine by receiving gunpowder into it and delivering it back to its owners.<sup>70</sup> Similarly, a statute in force in Connecticut in 1784 set out duties related to arms keeping for several positions in the militia.<sup>71</sup> It was the duty of the Quarter-Master-General, for example, to "*keep and maintain* a Magazine of Powder, Ball, and other warlike Stores and camp Equipage, to be ready for the use of this State as [o]ccasion may require."<sup>72</sup> And a "[d]uty of the Regimental Quarter-master [was] to provide and *keep* a sufficient Quantity of Ammunition and warlike Stores for the Use of their respective

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64. Harper's Ferry was located in Virginia at this time because West Virginia did not become a state until 1863.

65. ADAM COSTANZO, *GEORGE WASHINGTON'S WASHINGTON: VISIONS FOR THE NATIONAL CAPITAL IN THE EARLY AMERICAN REPUBLIC* 16 (2018). Notably, both locations were later the sites of insurrections; Shay's Rebellion involved an attempted raid on the Springfield arsenal in 1787 and in 1859, John Brown led an attempted raid on the arsenal at Harper's Ferry.

66. *Id.*

67. *The Statute at Large of all the Laws of Virginia from the First Session of the Legislature 1619*, vol. IV, 55 (William Waller Hening 1820), <https://vagenweb.org/hening/vol04-03.htm> (emphasis added) [hereinafter 4 Hening].

68. *Id.* at 56 (emphasis added).

69. Act of Feb. 1772, ch. 100, 1 Va. Laws 611–13.

70. *Id.* at 612 (emphasis added).

71. *See Acts and Laws of the State of Connecticut in America* 144–57 (1784).

72. *Id.* at 148 (emphasis added).

Regiments, *to be kept* in such Place or Places as shall be ordered by the Field Officers.”<sup>73</sup>

## 2. Militias from the Revolutionary War to the Constitution

After the Revolutionary War, with the conflict against the British foremost in their minds, the American public severely distrusted standing armies, and the British standing army in particular stood as the ultimate symbol of tyrannical force and intrusion into their lives.<sup>74</sup> The British army had waged the war against them, stationed troops among them, and often even forcibly quartered soldiers in their homes.<sup>75</sup> In fact, the Third Amendment, the next sentence in the U.S. Constitution after the Second Amendment, is a clear response to incursions of the British army; it prohibits the quartering of soldiers in homes during times of peace and only allows it as provided by law during times of war.<sup>76</sup> By the time the Revolutionary War ended in 1781, the public had seen enough of professional armies. The new nation would rely primarily on its far less threatening militias for public defense.<sup>77</sup>

The Articles of Confederation, which set out the initial structure of the new government, creating a loose affiliation of sovereign states but also establishing a national legislature known as the Confederation Congress,<sup>78</sup> went into effect in 1781, and included provisions related to state militias.<sup>79</sup> Those provisions appear in Article VI, which uses *keep* or *kept* four times, stating that no vessel of war or body of forces shall be *kept up* in time of peace by any state, and that “every State shall always *keep up* a well regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and *constantly have ready for use*, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition and camp equipage.”<sup>80</sup> Article VI goes on to prohibit states from granting commissions to “ships or vessels of war” or “letters of marque or reprisal,” unless the state is “infested by pirates, in which case vessels of war

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73. *Id.* at 148–49 (emphasis added).

74. *See* CORNELL, *supra* note 17, at 3, 12, 33, 36–37.

75. *See* William Sutton Fields, *The Third Amendment: Constitutional Protection from the Involuntary Quartering of Soldiers*, 124 MIL. L. REV. 195, 199 (1989).

76. U.S. CONST. amend III.

77. *See* Earl F. Martin, *America’s Anti-Standing Army Tradition and the Separate Community Doctrine*, 76 MISS. L.J. 135, 151 (2006).

78. ARTICLES OF CONFEDERATION of 1781, art. V.

79. *Id.* art VI.

80. *Id.* (emphasis added).

may be fitted out for that occasion, and *kept* so long as the danger shall continue,” or until Congress determined otherwise.<sup>81</sup>

The Confederation Congress needed a supermajority of nine out of the thirteen states to agree to legislation for it to pass under the Articles of Confederation, and amending the Articles themselves required the unanimous consent of the states.<sup>82</sup> So it was understandably shocking to much of the public when, six years later in 1787, the Continental Congress drafted a proposed Constitution permitting a new legislature to raise and support armies far more easily than under the Articles, and also granting the federal government much greater control over the militias.<sup>83</sup> The “militia clauses” in Article I of the new Constitution empowered Congress to call forth, “organize, arm, and discipline the militia”—a previously unimaginable level of federal control.<sup>84</sup> Of specific concern was that the authority of the federal government to *arm* the militia would now inversely allow it to *disarm* the militia by simply failing to supply the weapons.<sup>85</sup> This fear was a major reason the Second Amendment was included in the proposed changes to the U.S. Constitution in 1789 to ensure the continued arming of the militia under the new federal government.<sup>86</sup>

The First Congress began work, and about six months into its term adopted twelve articles to amend the Constitution, submitting them to the states for ratification on September 25, 1789.<sup>87</sup> At this point, the provision that eventually became the Second Amendment was actually the fourth Article listed, because the states did not ratify the first two.<sup>88</sup> The states did ratify the remaining ten articles, however, which later came to be known as the Bill of Rights.<sup>89</sup> James Madison wrote the amendments while he was serving in the House of

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81. *Id.* (emphasis added).

82. See Sen. Tom Harkin, *Filibuster Reform: Curbing Abuse to Prevent Minority Tyranny in the Senate*, 14 N.Y.U.J. LEGIS. & PUB. POL’Y 1, 6 (2011).

83. U.S. CONST., art. I, § 8, cl. 12; see also WALDMAN, *supra* note 19, at 25 (explaining that the committee intended to grant Congress authority “to make laws for organizing, arming, & disciplining the militia”).

84. U.S. CONST., art. I, § 8, cl. 15; see also WALDMAN, *supra* note 19, at 25; CORNELL, *supra* note 17, at 43.

85. See WALDMAN, *supra* note 19, at 38.

86. See *id.* at 24–27, 38–40.

87. See 1 Peters, *Statutes at Large*, *supra* note 9, at 97–98; *The Bills of Rights: A Transcription*, NAT’L ARCHIVES, <https://www.archives.gov/founding-docs/bill-of-rights-transcript#:~:text=On%20September%2025%2C%201789%2C%20the,in%20the%20National%20Archives%20Museum> (last updated Apr. 21, 2023).

88. CORNELL, *supra* note 17, at 62.

89. See FERGUS M. BORDEWICH, *THE FIRST CONGRESS: HOW JAMES MADISON, GEORGE WASHINGTON, AND A GROUP OF EXTRAORDINARY MEN INVENTED THE GOVERNMENT* 140–41 (2017).

Representatives during that initial term.<sup>90</sup> Madison wrote several drafts of the Second Amendment, including the following version which expressly refers to *military service*:

The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms, shall be compelled *to render military service* in person.<sup>91</sup>

The draft reveals the Amendment's clear military-service orientation. The religious objector language reflects an important issue at the time about who would provide militia service. Quakers, for example, were committed pacifists who refused to bear arms.<sup>92</sup> Their influence in Pennsylvania prevented a formal militia from existing in the state until 1776.<sup>93</sup> But some members of Congress opposed Madison's draft because they thought the exception for religious objectors could enable the new government simply to declare who was "religiously scrupulous" as a way of preventing large sections of the public from providing militia service.<sup>94</sup> During its revision of Madison's draft, Congress later removed the exception for religious objectors as well as the reference to military service,<sup>95</sup> and ultimately adopted the version of the Amendment we know today, which was successfully ratified in 1791.<sup>96</sup>

### 3. Evolution of Militias into the National Guard

After having experienced firsthand the difficulties of relying on militias to wage war against a professional army, George Washington pressed Congress to pass military reform from the outset of his first presidential term.<sup>97</sup> A plan

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90. Madison had previously opposed changes to the Constitution but switched his position at least in part to improve his chances of being elected to the inaugural term of the House of Representatives from Virginia's newly created Fifth District. *See* WALDMAN, *supra* note 19, at 45–48.

91. CORNELL, *supra* note 17, at 60 (emphasis added).

92. *See* WALDMAN, *supra* note 19, at 54; *see also* CORNELL, *supra* note 17, at 22 (describing how Quakers in Pennsylvania, who were "religious pacifists opposed to bearing arms," obtained a religious exemption from bearing arms in the state).

93. *See* WALDMAN, *supra* note 19, at 54.

94. CORNELL, *supra* note 17, at 61; *see also* WALDMAN, *supra* note 19, at 54–56 (describing congressional debate over the "religiously scrupulous" exception, including Elbridge Gerry's objection that the government "could simply declare classes of people to be conscientious objectors, and thus prohibit them from bearing arms").

95. *See* WALDMAN, *supra* note 19, at 52–56.

96. *See* BORDEWICH, *supra* note 89, at 140.

97. *See* CORNELL, *supra* note 17, at 66.

proposing to transform the country's general militia into a sort of select militia, by classifying it into an "advanced corps," "main corps," and "reserve corps" met resistance and was defeated.<sup>98</sup> But after a militia attacked Native Americans in the Ohio Territory and lost almost half its men in the resultant violence, Congress passed the Uniform Militia Act in 1792.<sup>99</sup> This statute required all "free able bodied white male" citizens between the ages of 18 and 45 to provide themselves with a musket, firelock, or rifle, ammunition, and other equipment needed for militia service, and to "appear so armed, accoutred and provided, when called to exercise."<sup>100</sup> The Uniform Militia Act was ineffective at improving enlistment and enforcing militia service, however, and the militia system continued to erode.<sup>101</sup> The limitations of the militia were especially evident during the War of 1812.<sup>102</sup> Although the state militias were still meant to serve as the nation's main military defense, the war exposed major problems: the British Army overwhelmed the militias, marched into Washington, DC, and set fire to the presidential mansion later known as the White House.<sup>103</sup>

Ultimately, the militia evolved into what is known today as the U.S. National Guard.<sup>104</sup> After the Civil War and the Spanish-American War, Congress created the National Guard in the Militia Act of 1903.<sup>105</sup> This statute, and others subsequent to it, set out the militia as consisting of able-bodied males between seventeen and forty-five years old who are, or have declared an intention to become, U.S. citizens, as well as female citizens who are members of the National Guard.<sup>106</sup> It further divided this group into two classes: the (1) "organized militia" consisting of the National Guard and the Naval Militia and the (2) "unorganized militia," made up of the remainder.<sup>107</sup>

The militia-related origins of the National Guard are also reflected in its motto, "Always Ready, Always There," as well as its seal which shows a Minute

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98. This was known as the "Knox plan" because Washington worked on it closely with Henry Knox, the then Secretary of War. *See id.*

99. CORNELL, *supra* note 17, at 66; WALDMAN, *supra* note 19, at 65–66.

100. Uniform Militia Act of 1792, ch. 33, 1 Stat. 271; *see also* CORNELL, *supra* note 17, at 67 (describing passage of the Uniform Militia Act); WALDMAN, *supra* note 19, at 65–66 (same).

101. *See* WALDMAN, *supra* note 19, at 66.

102. *See id.* at 67.

103. *Id.* at 67.

104. *See* CORNELL, *supra* note 17, at 196.

105. Militia Act of 1903 (Dick Act), ch. 196, 32 Stat. 775; *see also* H. Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 CHI.-KENT L. REV. 403, 426 n.81 (2000).

106. 10 U.S.C. § 246(a).

107. 10 U.S.C. § 246(a), (b); *see also* *Perpich v. Dep't of Defense*, 496 U.S. 334, 342 (1990) (describing the statutory creation of the organized and unorganized militia).

Man—specifically the Concord Minute Man statue located in Concord, Massachusetts.<sup>108</sup> Completed in 1875, that statue depicts a Minute Man lifting a musket to join the Battle of Concord at the outset of the Revolutionary War, while also setting down a plow to symbolize the fact that many members of the colonial militia were farmers called into service at a moment's notice.<sup>109</sup>

B. *Contemporaneous Uses of Keep Outside the Militia and Arsenal Contexts*

Even outside the contexts of militias and arsenals, the statutes, ordinances, and constitutional provisions contemporaneous with the Second Amendment consistently used *keep* to mean to fulfill a duty to provide a service. This Section discusses four categories of those texts, all of which use *keep* this way: (1) the Land Ordinance of 1785 and the Northwest Ordinance of 1787, (2) Article I of the Constitution, (3) the enactments of the First Congress, and (4) colonial and state statutes from the time. This Section examines these uses of *keep*, which appear in a wide variety of contexts, including the keeping of books, records, journals, troops and ships of war, accounts, jails, doors, medicine chests, the U.S. seal, ferries, toll gates, the peace, inns, standards, and lighthouses.

1. The Land Ordinance of 1785 and the Northwest Ordinance of 1787

The Confederation Congress did not accomplish much during its brief existence, largely because of the supermajority requirement under the Articles of Confederation that nine out of the thirteen states had to agree on legislation for it to pass.<sup>110</sup> But two of the more consequential pieces of legislation that it did enact dealt with the Northwest Territory; the vast area of land that would eventually become Ohio, Indiana, Illinois, Michigan, Wisconsin, and part of Minnesota.<sup>111</sup> These two enactments were the Land Ordinance of 1785 and the Northwest Ordinance of 1787, both of which led to the admission of the Northwest Territory into the Union and the establishment of a government structure there.<sup>112</sup> These ordinances pre-dated the Second Amendment by only a few years, and both used the word *keep*.

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108. See NATIONAL GUARD, <https://www.nationalguard.mil/> (last visited Sept. 16, 2023).

109. See WALDMAN, *supra* note 19, at 4–5.

110. Harkin, *supra* note 82, at 6.

111. *Id.*

112. The General Land Ordinance of 1785, *reprinted in* 28 Journals of the Continental Congress 375 (Jon Fitzpatrick, ed. 1933) [hereinafter Land Ordinance]; 32 Journals of the Continental Congress 1774-1789, at 334 (Gaillard Hunt ed., 1903–1919) (originally Ordinance of 1787: The Northwest Territorial Government) [hereinafter Northwest Ordinance].



The Land Ordinance of 1785 addressed how the land in the Northwest Territory would be surveyed and sold.<sup>113</sup> As part of this work, the Land Ordinance required a geographer to transmit surveyed plats to a board of treasury that would record them “in well bound books to be *kept* for that purpose.”<sup>114</sup> Two years later, the Confederation Congress passed the Northwest Ordinance of 1787 that chartered a government for the new territory.<sup>115</sup> The Northwest Ordinance allowed for the Northwest Territory eventually to be divided into three to five states, created a method for admitting the new states into the Union, established certain rights, and prohibited slavery in the territory.<sup>116</sup> The Northwest Ordinance is a short text, but it uses the words *keep*, *possess*, and *have*.<sup>117</sup> Section Four states that a secretary “shall reside in the district, and *have* a freehold estate therein, in five hundred acres of land, while in the exercise of his office. . . . [and i]t shall be his *duty to keep* and preserve” legislative acts and laws, public records of the district, and proceedings of the governor.<sup>118</sup>

The Ordinance created a Legislative Council, consisting of five members who were each required to be “*possessed* of a freehold in five hundred acres of land.”<sup>119</sup> It also stated that the newly established governor “shall reside in the district, and *have* a freehold estate therein, in one thousand acres of land, while in the exercise of his office.”<sup>120</sup> Notably the uses of *possess* and *have* in the Ordinance contrast starkly with the use of *keep*; both *possess* and *have* relate to property ownership requirements, while the Ordinance uses *keep* for the secretary’s duty to maintain government records.

## 2. Article I of the U.S. Constitution

The Confederation Congress lasted until 1789 when the Congress Americans know today took effect under the U.S. Constitution.<sup>121</sup> Article I of the Constitution creates Congress, sets out the structure of the legislative branch, and uses the word *keep* twice.<sup>122</sup> These are the only two times *keep* appears in the

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113. See Matthew J. Festa, *Property and Republicanism in the Northwest Ordinance*, 45 ARIZ. ST. L.J. 409, 442 (2013).

114. Land Ordinance, *supra* note 112, at 377 (emphasis added).

115. See Northwest Ordinance, *supra* note 112, at 334.

116. See *id.*

117. See generally *id.*

118. *Id.* at 336 (emphasis added).

119. *Id.* at 338 (emphasis added).

120. *Id.* at 336 (emphasis added).

121. *The Constitution*, THE WHITE HOUSE, <https://www.whitehouse.gov/about-the-white-house/our-government/the-constitution/> (last visited Sept. 16, 2023).

122. See U.S. CONST. art. I, §§ 5, 10.

Constitution other than in the Second Amendment itself. The word is in the Journal Clause and in a provision that prohibits states from maintaining troops and warships during times of peace.<sup>123</sup>

a. The Journal Clause

The Journal Clause states that “[e]ach House shall *keep a Journal* of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy.”<sup>124</sup> This provision creates a duty for the House of Representatives and Senate to maintain their respective journals, as a service to the public and to future congresses who refer to them.<sup>125</sup> During the Constitutional Convention in 1787, debates ensued over the discretion that the Journal Clause allowed Congress in deciding how frequently it would publish its journals and also the extent to which it could expunge or correct matters in them, but ultimately the journals of each house established the official historical record of the legislature’s proceedings.<sup>126</sup> In their initial form prior to and through the ratification of the Constitution, these journals set important procedural and constitutional precedents that future Congresses relied on in resolving disputes.<sup>127</sup> The precedential value of the congressional journals faded with the increased use of transcripts and emphasis on public transparency, but the *keeping* of them served both future congresses seeking procedural or interpretive precedent as well as public access to the legislature’s proceedings.<sup>128</sup>

b. Provision Prohibiting States from Keeping Troops and Warships

The second time *keep* appears in Article I is in a provision about military service, stating that “[n]o State shall, without the Consent of Congress, lay any Duty of Tonnage, *keep Troops, or Ships of War in times of Peace*, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of

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123. *Id.*

124. *Id.* (emphasis added).

125. See Nicholas Handler, *Rediscovering the Journal Clause: The Lost History of Legislative Constitutional Interpretation*, 21 U. PA. J. CONST. L. 1219, 1221, 1264–66 (2019); William T. Bodoh & Lawrence P. Dempsey, *Bankruptcy Reform: An Orderly Development of Public Policy?*, 49 CLEV. ST. L. REV. 191, 220 (2001).

126. See Handler, *supra* note 125, at 1264–65. The Articles of Confederation expressly required the Confederation Congress to publish its journal monthly. See ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 7.

127. See Handler, *supra* note 125, at 1221.

128. See *id.* at 1224–25, 1264–65.

delay.”<sup>129</sup> The language is similar to the provision in the Articles of Confederation, noted above,<sup>130</sup> which also imposed this prohibition on the states, stating that no vessel of war or body of forces could be *kept up* in times of peace.<sup>131</sup> The use of *keep* and *kept* in both instances relates to the governmental duty to maintain military forces—troops and warships—in service of the public defense, during times of war, invasion, and imminent danger.

### 3. The First Congress

The First Congress met in New York City from 1789 to 1791, and passed numerous statutes and resolutions related to a wide range of topics, including jails, customs duties, various record, book and account keeping practices, the seal of the United States, medicine chests aboard ships, and even the compensation of the Capitol’s doorkeeper. The words *keep* or *kept* appear more than eighty times in this body of enactments,<sup>132</sup> and none were used to mean *possess*. Without exception, the First Congress used the word to mean to maintain or hold in fulfillment of a duty to provide a service.

Several of its uses of *keep* were extremely close in time to the date that Congress adopted the Second Amendment and submitted it to the states for ratification.<sup>133</sup> The closest was in a jail keeping resolution passed on September 23, 1789, only two days before the Second Amendment was adopted.<sup>134</sup> The resolution uses a spelling of jails as “gaols,” which is no longer commonly used:

Resolved by the Senate and House of Representatives of the United States of America in congress assembled, That it be recommended to the legislatures of the several States to pass laws, making it *expressly the duty of the keepers of their gaols*, to receive *and safe keep therein* all prisoners committed under the authority of the United States, until they shall be discharged by due course of the laws thereof, under the like penalties as in the case of prisoners committed under the authority of such States respectively; the United States to pay for the *use and keeping of such gaols*, at the rate of fifty cents per month for each prisoner that shall, under their authority, be committed thereto, during the time such

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129. U.S. CONST. art. I, § 10, cl. 3 (emphasis added).

130. See *supra* Section I.A.2.

131. See ARTICLES OF CONFEDERATION OF 1781, art. VI, para. 4.

132. See 1 Peters, *Statutes at Large*, *supra* note 9.

133. See *id.* at 96–98.

134. See *id.* at 96–97; NAT’L ARCHIVES, *supra* note 87.

prisoner shall be therein confined; and also to support such of said prisoners as shall be committed for offences.<sup>135</sup>

The resolution recommends that the states require their jail keepers to hold federal inmates at the expense of the federal government, and in doing so uses *keep* to mean to maintain a jail as an institution and to hold inmates inside it, both of which are in fulfillment of the jail keeper's duty to provide a public safety service.<sup>136</sup> Additionally, the day before this, on September 22—a mere three days before the First Congress adopted the Second Amendment and submitted it to the states for ratification—it passed a statute setting the compensation of doorkeepers and assistant doorkeepers in each house of Congress.<sup>137</sup> The statute uses the term “door-keeper” four times in reference to these positions.<sup>138</sup> The doorkeeper for the House of Representatives controlled access to the House, and the Senate doorkeeper's main responsibility at that time was to secure the Senate Chamber because the Senate held closed-door sessions.<sup>139</sup>

On September 15, 1789, two weeks before the adoption of the Second Amendment, the First Congress passed a statute establishing the keeping of the U.S. seal as the duty of an official newly titled as the secretary of state.<sup>140</sup> The statute changed the name of the Department of Foreign Affairs to the Department of State, set up the new department's principal officer as the secretary of state, and established that the seal—which had until that point been used by Congress—would now be the seal of the United States.<sup>141</sup> It stated that the “[s]ecretary shall keep the said seal, and shall make out and record, and shall affix the said seal to all civil commissions, to officers of the United States, to be appointed by the President by and with the advice and consent of the Senate, or by the President alone.”<sup>142</sup> The Act also provided that the secretary, in *keeping* the seal would “be entitled to have the custody and charge of the said seal of the United States.”<sup>143</sup> The secretary's role was custodial; he would maintain the seal

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135. 1 Peters, *Statutes at Large*, *supra* note 9, at 96–97 (emphasis added).

136. *Id.*

137. *See id.* at 70–72.

138. *Id.*

139. *See Doorkeepers of the House*, HIST., ART & ARCHIVES, <https://history.house.gov/People/Office/Doorkeepers/> (last visited Nov. 13, 2023); *About the Sergeant at Arms*, U.S. SENATE, <https://www.senate.gov/about/officers-staff/sergeant-at-arms/overview.htm> (last visited Nov. 13, 2023).

140. *See* 1 Peters, *Statutes at Large*, *supra* note 9, at 68–69.

141. *Id.* at 68.

142. *Id.* at 68–69 (emphasis added).

143. *Id.* at 69.

not at his own personal discretion but at the direction of the federal government, specifically the president and Congress.<sup>144</sup>

Some of the most frequent contexts in which the First Congress used *keep* and *kept* were those involving various types of records, accounts, and books. This appears throughout the enactments of their term, some of which expressly describe the *keeping* as a duty. For example, an act regulating the collection of import duties states:

[T]hat the several officers of the customs *shall respectively perform the duties* following—to wit: . . . The naval officers shall receive copies of all manifests; shall, together with the collector estimate the duties on all goods, wares and merchandise subject to duty, *keeping a separate record thereof*; and shall countersign all permits, clearances, certificates and debentures to be granted by the collector.<sup>145</sup>

Another example is the act that created the Treasury Department in September 1789, which states that “it shall be the *duty* of the Treasurer to receive and *keep* the monies of the United States,” and that “it shall be the *duty of the Register to keep all accounts* of the receipts and expenditures of the public money, and of all debts due to or from the United States.”<sup>146</sup> And, an act to provide for the payment of debts states that commissioners were to be appointed “whose *duty* it shall be . . . to enter in *books to be by him kept* for that purpose, credits to the respective subscribers to the said loan for the sums to which they shall be respectively entitled.”<sup>147</sup>

The First Congress also used the word recurringly in the context of customs and import duties. Throughout the first term, various statutes and other enactments addressed the rules surrounding the importation of goods into the United States. These rules regulated the collection of duties on the tonnage of ships and the goods and merchandise they carried. For example, an act regulating the collection of duties imposed on ships and goods entering the country states “that the collectors, naval officers and surveyors, to be appointed by virtue of this act, shall respectively *keep fair and true accounts* of all their transactions relative to their duty as officers of the customs.”<sup>148</sup> In cases involving goods not accompanied by an original invoice, the “collector shall take into his custody the said goods, and shall *keep or cause the same to be kept* with due and reasonable care, at the expense and risk of the party or parties, until the said invoice shall

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144. *Id.* at 68–69.

145. *Id.* at 154 (emphasis added).

146. *Id.* at 66–67 (emphasis added).

147. *Id.* at 140 (emphasis added).

148. *Id.* at 38 (emphasis added).

arrive, or until the said party or parties shall consent to the valuation thereof,” and in cases involving ships forced by distress of weather into a port before their intended destination, the goods onboard could be unloaded if necessary and “stored under the direction, and subject to the safe *keeping*” of the collector.<sup>149</sup> Additionally, an act dealing with imported and domestic distilled spirits states that the supervisors, inspectors, and officers appointed under the act “*shall keep fair and true accounts and records* of their transactions in their respective offices.”<sup>150</sup>

Also passed during Congress’s initial term was the nation’s first federal labor law, which protected the rights of merchant sailors.<sup>151</sup> It was the “Act for the Government and Regulation of Seamen,” and among the protections it provided to sailors was a requirement that ship masters or commanders have and maintain a chest of medicines onboard. The master or commander of the ship or vessel “in default of *having* such medicine chest so provided, and *kept fit for use*,” would have to pay for the medical care of sick crew members in ports along the voyage without any deduction from their wages.<sup>152</sup> The law also required ships crossing the Atlantic Ocean to “*have* on board, well secured under deck, at least sixty gallons of water, one hundred pounds of salted flesh meat, and one hundred pounds of wholesome ship-bread, for every person on board.”<sup>153</sup> But it was the medicine chest that had to be kept fit for use, required under the statute to be maintained in good order, subjected to annual examinations, and replenished with fresh medications.<sup>154</sup>

To the extent the First Congress used *possess*, that word mostly appears in the context of customs and import duties—often related to cases of fraud. These provisions state that officials possessed the powers prescribed to them and authorized the duty collector to “take the said goods, wares, and merchandise, into his *possession*” to properly determine their value in cases involving fraudulently undervalued imports into the United States.<sup>155</sup> Additionally, the Judiciary Act of 1789 empowered federal courts to compel litigants to “produce books or writings in their *possession* or power” and a statute setting the president’s compensation states that it included “the use of the furniture and other effects, now in his *possession*, belonging to the United States.”<sup>156</sup> In neither case

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149. *Id.* at 39, 167 (emphasis added).

150. *Id.* at 200 (emphasis added).

151. *See id.* at 131–35.

152. *Id.* at 131, 135 (emphasis added).

153. *Id.* (emphasis added).

154. *Id.* at 134–35.

155. *Id.* at 42 (emphasis added).

156. *Id.* at 72.

were the litigants or the president maintaining these things as a service to anyone else, but rather merely possessing them for their own use.

4. Contemporaneous Ferry, Toll Gate, Criminal, Tavern, Ordinance, Inn, Standard, Lighthouse, and Carriage Tax Statutes

The consistent use of *keep* to mean the fulfillment of a duty to provide a service is seen in numerous statutory contexts throughout the period contemporaneous with the Second Amendment. This includes the aforementioned provisions relating to the keeping of arsenals, magazines, and armories, jails, books, records, journals, and accounts, as well as laws related to, but not limited to, the keeping of ferries, toll gates, the peace, taverns, ordinances, inns, standards and lighthouses.<sup>157</sup> This Section provides examples of this usage throughout the statutory provisions of the time. This Section also discusses one distorted usage of *keep* that appears in a 1794 federal carriage tax statute passed during the Third Congress, and the revealing motivation for this inconsistent use given the need for the measure's supporters to engineer its text in an effort to overcome major constitutional challenges.

a. Ferry Statutes

Although used today to a far lesser extent, ferries were a critical part of the transportation infrastructure in the pre-industrial United States.<sup>158</sup> Large-scale bridges did not yet exist and ferries were often the primary way to cross rivers, lakes, harbors, and other bodies of water.<sup>159</sup> The operators of ferries were commonly referred to as ferry keepers, and had to maintain the boats at the ready so that passage across the water was available when travelers needed it.<sup>160</sup> Their

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157. See *supra* Section I.A and I.B.

158. See Bruce C. Daniels, *Economic Development in Colonial and Revolutionary Connecticut: An Overview*, 37 THE WM. AND MARY Q. 429, 443–44 (1980); Lewis Leflar, *Muddy Waters: The Supreme Court's Failure to Clarify the Definition of A Vessel in Lozman v. City of Riviera Beach*, 86 UMKC L. REV. 467, 475 (2017).

159. See Camilla A. Hrdy, *State Patent Laws in the Age of Laissez Faire*, 28 BERKELEY TECH. L.J. 45, 68 (2013); Alan D. Watson, *The Ferry in Colonial North Carolina: A Vital Link in Transportation*, 51 THE N.C. HIST. REV. 247 (1974); see also Daniels, *supra* note 158, at 443 (describing how “[f]erries were of more vital concern than roads” to early inhabitants of Connecticut because crossing the many rivers there was much more difficult than following Native American trails, and how the colony had created nine ferries in operation by 1700 providing service on demand across major rivers).

160. Randy Beck, *Qui Tam Litigation Against Government Officials: Constitutional Implications of a Neglected History*, 93 NOTRE DAME L. REV. 1235, 1285 (2018); Watson, *supra* note 159, at 250, 252.

trade was essential to the economy, and statutes throughout the colonies and early United States established, licensed, and regulated the *keeping* of ferries.<sup>161</sup>

The Virginia General Assembly, for example, passed “An Act for appointing several new Ferries” in 1761, establishing that “publick ferries be *constantly kept*” at a number of places, including from the land of Robert Harper across the Potomac River to Maryland.<sup>162</sup> The Act set rates that the “*ferry keeper* may demand,” penalties for ferry keepers who would charge more, and a requirement that “every such *ferry keeper* shall enter into bond” and “be subject and liable to the penalties thereby inflicted for any neglect or omission of their duty.”<sup>163</sup> The Virginia General Assembly passed a similar statute in 1789 establishing public ferries that “shall be constantly *kept*” in numerous locations around the state, and setting rates for the “*ferry keepers*.”<sup>164</sup> In 1791, for another example, the Virginia General Assembly passed a law discontinuing ferries that had been disused and unfrequented for two years unless the “persons entitled to *keep*” these ferries procured the needed boats and ferrymen within twelve months. The Virginia General Assembly also passed a statute establishing a ferry to “be constantly *kept*” in Ohio County across Wheeling Creek as well as setting the rates the “*ferry keeper*” could charge.<sup>165</sup>

Massachusetts passed “An Act for Regulating Ferries” in 1797 stating that “no person or persons whatever shall *keep a Ferry* within this Commonwealth” without first obtaining a special license from the Court of General Sessions of the Peace in the county where the ferry was located.<sup>166</sup> The law also required all ferrymen to “*keep a good Boat or Boats in good repair*” and expressly described the duty to provide constant maintenance involved by requiring the keeper to “*give ready and due attendance on Passengers on all occasions*.”<sup>167</sup> Should the Court of General Sessions of the Peace of any county determine that a ferry was necessary, and “no person shall appear to *keep the same*,” then the town or district would “take effectual care to provide suitable person or persons to *keep and attend* the same at such place and in such times of the year as the said Court shall judge necessary.”<sup>168</sup> The law also created penalties for anyone who “shall *keep a Ferry*” without the right or authority to do so, including a fine and liability

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161. 7 William Waller Hening, *THE STATUTES AT LARGE; A COLLECTION OF ALL THE LAWS OF VIRGINIA* 401 (1819) [hereinafter 7 Hening]; Act of Feb. 14, 1797, ch. 42, 1796 Mass. Acts. 74, 74–75 (emphasis added).

162. 7 Hening, *supra* note 161, at 401 (emphasis added).

163. *Id.* (emphasis added).

164. *Id.* at 49 (emphasis added).

165. *Id.* (emphasis added).

166. Act of Feb. 14, 1797, ch. 42, 1796 Mass. Acts. 74, 74–75 (emphasis added).

167. *Id.* at 74–75 (emphasis added).

168. *Id.* at 75 (emphasis added).



in a special action to pay damages to the person “authorized to *keep any such stated Ferry or Ferries*.”<sup>169</sup>

Similarly, Vermont imposed a penalty on unlicensed ferry keepers in 1797, providing in a statute that “no person other than such as shall be appointed as aforesaid shall be at liberty to *keep a ferry*.”<sup>170</sup> Moreover, “any person, who shall be appointed as a *ferry-keeper* in manner aforesaid and shall accept such appointment, shall neglect to provide and *keep in repair* ferry boats suitable and proper for such ferry” could “forfeit his or her right to *keep such ferry*.”<sup>171</sup>

#### b. Toll Gate Keeping

The first highway built entirely with federal funds in the United States was the National Road, also known as the Cumberland Road, which was an interstate toll road that stretched from Maryland to Illinois.<sup>172</sup> In order to function as a toll road, the National Road required toll gate keepers to be constantly stationed at intervals along its route, so keepers lived all along the road in toll houses built for this purpose at the toll gates.<sup>173</sup> In 1832, the Ohio legislature passed a statute providing for the construction of one toll gate and one toll house after every ten-mile stretch of the road in the state.<sup>174</sup> Under this statute, it was “the *duty of each gate keeper* to demand and receive for passing such gate” various tolls depending on the type of vehicle and animals traveling through.<sup>175</sup> Other states used *keep* in the toll-gate context as well. For example, an 1807 Pennsylvania law established a \$10 penalty for any “*gate keeper, or toll gatherer, of any incorporated turnpike company within this commonwealth*” who would overcharge travelers in proportion to the distance they were traveling.<sup>176</sup> Further, an 1836 statute in Massachusetts authorized the Hartford and Dedham Turnpike Corporation to

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169. *Id.* at 74–75 (emphasis added).

170. Laws of the State of Vermont, Digested and Compiled: Including the Declaration of Independence, the Constitution of the United States, and of this State 498 (1808) [hereinafter *Laws of Vermont*] (emphasis added).

171. *Id.*

172. CYNDIE L. GERKEN, *TAKING THE TOLLS ALONG THE NATIONAL ROAD THROUGH OHIO: A STUDY OF TOLL GATES AND TOLL HOUSES ON OHIO’S NATIONAL ROAD 1* (2018).

173. *See id.* at 40–41.

174. *See* SPECIAL ACTS OF A GENERAL NATURE OF THE THIRTIETH GENERAL ASSEMBLY OF THE STATE OF OHIO 8 (1832).

175. *Id.* (emphasis added).

176. 8 STATUTES AT LARGE OF PENNSYLVANIA FROM 1806 TO 1809, 476 (James T. Mitchell, J. Willis Martin & Hampton L. Carson eds., 1915) (emphasis added) [hereinafter 8 Mitchell].

“keep a toll-gate at or near Breck’s Corner in the town of Medfield” and to collect tolls there.<sup>177</sup>

### c. Keeping the Peace

Several state criminal statutes contemporaneous with the Second Amendment use the expression *keep the peace*, as in to maintain public safety. Notably nothing is to be possessed in this context because of the abstract nature of the peace, like *keeping time* or *the score*. Vermont became a state in 1791, and six years later passed a statute imposing a \$200 fine on “any person or persons, not being a sheriff, deputy sheriff or constable, or other officer, whose *duty it is to keep the peace*, or apprehend persons for violating same” who falsely pretends to be any such officer.<sup>178</sup> The Vermont legislature passed another statute in 1801 defining the duties of grand jurors “for preserving and *keeping the peace*.”<sup>179</sup> That law provided that it was “the *duty* of the grand jurors, of the several towns in this state, who are or shall be hereafter appointed and duly qualified, to *keep the peace*, agreeably to law.”<sup>180</sup> And a New York criminal statute from 1787 also states that those who commit murder will suffer the death penalty, but this would not extend “to any person or persons who, in *keeping and preserving the peace*, shall chance to kill any person or persons, so as such killing be not done wittingly, willingly, and of purpose, under pretext and colour of *keeping the peace*.”<sup>181</sup>

### d. Tavern, Inn, and Ordinary Keeping

Variouly referred to as “taverns,” “inns,” and “ordinaries,” places that provided food, drinks, and lodging were common in colonial America and the early United States.<sup>182</sup> A number of state statutes contemporaneous with the Second Amendment address the licensing and regulation of these establishments. The statutes consistently use *keep* in these service-oriented contexts. A New Jersey statute on taverns and inns, for example, states that “no license shall entitle

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177. Act of Apr. 12, 1836, ch. 30, 1 Vt. Laws 312, 312–13.

178. Laws of Vermont, *supra* note 170, at 313 (emphasis added).

179. *Id.* at 424–25 (emphasis added).

180. *Id.* (emphasis added).

181. See Act of Feb. 14, 1787, ch. 22, 1 N.Y. Laws 60, 60–61 (emphasis added).

182. See Diana Diz. Rockman & Nan A. Rothschild, *City Tavern, Country Tavern: An Analysis of Four Colonial Sites*, 18 HIST. ARCHAEOLOGY 112, 112–14 (1984) (explaining the history of taverns in colonial times); see generally A. K. Sandoval-Strausz, *A Public House for a New Republic: The Architecture of Accommodation and the American State*, in 9 PERSPECTIVES IN VERNACULAR ARCHITECTURE F. 54 (2003) (discussing the significance and progression of Public Houses in early American history).

any person to *keep an inn and tavern* in any other place than that in which it was first *kept*, by virtue of such license; and such license, with regard to all other places and persons shall be void.”<sup>183</sup> An 1801 statute in Vermont prohibited “any *inn-keeper*, or person licensed to *keep* a house of public entertainment, or any other person” who would “*keep* in or about his or her house, yards, gardens or other dependencies, any cards, dice, shuffle-boards or billiards, or any other implements of gaming” and use them in gaming for liquors, money, goods, or chattels.<sup>184</sup> This was an offense regardless of “whether said implements so used shall belong to said *inn-keeper*, or any other person or persons.”<sup>185</sup> In Pennsylvania, the legislature passed a law in 1807 providing that “all *liverystable keepers* and *innkeepers*” would have a lien on horses “delivered to them to be *kept* in their stables, for the expenses of the *keeping*; and in case the owner of the said horse or horses, or the person who delivered them for *keeping* to the *keeper* of the *liverystable* or *innkeepers*, shall not pay and discharge the said expense . . . the *liverystable keeper* or *innkeeper*,” could have the horses sold in a public sale.<sup>186</sup>

Virginia passed a law in 1748 regulating ordinaries, stating that “every person intending to set up or *keep an ordinary*, or house of public entertainment, shall first petition the court of that county wherein such ordinary is intended to be, and obtain a licence for *keeping* the same.”<sup>187</sup> The statute also imposed penalties on ordinary keepers for permitting unlawful gaming and other offenses, empowering a court to “disable such offender from *keeping ordinary* thereafter, until they shall think fit to grant him a new licence, or may restore him to *keep ordinary* upon his former licence, as they shall see cause.”<sup>188</sup> The General Assembly amended the statute in 1779 to address and penalize illicit “tippling houses” that sold alcohol, providing “[t]hat every person *keeping a tippling house*, or retailing liquors,” contrary to the 1748 statute, would have to pay an additional monetary penalty for each offense.<sup>189</sup>

#### e. Standard Keeping

The keeping of uniform weights and measures is an important role the government fulfills to assure that the various sizes and measurements of products

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183. WILLIAM PATERSON, LAWS OF THE STATE OF NEW JERSEY 236 (Matthias Day 1800) (emphasis added).

184. Laws of Vermont, *supra* note 170, at 362 (emphasis added).

185. *Id.* (emphasis added).

186. 8 Mitchell, *supra* note 176, at 517–18 (1915) (emphasis added).

187. Act of Oct. 1748, ch. 30, Va. Laws 72 (emphasis added).

188. *Id.* at 74 (emphasis added).

189. Act of Oct. 4, 1779, ch. 13, Va. Laws 145 (emphasis added).

in the economy meet accepted standards. The U.S. Constitution addresses it in Article I, empowering Congress to “fix the Standard of Weights and Measures.”<sup>190</sup> States did as well; the Maryland legislature passed a law in 1789 requiring the justices of each county to keep “a good and sufficient beam, prizes, cranes, blocks, tackles, weights, and scales.”<sup>191</sup> Further, it was “declared to be the *duty of the standard keeper of each county*” to attend the justices with the county’s standard weights, help them with adjusting the “beams and scales,” and to try the weights at the warehouses.<sup>192</sup> The statute also provided for the standard keepers’ compensation.<sup>193</sup> Vermont passed a statute relating to weights and measures in 1797, having the state treasurer “provide and *keep* in good order and repair in his office, one complete set of weights and measures, necessary for the use of this state.”<sup>194</sup> If the treasurer neglected “to procure and *keep* in his office” all of the weights, measures, scales or beams, he would owe a fine of one hundred dollars for each period of six months that he was out of compliance.<sup>195</sup> The statute also required each county treasurer to “*keep* the same in repair in his office.”<sup>196</sup> All beams, weights, and measures “*kept* for standards in the several towns” were required to be “tried and proved every ten years, by the county standard.”<sup>197</sup>

At the federal level, Congress created the Office of Weights and Measures in 1836, and it has since evolved into the National Institute of Standards and Technology (NIST), which is part of the Department of Commerce.<sup>198</sup> Among its functions is “to develop, maintain, and retain custody of the national standards of measurement” that are shared with state regulatory agencies.<sup>199</sup> Such efforts have become extremely sophisticated. An operating unit of the NIST is the Physical Measurement Laboratory, which uses highly complex equipment to set U.S. standards for numerous types of measurements—sometimes at a level of accuracy reaching twenty orders of magnitude.<sup>200</sup>

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190. U.S. CONST. art. I, § 8.

191. 1785–1791 Maryland Laws., vol. 204, 397.

192. *Id.* (emphasis added).

193. *Id.*

194. Laws of Vermont, *supra* note 170, at 490 (emphasis added).

195. *Id.* at 491–92 (emphasis added).

196. *Id.* at 492 (emphasis added).

197. *Id.* at 494.

198. *See* 15 U.S.C. § 272(a) (2023).

199. *See id.* § 272(b)(2).

200. *See Physical Measurement Laboratory*, NAT’L INST. OF STANDARDS AND TECH., 1, 2 (Dec. 15, 2020), <https://www.nist.gov/system/files/documents/2022/01/21/pml-brochure.pdf>; Paul A. Williams, Matthew T. Spidell, Joshua A. Hadler, Thomas Gerrits, Amanda Koepke, David Livigni, Michelle S. Stephens, Nathan A. Tomlin, Gordon A. Shaw, Jolene D. Splett, Igor Vayshenker, Malcolm G. White, Chris Yung & John H. Lehman, *Meta-*

## f. Lighthouse Keeping

Lighthouses were a critical component of pre-industrial infrastructure throughout the American colonies and early United States, with ships relying on them for safe navigation along the East Coast and all sorts of waterways.<sup>201</sup> To function properly at the time, lighthouses required keepers to live on-site and provide a constant service, a duty which was literally a matter of life and death. Lives were frequently lost in maritime accidents related to poor navigation.<sup>202</sup> Lighthouses were some of the first infrastructure projects completed in the new country; the Virginia legislature, for example, passed a statute in 1772 to build a lighthouse at the entrance to the Chesapeake Bay on Cape Henry, and to “appoint a *keeper of such lighthouse*” to “*keep good and sufficient lights in the night time in the said lighthouse.*”<sup>203</sup> Work on this lighthouse stalled during the Revolutionary War, but the First Congress passed a statute in 1789 making it the “duty of the Secretary of the Treasury” to provide by contracts for the building of a lighthouse there, and for “*keeping in good repair, the lighthouses, beacons, buoys, and public piers in the several States.*”<sup>204</sup>

The following year the First Congress appropriated money for a lighthouse at Cape Henry.<sup>205</sup> Subsequently, then Treasury Secretary Alexander Hamilton reached an agreement with a New York bricklayer to build the lighthouse and a frame house for the “occupation & residence of the *keeper,*” as well as a vault for the “storage & *safekeeping* of the Oil belonging to the said Light House.”<sup>206</sup> Massachusetts also passed a number of statutes related to its lighthouses, including one in 1783 requiring that persons appointed “*keepers of the lighthouses* on the sea coast of this Commonwealth carefully and diligently attend their duty at all times, in kindling and *keeping burning the lights* from sun

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*Study of Laser Power Calibrations Ranging 20 Orders of Magnitude with Traceability to the Kilogram*, 57 METROLOGIA 015001 (2020); see also *About PML*, PHYSICAL MEASUREMENT LAB’Y (Oct. 23, 2020), <https://www.nist.gov/pml/about-pml>.

201. See generally ERIC JAY DOLIN, BRILLIANT BEACONS: A HISTORY OF THE AMERICAN LIGHTHOUSE 16–48 (2016) (describing the early need for the construction and use of lighthouses in New England and along the East Coast).

202. Act of July 23, 1716, ch. 4, Mass. Laws (“Whereas the want of a lighthouse at the entrance of the harbour of Boston hath been a great discouragement to navigation by the loss of the lives and estates of several of his majestie’s subjects; for prevention whereof . . .”).

203. Act of Feb. 1772, ch 20, Va. Laws 539 (emphasis added).

204. 1 Peters, *Statutes at Large*, *supra* note 9, at 54 (emphasis added).

205. *Id.* at 104–05.

206. *The First Contract for the Construction of a Lighthouse for the Federal Government*, in 5 U.S. LIGHTHOUSE SERVICE BULLETIN 151, 152 (1939) (emphasis added).

setting to sun rising and placing them so as they may be most seen by vessels coming in or going out.”<sup>207</sup>

Lighthouse keepers became civil service employees in 1896, and the Lighthouse Establishment evolved into the Bureau of Lighthouses, commonly known as the Lighthouse Service, which was ultimately transferred into the U.S. Coast Guard in 1939.<sup>208</sup> Today the Coast Guard operates all lighthouses in the country. All of them are automated and only one still has a keeper.<sup>209</sup> The one keeper remains at the historic lighthouse known as the Boston Light, which is part of the Boston Harbor Islands National Recreation Area managed by the National Park Service.<sup>210</sup> Built in 1716, the Boston Light was the first lighthouse in the American colonies, and a Massachusetts law at that time provided for its construction due to “a great discouragement to navigation by the loss of the lives and estates of several of his majesty’s subjects,” and requiring it “to be *kept lighted* from sun setting to sun rising.”<sup>211</sup> Because of the Boston Light’s historical significance, Congress passed a law in 1989 requiring a keeper at the Boston Light to preserve its character, and providing funds for “maintenance of the *keeper’s house*,” as part of what is now a sort of living museum about the historical role of lighthouses in the nation’s development.<sup>212</sup>

#### g. The Federal Carriage Tax of 1794

Several state statutes set out taxes on the ownership and possession of carriages contemporaneously with the adoption of the Second Amendment. Massachusetts, for example, passed a law in 1781 imposing duties on the “*owner or possessor*” of various carriages.<sup>213</sup> And Virginia had a tax on various types of carriages in place in a 1779 statute, which imposed the tax on the “*possessors* of every such carriage.”<sup>214</sup> Alexander Hamilton also wrote a draft bill entitled, “An Act Imposing Duties on Carriages and Servants,” which applied to the “*owner or possessor*” of carriages.<sup>215</sup> At the national level, amidst renewed tensions with

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207. Act of Oct. 22, 1783, ch. 19, Mass. Sess. L. 545 (emphasis added).

208. See DOLIN, *supra* note 201, at 385.

209. See *id.* at 393.

210. *Id.* at 418.

211. Act of July 20, 1715, ch. 4, Mass Sess. L. 7 (emphasis added).

212. Coast Guard Authorization Act of 1989, Pub. L. 101-225, 103 Stat. 1908, 1916 (emphasis added).

213. Act of Dec. 10, 1781, ch. 17, Mass. Sess. L. 529 (emphasis added).

214. Act of Oct. 1779, ch. 24, Va. Pub. L. 166 (emphasis added).

215. Alexander Hamilton, *Draft of an Act Imposing Duties on Carriages and Servants*, NAT’L ARCHIVES, <https://founders.archives.gov/?q=%22imposing%20duties%20on%20carria>

the British and a perceived need to raise revenue for defense, and despite major constitutional obstacles, Congress passed a statute in 1794 setting out a federal tax on carriages.<sup>216</sup> The measure was a means of taxing the rich, because only the wealthy could afford carriages.<sup>217</sup> The federal carriage tax statute essentially created a personal property tax on carriages, but ostensibly it could not appear to do that because of severe constitutional constraints on direct taxation. As a result, its text notably does not use the words *possess* or *own*, which would have implied that it was an unconstitutional direct tax on property.<sup>218</sup> Instead the text awkwardly uses *kept* as in “[t]here shall be levied, collected, and paid, upon all carriages for the conveyance of persons, *which shall be kept by or for any person, for his or her own use, or to be let out to hire, or for the conveying of passengers,* the several duties and rates following . . .,” and uses both *have* and *keep*, as in “every person *having or keeping a carriage* or carriages, which, by this act, is or are made subject to the payment of the duty. . . .”<sup>219</sup> The statute thus refers to the carriage tax as a duty throughout its text, and at no point makes reference to the *owner* or *possessor* of carriages.<sup>220</sup>

The looming constitutional challenge to the carriage tax had to do with whether it would be considered a “direct tax” under Article I of the Constitution, which required direct taxes to be apportioned across all the states according to their populations.<sup>221</sup> This Article I provision included the infamous “three-fifths” clause,” which, before it was repealed by the Fourteenth Amendment, counted African Americans as three-fifths when calculating the population for purposes of direct taxation by the federal government and representation in the House of Representatives.<sup>222</sup> Agreed to during the Continental Congress’s battles over the Constitution, the direct tax provision was designed to prevent Congress from

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ges%22&s=1111311111&r=2&sr= [hereinafter Hamilton, *Draft on Carriages and Servants*]. It is unclear precisely when Hamilton wrote this draft bill, but its text refers to dollars and Congress established that the money of the account of the United States would be expressed in dollars in the Mint Act, which it approved in April 1792. See Mint Act, ch. 16, 1 Stat. 246 (1792).

216. See 3 Peters, *Statutes at Large*, *supra* note 60, at 373–74.

217. See John K. Bush & A.J. Jeffries, *The Horseless Carriage of Constitutional Interpretation: Corpus Linguistics and the Meaning of “Direct Taxes”* in *Hylton v. United States*, 45 HARV. J.L. & PUB. POL’Y 523, 553 (2022).

218. See 3 Peters, *Statutes at Large*, *supra* note 60, at 373–74.

219. *Id.* (emphasis added).

220. *Id.*

221. *Hylton v. United States*, 3 U.S. (1 Dall.) 171, 173 (1796); see also U.S. CONST. art I, § 2.

222. U.S. CONST., art. I, § 2, cl. 3; see also Alex Zhang, *The Wealth Tax: Apportionment, Federalism, and Constitutionality*, 23 UNIV. OF PENN. J. OF L. & SOC. CHANGE, 269, 278 (2020) (discussing the repeal of the three-fifths clause).

taxing certain property, namely slaves and land in the southern states, by forcing states in the north to also have to pay those taxes themselves proportionally to their own large populations.<sup>223</sup> Moreover, Article I also states that Congress can impose duties, imposts, and excises, but these had to be uniform throughout the country as opposed to apportioned across the states.<sup>224</sup> If the carriage tax were considered a direct tax, then it would be unconstitutional because it did not apportion the rates according to state populations, but rather set them out to be applied uniformly.<sup>225</sup> Because of these constitutional requirements, supporters of the carriage tax needed the measure to be considered an indirect excise tax—not a direct tax—for it to survive the approaching constitutional challenge.<sup>226</sup>

That challenge came in *Hylton v. United States*,<sup>227</sup> a federal case that reached the U.S. Supreme Court in 1796.<sup>228</sup> Pre-dating *Marbury v. Madison*<sup>229</sup> by seven years, *Hylton* was actually the first case before the Court that involved judicial review.<sup>230</sup> The question was whether the carriage tax was constitutional. At the Circuit Court for the District of Virginia, the government argued that the tax on carriages should be upheld as an indirect tax because it was imposed on the consumption of goods, unlike direct taxes which are imposed on income and income-generating property.<sup>231</sup> Hamilton then argued in support of the carriage tax at the Supreme Court.<sup>232</sup> After hearing competing characterizations of the carriage tax from both sides, the Court ultimately did not adopt a rationale distinguishing between definitions of direct and indirect taxes, but resolved the case on more practical grounds.<sup>233</sup> Writing separate opinions, as was the practice at the time, the Court held that, as contemplated by the Constitution, the carriage tax was not a direct tax because the framers intended apportionment only for taxes on slaves and land.<sup>234</sup> The Court also based its holding on its analysis that the apportionment of a tax on carriages would have been difficult to apply reasonably across the states.<sup>235</sup>

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223. See Bush & Jeffries, *supra* note 217, at 529–30.

224. U.S. CONST. art. I, § 8, cl. 1.

225. 3 Peters, *Statutes at Large*, *supra* note 60, at 373–74.

226. See Bush & Jeffries, *supra* note 217, at 551.

227. 3 U.S. (1 Dall.) 171, 173 (1796).

228. *Id.* at 171.

229. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

230. See Bush & Jeffries, *supra* note 217, at 555.

231. See Zhang, *supra* note 222, at 275–76.

232. *Id.* at 280.

233. *Id.* at 276.

234. See *Hylton v. United States*, 3 U.S. (1 Dall.) 171, 176–77 (1796).

235. *Id.* at 177.



### C. *The Second Amendment at the Supreme Court*

For almost eighty-five years after it was ratified, the Second Amendment remained largely uninterpreted in the courts.<sup>236</sup> The U.S. Supreme Court then addressed it in 1875 in *United States v. Cruikshank*,<sup>237</sup> and again about eleven years later in *Presser v. Illinois*.<sup>238</sup> The Court took it up more directly in 1939 in *United States v. Miller*<sup>239</sup> and then left it alone for another sixty-nine years until misinterpreting it in *Heller* in 2008.<sup>240</sup> The Court then compounded its *Heller* interpretation in *McDonald v. City of Chicago*<sup>241</sup> and most recently, in *New York State Rifle & Pistol Association, Inc. v. Bruen*.<sup>242</sup>

#### 1. *United States v. Cruikshank* and *Presser v. Illinois*

The U.S. Supreme Court first took up the Second Amendment in *Cruikshank*, a post-Civil War case that arose out of the Colfax Massacre in Louisiana, during which a group known as the White League killed about one hundred African Americans over a disputed gubernatorial election.<sup>243</sup> An indictment ensued under the federal Enforcement Act.<sup>244</sup> Congress had passed this law in 1870, two years after the ratification of the Fourteenth Amendment, making it a felony for two or more people to deprive someone of their civil rights.<sup>245</sup> The indictment included a charge, among others, a charge of conspiracy to prevent two African American citizens from exercising their right of “bearing arms for a lawful purpose.”<sup>246</sup> *Cruikshank* did not interpret *keep* in any way, but held that the Second Amendment applied only to infringement by the federal government, not by the states or private individuals or entities.<sup>247</sup> The Supreme Court reaffirmed its *Cruikshank* holding in *Presser*, which involved an armed parade of German immigrants associated with the Socialist Workers Party who challenged an Illinois statute that prohibited people from associating together as military organizations, or drilling or parading with arms in cities and towns

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236. See CORNELL, *supra* note 17, at 190.

237. 92 U.S. 542 (1875).

238. 116 U.S. 252 (1886).

239. 307 U.S. 174 (1939).

240. 554 U.S. 570 (2008).

241. 561 U.S. 742 (2010).

242. 142 S. Ct. 2111 (2022).

243. *Cruikshank*, 92 U.S. at 544; Waldman, *supra* note 19, at 76–77.

244. *Cruikshank*, 92 U.S. at 544.

245. *Id.*

246. *Id.* at 553.

247. *Id.*

unless authorized by law.<sup>248</sup> Citing *Cruikshank*, the Court held again that the Second Amendment applied only to the federal government and not to the states.<sup>249</sup> But the Court found that even setting aside the Amendment, states still could not “prohibit the people from keeping and bearing arms so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from *performing their duty* to the general government.”<sup>250</sup> In short, the states could not outlaw guns in a way that would prevent the federal government from maintaining the public defense, and the people from fulfilling their civic duty to serve in the lawful militia.<sup>251</sup>

## 2. *United States v. Miller*

The Supreme Court next took up the Second Amendment in the *Miller* case in 1939.<sup>252</sup> Five years earlier, Congress had passed the National Firearms Act (NFA).<sup>253</sup> The NFA prohibited the interstate transportation of shotguns with a barrel shorter than eighteen inches in length, informally known as “sawed-off” shotguns, without proper registration and an accompanying stamp-affixed order.<sup>254</sup> Two men were charged with violating the NFA when they transported such a weapon from Oklahoma to Arkansas.<sup>255</sup> The U.S. District Court for the Western District of Arkansas issued a short decision, without a rationale, asserting that the applicable prohibition in the NFA violated the Second Amendment.<sup>256</sup> The Supreme Court heard the case on a direct appeal.<sup>257</sup> The appellant appeared before the Court, but the appellees did not, and the Court issued a short opinion reversing the District Court’s decision.<sup>258</sup> The Supreme Court stated in *Miller* that “in the absence of any evidence” showing that the possession or use of a shotgun with a barrel length less than eighteen inches “has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep

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248. *Presser v. Illinois*, 116 U.S. 252, 267–68 (1886); WALDMAN, *supra* note 19, at 80.

249. *Presser*, 116 U.S. at 265; WALDMAN, *supra* note 19, at 80.

250. *Id.* (emphasis added).

251. WALDMAN, *supra* note 19, at 80.

252. *United States v. Miller*, 307 U.S. 174 (1939).

253. 26 U.S.C. § 5849 (2023).

254. *Miller*, 307 U.S. at 175.

255. *Id.*

256. *See United States v. Miller*, 26 F. Supp. 1002, 1003 (W.D. Ark. 1939).

257. *See United States v. Miller*, 307 U.S. 174, 177 (1939); Sarah Gray, *Here’s a Timeline of the Major Gun Control Laws in America*, TIME, <https://time.com/5169210/us-gun-control-laws-history-timeline/> (last updated Apr. 30, 2019).

258. *Id.* at 174–75.

and bear such an instrument.”<sup>259</sup> The Court in *Heller* later asserted that *Miller* was actually suggesting that the Second Amendment provided an individual right to keep and bear arms, but only those arms that have a reasonable relationship to the preservation or efficiency of a well-regulated militia.<sup>260</sup> But the Court in *Miller* was focused on militia service, and reviewed militia statutes from the 1780s in Massachusetts, New York, and Virginia requiring members to provide arms for themselves to fulfill their duty to provide that service.<sup>261</sup> The Court held that “[c]ertainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.”<sup>262</sup> Consistent with the use of *keep* as the fulfillment of one’s duty to provide militia service, *Miller* went on to describe the “obvious purpose” of the Second Amendment as assuring the continuation and supporting the effectiveness of the militia, and to find that the Amendment “must be interpreted and applied with that end in view.”<sup>263</sup>

### 3. *District of Columbia v. Heller*

Almost seventy years later, the Supreme Court took the Second Amendment up again in *Heller*.<sup>264</sup> Including Richard Heller, the case involved six plaintiffs who were residents of the District of Columbia (D.C.).<sup>265</sup> As a D.C. special police officer, Heller was authorized to carry a handgun while on duty.<sup>266</sup> Heller applied for a registration certificate for a handgun that he wanted to have at home for his own private use, but the District, which had laws in place prohibiting the registration of handguns and the carrying of unregistered firearms, denied his application.<sup>267</sup> He and the other plaintiffs then sued on Second Amendment grounds, alleging it was their right to possess guns.<sup>268</sup> The federal District Court dismissed their complaint, holding that the Second Amendment does not bestow any rights on individuals other than when they serve in a militia.<sup>269</sup> But the U.S.

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259. *Id.* at 178.

260. *District of Columbia v. Heller*, 554 U.S. 570, 622 (2008).

261. *See id.* at 179–82.

262. *Id.*

263. *Id.*

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

265. *See Parker v. District of Columbia*, 311 F. Supp. 2d 103, 103 (D.D.C. 2004), *rev’d*, 478 F.3d 370 (D.C. Cir. 2007), *aff’d sub nom. District of Columbia v. Heller*, 554 U.S. 570 (2008).

266. *Heller*, 554 U.S. at 575.

267. *Id.*

268. *Id.* at 575–76.

269. *See Parker v. District of Columbia*, 311 F. Supp. 2d 103, 109–10 (D.D.C. 2004).

Court of Appeals for the D.C. Circuit granted review and reversed the lower court's decision, holding that the Second Amendment protects an individual right to keep and bear arms that is not limited to militia service.<sup>270</sup> In its decision the D.C. Circuit stated that “*keep* is a straightforward term that implies ownership or possession of a functioning weapon by an individual for private use.”<sup>271</sup> In support of this interpretation of *keep*, the D.C. Circuit cited an 1830 edition of Samuel Johnson's and Nathaniel Walker's *English Dictionaries Combined*, which defined *keep* as “‘to retain; not to lose,’ ‘to have in custody,’ ‘to preserve; not to let go,’” as well as a 2001 opinion from the Fifth Circuit and a 2003 dissent from the Ninth Circuit asserting the same “plain meaning” and “straightforward interpretation,” respectively.<sup>272</sup> The Supreme Court then granted certiorari to hear the case and address the issue of whether the D.C. Code violated the Second Amendment rights of individuals who are not affiliated with a state-regulated militia but “wish to keep handguns and other firearms for private use in their homes.”<sup>273</sup>

In its decision, the majority in *Heller* interpreted the various words and phrases in the Second Amendment independently, and then combined them into a new overall interpretation of the Amendment: that the Second Amendment provides an individual right to possess a handgun at home for self-defense, unassociated with militia service.<sup>274</sup> In reaching this conclusion, *Heller* devoted one paragraph to the meaning of *keep*, and a subsequent paragraph to usage of the phrase *keep arms*.<sup>275</sup> The opinion cites two dictionaries that defined *keep*, a 1773 edition of *Johnson's Dictionary* and an 1828 edition of *Webster's Dictionary*, which included the definitions “[to] retain; not to lose,” “[to] have in custody,” and “[to] hold; to retain in one's power or possession.”<sup>276</sup> The opinion then adds that “[n]o party has apprised us of an idiomatic meaning of ‘keep Arms.’”<sup>277</sup> And the next sentence concludes:

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270. See *Parker v. District of Columbia*, 478 F.3d 370, 401 (D.C. Cir. 2007).

271. *Id.* at 386 (quoting *United States v. Emerson*, 270 F.3d 203, 231 n.15 (5th Cir. 2001)) (emphasis added).

272. *Id.* (citing *United States v. Emerson*, 270 F.3d 203, 231 n. 31 (5th Cir. 2001); *Silveira v. Lockyer*, 328 F.3d 567, 573–74 (9th Cir. 2003)).

273. Petition for Writ of Certiorari, *District of Columbia v. Heller*, 554 U.S. 570 (2007) (No. 07-290).

274. See *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

275. *Id.* at 582–83.

276. *Id.* at 582.

277. *Id.*

Thus, the most natural reading of “keep arms” in the Second Amendment is to “have weapons.”<sup>278</sup>

The next paragraph then states that the phrase “keep Arms” was not prevalent in the written documents of the founding period that the majority had found, but that “there are a few examples, all of which favor viewing the right to ‘keep Arms’ as an individual right unconnected with militia service.”<sup>279</sup> This paragraph then cites examples of the phrase appearing in the writing of William Blackstone in 1769, and in an English statute from 1689 stating that papists could not “have or keep” arms in their houses, and in an English treatise from 1771.<sup>280</sup> The majority notes that the petitioners in the case had cited founding period militia laws requiring members “to ‘keep arms in connection with militia service’ and from that concluded that “keep Arms” had a “militia-related connotation.”<sup>281</sup> This, the majority states, was “rather like saying that, since there are many statutes that authorize aggrieved employees to ‘file complaints’ with federal agencies, the phrase ‘file complaints’ has an employment-related connotation.”<sup>282</sup> The Court concluded that to keep arms “was simply a common way of referring to possessing arms, for militiamen *and everyone else*.”<sup>283</sup>

The opinion then includes in a footnote a list of ten examples of the use of “keep Arms,” only two of which are U.S. statutory text.<sup>284</sup> The two are from a collection of statutes from the Colony of Virginia in 1733 and from a North Carolina case in 1849.<sup>285</sup> The example from the Virginia collection appears to paraphrase a brutal 1723 statute setting out severe punishments against slaves, which in one part allowed only a “free negro, mullatto, or indian” who was “a house-keeper, or listed in the militia” to keep a gun, with an exception for those “living at any frontier plantation” who could obtain a license from a justice of the peace.<sup>286</sup> The North Carolina opinion paraphrases a state statute adopted sixty years after the ratification of the Second Amendment that prohibited “any free Negro, Mulatto, or free Person of Colour” from wearing or carrying various weapons about their person, or keeping them in their house.<sup>287</sup>

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278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.* at 582–83.

282. *Id.* at 583.

283. *Id.*

284. *See id.* at 583 n.7.

285. *Id.*

286. *Id.* (quoting A Collection of All the Acts of Assembly, Now in Force, in the Colony of Virginia 596 (1733)).

287. *Id.* (quoting *State v. Dempsey*, 31 N.C. 384, 385 (1849)).

4. *McDonald v. City of Chicago* and *New York State Rifle & Pistol Association v. Bruen*

Two years later, the Supreme Court held in *McDonald* that the Second Amendment applies not only to the federal government, but also to the states because it is incorporated through the Due Process Clause of the Fourteenth Amendment.<sup>288</sup> The Court reiterated its holding from *Heller* that the Second Amendment protects the individual right to possess a handgun in the home for the purpose of self-defense, and did not revisit its interpretation of *keep*.<sup>289</sup>

The Supreme Court then took up the Second Amendment again twelve years later in *Bruen*.<sup>290</sup> The Court continued to apply the *Heller* interpretation of *keep*, and also reiterated and expanded the *Heller* interpretation of the Second Amendment overall, holding that not only did the Amendment protect the right of “ordinary, law-abiding citizens” to possess a handgun in the home for self-defense, it also protected the right of law-abiding citizens to carry handguns publicly for self-defense outside the home.<sup>291</sup> *Bruen* also did away with a two-step framework for analyzing Second Amendment cases that courts had developed in the years after *Heller* and *McDonald*.<sup>292</sup> The first step had been to determine whether a gun law regulated activity outside the scope of the Second Amendment right as originally understood. If it did, then the regulated activity would be unprotected.<sup>293</sup> However, if the activity was considered within the original scope of Second Amendment protection, courts would proceed to the second step by assessing how closely the law came to the core of the Second Amendment right generally limited to self-defense in the home and how severely the challenged law burdened that right.<sup>294</sup> *Bruen* replaced the two-step test, holding that “when the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct” and that to justify gun regulation the government must “demonstrate that the regulation is consistent with this Nation’s historical tradition of firearm regulation” for courts

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288. *McDonald v. City of Chicago*, Ill., 561 U.S. 742, 750 (2010).

289. *Id.* at 749–50.

290. *New York State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022).

291. *Id.* at 2122; *see also id.* at 2138 (noting an academic debate, outside the scope of this Article, about whether the meaning of the individual right should be determined from the context in 1791 when the Second Amendment was written or in 1868 when the Fourteenth Amendment was written).

292. *Id.* at 2126.

293. *Id.*

294. *Id.*; *see e.g.*, *Lara v. Evanchick*, 534 F. Supp. 3d 478, 479–80 (W.D. Pa. 2021) (applying the framework to firearm restrictions specific to people younger than twenty-one years old).

to “conclude that the individual’s conduct falls outside the Second Amendment’s ‘unqualified command.’”<sup>295</sup>

## II. ARGUMENT

The inclusion of *keep* in the text of the Second Amendment provides powerful evidence of the Amendment’s meaning and function; it granted a limited right to maintain arms in fulfillment of one’s civic duty to provide militia service. This is overwhelmingly how *keep* is used in texts written contemporaneously with the Second Amendment, and this Part analyzes a number of them. Across the wide range of subsequently discussed contexts the word expresses the duty to provide services—the way an account keeper maintains the accounts as a service to those who will refer to them, an innkeeper maintains an inn as a service to travelers, and a lighthouse keeper maintains a lighthouse as a service to those at sea. This Part argues that, contrary to *Heller*, to *keep* arms in the Second Amendment was not to *possess* them, but rather to maintain them in fulfillment of one’s duty to provide militia service.

First, this Part argues that the usage of *keep* is consistent throughout the contemporaneous enactments of the colonial, state, and federal legislatures, including the more than eighty times that the first U.S. Congress, which wrote and adopted the Second Amendment, used the word during its initial term. This Part argues that to *keep* and *possess* are not the same, that an inherent readiness exists in *keeping* that is absent from *possession*, and that the *Heller* interpretation of *keep* would be incoherent and even absurd in many contexts. This Part argues that the hallmark of *keeping* is its limitation on permissible use, as in the record keeper who has no authority to use records beyond his role in maintaining them, and that in this sense the Second Amendment functions largely like a licensing statute—the Amendment licensed the keeping of arms to satisfy the important public purpose of militia defense. Finally, this Part argues that the use of *keep* in the Second Amendment is a vestige of the pre-industrial Constitution, and that industrialization subsequently eroded its meaning and usage in many contexts.

### A. *Consistent Use of Keep in the First Congress and Other Contemporaneous Enactments*

The First Congress, the very body who wrote, adopted, and submitted the Second Amendment to the states for ratification, used *keep* or *kept* more than eighty times in the legislation, resolutions, and other enactments it passed during its initial two-year term.<sup>296</sup> In not a single one of these instances did it use the

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295. *Id.*

296. *See* 1 Peters, *Statutes at Large*, *supra* note 9.

word to mean *possess*. The First Congress consistently used it to mean to *maintain* or *hold* in fulfillment of a duty to provide a service, as in the provisions it passed related to the keeping of various records, books, and accounts,<sup>297</sup> the seal of the United States, and goods held by customs officials.<sup>298</sup> The person keeping the records does so as a service to those who will use those materials for reference; the official keeping the seal does so as a service to the government, which is empowered to apply it; and the customs official keeping the goods does so as a service to the buyer and seller while a transaction is sorted out. In no sense do such provisions grant to the keeper the control and discretion of use that comes with possession.<sup>299</sup> *Heller* glosses over this distinction and asserts that the use of *keep* in the Second Amendment simply meant to *possess*.<sup>300</sup> To accept that interpretation is to believe that the use of *keep* in the Amendment is a total anomaly, that among all of the more than eighty appearances of *keep* in the First Congress's various enactments, it used the word in the Second Amendment—in that one isolated instance—to mean something different from every other time it used the word during its two-year term. Such an interpretation strains credulity.

The First Congress's uses of *keep* were contemporaneous with the Second Amendment, often to an extreme degree. They appear in provisions passed not only within weeks, but even within several days of the adoption of the Second Amendment on September 25, 1789.<sup>301</sup> The First Congress approved the jail keeping resolution on September 23, merely two days before it adopted the Second Amendment and proposed it to the states for ratification.<sup>302</sup> The jail keeping resolution uses *keep* consistently, as in to maintain the facility itself and to hold inmates as a public safety service.<sup>303</sup> One day before that, on September 22, just three days before adopting the Second Amendment, the First Congress passed the statute setting the compensation for the Capitol doorkeepers, whose duty was to maintain the entrance by granting and denying entry as a service to those who were using the building.<sup>304</sup> And on September 15, just two weeks before the enactment of the Second Amendment, the First Congress set up the newly titled position of secretary of state, established the secretary's duty to keep

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297. See *supra* Section I.B.3.

298. See *supra* Section I.B.3.

299. See João Marinotti, *Possessing Intangibles*, 116 NW. U. L. REV. 1227, 1253 (2022); Linsey Gleason, "Possession" and the Abandoned Shipwreck Act: Promoting the Discovery of Historic Shipwrecks and Preventing an Unconstitutional Destruction of Federal Admiralty Jurisdiction, 2007 MICH. ST. L. REV. 1017, 1022 (2007).

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

301. See *supra* Section I.B; NAT'L ARCHIVES, *supra* note 87.

302. See 1 Peters, *Statutes at Large*, *supra* note 9, at 96–97.

303. *Id.*

304. See *id.* at 70–73.



the U.S. seal, and granted him custody and charge of the seal.<sup>305</sup> It would be the secretary of state who would maintain the seal and affix it to commissions in service of the federal government at the direction of the president and U.S. Congress.<sup>306</sup> All these uses of *keep* appear in enactments of the First Congress during September 1789, which could hardly be any more contemporaneous with the adoption of the Second Amendment that same month.<sup>307</sup>

Although not as frequently as *keep*, the First Congress also used the word *possess* in the enactments it passed during its term, and the uses of this word also illustrate how it contrasts with *keep*. These provisions empowered federal courts to compel litigants to “produce books or writings in their *possession* or power” in the Judiciary Act,<sup>308</sup> and set the president’s compensation as including “the use of the furniture and other effects, now in his *possession*, belonging to the United States.”<sup>309</sup> Others included the customs duties statutes providing that officials possess the powers prescribed and allowed to them, and authorizing the duty collector to “take the said goods, wares, and merchandise, into his *possession*” in cases involving fraudulently undervalued imports.<sup>310</sup> All of these uses contrast sharply with how the First Congress used *keep*.

Despite the many statutes passed in the First Congress that involve the keeping of records and books, the Judiciary Act uses *possess* here because the provision has nothing to do with the maintenance of those materials as a service to anyone who will refer to them; it is about the production of documents that litigants simply have in their possession. Similarly, in the compensation statute the president is said to possess the furniture because it was available for their individual use. In no way was the president maintaining it as any type of service to others. To possess powers as a public official is simply to exercise the dominion, control, and discretion—all associated with possession—that comes with that authority.<sup>311</sup> And with respect to cases of fraud in the customs process, the collector was taking punitive action; the penalty for fraud was the forfeiture of the goods, meaning that the importer truly had lost possession of them.<sup>312</sup> This stands in stark contrast to the customs provisions dealing with goods missing their original invoices or diverted due to weather, which were not punitive and

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305. *See id.* at 68–69.

306. *Id.*

307. *See supra* Section I.B.3.

308. 1 Peters, *Statutes at Large*, *supra* note 9, at 82 (emphasis added).

309. *Id.* at 72 (emphasis added).

310. *Id.* at 42 (emphasis added).

311. *See, e.g.,* Marinotti, *supra* note 299, at 1253 (explaining that there must be a manifestation of intent to “maintain such control to the exclusion of others”).

312. *See supra* Section I.B.3.

used *keep* to express the customs official's duty to hold the goods while such situations were resolved.<sup>313</sup>

Even outside the First Congress's enactments, the usage of *keep* is consistent in the Declaration of Independence, the Articles of Confederation, the Land Ordinance of 1785, Northwest Ordinance, elsewhere in the Constitution, and throughout the various ferry, toll gate, peace, tavern, inn, standard, and lighthouse keeping statutes.<sup>314</sup> The provisions in all of these measures use *keep* the same way the First Congress used it throughout the legislation, resolutions, and other enactments it passed: the fulfillment of a duty to provide a service.<sup>315</sup> The uses of *kept* and *keep* in the Declaration of Independence and the Articles of Confederation contemplate the duty of the sovereign, the King and the State, respectively, to maintain military forces as a service to the public.<sup>316</sup> To be sure, many American colonists reviled the British army, but a fundamental duty of the King as the sovereign was to maintain a military force in service of the public defense. His method of fulfilling that duty was to keep a standing army in times of peace and without the consent of the colonial legislatures, a practice that was clearly offensive to the colonists and listed among their grievances in the Declaration of Independence.<sup>317</sup> In the Land Ordinance and Northwest Ordinance, it was the duty of public officials to maintain books and records as a service to those who would refer to them in relation to their property and affairs in the new territory.<sup>318</sup> In the Constitution, where *keep* appears twice, it is again the duty of government to maintain military forces to serve the public defense, and the duty of each house of Congress to keep a journal of its proceedings as a service to future congresses and the public.<sup>319</sup> The contemporaneous colonial and state statutes are consistent as well. To accept the *Heller* interpretation of *keep* is to believe that its usage in the Second Amendment stands alone, unique amid all the rest of these contemporaneous uses of the word.

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313. See *supra* Section I.B.3.

314. See *supra* Section I.B.

315. See *supra* Section I.B.

316. THE DECLARATION OF INDEPENDENCE para. X (U.S. 1776) (using "kept"); ARTICLES OF CONFEDERATION of 1777, art. VI (using "keep").

317. THE DECLARATION OF INDEPENDENCE para. 13 (U.S. 1776) ("He has kept among us, in times of peace, Standing Armies, without the Consent of our Legislatures.").

318. Land Ordinance, *supra* note 112, at 377; Northwest Ordinance, *supra* note 112, at 336.

319. See U.S. CONST., art. I, §§ 5, 10.

### B. *To Keep Is Not to Possess*

Although *Heller* is ostensibly based on the text of the Second Amendment,<sup>320</sup> it is the text itself, the use of *keep* rather than *possess* or *have*, that undermines the opinion so thoroughly. To keep is not to possess. Whether militia-related, financial, administrative or otherwise, the contemporaneous meaning of *keep* was to fulfill a duty to provide a service, the way an inn keeper maintained that establishment in fulfillment of his duty to serve guests.<sup>321</sup> Someone who possesses an inn for their own individual use is not keeping an inn; they simply have a building with rooms. By interpreting *keep* to mean *possess*, for one's own individual purposes, *Heller* distorted the meaning of the Second Amendment and dispensed with any type of duty whatsoever. This clashes with the consistent use of *keep* in the Constitution itself and throughout the many other texts contemporaneous with the Amendment. The meaning of *keep* is evident in those texts.<sup>322</sup> To *keep* is to maintain or hold in fulfillment of a duty to provide a service, and to *possess* is to have for oneself.<sup>323</sup> To keep a ferry was to maintain it in fulfillment of a duty to provide a transportation service. One cannot possess a ferry for one's own purposes because in that case it would not even be a ferry; it would just be a private boat. The arms referred to in the Second Amendment were not weapons for one's individual use, and as such the word *keep* fits the Amendment perfectly. The Amendment provides a right to keep a gun for the purpose of fulfilling one's civic duty to provide militia service.<sup>324</sup>

Enacted just two years before Congress adopted the text of the Second Amendment and submitted it to the states for ratification, the Northwest Ordinance of 1787 is also an illustrative example of the contrast between *keep* on the one hand, and *have* and *possess* on the other. The text of the Northwest Ordinance is not long, but it uses all three of these words, and *keep* and *have* are located in close proximity to each other.<sup>325</sup> Section 4 of the Ordinance requires the secretary in the new territory to “*have* a freehold estate” consisting of “five hundred acres of land,” and in the next sentence states that “[i]t shall be his duty to *keep* and preserve” acts and laws, public records, and proceedings of the

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320. See *District of Columbia v. Heller*, 554 U.S. 570, 578 (2008).

321. See *supra* Section I.B.

322. See *supra* Section I.B.

323. See João Marinotti, *Possessing Intangibles*, 116 *Nw. U.L. REV.* 1227, 1253 (2022); Linsey Gleason, “*Possession*” and the Abandoned Shipwreck Act: Promoting the Discovery of Historic Shipwrecks and Preventing an Unconstitutional Destruction of Federal Admiralty Jurisdiction, 2007 *MICH. ST. L. REV.* 1017, 1022 (2007).

324. See *supra* Section I.A.

325. See generally Northwest Ordinance, *supra* note 112.

governor.<sup>326</sup> The divergent usage of these words is clear: to have the freehold estate meant that the secretary was required simply to possess property, but to keep various statutes and records meant his duty was to maintain those materials as a service to those who would refer to the documents. The duty inherent in *keep* is even made explicit in the text, which states expressly that “[i]t shall be his *duty* to keep” these acts, records, and proceedings.<sup>327</sup> The Northwest Ordinance continues this usage in Section 11, where it requires members of the Legislative Council in the territory to be “*possessed* of a freehold in five hundred acres” of land.<sup>328</sup> Again this merely requires the members to have this amount of property, not to fulfill any duty or provide any service. Further, the Land Ordinance of 1785 uses *keep* consistently with the Northwest Ordinance, requiring the Board of Treasury to record surveyed plats in the new territory “in well bound books to be *kept* for that purpose”—the purpose being the documenting of property information for those who would need to refer to it.<sup>329</sup>

The language in the Northwest Ordinance reveals even more about the nature of these words: the readiness inherent in *keeping*, which is absent from *possess*. As long as one possessed the 500 acres set forth in the Northwest Ordinance, then he would meet that requirement; no duty, service, or other continuous activity would be involved. But for the legislation, records, and proceedings to be ready for use by anyone referring to them, the secretary would have to constantly maintain them to prevent discrepancies and outdated information. The keeping of ferries also required this type of vigilance, and the expression to *keep a ferry* appears throughout the contemporaneous state ferry keeping statutes.<sup>330</sup> Ferries were often the only way to cross a body of water, and the ferry keeper had to be ready to provide service—state governments licensed ferry keepers for this reason; to ensure that the service would be available when members of the public needed it.<sup>331</sup> In each of these contexts *to keep* is to continuously maintain at the ready, while *to possess* implies no such readiness, it is simply a fixed state of having something such as an estate or other property.<sup>332</sup>

The usage of *keep* in the ferry context precisely follows that of the arms of the militia. The role of the militia was to protect the public from invasions and insurrections. Nobody could predict when these situations would arise, and that

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326. *Id.* at 336 (emphasis added).

327. *Id.* (emphasis added).

328. *Id.* at 338 (emphasis added).

329. Land Ordinance, *supra* note 112, at 377 (emphasis added).

330. *See* Laws of Vermont, *supra* note 170, at 498.

331. *See* Hrdy, *supra* note 159, at 68; Watson, *supra* note 159, at 247; Beck, *supra* note 160, at 1285 (describing how ferry operators could be sued in *qui tam* actions for failing to keep their ferries ready for service).

332. *See supra* text accompanying notes 320–29.

called for a decided readiness on the part of the militia.<sup>333</sup> In fact, the very archetype of militia service was the Minute Man, constantly at the ready to serve the public defense even at a moment's notice.<sup>334</sup> And the very motto of the National Guard states this as well.<sup>335</sup> Arms needed to be readily available to the militia members, in their homes and in the public arsenals and magazines, so the militia would be prepared to serve at any time.<sup>336</sup> This aspect of readiness is even expressly stated in the militia provision of the Articles of Confederation, which required that every state "always keep up a well-regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and *constantly have ready for use*, in public stores, a due number of filed pieces and tents, and a proper quantity of arms, ammunition and camp equipage."<sup>337</sup> This provision makes it explicit; it spells out the ready manner in which arms needed to be continuously available for the militia to function effectively.

Similarly the First Congress's "Act for the Government and Regulation of Seamen" required medicine chests to be provided onboard merchant ships "and *kept fit for use*."<sup>338</sup> The master or commander of the ship had to maintain a medicine chest in fulfillment of his duty to provide medical services to the sailors employed on the ship.<sup>339</sup> The chest had to be constantly kept fit for use because sailors could become sick at any time, the same way lighthouse keepers had to keep the lighthouse lit for ships that could approach the coast at any time,<sup>340</sup> and members of the militia had to keep arms ready for use when the need arose to defend the public.<sup>341</sup> All of these duties were to provide services. The seamen statute also required ships to "have on board" water, bread, and salted meat, but it was the medicine chest that had to be *kept fit for use*, not merely possessed on the ship but rather maintained in good order, subjected to annual examinations, and replaced and replenished of medications to assure a fresh and ready supply.<sup>342</sup> The threat of illness was always present at sea, and invasion or insurrection on land, but one could never know at exactly what moment these incidents might occur. Like the militiaman's gun, the medicine chest at sea had to be kept ready to be put into service at any time.

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333. See WALDMAN, *supra* note 19, at 6; CORNELL, *supra* note 17, at 13.

334. See WALDMAN, *supra* note 19, at 4–5.

335. See NATIONAL GUARD, *supra* note 108 ("Always Ready, Always There.").

336. See CHARLES, *supra* note 8, at 73, 78; WALDMAN, *supra* note 19, at 6 (explaining that "being armed was a duty").

337. U.S. ARTICLES OF CONFEDERATION of 1781, art. VI (emphasis added).

338. 1 Peters, *Statutes at Large*, *supra* note 9, at 135 (emphasis added).

339. See *id.*

340. See *supra* Section I.B.4.f.

341. See WALDMAN, *supra* note 19, at 15; CORNELL, *supra* note 17, at 2.

342. 1 Peters, *Statutes at Large*, *supra* note 9, at 134–35.

In neither case were the medicine chest or the arms possessed for private use. Ship masters kept the medicine chest in fulfillment of their duty to provide a medical service to the crew, and militiamen kept arms in fulfillment of their duty to provide militia service to the public. To *keep* is not self-oriented, but rather interpersonal and social. It is the fulfillment of a duty to provide a service to others. But to *possess* is personal and individual to the possessor or owner; no other people are involved. Ship masters who possessed the medicine chest for their own personal use would be defeating the whole purpose of keeping the medications on board. The ship master's duty was to keep the chest in good order for use in treating the ailments that might arise among the entire crew. To *keep* is to provide not a self-service but a social service. It is done to serve the needs of others.

Consider the contemporaneous state statutes related to standard keeping.<sup>343</sup> Government officials who possessed the standard weights and measures only for their own personal use would again be defeating the purpose of the standards in the first place. Standards exist to provide everyone with access to definitive weights and measures against which to compare their own materials. The official's duty to keep those standards is an essential service to others who rely on it for their affairs.<sup>344</sup> The secretary required in the Northwest Ordinance to keep the government records would also have no business possessing those materials for their own personal use. The same applies to the keeping of arms contemplated in the Second Amendment; to *keep arms* was also to act interpersonally. The man who possessed a gun for his own individual purposes would be of no help to a militia or to a public in need of defense. The purpose of keeping the arms, medicine chest, standards, and records was to serve others. To interpret *keep* in these contexts simply to mean *possess* is to render *keep* incoherent, because it strips the word of the social services that each is intended to provide.

*Heller* makes this error by interpreting *keep arms* to mean the individual possession of a gun for one's own personal use.<sup>345</sup> This ignores the social role of the keeper, and the interpersonal nature of the service which it is his duty to provide. One cannot *keep* without implications for other people. Keeping an inn, a tavern, the peace, a lighthouse, the records, the time, or the score, as just a few examples,<sup>346</sup> would be meaningless exercises without other people involved. In all these contexts the question is the same: for whom? Without someone else involved—a patron, user, customer, or beneficiary of the service—no keeping is

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343. 1785–1791 Maryland Laws., vol. 204, 397; Laws of Vermont, *supra* note 170, at 491.

344. *See supra* Section I.B.4.e.

345. *See* District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

346. *See supra* Section I.B.4.c–f.

taking place. Scrupulous though they may be, someone who cleans their own house is not a housekeeper. The role of the lighthouse keeper is to provide a service for those at sea.<sup>347</sup> An individual cannot keep a lighthouse for himself without contradicting the entire purpose of the structure; it would cease to function as a beacon without anyone to receive its signal. The public was who militiamen kept arms for, in ready service of the common defense.<sup>348</sup>

What is more, no possessor exists at all in a number of contexts in which *keep* is commonly used. For example, the duties of a peacekeeper, timekeeper, and scorekeeper, are to maintain the peace, time, and score as services to others, and in all three contexts there is nothing to be possessed. One cannot *possess* the peace, the time, or the score; none of these things belongs to anyone. An example is the contemporaneous statutory provisions in Vermont related to keeping the peace.<sup>349</sup> The *Heller* interpretation of *keep* would not only be incoherent in this context—it would be an impossibility. Neither law enforcement officers, grand jurors, nor anyone else can *possess* or *have* the peace. They can *keep* it though, by fulfilling their duty to provide law enforcement and prosecutorial services to the public.

The use of *keep* frequently appears in the contexts of various public institutions. This is because these institutions consist of officers and staff whose duty it is to provide public services. They are public servants. Along with the treasury and the jail, for example, the militia is yet another public institution that functionally relied on its members to fulfill their duty to maintain arms in the performance of their militia service.<sup>350</sup> The militia could not protect the public without the fulfillment of this duty,<sup>351</sup> just like the treasury could not provide for the public spending without the duties of the treasurer and register,<sup>352</sup> and the jail could not provide for the public safety without the fulfillment of the jail keeper's duty to maintain the facility and hold the inmates inside it.<sup>353</sup> Only those authorized to provide these services can carry out the function of these public institutions. There is no place for rogue private possession in the provision of public services. This is the distinction that separates a jury from an unlawful gang or mob; the jury is a public institution legally empowered to decide whether someone is guilty.<sup>354</sup> A group of people taking up arms for their own purposes is

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347. *See supra* Section I.B.4.f.

348. *See supra* Section I.A.

349. *See supra* Section I.B.4.c.

350. *See supra* Section I.A.

351. *See supra* Section I.A.

352. *See supra* Section I.B.3.

353. *See supra* Section I.B.3.

354. *See generally* CORNELL, *supra* note 17, at 14, 81, 96 (analogizing between the legal authority of the jury and the militia).

not a militia but rather a lawless mob operating under no legal authority to defend the public.<sup>355</sup> The militiamen were the lawful keepers of the arms. They were the ones legally authorized to maintain weapons in fulfillment of their duty to defend the public.<sup>356</sup>

The one exception among the contemporaneous texts that use *keep* is the 1794 statute taxing carriages, which awkwardly states that the tax would be imposed on carriages conveying people “which shall be kept by or for any person, for his or her own use, or to be let out to hire, or for the conveying of passengers.”<sup>357</sup> At the outset, the fact that the statute goes on to state that everyone “*having or keeping*” a carriage would have to pay the tax indicates that *have* and *keep* are not equivalent in the text. It is unclear if this provision even contemplates the possibility that someone could keep a carriage for his own use; as written it could mean only that carriages could be either *kept by* someone to be let out to hire or for the conveying of passengers, or *kept for* someone for that person’s use. But even assuming for the sake of argument that the intent of the wording did include the possibility that someone could keep a carriage for his own use, the motivation for the design of this language was to preemptively avoid constitutional scrutiny. The serious constitutional taxation challenge loomed over this measure, and, while Hamilton’s draft bill and several state carriage tax statutes applied to the “possessors” or “owner or possessor” of carriages,<sup>358</sup> those were not words proponents of the carriage tax would have wanted in the 1794 statute; taxes on property were direct taxes. The words *possess* and *own* indicate property, like the requirement in the Northwest Ordinance that the members of the Legislative Council be “*possessed of a freehold in five hundred acres of land.*”<sup>359</sup>

In its effort to overcome the inevitable constitutional challenge to the carriage tax in *Hylton*, the government wanted the measure to be considered an indirect excise on the use of carriages, not a direct tax on their ownership or possession.<sup>360</sup> The government argued this exact point at the Circuit Court.<sup>361</sup> What it needed was language for a statute that taxed the ownership or possession of carriages without appearing to deal with ownership or possession. Hence the strategic misuse of *keep*. The result is similar to the *Heller* interpretation of the word, because both that interpretation and the carriage tax statute involve a tortured use of *keep* forced to stand in for *possess*. While the carriage tax statute

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355. *Id.*

356. *See supra* Section I.A.

357. 1 Peters, *Statutes at Large*, *supra* note 9, at 373–74.

358. Hamilton, *Draft on Carriages and Servants*, *supra* note 215.

359. Northwest Ordinance, *supra* note 112, at 338 (emphasis added).

360. *See supra* Section I.B.4.g.

361. *See Zhang*, *supra* note 222, at 275–76.



substitutes *keep* in place of *possess* to disguise any notion of property possession, the *Heller* interpretation substitutes *possess* in place of *keep* to find an individual right to possess arms in an Amendment that actually has *keep* in its text.

Moreover, the reason the government imposed this measure on carriages was that it was meant to be a wealth tax; only the richest people could afford to travel in carriages and the tax was aimed at the nation's wealthy.<sup>362</sup> Again assuming for the sake of argument that the text of the statute even contemplated the possibility of someone keeping a carriage for his own use, it would be unlikely that the person riding in a carriage would have been the same person doing the keeping. In fact, the 1807 Pennsylvania inn and liverystable statute refers to the people providing this service and doing this type of work with horses and their associated vehicles as *liverystable keepers*.<sup>363</sup> To keep someone's private carriage in 1794 would have involved the maintenance not only of the vehicle itself but also the necessary animals in stables, often located in what was known as a "carriage house" on the property of a person wealthy enough to travel in a such a vehicle.<sup>364</sup> Workers, servants, or enslaved individuals did this work to be sure, sometimes even living in quarters designated for them inside the carriage houses.<sup>365</sup> Like a housekeeper or groundskeeper on an estate, these laborers were the ones keeping the carriage.<sup>366</sup> In no sense did any of them possess the carriage, or use it for their own purposes.

### C. Criminal Application of the *Heller* Interpretation

Not only would it be outside the role of the keeper to claim any possession over houses, grounds, accounts, records, lighthouses, or jails, in many of these contexts a keeper's use for their own individual purposes would also amount to criminal activity. The accounting duties set out in the statute establishing the U.S. Treasury Department, for example, were for the treasurer to keep and receive the monies of the United States, and the register "to *keep* all accounts of the receipts and expenditures of the public money, and of all debts due to or from the United

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362. See Bush & Jeffries, *supra* note 217, at 553.

363. See 8 Mitchell, *supra* note 176, at 517–18.

364. See, e.g., Susan L. Buck, *Paint Discoveries in the Aiken-Rhett House Kitchen and Slave Quarters*, 10 PERSPS. IN VERNACULAR ARCHITECTURE (BLDG. ENV'TS) 185, 185–86 (2005) (describing the carriage house at the 1818 Aiken-Rhett House in Charleston, South Carolina); Louann Wurst, *Internalizing Class in Historical Archaeology*, 33 HIST. ARCHAEOLOGY (CONFRONTING CLASS) 7, 14 (1999) (describing carriage houses in Binghamton, New York).

365. Buck, *supra* note 364, at 189.

366. Bush & Jeffries, *supra* note 217, at 553 (2022) ("Carriage taxes were akin to luxury taxes—more politically palatable than, say, a tax on whiskey.").

States.”<sup>367</sup> This statute dealt with the monies and accounts of the United States.<sup>368</sup> These funds in no sense belonged to the treasurer, and neither did the public accounts in any way belong to the register. The duty of these officials was to hold the nation’s money and maintain the accounts as a service to the government and the public.<sup>369</sup> There is no place for any individual possession or individual right to use the nation’s money or accounts. It would be preposterous to interpret *keep* here, as in *Heller*, simply to mean *possess*. But what is more, a treasurer or register who did use the public money or accounts for his own individual purposes would be committing the crime of embezzlement.<sup>370</sup> To interpret *keep* in this statute as meaning *possess* would be to assert that the intent of the First Congress was to enable the embezzlement of the nation’s funds by handing possession of public money and accounts over to two people for their own individual use.

Similarly absurd would be to interpret *keep* as *possess* in the jail keeping resolution that the First Congress adopted just two days before the Second Amendment. To do so would be to believe that the First Congress was again endorsing criminal behavior. The duty of a jail keeper was to maintain the jail and hold inmates inside it as a public safety service.<sup>371</sup> To fulfill that duty, the keeper was authorized by law to incarcerate and hold people in custody in the institution.<sup>372</sup> The First Congress used *keep* in this context for good reason. No one is authorized to assert possession over a jail or inmates for his own individual purposes. A jail such as that would be more accurately described as someone’s private dungeon, and someone doing this would be committing the crime of false imprisonment.<sup>373</sup> The function of a jail is not to serve the purposes of the keeper. Yet this is the outcome that the *Heller* interpretation leads to by equating *keep* with *possess*.

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367. 1 Peters, *Statutes at Large*, *supra* note 9, at 67 (emphasis added).

368. *Id.*

369. *Id.*

370. See *Recent Cases: Criminal Law-Courts Split on Whether “Stolen” As Used in Dyer Act Us Restricted to Larceny or Includes Embezzlement and False Pretenses*, 105 U. PA. L. REV. 110, 119 n.4 (1956) (“Embezzlement is defined by most statutes as the felonious conversion or appropriation by a servant, bailee or other named person of money or property lawfully held by him under a relation of trust or confidence with the owner.”).

371. See 1 Peters, *Statutes at Large*, *supra* note 9, at 96–97.

372. See *id.*

373. See e.g., Alexandra Michelle Ortiz, *Invisible Bars: Adapting the Crime of False Imprisonment to Better Address Coercive Control and Domestic Violence in Tennessee*, 71 VAND. L. REV. 681, 701 (2018) (“Criminal false imprisonment in Tennessee is a Class A misdemeanor. Tennessee Code Annotated Section 39-13-302 defines false imprisonment as ‘knowingly remov[ing] or confin[ing] another unlawfully so as to substantially interfere with the other’s liberty.’”).

D. *Limited Permissible Use is the Hallmark of Keep*

Discretion of use is the essential difference between *keep* and *possess*. Whether it involves the accounts, records, seal, ferries, or otherwise, the hallmark of the keeper in each context is the highly limited permissible use that they have over these things.<sup>374</sup> The treasury statute, for example, set out a limited permissible use of the public accounts and funds.<sup>375</sup> The statute authorizes the treasurer and register to maintain the federal government's accounts and to spend public money to be sure, but their roles are merely custodial.<sup>376</sup> Unlike individual bank account holders, who can use their accounts and money in a full spectrum of ways, the treasury official maintains the public accounts and monies with no personal discretion at all.<sup>377</sup> The same is true for the secretary of state, who the First Congress expressly granted custody of the seal to in 1789, but by no means the discretion for the secretary to use it for their own individual purposes.<sup>378</sup> So too was the narrow scope of the Second Amendment. The first Congress's use of *keep* in the Amendment follows this usage perfectly. The Amendment grants the right to maintain arms as a service to the public, in fulfillment of one's duty to provide militia service. In the same way the register was authorized to maintain the public accounts as a financial service to the nation,<sup>379</sup> so too were the militiamen authorized to maintain weapons in service of the public defense. Neither the Treasury official nor the militiaman had the discretion to use the accounts or the weapons for his own personal reasons. Both provided important public services to be sure, but the permissible use is markedly limited. Whether of arms,<sup>380</sup> accounts,<sup>381</sup> records,<sup>382</sup> or otherwise,<sup>383</sup> to keep is to be entrusted to maintain something in a limited and socially useful manner. Possession comes with no such constraints.

Also illustrative is the way in which the First Congress used *possess* to set out the president's use of the furniture, compared with *keep* to describe the secretary of state's use of the seal. The president is said to possess the furniture because it was for their individual use; to write at a desk, sit on a chair, or have a meal at a table. Like any other person, the president would use this furniture

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374. See *supra* Sections I.B.3, I.B.4.a.

375. See 1 Peters, *Statutes at Large*, *supra* note 9, at 66–67.

376. *Id.*

377. See *id.* at 66–67.

378. *Id.* at 68–69.

379. See *supra* Section I.B.3.

380. See *supra* Section I.A, II.B.

381. See *supra* Section I.B.3.

382. See *supra* Section I.B.1.

383. See *supra* Section II.B.

for individual purposes and *possess* reflects this perfectly in the First Congress's statute.<sup>384</sup> The secretary of state, on the other hand, is said to *keep* the seal because his use of it was far more limited; he was merely to be the custodian of the seal and could use it only at the direction of Congress and the president in service of the government.<sup>385</sup> The seal does not belong to the secretary of state, or any other official or individual for that matter. Nobody *possesses* it. The secretary *keeps* it strictly as a service to the government for its official purposes; to authenticate the president's signature and commissions of appointees, for example, and to appear on official documents such as international treaties.<sup>386</sup> This type of limited use is the essence of *keep*. If the secretary of state were to use the seal at his own personal discretion, it would no longer actually be the seal of the United States. What makes it the seal is that it represents the formal approval of the government.<sup>387</sup> Absent that imprimatur, it is a meaningless stamp or impression, not the official symbol that the U.S. seal is intended to be. The president might use a table in the White House either for writing or for dining, or might even choose not to use it altogether. The secretary of state has no such personal discretion as keeper of the seal.

This distinction is directly stated in the Maryland militia statute providing for the state to issue muskets, bayonets, and cartridge boxes to its militia members.<sup>388</sup> That statute expressly restricted the use of these weapons by imposing penalties on those militia members who used them "in hunting, gunning, or fowling, or shall not keep his arms and accoutrements clean and in neat order."<sup>389</sup> Not only does this statute use the "keep . . . arms" language, it also lays bare the way in which arms were meant to be kept for the limited use of militia service. The arms were expressly not to be used for hunting, gunning, or fowling; those were impermissible uses of the weapons that would in fact be punished.<sup>390</sup> The militiamen were keepers. They maintained the arms in fulfillment of their duty to provide militia service, nothing more. Just as the statute establishing the treasury authorized officials to keep the public monies, accounts, and books in fulfillment of their duty to provide these financial and

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384. See 1 Peters, *Statutes at Large*, *supra* note 9, at 72.

385. *Id.* at 68–69.

386. *Id.*

387. See 18 U.S.C. § 713(a) (prohibiting the knowing display of "any printed or other likeness of the Great Seal of the United States . . . for the purpose of conveying, or in a manner reasonably calculated to convey, a false impression of sponsorship or approval by the Government of the United States or by any department, agency, or instrumentality thereof").

388. See CHARLES, *supra* note 8, at 78.

389. *Id.*

390. *Id.* (explaining the punishment as "forfeit[ing] and pay[ing] not less than one, not more than ten dollars, at the discretion of the company court-martial").

record keeping services to the government,<sup>391</sup> this Maryland statute authorizes the militiamen to keep the muskets, bayonets, and cartridge boxes in fulfillment of their duty to provide militia service.<sup>392</sup> In both contexts the scope of their use is restricted to the provision of those services.<sup>393</sup> The militiaman who attempted to use his gun for fowling or self-defense would be acting outside his permissible role like a treasurer who tried to use the public accounts and money for his own individual purposes. In either case the activity exceeds the limited permissible use of the keeper.

Ironically, Richard Heller was already allowed to keep arms even before he became the namesake plaintiff in the *Heller* case. Heller was a D.C. special police officer authorized to carry a handgun while on duty.<sup>394</sup> In other words, he maintained a weapon in service of the public defense, in fulfillment of his duty as a special police officer. Law enforcement and the military are the modern institutions that have assumed the role the militia used to fill.<sup>395</sup> The question presented in *Heller* is relevant. That is, whether D.C. law “violated the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who *wish to keep handguns and other firearms for private use* in their homes.”<sup>396</sup> The question itself is incoherent because one cannot *keep* for his own private use. Rather, to keep arms is to provide a service exactly like the one that Heller was already providing while on duty as a special police officer: a public safety service.<sup>397</sup> Within the scope of his job, however, Heller’s right to use a gun was restricted to the limited permissible uses allowed to a law enforcement officer.<sup>398</sup> What Heller was asking for in the litigation was the right to *possess* a gun for his own individual use outside of his role in law enforcement. The text of the Second Amendment, however, uses *keep* rather than *possess*.

#### E. Second Amendment as a Licensing Provision

As evidenced throughout the contemporaneous state ferry licensing statutes, which authorized people to operate ferries, the meaning of the expression *keep a ferry* is clear: to maintain a ferry in fulfillment of one’s duty to provide a

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391. See *supra* Section I.B.3.

392. See CHARLES, *supra* note 8, at 78.

393. *Id.*

394. See *District of Columbia v. Heller*, 554 U.S. 570, 575 (2008).

395. WALDMAN, *supra* note 19, at 16; CORNELL, *supra* note 17, at 13.

396. Petition for Writ of Certiorari, *District of Columbia v. Heller*, 522 U.S. 1035, 1035. (2007) (emphasis added).

397. *Heller*, 554 U.S. at 575.

398. *Id.*

transportation service.<sup>399</sup> By definition, a ferry is a boat used to provide this service; private boats would have been useless in the context of ferry licensing because the underlying need of the statutes was for ferries to be available to move people and goods across the water as a reliable transportation service.<sup>400</sup> In this same sense, the Second Amendment functions not much differently from a licensing statute in that it too was designed to ensure that an important need was satisfied. In the case of the Second Amendment, the underlying need was for arms to be readily available to members of the militia for public defense. The Second Amendment is explicit about this need, stating expressly that the militia is “necessary to the security of a free State.”<sup>401</sup> Both governments and the public needed ferries at the crossing points of rivers and lakes, and governments and the public needed arms in the hands of their militia members.<sup>402</sup> The keeping of ferries and arms was the means by which these needs were satisfied. The ferry licensing statutes ensured the provision of a transportation service. Likewise, the Second Amendment ensured the provision of militia service. Both were meant to fulfill important governmental and public purposes that would have been unachievable through the private possession of boats and guns.

The keeping of arms contemplated in the Second Amendment is also analogous to the keeping of lighthouses. Suppose the U.S. Constitution removed the right to maintain lighthouses from the state and local levels of government, and instead empowered the federal government to do this exclusively. Such a provision would have raised the same concern that the militia clauses did by granting the federal government the exclusive power to arm the militia, because the federal government could at some point decide simply not to maintain the lighthouses any longer and as a result endanger the public by its inaction.<sup>403</sup> The Constitution does not address federal or state control of lighthouses, but the First Congress did pass the Lighthouse Act in 1789, which provided federal funds that would continue after one year if states ceded their lighthouses to the federal government.<sup>404</sup> Massachusetts ultimately ceded its lighthouses in 1790 but did so with a reservation of its right to take them back if the federal government

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399. *See supra* Section I.B.4.a.

400. *See Beck, supra* note 160, at 1285; *see also* Watson, *supra* note 159, at 250, 252 (describing the usual expectation in North Carolina that ferry keepers: provide ferries immediately upon receiving their licenses, subject their ferries to inspections if there was any doubt about the dependability of the boats, and post bond to guarantee the maintenance of proper boats and attendance at the ferries).

401. U.S. CONST. amend II.

402. *See Beck, supra* note 160, at 1285; Watson, *supra* note 159, 250, 252.

403. *See supra* Section I.B.4.a (discussing the necessity of lighthouses to promote safety at sea).

404. *See* 1 Peters, *Statutes at Large, supra* note 9, at 53–54.

failed to properly maintain them.<sup>405</sup> That was exactly the foreseeable problem that the Second Amendment was meant to address: the new federal government could undermine the militia by failing to arm it.<sup>406</sup>

The solution the Amendment provides is essentially a licensing provision to allow the keeping of arms for this purpose. The contemporaneous lighthouse statutes satisfied a similarly important purpose by appointing lighthouse keepers. Setting aside the question of whether one even could possess a lighthouse for their own individual purposes without it ceasing to function as a lighthouse, granting people such a right—the right to *possess* a lighthouse—would have accomplished nothing for a public in need of lighthouses along the water. The need was for lighthouses to be *kept* to ensure the provision of this service. Without that, the waterways would have been unsafe to navigate, threatening life and property, and impeding the economy.<sup>407</sup> The appointment of lighthouse keepers was the solution.<sup>408</sup> The meaning of *keep* is identical in both the lighthouse statutes and in the Second Amendment: to maintain lighthouses or arms in fulfillment of a duty to provide a service. In the case of lighthouses, it is a navigation service and with respect to the militia it is a public safety service.

#### F. *Keep and the Pre-Industrial Constitution*

The use of *keep* in the Second Amendment reflects the fact that the U.S. Constitution was written and ratified before the major waves of the Industrial Revolution transformed American society.<sup>409</sup> For a ferry, a lighthouse, or a toll road to function properly in the unmechanized pre-industrial world, an actual person—a keeper—had to be stationed onsite and constantly at the ready to make such implements work. These services required the keeper's vigilance. Travelers needed passage across the water, sailors needed navigation guidance, and governments needed tolls to be collected. None of these needs could be met without the sustained services provided by ferry, lighthouse, and toll gate keepers. Lighthouses and toll houses literally were the homes of the keepers who maintained them.<sup>410</sup> And ferry keepers had to be onsite to make the ferry

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405. See DOLIN, *supra* note 201, at 76.

406. See WALDMAN, *supra* note 19, at 38.

407. Act of July 20, 1715, ch. 4, 1715 Province Laws 2d Sess. (“Whereas the want of a lighthouse at the entrance of the harbour of Boston hath been a great discouragement to navigation by the loss of the lives and estates of several of his majestie’s subjects; for prevention whereof . . .”).

408. See *id.*

409. See Richard A. Posner, *Judicial Autonomy in A Political Environment*, 38 ARIZ. ST. L.J. 1, 7 (2006); Allen R. Kamp, *Constitutional Interpretation and Technological Change*, 49 NEW ENG. L. REV. 201, 202 (2015).

410. See GERKEN, *supra* note 172, at 41; DOLIN, *supra* note 201, at 294.

available when travelers needed to cross the water.<sup>411</sup> But industrialization changed all this, ushering in machinery and employees.<sup>412</sup>

The modern-day ferry, lighthouse, and tollbooth are all highly mechanized.<sup>413</sup> As the keeper played a far less viable role in these areas, the use of *keep* has accordingly faded from the language; employees today are said, for example, to *operate* ferries.<sup>414</sup> And many tollbooths, as well as all lighthouses in the United States except for one, are automated without any attendant or operator at all.<sup>415</sup> The keepers who lived onsite at these locations are relics of the past; all lighthouses in the U.S. today are automated, and only one continues to have a keeper, largely for historical preservation purposes.<sup>416</sup> The use of *keep* also eroded from the arsenal, armory, and magazine context, as those institutions became increasingly industrialized as well and military forces became increasingly professionalized.<sup>417</sup> No longer did the public defense require militiamen to maintain arms in their homes, ready for use at a moment's notice.<sup>418</sup> Mechanized federal arsenals could churn out and store rifles and other weapons by the thousands, for use by professionally employed soldiers.<sup>419</sup> The role of the militiaman went the way of the toll gate keeper—rendered obsolete.<sup>420</sup> The duty of militia members to keep muskets and firelocks in their homes evolved into the mass production and storage of rifles in the federal arsenals, the same way the ferry keeper's duty to provide that service grew into large enterprises operating steam-powered ferryboats. The usage of *keep* as it appears

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411. See Hrdy, *supra* note 159, at 68; Watson, *supra* note 159, at 247–48.

412. See Henry H. Perritt, Jr., *Job Training Mythologies: Stitching Up Labor Markets*, 98 NEB. L. REV. 795, 801, 803–04 (2020).

413. See James D. Phillips & Katharine E. Kohm, *Current and Emerging Transportation Technology: Final Nails in the Coffin of the Dying Right of Privacy?*, 18 RICH. J.L. & TECH. 1, 29–30 (2011).

414. See MONT. CODE ANN. § 7-14-2805(2) (2023) (“While ferries or wharves are owned by a county and operated and managed by the board, the operation is expressly declared to be a governmental function.”); WASH. REV. CODE ANN. § 47.04.140 (2023) (“Whenever a county that operates or proposes to operate ferries obtains federal aid for the construction, reconstruction, or modification of any ferry boat or approaches thereto under Title 23, United States Code, the following provisions apply to the county’s operation of its ferries . . .”).

415. See DOLIN, *supra* note 201, at 486.

416. See Coast Guard Authorization Act of 1989, Pub. L. No. 101-225, 103 Stat. 1908, § 221(b)(1); DOLIN, *supra* note 201, at 486.

417. See Michael A. Bellesiles, *The Second Amendment in Action*, 76 CHI.-KENT L. REV. 61, 91–92 (2000); CORNELL, *supra* note 17, at 196.

418. See WALDMAN, *supra* note 19, at 67; see also CORNELL, *supra* note 17, at 196 (describing changes to the militia in the early 1900s as “part of a broader shift in American attitudes toward the ideal of an armed citizenry”).

419. See Bellesiles, *supra* note 418, at 89–90.

420. See WALDMAN, *supra* note 19, at 67; CORNELL, *supra* note 17, at 196.



in these contexts, including the Second Amendment itself, is a vestige of the pre-industrial world.

Although the equivalent phrase today would be to *operate a ferry*, the now antiquated expression *keep a ferry* was commonly used in statutes contemporaneous with the adoption of the Second Amendment.<sup>421</sup> This expression, and its absence today, reveals how the usage of *keep* has changed over time in contexts transformed by the industrialization of the economy. The contemporary expression is *operate a ferry* for good reason; modern ferries are complex machines operated by substantial enterprises and their employees. Travelers today do not rely on vigilant keepers living at the crossing points of rivers and lakes. And in many cases, industrial-scale bridges have replaced the need for ferries altogether. The pre-industrial role of the ferry keeper has eroded away. The same effect is seen in the expression *keep a standard*, which also involves a context radically altered by technological advancement. Contemporaneously with the Second Amendment, to *keep a standard* was for a public official actually to hold in their custody the simple standard weights and measures, or even to keep those standards of the pre-industrial past in their office, an unimaginable practice today given the extremely high level of technology and machinery used in the complex applied science that determines modern weights and measures. Today, the Physical Measurement Laboratory determines standards for measurement using advanced technology, laboratories, and equipment far beyond what was available to the pre-industrial standard keeper.<sup>422</sup> In short, the role of the keeper as contemplated at the time of the Second Amendment was not sophisticated enough to survive the massive changes of the Industrial Revolution, and the language commonly used to describe these activities has evolved.

In some contexts, however, the usage of *keep* has not changed nearly as much over time. For example, *keep the records*, *keep the accounts*, and *keep the books* today remain common ways of expressing the duty to maintain documentation and information as a service to those who will refer to it.<sup>423</sup>

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421. See *supra* Section I.B.4.a.

422. See *About PML*, NAT'L INST. OF STANDARDS & TECH., <https://www.nist.gov/pml/about-pml> (last updated Oct. 23, 2020); see e.g., Williams et al, *supra* note 200, at 1–3. (discussing how the National Institute of Standards and Technology has maintained a high-accuracy laser power metrology capability spanning twenty orders of magnitude).

423. See e.g., S.C. CODE ANN. § 12-36-2540(B) (2023) (“Any person selling both at wholesale and at retail shall *keep books* which separately show the gross proceeds of wholesale sales and the gross proceeds of retail sales. If the *records are not separately kept*, all sales must be considered retail sales.”) (emphasis added); MICH. COMP. LAWS § 487.1213(1) (2023) (“If a person other than a licensee makes or *keeps the books, accounts, or other records* of that licensee, this act applies to that person with respect to the performance of those services and

Mechanization has not transformed this type of work to the extent it has in the more industrialized spheres. A ferry keeper may have done some amount of bookkeeping related to his work in 1789, and even though industrialization eliminated the role of the ferry keeper in this context some time ago,<sup>424</sup> the enterprises that operate ferries continue to keep their books today.<sup>425</sup> The use of *keep* remains in some areas relatively unaffected by technological change at this point. But with the accelerating automation of document management and information technology now,<sup>426</sup> the roles of the keeper of records, accounts, and books—and accordingly the language that describes those roles—are also likely to change. The *Heller* interpretation of *keep* is incoherent in these contexts to be sure, but imagine the absurdity of it as advancing technology continues to transform these information management occupations. Given the way *Heller* glosses over the consistent usage of *keep* in 1789, it would be as if courts 200 years from now were to look back on a statute involving record keeping from the early 2000s and assume that at that time record keepers must have possessed the documents for their own individual use.

#### CONCLUSION

By choosing *keep*, the framers of the Second Amendment truly found the perfect word. To keep is to fulfill one's duty to provide a service. The way an inn keeper's duty is to maintain the inn to provide a hospitality service, a lighthouse keeper's duty is to maintain the beacon to provide a navigation service, and a ferry keeper's duty is to maintain the ferry to provide a transportation service. The duty contemplated in the Second Amendment is clear: militia service. Men in the American colonies and early United States were legally obligated to fulfill their civic duty to participate in the militia, and the

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with respect to those books, accounts, and other records to the same extent as if that person were the licensee.”) (emphasis added).

424. See, e.g., Sam Roberts, *How a Ferry Ride Helped Make Brooklyn the Original Suburb*, N.Y. TIMES (Dec. 29, 2014), <https://www.nytimes.com/2014/12/30/nyregion/how-a-ferry-ride-helped-make-brooklyn-the-original-suburb.html> (describing the evolution of the ferry commute from Brooklyn to Manhattan in New York City).

425. See, e.g., *Route Statements for Fiscal Years 2017 to 2022*, WASH. STATE DEP'T OF TRANSP., 1, 10–19 (2022), <https://wsdot.wa.gov/sites/default/files/2023-02/WSF-RouteStatements-FY2022.pdf> (describing factors affecting ferry routes for fiscal year 2022 and “information regarding cost, ridership, and revenue trends over the past six fiscal years”).

426. See, e.g., Madison Alder & Rebecca Heilweil, *National Archives Discloses Planned AI Uses for Record Management*, FEDSCOOP (Aug. 25, 2023), <https://fedscoop.com/national-archives-plans-ai-record-management/> (stating “[t]he National Archives and Records Administration revealed that it plans to use several forms of AI [i.e., artificial intelligence] to help manage its massive trove of records”).

Second Amendment is about their right to maintain arms in order to do so. The Amendment contemplates no service other than this: the provision of militia service, which is the limited permissible use of keeping arms. Such a limitation of use is the hallmark of keeping. The record keeper, account keeper, and keeper of the nation's seal, for example, are all highly restricted in their authorized use of these implements. In this sense the Second Amendment functions largely like a ferry licensing statute, enacted to ensure the regulated provision of an important service.

To *keep* arms was not to *possess* them, and that is apparent throughout the enactments of the First Congress, which used *keep* and *kept* consistently to express the fulfillment of duties to provide services in the more than eighty instances it used those during its two-year term. In requiring treasury officials to keep the public monies and accounts, the First Congress established the duty of these officials to maintain those funds and financial records at the ready, as a service to the government and the public. To interpret *keep* simply to mean *possess* would be absurd; any treasury official asserting individual possession over the public money or accounts would be on their way to committing the crime of embezzlement. Moreover, to *keep* is to be constantly ready in a way that is absent from *possession*, which involves no such readiness. The low-tech, pre-industrial world in which the Second Amendment was written required a high level of vigilance across numerous contexts, and the usage of *keep* subsequently evolved during waves of industrialization that changed many aspects of American social and economic life. The Second Amendment does not use the word *possess*; it uses *keep*, and the very inclusion of this word in its text provides powerful evidence of the Amendment's intended meaning.