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The Second Amendment in Context: The Case of the Vanishing Predicate

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THE SECOND AMENDMENT IN CONTEXT: THE CASE OF THE VANISHING PREDICATE

H. RICHARD UVILLER* & WILLIAM G. MERKEL**

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That a well-organized militia is essential to the security of a free state is one of those fine sayings that, like the mild axiomatic truths which adorn Root's system of penmanship, are often copied, but never acted upon. We resolved it at town meetings; we proclaimed it in flaming editorials; it did yeoman-service in many a closely-contested election, on one side or [on the] other, or . . . on both; orators waxed eloquent upon it . . . ; it was the favorite toast at many a banquet . . . ; Congress rang with it; the Executive endorsed it; it was lugged into the learned opinions of the Judiciary: but nothing came of it.

— *The United States Service Magazine*, September 1864

INTRODUCTION: THE SOCIAL AND JUDICIAL FOUNDATIONS OF THE DISPUTE

Owning and carrying personal firearms—or at least the unbridled right to do so—has become a freighted metaphor of American individualism. With obvious linkage to the muscular nineteenth-century frontier hero of myth and experience,¹ the powerful image of pride can be traced to Renaissance Florence by way of English pamphlets popular in Revolutionary America.² Mostly masculinist, today's phantom of the armed pioneer limns the true American patriot as loyal to great quasi-religious principles thought to be the founders' creed. Emboldened by his proclaimed stance of sturdy independent autonomy, this present-day

1. On the symbolic significance of the frontiersmen's conquest of the West in crafting the American self-image, see SACVAN BERCOVITCH, *THE RITES OF ASSENT: TRANSFORMATIONS IN THE SYMBOLIC CONSTRUCTION OF AMERICA* 7 (1993); DANIEL J. BOORSTIN, *THE AMERICANS: THE NATIONAL EXPERIENCE* 51-52 (1966). In Boorstin's words:

[O]f all American myths, none is stronger than that of the loner moving west across the land. . . . The courage to move to new places and try new things is supposed to be the same as the courage to go it alone, to focus exclusively and intensively and enterprisingly on one-self. Only so, we hear, could the threatened pioneer survive. And so, it is said, an American way was born.

Id. at 51. But Boorstin makes the insightful point that, contrary to our popular intuitions, the West was settled, not by lone frontiersmen, but by groups. "The lone adventurer was likely to be a priest, a professional explorer, a surveyor, a guide, or a hunter. Early *settlers*, those who took one-way passage and became the backbone of new Western communities, generally went together." *Id.* at 52.

2. See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 1-19 (1967); 1 PAMPHLETS OF THE AMERICAN REVOLUTION, 1750-1776, *passim* (Bernard Bailyn ed., 1965); J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 506-09, *passim* (1975). The Florentines and the Anglo-American pamphleteers both extolled the incorruptibly independent citizen-in-arms serving public purposes. In contrast, there does not appear to be even a subconscious public purpose behind today's frontiersman's taking up of arms. Indeed, it is precisely the absence of a settled, constitutionally rooted public dimension to their arms bearing that separates today's armed autonomists from the militia contemplated in the Second Amendment. *Cf. infra* text accompanying notes 722-41.

hero is scornful of the accretions of social enlightenment of the last 200 years and animated by a hearty distrust of government, which is seen as having betrayed the grand design of the sainted founders in favor of a debilitating social ethic. The hero has reinvented personal responsibility and takes upon himself the basic obligation of defense of self, land, and family against vaguely defined intruders of any stripe—including the forces of government itself.

Despite its thick romantic patina and a disturbing xenophobic strain,³ the picture is not altogether repugnant to patriotic American values. We do, as a nation, extol the values of individual responsibility. The lessons of the colonial and western frontiers have been etched on our national character.⁴ Indeed, an argument might be made that we have maintained democracy as successfully as we have because of the egalitarian ideals and skeptical attitudes towards authority that derive in part from the early national experience. While our idea of the frontier has been colored by generations of Hollywood scriptwriters, the legend remains a vital component of contemporary notions of civic courage and individual virtue. And, to the extent that the gun figures in our image of the responsible, liberty-loving family protector who stands at the center of our cherished self-image today, it cannot be lightly dismissed. Symbols count.

With the resurgence of the militant individualist, interest has been rekindled in the constitutional precept most closely associated with the credo: the Second Amendment.⁵ Roused from its peaceful slumber with its dormant companion, the Third Amendment,⁶ the proclaimed right of the individual to keep and bear arms has been stitched like an icon into the center of the banner around which our contemporary

3. See Garry Wills, *The Militias: The New Revolutionaries*, N.Y. REV. BOOKS, Aug. 10, 1995, at 50, for an interesting and insightful portrayal of this isolationist strain of neo-militia ideology. According to Wills, this isolationism is directed principally against European "socialism." In the new militias, Wills points out, hostility focuses on the secret services and communist reserve armies of Britain and Russia, which allegedly lie waiting in Mexico for orders from agents in Washington (most prominent among these in recent years have been Bill Clinton and George Bush) to assist the U.N. and U.S. armies in the final assault on American individualism and liberty.

4. See BOORSTIN, *supra* note 1, at 52-57 (making the point that settlers adopted communal, even regimented, ways to protect themselves against native tribes). See generally LEO MARX, *THE MACHINE IN THE GARDEN: TECHNOLOGY AND THE PASTORAL IDEAL IN AMERICA* (1964) (discussing the colonial and early national frontiers as shapers of the national character); FREDERICK JACKSON TURNER, *THE FRONTIER IN AMERICAN HISTORY* (Dover 1996) (1920) (discussing the far west frontier).

5. "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." U.S. CONST. amend. II.

6. "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." *Id.* amend. III.

frontiersmen rally. Largely ignoring the introductory clause: "A well regulated Militia, being necessary to the security of a free State," the individual rights brigade emphasizes the ringing language of the main clause: "the right of the people to keep and bear Arms, shall not be infringed." These people see in the provision, engraved in parchment, a recognition of the basic liberty of each individual citizen, in his or her private capacity, to possess lethal weapons without government interference. It is, they claim, an entitlement written into the text of the fundamental civic charter to add a stroke to the definition of the freedom of the individual citizen every bit as important as the security against unreasonable searches and seizures or the right not to be forced to cooperate in one's own prosecution.⁷

Needless to say, there is another interpretation. Sometimes carelessly labeled—sometimes carelessly articulated—the opposing group takes the position that the Amendment was adopted to assure the states' control over their local militias only.⁸ Embraced by gun control

7. See, e.g., Stephen P. Halbrook, *Congress Interprets the Second Amendment: Declarations by a Co-Equal Branch on the Individual Right to Keep and Bear Arms*, 62 TENN. L. REV. 597, 641 (1995) ("[T]he right to keep and bear arms is a fundamental, individual right, and . . . statutes regulating this right should be narrowly construed against the government and in favor of the people."); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 205-26 (1983) ("The unanimity with which Federalists and Anti-Federalists supported an individual right to arms is a reflection of their shared philosophical and historical heritage. Examination of contemporary materials reveals that the Founders ardently endorsed firearms possession as a personal right and that the concept of an exclusively state's right was wholly unknown to them.") (footnotes omitted); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 658 (1991) ("For too long, most members of the legal academy have treated the Second Amendment as the equivalent of an embarrassing relative, whose mention brings a quick change of subject to other, more respectable, family members. That will no longer do. It is time for the Second Amendment to enter full-scale into the consciousness of the legal academy.").

8. Laurence Tribe, author of widely used casebooks on constitutional law but not, until this year, of any specialized studies of the Second Amendment, aptly summarized the position taken by the opposing group in the second edition of his *American Constitutional Law*. According to Tribe, "[T]he central concern of the second amendment's framers was to prevent such federal interferences with the state militia as would permit the establishment of a standing national army and the consequent destruction of local autonomy." LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 299 n.6 (2d ed. 1988). In the just published third edition, however, Professor Tribe appears to have had a change of heart. In his much expanded treatment of the subject, Tribe now expresses greater sympathy for those who read the Second Amendment to accord a right to individuals to own guns for private purposes. See 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 901-02 n.221 (3d ed. 2000). Tribe's seeming conversion to the "individualist" camp, as well as his new take on the Second Amendment, are analyzed in detail by Professor Carl Bogus in his lead article to this Symposium. See Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 3, 19-21 (2000).

With a few prominent exceptions (see, e.g., Akhil Reed Amar, *The Bill of Rights As a Constitution*, 100 YALE L.J. 1131, 1162-73 (1991); Levinson, *supra* note 7, at 644-45; William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1255 (1994)), Tribe's summary articulated in his second edition continues to epitomize the position of

advocates among others, this contingent refuses to acknowledge any purpose or effect in the provision to assure individuals the absolute right to keep guns. They argue that the newly liberated colonists, still mistrustful of central government and its standing armies, wrote the Second Amendment into the Bill of Rights out of concern over the powers granted to the new federal government in Article I, Section 8; powers expressly allowing Congress to “call[] forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions” as well as to “organiz[e], arm[], and disciplin[e]” them. It was not enough that Clause 16 of Section 8 expressly reserves to the states the “Appointment of the Officers” and the “Authority of training the Militia according to the discipline prescribed by Congress.” Fearing federal control—even use of state militias against rebellious citizens of the states—Antifederalists insisted on the Second Amendment (so this contingent insists) to make sure Congress would not take away the essential power of the local troops by depriving them of their weapons. This take on the Second Amendment is often labeled the “collectivist” approach by adherents and detractors alike.

In this raging hermeneutic controversy, the Supreme Court has been, if not silent, strangely Delphic. Apart from an occasional comment by a particular justice,⁹ the Court has spoken only four times

academic professionals in law schools and on history faculties who have entered the Second Amendment debate. Typical of academic commentary in arguing against an individual right component of the Second Amendment are, among others, Michael A. Bellesiles, *The Origins of Gun Culture in the United States, 1760–1865*, 83 J. AM. HIST. 425 (1996); Carl T. Bogus, *Race, Riots, and Guns*, 66 S. CAL. L. REV. 1365 (1993); Lawrence Delbert Cress, *An Armed Community: The Origin and Meaning of the Right to Bear Arms*, 71 J. AM. HIST. 22 (1984); Frederick Bernays Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181 (1940).

Similarly, the U.S. government is on record interpreting the Second Amendment to establish the constitutional validity of state militias rather than a purely private right to arms. In 1912, for example, the attorney general issued an opinion adopting findings contained in a War Department report labeling the Militia Reform Act of 1908, ch. 204, 35 Stat. 399, unconstitutional and finding that the militia drew its essential constitutional legitimacy from the Second Amendment. See *Authority of President to Send Militia into a Foreign Country*, 29 Op. Att’y Gen. 322 (1912). For a discussion of the attorney general’s opinion and the report of the War Department, see RUSSELL F. WEIGLEY, *HISTORY OF THE UNITED STATES ARMY* 324–25, 340 (Ind. Univ. Press 1984) (1967); Alan R. Millet, *The Constitution and the Citizen-Soldier*, 69 REVUE INTERNATIONALE D’HISTOIRE MILITAIRE 97, 109 (1990).

9. See *Adams v. Williams*, 407 U.S. 143, 150 (1972) (Douglas, J., dissenting) (“A powerful lobby dins into the ears of our citizenry that these gun purchases are constitutional rights protected by the Second Amendment . . . There is under our decisions no reason why stiff state laws governing the purchase and possession of pistols may not be enacted . . . There is no reason why all pistols should not be barred to everyone except the police. The leading case is *United States v. Miller*, [see discussion *infra* text accompanying notes 34–36] upholding a federal law making criminal the shipment in interstate commerce of a sawed-off shotgun. . . . The Second Amendment, it was held, ‘must be interpreted and applied’ with the view of maintaining a ‘militia.’ . . . Critics say that proposals [for gun control] water down the Second Amendment. Our decisions belie that argument, for the Second Amendment, as noted, was designed to keep

on the subject of the Second Amendment.¹⁰ The decisions, *Cruikshank* (1876), *Presser* (1886), *Miller v. Texas* (1894), and *United States v. Miller* (1939), are old, flawed in some respects, and, in the most critical instance (*United States v. Miller*), somewhat ambiguous. Yet as scholars on both sides of the erratic trajectory must acknowledge, lower courts, excepting a single maverick federal district court in Texas,¹¹ have read

alive the militia.”); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 708 (Carolina Academic Press 1987) (“The right of citizens to keep, and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers” Story’s much quoted panegyric occurs in the context of a morose lamentation on the failure of the states to issue militia regulations and the consequent decay of the venerable citizens’ militia into disuse and derision); *MacNeil/Lehrer NewsHour: Interview by Charlayne Hunter-Gault with Warren Burger* (PBS television broadcast, Dec. 16, 1991) (Monday transcript #4226), available in LEXIS, News Library, NewsHour with Jim Lehrer File (“If I were writing the Bill of Rights now there wouldn’t be any such thing as the Second Amendment This has been the subject of 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. Now just look at those words. There are only three lines to that amendment. A well regulated militia—if the militia, which was going to be the state army, was going to be well regulated, why shouldn’t 16 and 17 and 18 or any other age persons be regulated in the use of arms the way an automobile is regulated? It’s got to be registered, that you can’t just deal with it at will. . . . I don’t want to get sued for slander, but I repeat that they [the NRA] have . . . had far too much influence on the Congress of the United States than as a citizen I would like to see—and I am a gun man. I have guns. I’ve been a hunter ever since I was a boy.”); Warren E. Burger, *The Right to Keep and Bear Arms*, PARADE MAG., Jan. 14, 1990, at 4. In contrast, Justice Thomas has indicated support for an individualist reading of the Second Amendment, see *Printz v. United States*, 521 U.S. 898, 939 n.2 (1997) (Thomas, J., concurring) (noting the “growing body of scholarly commentary” favoring an individual right approach to the Second Amendment), and Justice Scalia has noted favorably JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* (1994), see *infra* note 290.

10. See *United States v. Miller*, 307 U.S. 174 (1939); *Miller v. Texas*, 153 U.S. 535 (1894); *Presser v. Illinois*, 116 U.S. 252 (1886); *United States v. Cruikshank*, 92 U.S. 542 (1876); see also *Perpich v. Department of Defense*, 496 U.S. 334 (1990). In *Perpich*, the Court considered claims by the governor of Minnesota that a federal statute contravenes the Militia Clauses of the Constitution by preventing a governor from withholding consent to the federal call up of National Guard units for overseas service if the governor’s reason for withholding consent is his or her objection to the purpose of the guard’s overseas mission. The opinion by Justice Stevens reviewed the history of American military policy and ascribed to the drafters of the Militia Clauses an intent consonant with a collective purpose to the Second Amendment, see *id.* at 340-41, but Justice Stevens did not address the Second Amendment or reach any Second Amendment issues in his holding. See also *United States v. Lopez*, 514 U.S. 549 (1995) (considering the constitutionality under the Commerce Clause of the Gun-Free School Zones Act of 1990, which banned gun possession on school property, and striking down the statute for failure to articulate any relationship between gun possession in school zones and interstate commerce). For a discussion of the possible Second Amendment implications of the majority and dissenting opinions in *Lopez*, see *infra* text accompanying notes 56-57; cf. *United States v. Cardoza*, 129 F.3d 6 (1st Cir. 1997) (upholding the Youth Handgun Safety Act in the face of a *Lopez* based challenge because the Act, unlike the statute in *Lopez*, is expressly directed at economic activity and, hence, well within the commerce power); accord *United States v. Michael R.*, 90 F.3d 340 (9th Cir. 1996).

11. In *United States v. Emerson*, 46 F. Supp. 2d 598 (N.D. Tex. 1999), the U.S. District Court for the Northern District of Texas became the first and only court to decline to follow *United States v. Miller* in a Second Amendment case, upholding a Second Amendment challenge to 18 U.S.C. § 922(g)(8).

the opinions consistently down to the present day.¹² The two Supreme Court cases exercising the most influence on lower courts have been the first and last in the series, *United States v. Cruikshank* and *United States v. Miller*. In essence, *Cruikshank* teaches that the Second Amendment is not binding on the states, and *United States v. Miller* teaches that the Second Amendment does not invalidate all federal laws prohibiting weapons.

Cruikshank—notwithstanding two problems discussed below¹³—continues to make sense to today's courts; it would be odd, to say the least, to read the Second Amendment as prohibiting states from undermining their own freedom and security. Regarding the Second Amendment, the *Cruikshank* Court wrote:

The right . . . of "bearing arms for a lawful purpose" . . . is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The Second Amendment declares that it shall not be infringed; but this, as has been seen, means no more than it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the National Government¹⁴

This aspect of *Cruikshank* was restated in *Miller v. Texas*,¹⁵ the third of the Supreme Court's four Second Amendment cases. However, both *Cruikshank* and *Miller v. Texas* came down well before the wave

12. The *Emerson* decision awaits review by the U.S. Court of Appeals for the Fifth Circuit. The Fifth Circuit is the only federal appeals court not to have ruled on a Second Amendment case. Every other federal circuit court has relied on *United States v. Miller* at least once in rejecting a Second Amendment challenge to firearms regulations. All but the First Circuit, which last took a Second Amendment case in 1942, see *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942), have followed *United States v. Miller* in the last three decades; no fewer than seven circuits have done so since 1995. See *United States v. Scanio*, No. 97-1584, 1998 U.S. App. LEXIS 29415 (2d Cir. Nov. 12, 1998); *United States v. Rybar*, 103 F.3d 273 (3d Cir. 1996), *cert. denied*, 522 U.S. 807 (1997); *Love v. Pepersack*, 47 F.3d 120 (4th Cir. 1995), *cert. denied*, 516 U.S. 813 (1995); *United States v. Warin*, 530 F.2d 103 (6th Cir. 1976), *cert. denied*, 426 U.S. 948 (1976); *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982); *United States v. Synnes*, 438 F.2d 764 (8th Cir. 1971); *Hickman v. Block*, 81 F.3d 98 (9th Cir. 1996); *United States v. Oakes*, 564 F.2d 384 (10th Cir. 1977); *United States v. Wright*, 117 F.3d 1265 (11th Cir. 1997); *Fraternal Order of Police v. United States*, 173 F.3d 898 (D.C. Cir. 1999); see also *United States v. Henson*, 55 F. Supp. 2d 528 (S.D. W. Va. 1999) (rejecting a Second Amendment challenge to 18 U.S.C. § 922(g)(8)); *Lewis v. United States*, 445 U.S. 55, 65-66 n.8 (1980) (reaffirming *United States v. Miller*) ("These legislative restrictions [18 U.S.C. § 922(h)(1), making it unlawful for convicted felons to receive firearms transported in interstate commerce] are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties. See *United States v. Miller*, 307 U.S. 174, 178 (1939) (the Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia')."). No reported decisions question the Second Amendment holdings of *Cruikshank*, *Presser*, or *Miller v. Texas*.

13. See *infra* text accompanying notes 16-20, 30-33.

14. 92 U.S. at 553.

15. 153 U.S. at 538.

of incorporation decisions by which the Supreme Court applied most of the rights enumerated in the Bill of Rights against the states.¹⁶ In fact, *Miller v. Texas*, like *Cruikshank*, is archetypally pre-incorporationist in tone and style, relying on, *inter alia*, *Baron v. Baltimore*,¹⁷ and the *Slaughter-House Cases*.¹⁸ One might, therefore, be inclined to ask whether *Cruikshank*'s nineteenth-century holding that the Second Amendment does not bind the states survives the incorporation of most of the Bill of Rights over the course of the twentieth century. But since the Supreme Court early rejected "total" in favor of "selective" incorporation,¹⁹ and since no subsequent court has applied the Second Amendment against the states, *Cruikshank*—dated as its jurisprudence may seem—has not been overturned by implication through the general triumph of incorporation. Indeed, modern cases state forthrightly that *Cruikshank*'s Second Amendment holding is still law of the land.²⁰

The Second Amendment's right to keep and bear arms thus remains one of the few rights enumerated in the first eight amendments not to have been incorporated in the Fourteenth Amendment, and thus made binding upon the states.²¹ In part, this reflects the Second

16. The Supreme Court has not passed on the Second Amendment since the wave of incorporation decisions during the Warren era. See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961) (guaranteeing against the states the Fourth Amendment right to be free from unreasonable searches and seizures and to have excluded from criminal trials any evidence illegally seized); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (enforcing against the states the Sixth Amendment right to counsel); *Malloy v. Hogan*, 378 U.S. 1 (1964) (enforcing against the states the right guaranteed by the Fifth Amendment to be free of compelled self-incrimination); *Pointer v. Texas*, 380 U.S. 400 (1965) (enforcing against the states the Sixth Amendment right to confront opposing witnesses); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (enforcing against the states the right to a speedy trial); *Washington v. Texas*, 388 U.S. 14 (1967) (enforcing against the states the Sixth Amendment right to compulsory process for obtaining witnesses).

17. 32 U.S. (7 Pet.) 243 (1833).

18. 83 U.S. (16 Wall.) 36 (1873).

19. The guarantees of individual rights against the federal government set out in the first eight amendments are not now considered to apply on aggregate directly against the states via the Due Process Clause of the Fourteenth Amendment. However, they all—save the right to keep and bear arms, the right against quartering, the right to grand jury indictment, and the right to jury trial in civil controversies where more than twenty dollars is in dispute—have been applied individually by federal courts against state action on the grounds that they are fundamental to the principles of fairness and ordered liberty inherent in due process. This development is known as selective as opposed to total incorporation. See *Palko v. Connecticut*, 302 U.S. 319, 323-26 (1937) (Cardozo, J.) (rejecting total incorporation, but articulating the rationale that procedural principles fundamental to the sense of ordered liberty inherent in due process can be enforced against the states); *Adamson v. California*, 322 U.S. 46, 71-72 (1947) (Black, J., dissenting) (setting forth the classic argument for total incorporation).

20. See, e.g., *Fresno Rifle & Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723, 729-30 (9th Cir. 1992).

21. The others are the right against quartering of troops, the right to grand jury indictment, and the right to jury trials in civil controversies where more than twenty dollars is in dispute.

Amendment's concern with federalism. Unlike the First,²² Fourth,²³ Fifth,²⁴ Sixth,²⁵ Eighth,²⁶ and possibly even the Seventh²⁷ Amendment guarantees of personal liberties, the Second Amendment is aimed directly at preserving the balance of powers between federal and state governments.²⁸ As such, it lacks a private liberty component that could be applied as a limit to state action against individuals identical to the limit on federal action originally enshrined by the framers.²⁹

Legally irrelevant, but morally more vexing than *Cruikshank's* pre-incorporation vintage, is the fact that the case worked a shameful perversion of justice which should rightly place it alongside *Dred Scott* in the annals of judicial infamy. *Cruikshank* affirmed a federal circuit court order arresting judgment upon a jury verdict convicting six of several thousand members of the "White League" (a.k.a. the Ku Klux Klan) for banding together in disguise to obstruct black citizens from voting and to take retribution against blacks for appearing at the polls and for carrying arms to protect themselves. The undertakings of the "White League" that led to the prosecution of *Cruikshank* climaxed in the Colfax Massacre in which several hundred blacks were murdered by

22. Freedom from religious establishment, free exercise of religion, freedom of speech, freedom of the press, freedom of assembly, freedom to petition the government for redress of grievances. See U.S. CONST. amend. I.

23. Security against unreasonable searches and seizures of persons, houses, papers, and effects; security against general warrants (description of elements of a valid warrant). See *id.* amend. IV.

24. Rights of the criminally accused to presentment or grand jury indictment, security against double jeopardy, self-incrimination, deprivation of life, liberty, or property without due process of law, and against takings except for public use with just compensation. See *id.* amend. V.

25. Right to speedy and public trial by jury of the state and district, to be informed of the nature and cause of criminal accusation, to confront witnesses, compulsory process, and to counsel. See *id.* amend. VI.

26. Freedom from excessive bail, excessive fines, and cruel and unusual punishments. See *id.* amend. VIII.

27. Right to jury trial in civil suits where value in controversy exceeds twenty dollars, freedom from reexamination of fact tried by jury except under the rules of the common law. See *id.* amend. VII. These rights have not been incorporated against the states.

28. See *infra* Part I.B.5.

29. In this respect, the Second Amendment resembles the Tenth Amendment. Under the Tenth Amendment, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. The principle that powers not delegated to the federal government are reserved to the states denies the federal government the exercise of nondelegated powers, and by implication therefore affords some additional protection to nonspecified individual rights. However, this principle could not logically be incorporated by the Fourteenth Amendment as a limitation on state powers without doing violence to the overarching federal system established by the Constitution. In fact, the Tenth Amendment expressly preserves the unlimited police powers of the states in so far as they are not expressly curbed by the Constitution or reassigned to the federal government.

the Klan, which was then in the process of "redeeming" Louisiana from Reconstruction rule. *Cruikshank* had been the only successful federal prosecution in the wake of the atrocities, and arresting judgment in the case thus assured that the massacre went unpunished.³⁰

The Supreme Court's decision rested in part on a narrow reading of the Equal Protection Clause of the Fourteenth Amendment that has since been wholly superseded.³¹ Of perhaps partially redeeming value, *Cruikshank*—while steeped in the formalism characteristic of the age of pedantic pleading—is still cited for the nobler proposition that due process requires an indictment to set forth with particularity and factual specificity each element of an offense with which a defendant is charged.³² But to a less formalistic eye, this aspect of *Cruikshank* reflects less a concern for the rights of the accused than it does a

30. See ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 529–31, 550 (1988).

31. Technically, *Cruikshank* held that the constitutional rights of two black citizens, Levi Nelson and Alexander Tillman, had not been criminally violated when they were prevented by armed Klansmen from voting in a Louisiana election (the decision does not make clear whether this was a state or federal or combined election, because the indictment failed to set forth the answer to this question with sufficient particularity and detail). The Court held that the statute enforcing the Fourteenth Amendment applied only to incidents of national citizenship, and that, while the right not to be prevented from voting on account of race was an incident of national citizenship, the right to vote itself remained purely an incident of state citizenship, and that because the indictment merely stated that black voters had been prevented from exercising their suffrage and did not specify that they had been denied this right *on account of race*, the actions alleged in the indictment did not fall within the statute. Writing for a unanimous Court, Chief Justice Waite thus took a very narrow reading of the scope of federal constitutional rights protected by the Enforcement Act and contemplated within the Fourteenth Amendment. To this day, the Privileges and Immunities Clause is burdened by a similarly restrictive reading, see GERALD GUNTHER, CONSTITUTIONAL LAW 408–11 (12th ed. 1991), while jurisprudence under the Equal Protection and Due Process Clauses has grown far more expansive in its protection of individual rights. See *id.* at 410, 601–08. See also the excellent discussion in *Doe v. Daily News, L.P.*, 660 N.Y.S.2d 604, 610–11 (N.Y. Sup. Ct. 1997), regarding the superseding of *Cruikshank* on the scope of the Fourteenth Amendment Due Process and Equal Protection Clauses. The *Cruikshank* Court reached the Second Amendment question because Nelson and Tillman had endeavored to protect themselves against the Klansmen with weapons of their own, and held that there was no constitutional right against disarmament by private actors. The opinion implies that the only right of national citizenship contained in the Second Amendment is that of keeping and bearing arms for service in the militia free of unwarranted molestation by the federal Congress. See *United States v. Cruikshank*, 92 U.S. 542, 592–93 (1876). Interestingly, it is by no means clear from the record that Nelson and Tillman were not in fact disarmed while serving in the militia, because Louisiana's legitimately elected Republican governor had called out heavily black loyalist militia units to police the polling stations and resist the insurrectionist forces of the "White League." Of further interest is the fact that the "White League" operated under the authority of Louisiana's rival self-proclaimed Democratic governor, which raises the question of whether Nelson and Tillman might be said to have been disarmed "under color of state law" while serving dutifully in the militia, circumstances that would, even under Justice Waite's absurdly reductionist reading of the Fourteenth Amendment and the Enforcement Act, constitute a civil rights violation. See generally FONER, *supra* note 30, at 529–31, 550 (discussing the situation in Louisiana in 1873).

32. See, e.g., *United States v. Dixon*, 596 F.2d 178, 180 (7th Cir. 1979).

reactionary Court's desire to circumvent the congressional intent behind the Reconstruction Amendments and the Civil Rights Act of 1866.³³

If *Cruikshank*—its dubious provenance notwithstanding—remains readily understandable purely as Second Amendment precedent, *United States v. Miller* is more problematic from the standpoint of Second Amendment doctrine. The single critical sentence in that decision³⁴ is read by the individual right advocates as saying that the weapon in question, a sawed-off shotgun, could be proscribed only because it was not the sort of gun likely to be among the ordnance of a militia.³⁵ This reading suggests that other sorts of weapons—handguns, automatic rifles, assault guns, even rocket launchers and machine guns—are immune from government regulation. The opposing position reads the Court's language as confirming the inescapable connection between the right to have arms and the purposes of a collective militia, saying in effect that the proclamation of the major clause is dependent on its service to the minor. The unfortunate ambiguity in *United States v. Miller*'s holding is, to some extent, relieved by the Court's recognition in the same opinion that the "obvious purpose" of the Second Amendment is "to assure the continuation and render possible the effectiveness of [state militias] [The Amendment] must be interpreted and applied with that end in view."³⁶

Between *Cruikshank* and *United States v. Miller*, the Supreme Court handed down two other Second Amendment opinions, the first of which one writer has called the most important decision in the field.³⁷ In

33. See generally FONER, *supra* note 30, at 529-34, 569, 587 (discussing the Supreme Court's flaunting of the purposes of the Reconstruction amendments); see also Doe, 660 N.Y.S.2d at 610-11 ("[T]he radical plan to protect the Negro by subjection of the states was thus 'demolished' by Waite and his associates [referring to the decisions in *Cruikshank* and the *Slaughter-House Cases*] This marked the overthrow of the congressional plan of reconstruction within seven years after the adoption of the Fourteenth Amendment." (quoting BRUCE R. TRIMBLE, CHIEF JUSTICE WAITE: DEFENDER OF THE PUBLIC INTEREST (1938))); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 89-98 (1872) (Field, J., dissenting).

34. See *United States v. Miller*, 307 U.S. 174, 178 (1939) ("In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time 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 and bear such an instrument.").

35. See David I. Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 FORDHAM URB. L.J. 31, 44-48 (1976); Richard E. Gardiner, *To Preserve Liberty—A Look at the Right to Keep and Bear Arms*, 10 N. KY. L. REV. 63, 88-89; Art Black, *From Trenches to Squad Cars*, AM. RIFLEMAN, June 1982, at 30, 72-73.

36. 307 U.S. at 178.

37. See Roy G. Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 HASTINGS CONST. L.Q. 961, 996 (1975) ("[U]ndoubtedly the most important Second Amendment case was *Presser v. Illinois*.").

1886, in *Presser v Illinois*,³⁸ the Supreme Court considered constitutional challenges to the Military Code of Illinois. The case arose from a criminal charge brought under a portion of the Code prohibiting men from “associat[ing] themselves together [in any] military company” other than the regularly constituted state militia, or from drilling or parading without permission of the governor.³⁹ In upholding Hermann Presser’s conviction for leading an armed parade of his *Lehr und Wehr Verein*⁴⁰ through the streets of Chicago without leave from the governor, the Court made clear that the Second Amendment does not sanctify wholly private militia operating without state license or authority.⁴¹

The *Presser* decision is the best reasoned of the Supreme Court’s Second Amendment cases. But unfortunately for purposes of the present controversy, *Presser* addresses Second Amendment considerations only tangentially. The *Presser* opinion is devoted chiefly to rejecting well thought (if misplaced) preemption and supremacy arguments by appellant’s co-counsel, Lyman Trumbull. The former Senate judiciary chairman and moderate Republican leader during Reconstruction⁴² maintained that the entire Military Code of Illinois, consisting largely of the Illinois Militia Act of 1879, was unconstitutional. According to Trumbull, the Illinois code allowed an organized state militia of no more than 8,000 men, but the federal Militia Act of 1792, by which Congress occupied the field in respect to militia organization, actually required the states to maintain general or common militias, consisting of the entire nonexempted, military-aged male population.⁴³ Because the state act was incompatible with federal law, Trumbull insisted, it must give way in the face of the Supremacy Clause.⁴⁴ The Supreme Court, however, invoked the doctrine of severability, and held that the only provisions of the code relevant to Presser’s indictment—namely those barring armed parades by unlicensed bodies without gubernatorial permission—were clearly constitutional, and therefore declined to pass on the constitutionality of

38. 116 U.S. 252 (1886).

39. Military Code of Illinois, Act of May 28, 1879, ch. 192, § 5 (current version as amended at 20 ILL. COMP. STAT. 1805/94 (2000)).

40. This translates as the “Teaching and Defense Club,” which helps round out what is indeed a rather alarming image of Presser’s spiked-helmeted, rifle-bearing Germans on unlicensed marches through Chicago in celebration of ostensibly worthy civic values.

41. See *Presser*, 116 U.S. at 264-65.

42. On Trumbull’s constitutional politics, see FONER, *supra* note 30, at 226, 243-47, 250, 272, 336, 453-56, 507.

43. See Supplemental Brief for Plaintiff in Error, reported in *Presser*, 116 U.S. at 256, 256-57.

44. See *id.* at 259.

the rest of the state militia code.⁴⁵

In so far as the Second Amendment was concerned, the *Presser* Court reaffirmed *Cruikshank*, stating that the Amendment restrained only congressional action.⁴⁶ It also rejected a related Fourteenth Amendment claim on the grounds that any right to serve in the state militia was a creature of state law, and not a privilege or immunity of national citizenship.⁴⁷ Interestingly, the Court conceded in dicta that because “all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the states,” the states cannot 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.”⁴⁸ However, this prohibition on state-ordered disarmament of the federal militia reserve existed apart from the Second and Fourteenth Amendments.⁴⁹ Instead, it reflected what the Court called the “prerogative of the general government, as well as its general powers” respecting the “reserve militia of the United States.”⁵⁰ The Court thus invoked a concept of federal supremacy derived from the “calling forth” and “provid[ing] for”⁵¹ powers under the Constitution to imply a prohibition against state interference with arms bearing in the federal militia. This federal right of the people to

45. See *Presser*, 116 U.S. at 263. As the court explained:

We have not found it necessary to consider or decide the question thus raised as to the validity of the entire Military Code of Illinois, for, in our opinion, the sections under which the plaintiff in error was convicted may be valid, even if the other sections of the act were invalid. For it is a settled rule “that statutes that are constitutional in part only will be upheld so far as they are not in conflict with the constitution, provided the allowed and prohibited parts are separable.”

Id.

46. See *id.* at 265.

47. See *id.* at 266-67.

48. See *id.* at 265; see also *United States v. Rybar*, 103 F.3d 273, 285-86 (3d Cir. 1996) (declining to read *United States v. Miller* as affording Second Amendment protection to possession of weapons of colorable military character absent a connection to lawful use in the legitimate militia). As Judge Sloviter wrote:

[H]owever clear the Court’s suggestion that the firearm before it lacked the necessary military character, it did not state that such character alone would be sufficient to secure Second Amendment protection. In fact, the *Miller* Court assigned no special importance to the character of the weapon itself, but instead demanded a reasonable relationship between its “possession or use” and militia-related activity.

Id. at 286 (citing *United States v. Miller*, 307 U.S. 174, 178 (1939)).

49. See *Presser*, 116 U.S. at 265.

50. See *id.*

51. Cf. U.S. CONST. art. I, § 8, cls. 15-16 (“The Congress shall have Power . . . To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States . . .”).

keep and bear arms, like the state right to keep and bear arms guaranteed by the Second Amendment, had no application outside the context of militia service. To the Supreme Court,⁵² as well as to Lyman Trumbull,⁵³ the right(s) to arms protected the states and the nation against over-large standing armies by enabling a militia, but served no private purposes.

The other Supreme Court case touching the Second Amendment is the first *Miller* case, *Miller v. Texas*,⁵⁴ in which the Court dismissed a Second Amendment claim for want of jurisdiction and lack of a federal question. Beyond refusing to apply the Second and Fourth Amendments against state courts ("it is well settled that the restrictions of these amendments operate only upon the federal power, and have no reference whatever to proceedings in state courts"),⁵⁵ Justice Brown's 1894 opinion says nothing at all about the scope of the Second Amendment protection of the right to bear arms.

In addition to these four familiar cases, the Supreme Court has recently addressed the subject of constitutional restraints on gun control legislation in a celebrated Commerce Clause case, and in so doing cast light indirectly on the possible approach of the current justices to a

52. See *Presser*, 116 U.S. at 264-65. In the *Presser* Court's words:

The right voluntarily to associate together as a military company or organization, or to drill or parade with arms, without, and independent of, an act of Congress or law of the State authorizing the same, is not an attribute of national citizenship. Military organization and military drill and parade under arms are subjects especially under the control of the government of every country. They cannot be claimed as a right independent of law. Under our political system they are subject to the regulation and control of the State and Federal governments, acting in due regard to their respective prerogatives and powers. The Constitution and laws of the United States will be searched in vain for any support to the view that these rights are privileges and immunities of citizens of the United States independent of some specific legislation on the subject.

Id. at 267.

53. In Trumbull's words: "The citizen of the United States has secured to him the right to keep and bear arms as part of the militia which Congress has the right to organize, and arm, and to drill in companies." Supplemental Brief for Plaintiff in Error, *reported in Presser*, 116 U.S. at 256, 257-58. The Supreme Court clearly understood Trumbull's argument for a right to arms as premised on the militia's desirability as an alternative to a standing army. Thus the Court reported:

It is said [by counsel for plaintiff in error] that the object of the act of congress is to provide for organizing, arming, and disciplining all the able-bodied male citizens of the states, respectively, between certain ages, that they may be ready at all times to respond to the call of the nation to enforce its laws, suppress insurrection, and repel invasion, and thereby avoid the necessity for maintaining a large standing army, with which liberty can never be safe

Presser, 116 U.S. at 261-62.

54. 153 U.S. 535 (1894).

55. *Id.* at 538 (citing, *inter alia*, *United States v. Cruikshank*, 92 U.S. 542, 552 (1876); *Baron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833)).

Second Amendment challenge. In *United States v. Lopez*,⁵⁶ decided in 1995, the Court struck down the Gun Free School Zones Act of 1990—which outlawed carrying guns in the vicinity of schools—for failure to articulate any tenable relationship between gun possession in school zones and the regulation of interstate commerce. The decision has been hailed by scholars as the opening salvo in the Court's postmodern campaign to revitalize the federal structure of American government by considering critically the too-ready—and heretofore unchallenged—invocation by Congress of its powers to regulate interstate commerce. As far as *Lopez*'s possible Second Amendment implications are concerned, the clearest guidance as to any justice's reading of the right to arms emerges not from the majority, but from a brief dissent by Justice Stevens. In his words:

Guns are both articles of commerce and articles that can be used to restrain commerce. Their possession is the consequence, either directly or indirectly, of commercial activity. In my opinion, Congress' power to regulate commerce in firearms includes the power to prohibit possession of guns at any location because of their potential harmful use⁵⁷

Thus, Justice Stevens clearly assumes that gun possession lacks any constitutional protection that might render prohibition under the commerce power void or even suspect. If not quite as apparent, the majority opinion in *Lopez* appears to have similar implications regarding the lack of constitutional protection for a private right to own guns. The majority not only ignored suggestions by amici curiae, Academics for the Second Amendment et al., that the Gun Free School Zone Act be struck down as violative of the Second Amendment, but, perhaps more significantly, took for granted throughout its opinion that Congress could regulate or prohibit gun possession to the extent that it had a rational basis for so acting pursuant to its power to regulate commerce.

The issues joined in the above Supreme Court cases, if not well known to more doctrinaire polemicists, have been thoroughly expounded in the growing academic literature on the subject. It is not our intention to provide yet another critical review of the positions and arguments by those who have preceded us into the fray. Rather, we mean to submit an interpretation of the Second Amendment less often heard and, we feel, more persuasively supported by textual analysis and historical material than the polar positions that divide the protagonists.

56. 514 U.S. 549 (1995).

57. *Id.* at 602-03 (Stevens, J., dissenting).

In brief, the hypothesis we shall advance is this: The Second Amendment cannot be read as a simple guarantee to the states that they will be able to maintain armed troops subject to their command despite what Article I, Section 8 might appear to say to the contrary. Such a reservation of ungranted power, if such there were, would more likely be found in the Tenth Amendment.⁵⁸ From the text as well as a fair understanding of the contemporary ethic regarding arms and liberty, it seems to us overwhelmingly evident that the principal purpose of the Amendment was to secure a personal, individual entitlement to the possession of arms. We cannot, however, (as the individual right contingent generally does)⁵⁹ disregard entirely the first part of the text proclaiming “[a] well regulated Militia, being necessary to the security of a free State.” The question becomes, then, how does the introductory phrase affect the scope of the individual right to arms secured in the language of the second clause of the Amendment.

Here, as a matter of textual analysis, we regard it as highly significant that of the several great entitlements enunciated in the first eight amendments, no other is hedged by a conditional or explanative clause. The founders could have said, introducing the First, for example, that “free communication being essential to the intelligent exercise of the franchise, Congress shall make no law, etc.” If they had, the gloss might have had a different sheen; laws restricting artistic expression, commercial speech, or other communication unrelated to voting might have been tolerated. But they did not. They could have written in the Fifth that “torture being inimical to the dignity of man, and likely to induce false confessions, no one shall be compelled to be a witness against himself.”⁶⁰ But they did not. So too, introductory clauses might have altered the impact of the single provision of the Fourth Amendment or the several of the Sixth. The unconditional rights announced in the First, Fourth, Fifth, and Sixth Amendments

58. “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.

59. Residents and visitors of northern Virginia will perhaps have noted that, as recently as 1999, the NRA Headquarters building, visible from Interstate 66, proudly displayed the motto “The Right to Keep and Bear Arms Shall Not Be Infringed,” but failed to quote the Amendment’s introductory language. The sign has since been removed.

60. Had they done so, the doctrine of self-incrimination might have developed in accord with the interpretation expounded by Professor Albert Alschuler, who argues that “as embodied in the United States Constitution, the privilege against self-incrimination was not intended to afford defendants a right to remain silent or to refuse to respond to incriminating questions. Its purpose was to outlaw torture and other improper methods of interrogation.” Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2631 (1996).

might then have been construed considerably less generously.

In the light of this unique introductory language, we understand the Second Amendment as though it read: "*Inasmuch as and so long as a well regulated Militia shall be necessary to the security of a free state and so long as privately held arms shall be essential to the maintenance thereof, the right of the people to keep and bear arms shall not be infringed.*" This is not an arbitrary choice among available readings. As we shall show in Part III, the grammatical structure of the Amendment precludes reading the provision as severable, independent clauses, one of which might stand though the other falls. In our paraphrase we part company from the most devoted of the individual right advocates. The uncompromisable point of difference is that, to us, the language of the Amendment cannot support a right to personal weaponry independent of the social value of a regulated organization of armed citizens—notwithstanding comments in other contexts by some of the founders regarding guns and the ideal of personal responsibility.

To be sure, more than a few utterances by leading figures of the Revolutionary and constitutional period do endorse shooting and gun possession as tokens of firm and independent character. Perhaps the most cited instance thereof is the following homily by Thomas Jefferson in which he advises his fifteen-year-old nephew concerning the value of sport shooting as a character-building exercise:

A strong body makes the mind strong. As to species of exercises, I advise the gun. While this gives a moderate exercise to the body, it gives boldness, enterprize, and independence to the mind. Games played with the ball and others of that nature, are too violent for the body and stamp no character on the mind. Let your gun therefore be the constant companion of your walks.⁶¹

Jefferson's dictum reveals as much about the eighteenth-century English-speaking aristocracy's distaste for rowdy and plebeian soccer⁶² as it does about his constitutionalism. Yet Jefferson was in fact one of the few political leaders of the Revolutionary generation

61. Letter from Thomas Jefferson to Peter Carr (Aug. 19, 1785), in 8 THE PAPERS OF THOMAS JEFFERSON 405, 407 (Julian P. Boyd ed., Princeton Univ. Press 1953).

62. See RHYS ISAAC, THE TRANSFORMATION OF VIRGINIA, 1740–1790, at 98–104 (1980) (discussing the nature and cultural importance of sport in late colonial Virginia). To the Anglican gentry, soccer and cricket rated less loathsome than brawling and cockfighting, but were still considered unfit for gentlemen, who preferred the hunt, shooting, fowling, (lawn) bowling, croquet, horseracing, and boxing. The gentry generally involved themselves in horseracing and boxing only in a sponsorship and wagering capacity, leaving the prizefighting and jockeying to champion slaves. For an interesting and insightful description of the sociology of horseracing in the colonial South, see EDWARD HOTALING, THE GREAT BLACK JOCKEYS: THE LIVES AND TIMES OF THE MEN WHO DOMINATED AMERICA'S FIRST NATIONAL SPORT 9–37 (1999).

to go beyond endorsing gun ownership as a sporting attribute of manly and genteel character, and discuss weapons possession outside the context of militia service as a property worthy of constitutional protection.⁶³ In the third version of his 1776 draft constitution for Virginia—which, incidentally, the commonwealth declined to adopt—Jefferson proposed that no “free man be debarred the use of arms [within his own lands or tenements].”⁶⁴ This proposition, radical as it was, perhaps represented a retreat from an earlier draft of the proposed fundamental law for Virginia, which would have guaranteed an unqualified right that “freem[e]n shall [never] be debarred the use of arms,”⁶⁵ presumably on public, common, and unclaimed lands as well as their own. Neither version became law in the Old Dominion, a fate shared by a number of other radical provisions of Jefferson’s draft constitutions, including a clause guaranteeing fifty-acre land grants to every person not otherwise entitled to vote,⁶⁶ thereby elevating the general populace into the propertied electorate, rather than debasing electoral qualifications to the meanest level of the commonest man.

Jefferson’s early radicalism respecting constitutional entitlements to gun possession went the way of his land redistribution and emancipation schemes.⁶⁷ By the time of the Chesterfieldian letter to his

63. Samuel Adams was one of the few others. See *infra* notes 341, 456 and accompanying text (discussing Adams’s effort to append a draft amendment securing a private right to arms to the recommendations that the Massachusetts Ratifying Convention submitted to Congress).

64. Thomas Jefferson, Third Draft of Virginia Constitution (1776), in 1 THE PAPERS OF THOMAS JEFFERSON, *supra* note 61, at 356, 363. Boyd’s notation indicates that the words “within his own lands or tenements” were not entirely legible in the best-preserved text, but that this represents a probable reading.

65. Thomas Jefferson, First Draft of Virginia Constitution (1776), in 1 THE PAPERS OF THOMAS JEFFERSON, *supra* note 61, at 329, 344.

66. See Jefferson, *supra* note 64, at 362 (“Every person of full age neither owning nor having owned [50] acres of land, shall be entitled to an appropriation of [50] acres or to so much as shall make up what he owns or has owned [to] [50] acres in full and absolute dominion, and no other person shall be capable of taking an appropriation.”).

67. In 1776, Jefferson drafted a comprehensive, gradual emancipation plan for Virginia as Bill No. 51 in the proposed laws that the Committee of Revisors (Jefferson, Edmund Pendleton, and George Wythe) eventually submitted to the state legislature in 1779. See Thomas Jefferson, Draft of Bill No. 51: A Bill Concerning Slaves, in 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 61, at 470, 470-72. This is the same project that produced the Virginia Statute for Religious Freedom, but the emancipation measure did not become law; in fact, it was not introduced as a bill because members of the assembly “concluded that the public mind would not bear the proposition [of emancipation].” DUMAS MALONE, JEFFERSON AND HIS TIME: JEFFERSON THE VIRGINIAN 264 (1948). By 1779, when the General Assembly took the bill calling for the revision of the laws of Virginia under consideration, Jefferson had been elected governor. See *id.* at 264. During his governorship, Jefferson maintained a scrupulous distance from the legislative process consistent with his belief in the strict separation of powers, and played no role in the introduction of any bills. See generally *id.* at 261-64.

nephew, Jefferson's praise of firearms was no longer articulated on constitutional grounds. A few years later, writing Madison from Paris with advice on the desirability of the proposed federal Bill of Rights, Jefferson spoke exclusively of protecting a right against standing armies, and made no mention of arms or weapons at all.⁶⁸

Indeed, save for Jefferson's failed 1776 proposals and Samuel Adams's rejected draft amendment of 1787,⁶⁹ we know of no comments by leading figures of the Revolutionary generation concerning the value of private arms possession made in the context of drafting or interpreting the Constitution, the Second Amendment, militia legislation, or related state constitutional provisions. Exhortations lauding the virtues of shooting, including Jefferson's to his nephew, were inevitably made in an extra-legislative situation and without any legislative reference.⁷⁰ In contrast, for Jefferson's peers on the political

68. See Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in 12 THE PAPERS OF THOMAS JEFFERSON, *supra* note 61, at 438, 440; see also discussion *infra* notes 379-83.

69. See 3 WILLIAM V. WELLS, THE LIFE AND PUBLIC SERVICES OF SAMUEL ADAMS 267 (1865); see also *infra* notes 341, 456 and accompanying text.

70. Further illustration is provided by George Washington's sporadic correspondence with his Fairfax neighbors regarding hunting and the chase. On balance, Washington and the Fairfaxes seemed more involved with hounds than with guns, being more inclined to the fox hunt (and perhaps also dog-based pest control) than to shooting game. See, e.g., Letter from Bryan Fairfax to George Washington (Oct. 15, 1769), in 8 THE PAPERS OF GEORGE WASHINGTON 261, 262 (W.W. Abbot & Dorothy Twohig eds., Univ. Press of Va. 1993) (discussing the hound Fry's debut as a fox hunter, and the question whether it would be beneath his canine dignity to be borrowed by some of Washington's slaves for the purpose of culling the local raccoon population); Letter from Bryan Fairfax to George Washington (Aug. 3, 1772), in 9 THE PAPERS OF GEORGE WASHINGTON, *supra*, at 77, 77-78 (regarding a gift of sporting hounds whose skill Mrs. Washington had questioned to Mrs. Fairfax). Still, it cannot be denied that they did shoot. See Letter from George William Fairfax to George Washington (Feb. 22, 1773), in 9 THE PAPERS OF GEORGE WASHINGTON, *supra*, at 183, 183-84 (explaining that the political climate dictated the elder Fairfax's imminent departure for the home country (taking with him, of course, Lady Fairfax—Washington's favorite Sally), but that a set of pistols should be left at his seat for Colonel Washington's use in hunting on Fairfax's lands, which, according to the annotation, see *id.* at 184 n.2 (citing Washington's diary), Washington spent the next two days doing with the younger Fairfax and associates (while Washington's diary remarked the party "found a fox," it is to be expected hounds rather than guns perpetrated the ultimate act)).

The most important point for present purposes is that Washington used the term "arms" in a military, as opposed to a sporting, context. See Letter from George Washington to George Mason (Apr. 5, 1769), in 8 THE PAPERS OF GEORGE WASHINGTON, *supra*, at 177, 178, in which Washington discusses the pending association (a nonimportation agreement) and reflects:

At a time when our lordly Masters in Great Britain will be satisfied with nothing less than the deprivation of American freedom, it seems highly necessary that something shou'd be done to avert the stroke and maintain the liberty which we have derived from our Ancestors; but the manner of doing it to answer the purpose effectively is the point in question.

That no man shou'd scruple, or hesitate a moment to use a—ms in defense of so valuable a blessing, on which all the good and evil of life depends; is clearly my opinion; yet A—ms I wou'd beg leave to add, should be the last resource; the de[r]nier resort. Addresses to the Throne, and remonstrances to parliament, we have

stage, arms-related discourse in a legislative context focused on securing or organizing the militia rather than protecting a private right to own guns for recreational or other personal purposes. The most telling collateral utterance relating to the language of the Second Amendment is doubtless the Militia Act of 1792. Passed by Congress only one year after the Amendment's ratification, the Militia Act aimed to flesh out the right to arms described in the Amendment. It provided:

That every citizen so enrolled [in the militia] and notified, shall, within six months thereafter, provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch with a box therein to contain not less than twenty-four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball: or with a good rifle, knapsack, shot-pouch and powder-horn, twenty balls suited to the bore of his rifle, and a quarter of a pound of powder; and shall appear, so armed, accoutred and provided, when called out to exercise, or into service, except, that when called out on company days to exercise only, he may appear without a knapsack.⁷¹

This statute, the light it sheds on the Second Amendment, and its importance to the evolution of the militia are analyzed in detail below in Part II.A.1. But for now, it is sufficient to compare the language in the statute to that in Jefferson's avuncular maxim. The statute reflects the military reference of the framers' obligation-focused "rights talk" in the Second Amendment, while Jefferson's aphorisms on the sporting, manly, and salubrious nature of shooting, not only lack a military reference, but pivotally remain wholly apolitical, extra-legal, and unconcerned with rights.⁷²

already, it is said, proved the inefficiency of; how far then their attention to our rights & privileges is to be awakened or alarmed by starving their Trade & manufactures, remains to be tried."

Arms then, unlike "hounds," "dogs," or even "pistols" implied to Washington military action with a strong political dimension, so much so that he dared not spell out the word in the context of embracing a potentially treasonous combination to protest actions and policies at least putatively vested with legitimate authority by his dread Sovereign (and namesake) Georgius Tertius Rex Britanniae et Hiberniae.

71. Uniform Militia Act of 1792, ch. 33, § 1, 1 Stat. 271, 271, *repealed by* Dick Act, ch. 196, 32 Stat. 775 (1903).

72. Indeed, it is worth remarking that, unlike the framers of the Second Amendment, Jefferson spoke not of *bearing arms* at all, but simply of a "gun" being his nephew's "constant companion [on his] walks." The Second Amendment speaks not of *guns*, but of *the right "to keep and bear Arms."* In late-eighteenth-century usage, *bearing arms* was a term of art with an obvious military and legal meaning. "Carrying a gun" lacked the restrictive technical connotations of *bearing arms*, and the Second Amendment nowhere mentions a "right to carry a gun." Cf. Garry Wills, *Why We Have No Right to Keep and Bear Arms*, N.Y. REV. BOOKS, Sept. 21, 1995, at 62, 64-65 (setting forth a scholarly exposition of the etymology and technical meaning of *bearing arms*); discussion *infra* pp. 593-94. In this sense, even Jefferson's constitutional proposal of 1776 (although not his original draft thereof) admits quite plausibly of

At least as early as 1840, courts acknowledged that the terms “keep and bear Arms” had military connotations inconsistent with assertions of personal rights to carry whatever weapons pleased the individual.⁷³ Moreover, this recognition reflected long established usage, not linguistic innovation.⁷⁴ In our analysis, then, the individual right to keep and bear arms secured in the Second Amendment is a right without application outside the context of service in state or federal militia. As our focus shifts forward from the time of the Republic’s founding, we will demonstrate that the critical context surrounding the personal right to bear arms set down in 1789 has experienced dramatic, substantial, and material changes; changes which began even in the early years of nationhood, accelerated over the course of the nineteenth century, and reached the very foundations of the right in the twentieth century.

In the early years of the Republic, compulsory, universal militia service gave way to the volunteer principle, as the militia-of-the-whole fell into proverbial disfavor, disrepute, and desuetude.⁷⁵ Even more fundamentally, from 1808 onward, Congress provided an annual appropriation of \$200,000 with which the states could purchase militia arms,⁷⁶ thereby taking the first steps down a long road leading to the national government’s complete assumption, during the early twentieth

a less expansive, exclusively military reading. Cf. discussion *supra* pp. 421-23.

73. See *Aymette v. State*, 21 Tenn. (2 Hum.) 154 (1840). In *Aymette*, the court was interpreting a provision of the Tennessee Constitution, which then provided that “[t]he free white men of this State have a right to keep and bear arms for their common defense.” The court stated in its opinion:

[E]very free white man may *keep and bear arms*. But to keep and bear arms for what? If the history of the subject had left in doubt the object for which the right is secured, the *words* that are employed must completely remove that doubt. It is declared that they may keep and *bear* arms for their common defence. The word “common,” here used, means, according to Webster: 1. Belonging equally to more than one, or to many indefinitely. 2. Belonging to the public. 3. General. 4. Universal. 5. Public. The object, then, for which the right of keeping and bearing arms is secured is the defence of the *public*. The free white men may keep arms to protect the public liberty, to keep in awe those who are in power, and to maintain the supremacy of the laws and the constitution. The words “bear arms,” too, have reference to their military use, and were not employed to mean wearing them about the person as part of the dress. As the object for which the right to keep and bear arms is secured is of a general and public nature, to be exercised by the people in a body, for their *common defence*, so the arms the right to keep which is secured are such as are usually employed in civilized warfare, and that constitute the ordinary military equipment.

Id. at 158 (emphasis added).

74. See Wills, *supra* note 72, at 64; see also David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551, 554 (1991) (“The militia must be the people acting together, not isolated persons acting individually.”).

75. See MARCUS CUNLIFFE, *SOLDIERS AND CIVILIANS: THE MARTIAL SPIRIT IN AMERICA, 1775-1865*, at 202-12 (1968).

76. Act of Apr. 23, 1808, ch. 55, § 1, 2 Stat. 490, 490. For an analysis of the law, see CUNLIFFE, *supra* note 75, at 193; discussion *infra* note 538 and accompanying text.

century, of the arming of the militia, which the Militia Act of 1792 had rested with the individual, able-bodied man.⁷⁷ Even as early as the Civil War, when the nation first confronted the need for mass mobilization under the Constitution, all state enrollees and volunteer companies were sworn into federal service.⁷⁸ And after considerable initial confusion regarding the bounds of state and federal authority, all arms used by the 2,666,999 soldiers who served in the Union armies⁷⁹ were procured and issued by the federal government.⁸⁰

In 1903, following the great disorder which accompanied mobilization of state guard units during the Spanish War and Philippine insurrection, Congress finally acted under pressure from President Roosevelt to subdivide the militia-of-the-whole—by then entirely fictitious—into an active militia (the National Guard) and unorganized militia (the nonenrolled male population between eighteen and forty-five years of age). At the same time, the federal government standardized state units and equipment and, in return for massive increases in federal funding, the states accepted vastly enhanced federal supervision of militia training.⁸¹

Congress acted again in 1908 to make the National Guard the country's first-line reserve, providing that the organized militia would be called forth before the raising of federal volunteers.⁸² More fundamentally, Congress waived existing territorial limitations on National Guard call ups, thereby attempting to bypass the issue of the constitutionality of militia service outside the United States which had plagued the president and the War Department in the wars of 1812–15, 1846–48, and 1898–1901. Within a few years, however, both the attorney general and the judge advocate general of the army had written reports finding this use of the militia to be unconstitutional,⁸³ presenting Congress anew with the problem of legally deploying

77. See Uniform Militia Act of 1792, ch. 33, § 1, 1 Stat. 271, 271, *repealed by* Dick Act, ch. 196, 32 Stat. 775 (1903). For an analysis of the Uniform Militia Act of 1792, see CUNLIFFE, *supra* note 75, at 184; WEIGLEY, *supra* note 8, at 93-94; discussion *infra* notes 482-91 and accompanying text.

78. See WEIGLEY, *supra* note 8, at 204; Wiener, *supra* note 8, at 191.

79. See WEIGLEY, *supra* note 8, at 216-18.

80. See *id.* at 203-04.

81. See Dick Act, ch. 196, 32 Stat. 775 (1903). For analysis of the Dick Act, see Perpich v. Department of Defense, 496 U.S. 334, 342 (1990); MARTHA DERTHICK, *THE NATIONAL GUARD IN POLITICS* 26-27 (1965); WEIGLEY, *supra* note 8, at 320-22; Wiener, *supra* note 8, at 193-96.

82. See Militia Reform Act of 1908, ch. 204, § 5, 35 Stat. 399, 400-01.

83. See 29 Op. Att'y Gen. 322 (1912).

American reservists overseas.⁸⁴

This controversy came to a head during the preparedness movement that preceded American entry into World War I. The bitterly contested National Defense Act of 1916⁸⁵ “federalized” the organized militia, which was thenceforth known only as the National Guard, and integrated it into the command structure of the War Department and the regular army. Upon Congressional authorization, the president was empowered to draft guardsmen into federal service for the duration of the emergency specified by Congress. In the years before World War I, then, the state militias were being integrated into a federally supervised United States Army National Guard supplied with standardized, congressionally prescribed arms purchased with federal funds and kept in state arsenals, which too were increasingly financed by the national government. During the same period, the states acknowledged delegation of the provision of security against invasion to the U.S. Army and the organized reserves, laying the framework of federal relations that allowed the massive mobilization of citizens into soldiers in both world wars.⁸⁶

The next step on the road to federal integration was taken during the Hundred Days of 1933.⁸⁷ Congress made the National Guard part of the army during peacetime as well as war, justified its administration for the first time not under the Militia Clause but under the Army Clause of the Constitution, and “eliminated the word ‘Militia’ from the War Department organization by changing the name of the supervisory agency to National Guard Bureau.”⁸⁸ Crucially, the states now accepted the dual enlistment system whereby guard members took simultaneous oaths to serve in their state units and in the regular army when called up to national duty.⁸⁹ Presidential authorization to draft individual guard

84. See WEIGLEY, *supra* note 8, at 324-25.

85. National Defense Act of 1916, ch. 134, 39 Stat. 166.

86. See WEIGLEY, *supra* note 8, at 344-50.

87. Act of June 15, 1933, ch. 87, 48 Stat. 153 (amending the National Defense Act of 1916, ch. 134, 39 Stat. 166).

88. See Wiener, *supra* note 8, at 209. Wiener comments that “the 1933 Act proved conclusively that a well-regulated militia is impossible of attainment under the militia clause, and can be organized only by resort to the plenary and untrammelled powers under the army clause.” *Id.*

89. The dual enlistment system continues in force to this day. In the words of Justice Stevens:

Since 1933 all persons who have enlisted in a State National Guard unit have simultaneously enlisted in the National Guard of the United States [U]nder the “dual enlistment” provisions of the statute that have been in effect since 1933, a member of the Guard who is ordered to active duty in the federal service is thereby relieved of his or her status in the State Guard for the entire period of federal service.

members into federal service, which had facilitated mobilization in World War I but had dissolved the traditional state units, now gave way to a delegated power to order guard units into federal service whenever Congress declared a national emergency and authorized troop use in excess of the regular forces. Finally, in 1952, Congress did away with the requirement of the declaration of an emergency and gave the president essentially discretionary power to call up National Guard units with gubernatorial consent.⁹⁰

In the years since World War II, however, the roll of a mass reserve in assuring national security has seriously diminished, in part because the technical complexity of equipment and tasks required of the modern army have dictated a heightened emphasis on professionalism, and in part because nuclear arsenals have made massed war drawing all the personnel reserve of the country increasingly unlikely. The need for a whole nation in arms has—in all likelihood, permanently—disappeared. At the same time, conscription has become so unpopular as to border on being politically unfeasible. In this climate, the volunteer principle has again supplanted the draft as the recruiting mechanism for fighting the limited wars of the nuclear age, leaving no shadow of the old militia's universality or compulsory service obligation about today's National Guard.⁹¹

These historical processes, treated in detail in Part II, have fundamentally changed the militia and the context in which it operates. Taken together, we will argue, historical developments have altered a vital condition for the articulated right to keep and bear arms. While not exactly obsolete, the Second Amendment has become, like the Third, dormant: of no significance or effect on Congress's gun regulation power unless or until the conditions of the enactment are revived, state militias⁹² are restored, and militia members are required to arm themselves. It might illustrate our position regarding the present posture of the Second Amendment to imagine a provision of the 1789 Bill of Rights reading as follows: *Commerce within and between the several States being essential to the economy of the Nation, the right of the people to breed and keep horses shall not be infringed.* Should government, at some level that is bound by the provision, enact today a

Perpich v. Department of Defense, 496 U.S. 334, 345-46 (1990).

90. See *id.* at 346.

91. See WEIGLEY, *supra* note 8, at 505-06.

92. By a "state militia" we mean an official state military organization as contemplated by the Second Amendment and not self-styled private bands of paramilitary citizens. See *supra* notes 37-53 and accompanying text (discussing *Presser v. Illinois*).

restriction on the number of horses that might be stabled within a designated area, no constitutional challenge would be heard, we will claim, because the right created by the provision had gone into suspension when equine commerce was taken over by the internal combustion engine.

We are proposing that the first clause of the Second Amendment—which cannot be ignored—must be read as a *condition* for the principal clause. And it is significant that—even if rhetoric concerning the virtue of economic self-sufficiency and citizen defense had permeated late-eighteenth-century thinking on this side of the Atlantic—the condition imposed by the text is not: “Self-reliance and the virtue of arms being necessary to the maintenance of personal security, the right of the people to keep and bear arms shall not be infringed.” Such a condition, it might well be maintained, would never change and would keep the enunciated right as alive today as it was when enacted. To those who would have it so, we express our regrets but, as they have often said to their gun control opponents, wishing will not make it so. If one side is stuck with one clause, the other is as fully bound to take account of the other.⁹³

It should be unnecessary to emphasize that our position says nothing whatsoever about the legality or wisdom of possessing arms, the types of weapons people may own, or regulation of the manner and purposes of carrying them. We say only that such entitlement or prohibitions as there may be must emanate from a source other than the Second Amendment to the Constitution of the United States. And it is, in our view, entirely fitting that the democratic branch—free of constitutional constraints—should from time to time enact, amend, repeal, and reenact, locally or federally, such rules regarding private access to weapons of various sorts as may seem wise.⁹⁴

93. Cf. Wills, *supra* note 72, at 73 (citing Levinson, *supra* note 7, at 657-59).

94. In essence, we are repeating Justice Holmes's famous dissent in *Lochner v. New York*, 198 U.S. 45, 74 (1905). If the “Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics*,” *id.* at 75, neither does the Second Amendment enact Wayne LaPierre's *Guns, Crime, and Freedom* (1995). Justice Holmes wrote regarding the Court's grafting of substantive due process limitations against economic regulation onto the Fourteenth Amendment that “a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*.” *Id.* (Holmes, of course, lived to see the Soviet constitutions of 1918 and 1924.) He felt that the judiciary's agreement or disagreement with a particular social or economic policy “has nothing to do with the right of a majority to embody their opinions in law.” *Id.* He had no doubt that it was settled law that state legislatures “may regulate life in many ways which [Justices of the Supreme Court] as legislators might think as injudicious or if you like as tyrannical [as a maximum-hours law for bakery workers].” *Id.* To Holmes, the Fourteenth Amendment's Due Process Clause restricted legislative action only to the degree that “a rational and fair man necessarily would admit that

Perhaps the most difficult component of our argument will be neither the linguistic nor the historical, but the theoretical: How do changing times affect the meaning of ancient texts? Here, eschewing the modern, pragmatic Posner,⁹⁵ we come closer to Justice Scalia's view that the original intention of the framers, inferred from text according to a hypothetical contemporary understanding, should govern as long as and insofar as critical, assumed, underlying social and technological factors remain fundamentally unchanged.⁹⁶ Since most such things evolve in some respects, what constitutes an unchanged *critical* factor is obviously a matter of judgment. But it does seem clear that a provision relating to horses enacted in an era of exclusively horse-powered land transportation loses its force when the mode of commerce is utterly altered. To this general theory of construction, we would add that an express recognition in the governing text of the dependence of a right on a particular social condition makes our interpretative model considerably easier to apply.

This, then, is our plan of argument. Following this introductory summary, this Article treats the ideological roots of the Second Amendment in Part I. Much of what we set forth there is familiar ground to scholars of the eighteenth century. In the light of the high-decibel controversy surrounding the modern import of the

the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law." *Id.* at 76.

In essence, we are arguing that the Second Amendment should never become a vehicle for judicial imposition of restraints grounded in social theory on state or national legislatures' abilities to regulate, restrict, or prohibit possession of firearms for purely private purposes. The Second Amendment was intended to prohibit Congress or the president from disarming state militias by disarming their members. To read into it any other limitations on legislative authority would be to engage in long-discredited Lochnerian intervention. Activism of that stripe would differ entirely from Warren-era judicial insistence that the Reconstruction Congress intended the Due Process Clause of the Fourteenth Amendment to afford citizens the same civil rights under state law as they were guaranteed under federal law by the express terms of the Constitution, and criminal defendants the same procedural rights in state court as they would be afforded under the explicit terms of the Bill of Rights in a federal trial. How such activism might compare to judicial insistence that textually unspecified rights to sexual and reproductive liberties lurk within the penumbra of specified rights of criminal defendants (or home owners!) is a closer, more delicate, and more contentious question. But to the extent that libertarians are less interested in political outcomes than principles of jurisprudence, this last consideration might occasion pause for thought. In other words, if Judge Bork is right on *Roe v. Wade*, then the NRA has no Second Amendment argument against the Brady Law. See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 110-15, *passim* (1990).

95. For the new, pragmatic thesis, see Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1 (1998); Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1640-42 (1998).

96. See *County of Riverside v. McLaughlin*, 500 U.S. 44, 60 (1991) (Scalia, J., dissenting). See also the thoughtful discussion in Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 397-98 (1995).

constitutional provision, it may come as a mild surprise to lawyers not overly steeped in early-American political theory to find much general accord regarding seventeenth- and eighteenth-century antecedents and the function of arms and the militia in the design of the new American political experiment. We describe the understanding of the founding generation as derived from the political thought that impressed itself on the minds of those concerned with the nature of just and enduring government. Here we draw upon not only the influential sources in America of the late eighteenth century, but also explore the collateral expressions of the founders and their contemporaries to find the most likely purposes and assumptions underlying the text. This will constitute the web of historical context from which the meaning of the text may be read. Then, in Part II we will describe the evolution of the military unit called militia to its present (non)status in the social fabric of contemporary America.

Thereafter, in Part III, we turn to the Second Amendment's meaning today, seen, as we think it must be, in the light of its history and its context—a context very different from that which existed when the Amendment was written. We will stress that because the operative language of the Second Amendment is predicated on the existence of a specified social and military condition,⁹⁷ fidelity to the Amendment requires that the rights it guarantees be assessed in the light of today's militia's constitutional posture, its status under state and federal law, the manner in which it is armed, and its role in the preservation of the states' and the Union's military and civil security. The inquiry will focus on how far these rights contemplated in reference to the militia as it existed in theory and practice in 1791—when individual members were responsible for arming themselves—survive after that militia has vanished in fact (and very nearly in name as well). In our Conclusion, then, the Second Amendment reemerges in its original meaning, protecting rights fundamental to the vitality of the militia, the constitutionally preferred system of national defense. But as the Second Amendment resurfaces with the meaning with which it was invested over two hundred years ago, it also enters into a modern America in which that original meaning, at least for the time being, no longer has any scope for application or operation. Finally, we will undertake to respond to three eminent scholars who have expounded theses at variance with our own.

97. In other words, that “[a] well regulated Militia, be[] necessary to the security of a free State.”

I. ARMS, THE MAN, AND THE MILITIA: THE HISTORY OF A CONCEPT

A. *The Militia and the Militia Ideal in the Historiography of the American Revolution*

Many have been baffled by the language of the single sentence that is the Second Amendment. Just what should we make of the odd—indeed unique—preamble, the language that precedes (but otherwise seems to bear no connection to) the ringing declaration of the right to keep and bear arms? Some have emphasized that since the *militia* was, at the time, the whole *people* (free, white, adult, male people anyway), the words “Militia” in the first clause and “people” in the second clause are synonymous, and the right of arms is extended only to the militia as such.⁹⁸ Others, as vehemently, would regard the preamble as nothing but introduction, of no more substantive significance than an indrawn breath before the delivery of the message.⁹⁹ And the message, like others in the First, Fourth, Fifth, and Sixth Amendments, is unequivocal: now and forever, in military pursuits and all others, guns

98. See, e.g., Weatherup, *supra* note 37, at 991-92. Weatherup notes that Madison, while speaking to the adequacy of the unamended Militia Clauses at the Virginia convention, used the words “people” and “militia” as synonyms, “as [he did in] the Second Amendment, which he was later to draft.” *Id.* The passage to which Weatherup refers is, however, not without its ambiguities. Madison actually does not use the terms “people” and “militia” interchangeably. Rather, he uses “militia” to mean the people’s agent, as opposed to the people themselves. In the following passage (the one that Weatherup had in mind), our sense is that Madison uses “people” to suggest an agency relationship in much the same way as New York does when it refers to the “People” to mean the state prosecutor acting on behalf of the state’s inhabitants:

If resistance should be made to the execution of the laws, [Madison] said, it ought to be overcome. This could be done only in two ways—either by regular forces or by the people. If insurrections should arise, or invasions should take place, the people ought unquestionably to be employed, to suppress and repel them, rather than a standing army. The best way to do these things was to put the militia on a good and sure footing, and enable the government to make use of their services when necessary.

3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 378 (Jonathan Elliot ed., 2d ed. 1863) [hereinafter STATE DEBATES].

The reporter’s is clearly not a verbatim transcript. While the indirect, descriptive rendering of Madison’s speech set down in *State Debates* does suggest that the militia called to duty serve as the people in action, it very much leaves open the question whether the militia and the people are coextensive in their rights. See also Cress, *supra* note 8, at 23-24 (rebutting an individualist argument much like Weatherup’s, first advanced by Robert E. Shalhope in *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599 (1982)). But see Williams, *supra* note 74, at 554 (theorizing that the individualistic interpretation is fundamentally inconsistent with the republican principles out of which the Second Amendment sprang). Republicanism supports the idea of a militia only insofar as a militia is a collective entity acting for the common good. See *id.*

99. Joyce Lee Malcolm, for one, sees the first clause as “amplifying” rather than “qualifying” the second. Joyce Lee Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q. 285, 314 (1983).

are an individual entitlement immune from government curtailment.¹⁰⁰

Fair consideration of the ample historical record, however, discloses that to the framers, the ratifiers, and indeed to the polity of new-fledged Americans generally, the language of the provision could hardly have been a more felicitous expression of its scope, intent, and purpose. There seems to us little doubt that the provision protected as an individual right (and in more democratically generous form)¹⁰¹ the ancient custom of free, adult citizens to keep and to carry arms,¹⁰² but

100. See, for example, Halbrook, *supra* note 7, at 598, who notes that when Madison introduced the Bill of Rights in 1789, he explained that the amendments "relate first to private rights," thereby endorsing what Halbrook assures us was a "leading popular analysis" under which "the people [were] confirmed . . . in their right to keep and bear their private arms."

101. The progenitive English Bill of Rights of the seventeenth century conditioned the right to "have Arms" on station and Protestantism—class and religion-based restrictions that the Americans elected not to incorporate into the Bill of Rights of 1789. Compare An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown (Bill of Rights), 1689, 1 W. & M., Sess. 2, ch. 2, 7 (Eng.) ("That the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions and as allowed by Law."), with U.S. CONST. amend. II. See also detailed discussion *infra* notes 178-201 and accompanying text.

102. The ancient right figured highly in Blackstone's reckoning, not as one of the three primary (natural) rights (personal security, personal liberty, private property), but as one of the five auxiliary (political) rights without which the primary rights would be "dead letter[s]." See 1 WILLIAM BLACKSTONE, COMMENTARIES *140-45. Blackstone described these five auxiliary rights as (1) the constitution, powers and privileges of Parliament; (2) the limitation of the king's prerogative; (3) the right to apply to the courts of justice for redress of injuries; (4) the right of petitioning the king or either house of Parliament for redress of grievances; and (5) the right of subjects to have arms for their defense. See *id.* at *141-45; see also 1 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; OR A COMMENTARY UPON LITTLETON § 71.a. (19th ed. 1853). At first blush, Blackstone may appear to endorse an unbridled right to arms for defense of self as well as realm and weal, but it is well to note that in the context of his times, Blackstone took for granted a high degree of regulation, circumscription, and exclusion to the right to arms he described. More fundamentally, the Bill of Rights is not generally read to have enshrined the common law as memorialized by Blackstone, but to have constitutionalized exactly those rights that it expressly articulates and to have given them the scope defined by the terms of the amendments themselves or subsequently by judicial inquiry. Thus Blackstone is a useful constructive aid in so far as he elucidates terms of art appearing in the Bill of Rights, but when looking to Blackstone for guidance as to meaning, we should not cross over into grafting his assertions of legal principle into the Bill of Rights, or into giving legal principles protected therein precisely the scope they are assigned in the *Commentaries*. See, for example, Justice Brennan's analysis of the First Amendment right to free speech in *New York Times v. Sullivan*, 376 U.S. 254, 273-77 (1964), and in particular his commentary on the Sedition Act of 1798, expressing the Court's sense that even though that act had never been subjected to judicial review, it almost certainly had been unconstitutional *ab initio*. Justice Brennan implicitly rejected the position maintained by some High Federalists during the controversy surrounding enforcement of the Alien and Sedition Acts that the First Amendment constitutionalized the law of libel as set forth by Blackstone, and hence accorded free speech no greater protections than those recognized by the common law of libel in England. The Court went on to endorse Madison's famous argument that establishment of the American constitutional Republic marked a fundamental departure from English common law precedent. See *id.* at 274-75. By insisting that "make no law means make no law," Justice Brennan was as persuasive in this context from a textualist standpoint as he was from the perspective of the "living Constitution" with which he was often more closely associated. On Justice Brennan and the *Sullivan* opinion, see generally ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT (1991).

only in the context and for the advancement of the organized, communal military units generally believed to be indispensable to the preservation of political liberty.¹⁰³ During the ratification debate, some radical Antifederalists did call for a wider, purely private right to own weapons, but, at least outside of New Hampshire, theirs remained marginal voices.¹⁰⁴ On the other hand, innumerable contemporary utterances, cutting a wide swath across the political spectrum and spanning the full breadth of the nation, support our militia-focused reading. For the moment, we choose but one such expression from the Virginia Ratifying Convention. Virginia's recommended constitutional amendments, drafted principally by George Mason and appended to its vote of ratification, include language that is virtually identical to the Second Amendment, but more illuminating:

Seventeenth, That the people have the right to keep and bear arms; that a well regulated Militia composed of the body of the people trained to arms is the proper, natural and safe defence of a free State. That standing armies in time of peace are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the Community will admit; and that in all cases the military should be under strict subordination to and governed by the Civil power.¹⁰⁵

Like the framers of the Second Amendment two years later, Virginians at the ratifying convention imbedded the right to keep and bear arms in a web of related military principles. As Robert E. Shalhope writes, "more often than not [Americans of the Revolutionary generation] considered these rights inseparable."¹⁰⁶ *Bearing* implied making muster, equipped and ready for service; *keeping* entailed steady

103. There were, of course, exceptions to this general consensus, chiefly among the arch-Federalists. Many veterans of the Revolutionary officer cadre did not consider the militia necessary (or even useful to) the preservation of national security. See WEIGLEY, *supra* note 8, at 80-81, 88; see also discussion *infra* notes 272-81 and accompanying text. Alexander Hamilton went further—he did not believe the militia useful to the preservation of political liberty. Hamilton's view of the militia's utility to the conservation of liberty has much to do with his conception of the type of liberty sound government was designed to secure. To Hamilton, liberty meant no more than the ability of the financial and commercial classes to rely on a strong executive's ability to check the mobocracy, and to this end, the militia was hardly a useful tool at all, but rather a foil. See Williams, *supra* note 74, at 575-76. But see LANCE BANNING, *THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY passim* (1978) (discussing the republican conception of Hamilton's politics).

104. For a fuller discussion, see *infra* pp. 484-86.

105. For a detailed analysis of this passage, along with other utterances from the ratification period in favor of and against constitutional protection for a communal or private right to arms, see *infra* Part I.B.4.

106. Shalhope, *supra* note 98, at 611. Shalhope, however, does not share our position that the right to keep and bear arms had no meaning outside the militia context. See *id.* at 614.

readiness to serve when called upon.¹⁰⁷ For the founding generation and for near contemporaries, then, the right to bear arms, far more than others enshrined in the Bill of Rights, brooked, tolerated, invited, and even demanded regulation because of its communal and military context.¹⁰⁸

As the Virginia Ratifying Convention's conjunction makes plain, the right of arms was not therefore an *individual right* in the same sense as the rights expressed in the Fourth, Fifth, Sixth, and even the First Amendments to the United States Constitution. These are rights the exercise of which protected *personal integrity*, often at the expense of common interests. They reflect distinctly postclassical ideals, rooted in the principles of the common law, but accorded a basis in larger political theory only by the individual rights philosophers of the eighteenth century who forged the first modern conceptions of liberal democracy. They owe as much to the Enlightenment as to the Renaissance. In contrast, the *personal right* expressed in the neoclassical language of the Second Amendment was understood by principal draftsman James Madison to serve the interests of the commonweal by buttressing *community security* and reducing the sway of a dangerous, potentially usurpatory standing army.¹⁰⁹

The extent that we are today bound by the understanding of our foreparents, how far the running sands erode or reshape the governing intent of ancient text is, of course, an endless and perhaps fruitless debate.¹¹⁰ But we think the significance of dramatically altered context two centuries later is especially loud and clear in the case of the Second Amendment, because the framers explicitly stated their social and

107. See Wills, *supra* note 72, at 64.

108. See, e.g., STORY, *supra* note 9, at 708. In the often cited "palladium of liberties" passage, Justice Story calls for more forceful regulation of the militia in order to breathe life into the fundamental right to keep and bear arms. Story captures nicely the great irony behind the Second Amendment: Far from having any record of interfering with peoples' rights to keep and bear arms—suggesting that those rights required constitutional protection—the post-Revolutionary state and federal governments devoted considerable and largely unavailing efforts towards convincing citizens that they should indeed exercise these very rights and appear properly armed and accoutered on the muster day. The people by and large showed themselves less and less inclined to do so. See, e.g., CUNLIFFE, *supra* note 75, at 177-212.

109. For a discussion of Madison's conversion to the cause of a bill of rights and his role in drafting the Second Amendment, see *infra* pp. 493-96.

110. For an excellent summary of some the most influential approaches to originalism, see Jack Rakove's insightful *Introduction* to *INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT* 3, 3-10 (Jack N. Rakove ed., 1990). For a classic exposition of the viewpoint that we are expressly bound by the original meaning of constitutional and statutory text, see ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1990). See also the intelligent commentaries of Gordon S. Wood, Laurence Tribe, Mary Ann Glendon, and Ronald Dworkin contained in Justice Scalia's book.

ideological premise in the same breath as the right they enunciated.¹¹¹ Hence, in this Part, we will develop the historical argument that the right expressed was *individual*, and that it was deemed vital enough to be enumerated among the fundamentals because, in the republican framework of this particular provision, it was deemed a *communal* bulwark.

To pursue this inquiry into purpose and meaning, we must return to the frame of mind of the late eighteenth century.¹¹² As the Pulitzer and Bancroft Prize winner Gordon Wood, among others, has argued, the prevailing political climate in this epoch among Americans of all classes and conditions was vigorously intellectual and historicist.¹¹³ The American Revolution was, like the framing and adoption of the Constitution, a revolution of ideas.¹¹⁴ To Wood, the Revolution involved taking honored old ideas seriously, while the Constitution fashioned new ideas to serve old purposes.¹¹⁵ In this philosophical climate, "Militia" and "bear[ing] arms" were pedigreed terms of art, deeply steeped in meaning that was then as intuitively clear as it is now opaque. Both were central constructs in a system of thought with which the constitutional generation was intimately familiar, and with which many of its representatives were virtually obsessed.¹¹⁶ This was the

111. Since the First Congress took the pains to express its intent in the language of the Second Amendment itself—something it did for none of the other amendments in the Bill of Rights—this intention became incorporated into the Constitution by the Amendment's ratification. Therefore, the legislative intent behind the right to keep and bear arms demands particular fidelity; indeed, one could argue it becomes determinative of the scope of the right protected.

112. Here, we insist that history is important, that text takes meaning from context, and that the Constitution cannot be remade at will to reflect changing sensibilities. At the same time, we step away from the devoted originalism that would bind us to interpretations that make sense only by ignoring the evolution of ideas and institutions.

113. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 4-10 (1969).

114. Reflecting upon the momentous events of his youth, John Adams wrote to Jefferson in 1815:

What do we mean by the Revolution? The war? That was no part of the Revolution; it was only an effect and consequence of it. The Revolution was in the minds of the people, and this was effected, from 1760 to 1775, in the course of fifteen years before a drop of blood was shed at Lexington. The records of the thirteen legislatures, the pamphlets, newspapers in all the colonies, ought to be consulted during that period to ascertain the steps by which the public opinion was enlightened and informed concerning the authority of Parliament over the colonies.

Reprinted in BAILYN, *supra* note 2, at 1, 1.

115. See WOOD, *supra* note 113, at viii-ix, 83-90, 593-615.

116. On republicanism as the ideology that drove the American Revolution, see generally DOUGLAS ADAIR, *FAME AND THE FOUNDING FATHERS: ESSAYS* (Trevor Colbourn ed., 1974); BAILYN, *supra* note 2; H. TREVOR COLBOURN, *THE LAMP OF EXPERIENCE: WHIG HISTORY AND THE INTELLECTUAL ORIGINS OF THE AMERICAN REVOLUTION* (1965); 1 PAMPHLETS OF THE AMERICAN REVOLUTION, 1750–1776, *supra* note 2; J.G.A. POCOCK, *POLITICS,*

intellectual universe of civic humanism or classical republicanism,¹¹⁷ the political culture that formed the starting point for constitutional debate in late-eighteenth-century America.¹¹⁸

Until the late 1950s, most American historians assumed that the constitutional universe of the founding period could be reduced to a recapitulation of Locke's *Second Treatise on Government*. An outpouring of brilliant scholarship during the next two decades amply demonstrated that the constitutionalism of the founders and framers had in fact had a rather different predicate, that Locke was not a fundamental figure in their political hagiography, and that Americans of the constitutional period were far closer to the radical, civic, and communitarian impulses of the English Commonwealth and the Restoration-era opposition than to what twentieth-century writers have wrongly styled "Lockean" individualism.¹¹⁹ These insights became the

LANGUAGE, AND TIME: ESSAYS ON POLITICAL THOUGHT AND HISTORY (1973) [hereinafter POCOCK, POLITICS]; POCOCK, *supra* note 2; THREE BRITISH REVOLUTIONS: 1644, 1688, 1776 (J.G.A. Pocock ed., 1980); WOOD, *supra* note 113; Cecelia Kenyon, *Men of Little Faith: The Anti-Federalists on the Nature of Representative Government*, 12 WM. & MARY Q. 3 (1955). For historiographical reviews of scholarship on the American Revolution emphasizing the republican perspective, see Robert E. Shalhope, *Republicanism and Early American Historiography*, 39 WM. & MARY Q. 334 (1982) [hereinafter Shalhope, *Republicanism*]; Robert E. Shalhope, *Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism in American Historiography*, 29 WM. & MARY Q. 49 (1972). For a countervailing perspective, arguing that overestimation of republicanism's role in late-eighteenth-century America has obscured a protocapitalist animus at the root of Jeffersonian democracy, see JOYCE APPLEBY, CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790S (1984) (Appleby's title refers to Jefferson's party, not to the classically derived ideology); see also John Ashworth, *The Jeffersonians: Classical Republicans or Liberal Capitalists?*, 18 J. AM. STUD. 425 (1984). Even the neoliberal revisionists concede the centrality of republican ideology during the emotionally charged years before the Revolutionary War.

117. The terms "civic humanism" and "republicanism" connote different historical phases of what is essentially a single political ideology. We use the term "civic humanism" to refer to the political ideology of the Florentine Renaissance, as described particularly by POCOCK, *supra* note 2, at 183-218. James Harrington expanded upon these Florentine principles during the English Commonwealth, and his political thought became known as classical republicanism. See *id.* at 381-422. By itself, the term "republican" has been used to refer to the entire system of thought from Machiavelli onwards, but the term refers also more narrowly to the eighteenth-century American variant, which is described best in the first part of WOOD, *supra* note 113, at 3-90.

118. Notwithstanding critiques such as Appleby's, see APPLEBY, *supra* note 116, it remains difficult to overstate the influence of classical republican ideology on the formation of the American political design. Yet, for thoughtful commentary from an egalitarian and feminist perspective concerning the dangers of a potential republican revival in contemporary politics and jurisprudence, see Wendy Brown, *Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism*, 99 YALE L.J. 661 (1989). See also Williams, *supra* note 74 (offering another interesting take on the up and down sides of "neorepublicanism").

119. In American historiography, a long-standing assumption that Locke was the dominant figure in eighteenth-century political thought, and the determinative influence behind the ideology of the Revolution (see, e.g., CARL BECKER, *THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS* (1942)), did not survive focused, detailed probing of the pamphlets and papers of the Revolutionary period during the 1950s and '60s,

central tenets of a new republican paradigm, which in great measure determined the course of writing about early American history from the late 1960s into the early 1980s.¹²⁰

Not only did leaders of the Revolutionary era dwell on the radical thought of the Interregnum English Commonwealth and the Restoration opposition, the Americans also applied this republican ideology to the constitutional questions of their own time—including the issues of the relationship of liberty to arms possession and the role of the military in civil society. In the words of Lance Banning:

No man's thought is altogether free. Men are born into an intellectual universe where some ideas are native and others are difficult to conceive. Sometimes this intellectual universe is so well structured and has so strong a hold that it can virtually determine not only the ways in which a society will express its hopes and discontents but also the central problems with which it will be concerned. In 1789 Americans lived in such a world. The heritage of classical republicanism and English opposition thought, shaped and hardened in the furnace of a great Revolution, left few men free.¹²¹

The republican ideology that went so far in defining the political world of Revolutionary America rested on a short set of assumptions about the nature of people and the state. Like their Commonwealth-Whig forbears during and after the English Civil War, Americans of the Revolutionary period assumed that public virtue was both the source and goal of all legitimate exercise of public authority. Public virtue implied a common purpose, a dedication that transcended individual

which ushered in the republican historical revision. See, e.g., POCOCK, *POLITICS*, *supra* note 116, at 107 ("[T]he textbook account of Augustan political thought as *Locke et praeterea nihil* badly needs revision."). Locke's chief political influence, it emerged, flowed from his status as a representative Restoration-era opposition thinker, not from any proto-individualism inherent in his political writings. See BAILYN, *supra* note 2, at 34-54. Moreover, Locke was known to the colonists, not so much as a political theorist, but as the epistemologist behind *An Essay Concerning Human Understanding* (1690) and the pragmatist behind *Some Thoughts Concerning Education* (1693). See GARRY WILLS, *INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE 167-74* (1978). Finally, it emerged during the 1980s that Locke was hardly a conservative individualist at all, for he had not written his *Two Treatises of Government* after the fact in the 1690s to provide the post-Settlement government with theoretical underpinnings, but instead had penned the *Second Treatise* as a revolutionary manifesto in support of the Rye House Plot of 1682-83, an abortive regicidal and communitarian combination spearheaded by Locke's patron, the radical Whig leader Earl Shaftesbury. See RICHARD ASHCRAFT, *REVOLUTIONARY POLITICS & LOCKE'S TWO TREATISES OF GOVERNMENT* 327, *passim* (1986).

120. For a summary of the republican understanding of late-eighteenth-century American political thought, see the works cited *supra* note 116, particularly Shalhope, *Republicanism*.

121. Lance Banning, *Republican Ideology and the Triumph of the Constitution, 1789 to 1793*, 31 WM. & MARY Q. 167, 178-79 (1974) (footnote omitted).

interest.¹²² Its antithesis was corruption, both individual and constitutional.¹²³ Individual corruption could take the most obvious and literal form of soliciting or working improper, self-serving influence in government, or it could manifest itself in economic dependence that sapped the individual of his or her independent will and ability to make public-minded choices.¹²⁴ Constitutional corruption arose from interbranch imbalances or from imbalances in power among social orders, which undid the carefully nourished historical stability of the polity.¹²⁵

One of the vilest engines of constitutional corruption was the standing army and the system of debt, taxation, influence, and executive bureaucracy upon which it depended. Military power in the hands of a professional band of soldiers—whose loyalty to the government was unleavened by personal commitment to the community, the people, or the concerns of local security—was anathema to the ideals of civic virtue. Expensive, disengaged, brutal, and unthinking (and most likely composed of ne'er-do-wells and foreigners as well), the standing army was corruption of the body politic incarnate.¹²⁶ The surest antidote to this sort of corruption was reliance on a militia of independent and virtuous freemen who supplied their own arms for the defense of the Republic.¹²⁷ In the words of one seventeenth-century pamphleteer,

[T]he only Ancient and true Strength of the Nation [is] the *Legal Militia* The *Militia* must, and can never be otherwise than for *English Liberty*, because else it doth destroy *itself*, but a *standing Force* can be for nothing but [royal] Prerogative, by whom it hath its *idle living* and *Subsistence*.¹²⁸

In this system of thought, then, independent arms and militia were interlocking central concepts. Early in the evolution of republican ideology, during the sixteenth and seventeenth centuries, they were perhaps *the* central concepts.¹²⁹ However, as time wore on and republican ideology was shaped more and more by English and

122. See, e.g., WOOD, *supra* note 113, at 65-70.

123. See, e.g., *id.* at 28-36; POCOCK, POLITICS, *supra* note 116, at 93-94.

124. See POCOCK, POLITICS, *supra* note 116, at 92-93.

125. See, e.g., WOOD, *supra* note 113, at 18-36; cf. POCOCK, POLITICS, *supra* note 116, at 88.

126. See, e.g., BAILYN, *supra* note 2, at 61-63.

127. See POCOCK, POLITICS, *supra* note 116, at 126.

128. *Id.* (quoting A LETTER FROM A PARLIAMENT MAN TO HIS FRIEND (1675), reprinted in 2 STATE TRACTS: BEING A COLLECTION OF SEVERAL TREATISES RELATING TO THE GOVERNMENT, PRIVATELY PRINTED IN THE REIGN OF K. CHARLES II 68 (London 1693)).

129. On the centrality of the possession of independent arms to the thought of James Harrington in the middle of the seventeenth century, see POCOCK, POLITICS, *supra* note 116, at 110.

eventually by American experience, the relative importance of various components of republicanism underwent adjustment. While independent arms possession long retained symbolic and rhetorical significance, by 1787 Madison's "American science of politics"¹³⁰ focused more on structural safeguards for republican government (and hence on the dangers of a standing army) than on the character of the individual best suited to prop up a republic (and hence on the linkage of gun ownership to virtue). Whether Federalist or Antifederalist, American political theory of the constitutional period no longer relied principally on an ideal of independent arms possession—even if it descended from ideology that did, and even if it still engendered rhetorical flourishes on the virtues of independent arms similar to those which had informed political thought at an earlier time. This sea change in political principle is developed in detail in Section 2 of this Part. In the intervening subsections, we will examine the evolving role of arms possession in republican political theory, from its origins in the Renaissance up until its last flowering in the antifederalism of the Bill of Rights and the Second Amendment. What ultimately emerges is a Second Amendment expressing a constitutional preference for government independent of standing armies rather than a right to arms existing wholly without public or military context.

1. Civic Humanism

At least part of the ideology of the American Revolution had its origins in the Italian Renaissance. As J.G.A. Pocock developed the argument some twenty-five years ago, Renaissance statesmen—especially Machiavelli in Florence—wrestled with renewed conceptions of the interrelations of politics, history, and human nature.¹³¹ In the Middle Ages, political systems—even history itself—had seemed relatively stable. The same organic interdependence of prince, clergy, nobles, soldiers, and people characterized all of Christendom, forming an ingrained pattern transferred with slight variations from generation to generation. The Renaissance brought a consciousness of change, of evolution, and the consequent appreciation of the inherent instability of

130. Wood coins this phrase to refer to the political system of the Constitution, which he sees as Madison's innovative structural and federal resolution of the fatalistic and pessimistic aspect of the republican paradigm. Blending, checks and balances, phased and filtered elections, judicial review, and enumerated powers rendered possible a survivable polity composed of less than virtuous citizens. See WOOD, *supra* note 113, at 593-618.

131. See POCKOCK, *supra* note 2, at 156-218; see also Richard B. Morris, *The Origin and Framing of the American Constitution*, 9 REVUE INTERNATIONALE D'HISTOIRE MILITAIRE 41 (1990) (likewise noting the debt to Machiavelli and the classical republican ideal of civic virtue).

human society.¹³²

In the Italian city-states where the Renaissance first and most brightly flourished, rediscovery of the history of republican Athens and Rome brought also a particular sensitivity to the instability of the republic over time. Historically conscious Florentines and Venetians bemoaned the inability of the ancient republican institutions to withstand historical change and decay. In crafting their own republican city-states, Renaissance statesmen sought to create some certainty that their political systems might, unlike their classical predecessors, endure.¹³³ But Machiavelli more than others understood that the new republics, too, would inevitably decline.¹³⁴ To him, republican government depended on republican society, in which individuals acted virtuously for public purposes and not corruptly and selfishly for private ones. The highest public purpose was, of course, defense of the republic itself.¹³⁵

Yet according to Machiavelli's *Discourses*, defense achieved by granting a powerful king absolute control of a strong standing army was chimerical.¹³⁶ Although that power might repel foreign enemies, it surely corrupted the virtue of the citizen. If it buttressed the republic in the short term, it undermined it over the long haul. Propped up by a standing army, government would no longer flow from deliberation and the individual's sense of duty to the commonweal, but from "placemen," office-seekers, and influence peddlers buying and selling favor with the powerful magistracy necessary to administer the vast military establishment. Access to decision-making authority would become purchasable, and decisions would be made to suit private purposes. The military itself would no longer be employed chiefly in necessary defense, but in elaborate foreign campaigning designed to justify expanding its size, influence, and bankroll. The once virtuous and independent-minded republican citizenry would become politically passive and civically feeble; the republic would go over to absolutism, and the state itself would eventually fall to more vigorous competitors.¹³⁷

132. See POCOCK, *POLITICS*, *supra* note 116, at 81-90.

133. See *id.* at 85-86.

134. See POCOCK, *supra* note 2, at 156-218; POCOCK, *POLITICS*, *supra* note 116, at 88.

135. See POCOCK, *supra* note 2, at 201-03, 386.

136. In the next century, Francis Bacon echoed Machiavelli's views, commenting that a prince who depends upon professional soldiers "*may spread his feathers for a time, but he will mew them soon after.*" FRANCIS BACON, *Of the True Greatness of Kingdoms and Estates*, in 6 THE WORKS OF SIR FRANCIS BACON 446 (James Spedding et al. eds., 1861), *quoted in* LOIS G. SCHWOERER, "NO STANDING ARMIES!" THE ANTIARMY IDEOLOGY IN SEVENTEENTH-CENTURY ENGLAND 10 (1974).

137. See POCOCK, *supra* note 2, at 413-15.

In the classical mode then, republican survival was premised largely on a capacity for defense arising apart from a specialized, full-time, state-financed military establishment. Here, at the center of the civic-humanist paradigm, was the arena in which the citizen-soldier could assert his independence and virtue in the service of the republic. The ideal of the citizen-soldier was embodied in the legendary General Cincinnatus, who had been called from the plough to the defense of the Roman republic. To act in the spirit of Cincinnatus in the early Renaissance era required economic independence: one had to have the wherewithal to carry one's own arms in the service of the republic.¹³⁸ Hirelings and mercenaries, paid by the state to carry arms they could not furnish independently, served as foils to the classical republican ideal, for they acted not from motives of virtue, but merely at the bidding of the powerful.¹³⁹ As developed below, this archetype passed through Commonwealth ideology and English political pamphlets into the mainstream of American Revolutionary thought.¹⁴⁰ Thus, private arms in the public service played an important part in early Americans' conceptions of public duty and, in turn, in their understanding of political stability in a changing world.

2. The English Civil War and the Classical Republicans

Even as sixteenth-century Italian writers celebrated the virtues of classical citizen-soldiers, the nations of Continental Europe were experiencing a "military revolution,"¹⁴¹ during which the feudal array yielded to the antithesis of an armed citizenry, the professional army.¹⁴²

138. See POCOCK, *POLITICS*, *supra* note 116, at 90-93, 112-14 (discussing the importance of independently furnished arms); cf. GARRY WILLS, *CINCINNATUS: GEORGE WASHINGTON AND THE ENLIGHTENMENT* 225-30 (1984) (discussing the image of Cincinnatus).

139. See POCOCK, *supra* note 2, at 210-11.

140. For a detailed study of anti-army and pro-militia ideals in English political thought from the sixteenth through the eighteenth centuries, see generally SCHWOERER, *supra* note 134, *passim*. Schwoerer discusses evidence of Machiavelli's influence on English early modern anti-army thought. See *id.* at 17-18. But it is easy for one to underestimate Machiavelli's influence in the English-speaking world by dwelling on his reception into English political thought during his own lifetime. According to Schwoerer, he became much more familiar to readers on both sides of the Atlantic through archrepublican Henry Neville's translations of his works—including *The Discourses*, *The Florentine History*, and *The Arte of Warre* (found in *The Works of the Famous Nicholas Machiavel, Citizen and Secretary of Florence*)—which were published in 1680, 1694, and 1695 and reprinted throughout the eighteenth century in England, Scotland, and America. See *id.* at 114-15.

141. This phrase gained currency with the publication of Professor Michael Roberts's Inaugural Lecture, *The Military Revolution, 1560-1660*, delivered at Queens University, Belfast, in January 1955. For a summary of Roberts's historiographical influence and a discussion expanding on Roberts's ideas, see GEOFFREY PARKER, *THE MILITARY REVOLUTION: MILITARY INNOVATION AND THE RISE OF THE WEST, 1550-1800*, at 1-5, *passim* (1988).

142. See generally *id.* at 14-28 (discussing professionalization and expansion of armies in the

But while Renaissance learning spread from Italy to England during the Tudor period, the military revolution did not.¹⁴³ In Elizabethan England, physical separation from Europe, reliance on naval defense against foreign powers, and the conjunction of imported neoclassical ideals with native prejudices against professional soldiers helped engender policies favoring modernization of the historic militia rather than creation of a standing army to guard the Protestant state against Catholic invasion or subversion.¹⁴⁴

The term "militia" did not enter the English language until 1590.¹⁴⁵ However, an institution analogous to the militia existed as a holdover from the pre-Norman customary duty of male subjects of every social rank to appear in arms whenever the Saxon fyrd was summoned to defend king and country, a species of obligation existing quite apart from the separate Anglo-Norman duty to bear arms in the array. In 1558, the first year of Elizabeth's reign, England's system of military obligation was reorganized, with control of the county forces devolving to local aristocratic potentates henceforth called county lord-lieutenants.¹⁴⁶ This localism was jealously guarded against royal control as long as the militia continued to be a politically relevant institution in England. In 1573, legislation created "trained bands" of selected men to serve as the core of the county militia. A full-time force was assembled to meet the threat of the Spanish Armada in 1588, but it disbanded quickly after the crises, and thereafter the trained bands and county militia served as England's only army apart from a small force of the Queen's Guards.¹⁴⁷

Elizabeth's successor, James I, ruling in both England and Scotland, took little interest in military affairs for their own sake.¹⁴⁸ But James was greatly concerned with expanding English royal prerogative

context of technological changes, in particular, the advent of commercial credit, the coming of siege artillery, the rise of "horizontally" designed siege-resistant fortification, and the triumph of archers and gunners over cavalry on the battlefield).

143. See SCHWOERER, *supra* note 134, at 12, 16-18 (discussing English isolation from the military revolution and England's reception of neoclassical and Renaissance attitudes towards soldiers). Parker points out that England made limited experiments implementing progressive fortification design under the Tudors, see PARKER, *supra* note 141, at 26-28, and thus dates the arrival of the military revolution in England to the sixteenth century. But for present purposes, the important consideration is that large, professional armies were not introduced into the British Isles until Cromwell's time. See SCHWOERER, *supra* note 134, at 52.

144. See *id.* at 10-12.

145. See *id.* at 14; see also 6 NEW ENGLISH DICTIONARY 438 (Sir James A.H. Murray ed., 1908).

146. See SCHWOERER, *supra* note 134, at 14.

147. See *id.*

148. See *id.* at 12.

and expounding theories of absolute monarchical powers,¹⁴⁹ and, in this context, the harmonious relations between the Crown and Parliament so characteristic of England's first golden age came to an end. As tensions between the Crown and Parliament intensified, seventeenth-century British politics were given up to ideological and political struggles, focusing on issues of religion and separation of powers and, after the coronation of Charles I, on crises of military funding, organization, and control.¹⁵⁰

Quarrels between the king and Parliament over military issues began as altercations about strategy in Europe, but at length joined constitutionally more explosive questions concerning control of the taxing power, the Crown's attempt to rule without Parliament, and the scope of royal power over the religious establishment and dissenting churches.¹⁵¹ The pacifist James I long succeeded in ignoring parliamentary pressure for direct British intervention to support the Protestant cause in the Thirty Years' War, but by the close of James's reign, the king's favorite Buckingham was interjecting English expeditionary forces into French campaigns with disastrous results.¹⁵² Upon the accession of Charles I in 1625, the new king made clear his eagerness to involve England more directly in the Continental war. But unlike the haphazard naval privateering undertaken with the Crown's blessing through the early stages of the war, raising a large army for action in Europe required that Parliament create new revenue by imposing taxes.¹⁵³ Parliamentarians, jurists, scholars, and the educated realm agreed that the king did not enjoy the power of taxation without parliamentary consent. Yet Parliament suspected that voting high taxes to raise an army would leave Charles virtually unchecked in the exercise of those powers and prerogatives he did legitimately wield. If the king secured the revenue his army required, his opponents feared he could dispense with Parliament by dissolving it and not calling a new one. Without Parliament to pass statutes and voice opposition, Charles's

149. For the divine right theory expounded by the first two Stuarts, see JAMES VI OF SCOTLAND (JAMES I OF ENGLAND IN 1603), *TRUE LAW OF FREE MONARCHIES* (1598) and *BASILIKON DORON* (1599); CHARLES I, *EIKON BASILIKE* (1649) (possibly ghostwritten by Dr. John Gauden), three classic (and self-interested) early tracts on absolutism.

150. See generally GEORGE MACAULAY TREVELYAN, *ENGLAND UNDER THE STUARTS* (1904) (still the classic history of seventeenth-century England); J.P. SOMMERVILLE, *POLITICS AND IDEOLOGY IN ENGLAND, 1603-1640* (1986). For a good specialized study of military practices in seventeenth-century England, see SCHWOERER, *supra* note 134.

151. See generally LACEY BALDWIN SMITH, *THIS REALM OF ENGLAND, 1399-1688*, at 206-15 (4th ed. 1983). See also SCHWOERER, *supra* note 134, at 3-4.

152. See *id.* at 20.

153. See *id.*

critics argued, the door would open to the king's unpopular High Church religious program.¹⁵⁴

Exasperated by parliamentary intransigence over the right to control taxation and by the tone of Parliament's Petition of Right of 1628, Charles I did indeed decide to circumvent the Legislature, calling no Parliament at all from 1629 to 1640.¹⁵⁵ Charles endeavored to finance his personal rule by imposts and excises, forced loans, billeting soldiers on the public contrary to law, and by imposing an unpopular and unsuccessful levy called the ship money, which attempted to requisition from inland cities and counties a cash equivalent to the ships coastal jurisdictions customarily surrendered for royal service.¹⁵⁶ The final failure of this scheme and the king's desire to raise money to build a navy and intervene on the Continent led to the begrudging convention of the Short and Long Parliaments in 1640. By November 1641, the inability of the king and Parliament to settle the "Constitutional Question" over the power of taxation had unleashed the English Civil War.¹⁵⁷

Political issues that fueled the English Civil War were not resolved during that conflict or in its immediate aftermath. Images forged and questions raised in the mid-seventeenth century long endured in the minds of English-speaking people, and, almost 150 years later, these familiar civic dilemmas still exercised unrivaled influence on the developing ideology behind the American Revolution, Constitution, and Bill of Rights.¹⁵⁸ At the heart of England's seventeenth-century

154. See SMITH, *supra* note 151, at 217-25.

155. See *id.* at 222-25.

156. See *id.* at 225-29.

157. See *id.* at 229-33.

158. See generally BAILYN, *supra* note 2, at 33-34. As Bailyn describes it:

[W]hat dominated the colonists' miscellaneous learning and shaped it into a coherent whole, was the influence of still another group of writers The ultimate origins of this distinctive ideological strain lay in the radical social and political thought of the English Civil War and of the Commonwealth period; but its permanent form had been acquired at the turn of the seventeenth century and in the early eighteenth century, in the writings of a group of prolific opposition theorists, "country" politicians and publicists.

Id. at 34.

The allegorical importance of the English Civil War and of republican thought to George Washington is captured nicely in WILLS, *supra* note 138. According to Wills, Washington was heavily influenced by Joseph Addison's *Cato* (1713), the most popular play in eighteenth-century America. Indeed, Washington is said to have seen it staged over two hundred times, and he cited from it liberally and often. *Cato* can be understood as an allegory on the Civil War, in which Cromwell appeared in the guise of the great Roman republican who lent the play its name. Addison's message was of the infinitely greater nobility of republicanism to Caesarism, and, according to Wills, Washington consciously patterned his retirement from military command, and his refusal to be king, after *Cato*. See *id.* at 133-37.

quest for constitutional settlement were questions concerning the relation of the legislature and the executive to armed individuals, the militia, and standing armies. The same issues crystallized again in the 1780s, across the Atlantic, in the efforts to forge what became the Second Amendment to the United States Constitution. Yet the English Civil War and the Commonwealth left a mixed legacy for the Second Amendment's framers and interpreters.¹⁵⁹

To begin with, Commonwealth ideology—the republican principles at the heart of the parliamentary cause—developed into the background of accepted political values that Americans on all sides of Revolutionary and constitutional politics took for granted.¹⁶⁰ Thus, during the formative period of the American Revolution, Whiggish fidelity to the gospels of the Commonwealth and of Restoration-era opposition amounted to almost the whole of the American ideology. Central to this line of thinking were the tenets of legislative supremacy, limits over executive power, and suspicion of standing armies.¹⁶¹ During the “critical period”¹⁶² before ratification of the Constitution, the “ancient” English rights and liberties characterizing the Commonwealth ideal informed the beliefs of Federalists and Antifederalists alike.¹⁶³

But if Americans in the 1780s universally accepted the fundamental principles of the parliamentary cause of the 1640s, the English Civil War's lessons directly touching the army and citizen-soldiers were not

159. In the words of Professor Pocock:

The Civil War of 1642 had broken out in a dispute between king and parliament for control of the county militia, and had, until the regiments were new-modeled, been fought between elements of that armed force, the only one which England then possessed. Some of the opposition to Cromwell's Protectorate from within the army had come from New Model idealists who still believed themselves to be a people in arms and resented being placed under the direct control of the head of state. The Restoration of 1660—itself in part the work of an army willing to disband itself rather than live at free quarter—had carried with it an unequivocal declaration vesting control of the militia in the king; but a necessary counterpoint to this principle had been an unspoken but no less unequivocal insistence that it should only be the county militia—the freeholders in arms under the gentry as their natural leaders—over which the king was to exercise command.

Pocock, *supra* note 2, at 410.

160. See BAILYN, *supra* note 2, at 34.

161. See WOOD, *supra* note 113, at 15-17, 20, 41-43.

162. The description of the postwar years of Confederation government as a critical period, during which fundamental questions of union, order, and liberty hung in the balance, gained currency via publication of JOHN FISKE, *THE CRITICAL PERIOD OF AMERICAN HISTORY, 1783-1789* (1896). This image was famously reassessed in MERRILL JENSEN, *THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION, 1781-1789* (1950).

163. See WOOD, *supra* note 113, at 404-05, 410-11 (discussing the emerging Federalist conception that unchecked populism imperiled established rights and liberties); *id.* at 536-40 (discussing the Antifederalist reliance on traditional Whig theory to attack the proposed constitution and urge a bill of rights).

unambiguous. The victorious (parliamentary or) English army was a republican army in the sense that it comprised civic-minded, independent-thinking, politically conscious citizen-soldiers fighting expressly for the public good (the Commonwealth).¹⁶⁴ Oliver Cromwell's New Model Army was, however, also arguably the first modern regular army.¹⁶⁵ Ploughmen and artisans rallied to the "Good Old Cause"¹⁶⁶ for nonmercenary purposes, but they became full-time, highly regimented professional soldiers, differentiated according to merit and function, not according to birth and station.¹⁶⁷ More even than being in the service of the state, they became, or endeavored to become, the state.¹⁶⁸ Finally, with the paradigmatic passing (or ossification?) of their virtue and revolutionary idealism, they became something that bore a marked and disturbing resemblance to a standing army,¹⁶⁹ which example Americans of the immediate pre-Revolutionary period firmly eschewed.¹⁷⁰

Beyond this, even the militia and the system of militia

164. See POCOCK, *supra* note 2, at 372-76. On the ideological ambiguities at the heart of the New Model Army's changing sense of mission, see generally SCHWOERER, *supra* note 134, at 51-71.

165. See CHRISTOPHER HILL, *GOD'S ENGLISHMAN: OLIVER CROMWELL AND THE ENGLISH REVOLUTION 63-70* (Norman F. Cantor ed., 1970); SCHWOERER, *supra* note 134, at 51-52.

166. This phrase, referring to nostalgia for the Commonwealth among Civil War veterans unhappy with subsequent counter-republican developments, occurs commonly in the academic literature. See, e.g., A.H. Woolrych, *The Good Old Cause and the Fall of the Protectorate*, 13 CAMBRIDGE HIST. J. 133 (1957); J.G.A. Pocock, *James Harrington and the Good Old Cause: A Study of the Ideological Context of His Writings*, 10 J. BRIT. STUD. 30, 32 (1970). It has its origins in the influential *Humble Petition of Several Colonels of the Army of 1654*, which referred to the "good cause . . . that old cause mentioned in our publike Declarations and Engagements." *Id.* at 32 n.7.

167. In Cromwell's famous words: "I had rather have a plain russet-coated captain that knows what he fights for and loves what he knows than what you call a gentleman and is nothing else. I honour a gentleman that is so indeed." Cromwell expanded, "If you choose godly honest men to be captains of horse, honest men will follow them. . . . A few honest men are better than numbers." HILL, *supra* note 165, at 67.

168. See G.E. AYLMER, *REBELLION OR REVOLUTION? ENGLAND, 1640-1660*, at 94-102 (1986); SCHWOERER, *supra* note 134, at 71. But see also the following from an anonymous radical pamphleteer:

It is our conquest, not the Army's: the Army being considered as the people's power, chosen by the people, paid by the people, entrusted with the people's welfare and defence, acting all—hitherto they have done and we hope shall—for the good, liberty and freedom of the people. By "people" is meant the sound, well-affected part, the rest are the conquered subdued part, who can challenge no right in the free election, which is the fruit of conquest.

Anonymous, *The Extent of the Sword* (1653-54), quoted in HILL, *supra* note 165, at 79.

169. See POCOCK, *supra* note 2, at 412-13.

170. See SCHWOERER, *supra* note 134, at 196 (discussing American opposition to standing armies in the run up to the Revolution); *id.* at 189 (discussing that opposition's roots in the anti-army reaction during the Interregnum).

administration became problematic in the aftermath of the English Civil War. Under the rule of the major generals, Cromwell organized all of England into full-time militia districts, which were regimented, standardized, and supervised to an extent that, with the waning of revolutionary Puritan zeal, seemed oppressive.¹⁷¹ As Commonwealth gave way to Protectorate and finally to Restoration, not only Cromwell's one-time secretary John Milton mused upon the waning of republican glory.¹⁷² In 1656, James Harrington published his *Commonwealth of Oceana*, the classical republican parable of England and its political culture. He expounded the ideal of the citizen-soldier-statesman transferred from Florence into English idiom. Harrington's imagination brought forth a militiaman who might never have won the war, but who nonetheless represented the militia's most stoically civic and individualist principles.¹⁷³ This fantasy of the early Cromwellian Commonwealthman, rather than the living veteran struggling for political accommodation after the war, passed into the pamphlets of later generations of Real Whig English opposition thinkers, and from thence into the spirit of '76, and finally, in transfigured form, into the militia mythos of today.¹⁷⁴

3. The Glorious Revolution and the English Bill of Rights of 1689

The English Commonwealth/Protectorate was a military republic, spending as much as ninety percent of government income on the army, navy, and militia.¹⁷⁵ After the death of Oliver Cromwell in 1658, parliamentary and republican leaders proved unable to resurrect a political consensus in favor of either the military establishment or the administrative and revenue mechanisms necessary to sustain that

171. See David Underdown, *Settlement in the Counties, 1653-1658*, in *THE INTERREGNUM: THE QUEST FOR SETTLEMENT, 1646-1660*, at 165, 165-82 (G.E. Aylmer ed., 1990); SCHWOERER, *supra* note 134, at 62-63.

172. See generally JOHN MILTON, *THE READY AND EASY WAY TO ESTABLISH A FREE COMMONWEALTH* (1660). According to the *OXFORD COMPANION TO ENGLISH LITERATURE* 653 (Margaret Drabble ed., 5th ed. 1985), Milton wrote this book in "a last-minute attempt to defend the 'Good old Cause' of republicanism and to halt the growing tide of royalism and the defection of 'the misguided and abused multitude.'" The extent to which Milton's great later works, *Paradise Lost* (1667), *Paradise Regained* (1671), and *Samson Agonistes* (1671), served as allegories on the vanished Commonwealth is, of course, the subject of varied interpretations. For an excellent recent discussion of the political implications of Milton's writings, see DAVID NORBROOKE, *WRITING THE ENGLISH REPUBLIC: POETRY, RHETORIC AND POLITICS, 1627-1660*, at 109-39, 433-98 (1999). In addition, Mr. Merkel thanks Dr. Andrew King of University College, Oxford, for sharing liberally during the writing of this paper his insights on Milton, seventeenth-century literature, and seventeenth-century culture.

173. See POCOCK, *supra* note 2, at 361-422; POCOCK, *POLITICS*, *supra* note 116, at 104-47.

174. See BAILYN, *supra* note 2, at 38-44.

175. See PARKER, *supra* note 141, at 62.

martial system. In the end, the Protectorate collapsed under the combined weight of its military apparatus and its inability to forge a constitutional consensus settling and legitimizing its own continued existence.¹⁷⁶ But Restoration of the monarchy in 1660 only recast the fundamental military/constitutional questions of the day, it did not submerge them. Old Commonwealthmen and new Whigs soon perceived familiar abuses in Stuart military policy. Criticism of the Crown and the army became widespread in the 1670s; in the next decade, “No Standing Army” became with “No Popery” the most prominent mantra of Opposition politicians and pamphleteers.¹⁷⁷ At length, the Country/Whig/Opposition joined forces with William of Orange to thwart the Stuart vision of an absolutist Britain and usher in a constitutional monarchy. The English constitutional Settlement achieved with the Glorious Revolution of 1688–89 embodied principles that would remain fundamental to the framers of the American Constitution and Bill of Rights one hundred years later.¹⁷⁸ The accommodation the Convention Parliament reached with William and Mary after the flight of James II was memorialized in the Declaration of Rights of February 12, 1688; consisting of two sections, a written catalogue of grievances against the old executive, and a set of stipulations of parliamentary and individual rights that the new monarchs bound themselves to respect.¹⁷⁹

The Declaration of Rights spoke to the same concerns over maintenance of standing armies and disarmament of the citizen army that prompted passage of the American Second Amendment in the next century. The Declaration reflected Whig resentment of the Stuart government’s confiscation of arms in opposition strongholds, where the militia could not be expected to side with the Crown in the event of a new civil war. Likewise, it condemned royal establishment, without full parliamentary authorization, of a large, professional army composed disproportionately of Irish Catholics and officered by the Crown’s Catholic sympathizers, in clear violation of the Test Act of 1661. As

176. See generally SMITH, *supra* note 151, at 266-71.

177. See generally SCHWOERER, *supra* note 134, at 136-47.

178. See generally LOUIS G. SCHWOERER, *THE DECLARATION OF RIGHTS, 1689*, at 289-90 (1981).

179. See Convention Parliament, *The Declaration of the Lords Spiritual and Temporal, and Commons, Assembled at Westminster (Feb. 12, 1688)*, reprinted in JACK N. RAKOVE, *DECLARING RIGHTS: A BRIEF HISTORY WITH DOCUMENTS* 41, 41-45 (1998); William III, *His Majesties Gracious Answer, to the Declaration of Both Houses (Feb. 15, 1688)*, reprinted in RAKOVE, *supra*, at 45. See generally SMITH, *supra* note 151, at 303-06. The Declaration of Rights, with some modifications, became statute with the passing of the Bill of Rights on December 16, 1689. See SCHWOERER, *supra* note 178, at 3.

critics of the Stuart Court declaimed throughout the 1670s and '80s, this new army was designed not to protect English security or even to project English interests abroad, but to provide employment for royal favorites and to cow and harass the parliamentary opposition that considered itself the natural defender of the Protestant nation against royal and papal usurpation.¹⁸⁰

At the center of the first section of the Declaration of Rights was the charge that "the late King *James* the Second, by the Assistance of divers Evil Counsellors, Judges, and Ministers Employ'd by Him, did endeavor to Subvert and Extirpate the Protestant Religion, and the Laws and Liberties of th[e] Kingdom."¹⁸¹ In its indictment of the old monarchy, the Convention complained that the deposed king conspired to violate religious and political liberties by such abusive means as

Levying Money for and to the Use of the Crown, by Pretence of Prerogative, for other time, and in other manner, than the same was granted by Parliament[,] [Article 4]

[R]aising and keeping a standing Army within this Kingdom in time of Peace, without consent of Parliament; and Quartering Soldiers contrary to Law[,] [Article 5] [and]

[C]ausing several Good Subjects, being Protestants, to be Disarmed at the same time, when Papists were both Armed and Employed contrary to Law. [Article 6]¹⁸²

Among the royal concessions demanded by the Convention Parliament in the second section of the Declaration of Rights were stipulations

That levying of Money for or to the Use of the Crown, by pretence of Prerogative, without Grant of Parliament, for longer time, or in other manner, than the same is or shall be granted, is Illegal[,] [Article 4]

That the raising or keeping a standing Army within the Kingdom in time of Peace, unless it be with Consent of Parliament, is against Law[,] [Article 6] and

That the Subjects which are Protestants may have Arms for their Defence suitable to their Condition, and as allowed by Law. [Article 7]¹⁸³

With these last three provisions, the Convention secured legal protection for the English polity against royal funding of standing armies by illegal taxes, against royal maintenance of unfunded standing

180. See SCHWOERER, *supra* note 134, at 136-46.

181. See Convention Parliament, *supra* note 179, at 41.

182. *Id.* at 42.

183. *Id.* at 43.

armies during peacetime without parliamentary consent, and against royal disarmament of subjects Parliament deemed suited to bearing arms in the militia. In so doing, the Convention constitutionalized the Whig theory of legislative supremacy that had animated anti-army politics throughout the seventeenth century, and effected a major shift in the locus of sovereignty from Crown to Parliament. As Lois Schwoerer suggests, the crown that William III accepted in 1689 was hence a very different crown than that for which Charles I raised his standard in 1641, for which he lost his head in 1649, and to which his son was restored in 1660.¹⁸⁴

Although the Convention Parliament could successfully make a bloodless revolution, it could not, technically, speak with the sovereign's voice under accepted principles of constitutional law.¹⁸⁵ It was a fundamental axiom of the ancient law that only "the King in Parliament" was sovereign over the English people. The Convention, however, had been elected and convened with the throne "vacant" following James's "abdication."¹⁸⁶ It was therefore with a view to legitimacy that an act of the Convention transformed that body into a constitutionally familiar Parliament soon after William and Mary's coronation, and that Parliament then reduced the Settlement embodied in the Declaration to proper statutory form in the Bill of Rights on December 16, 1689.¹⁸⁷ Changes were made in the statutory language specifying the order of succession to the throne, requiring that the monarch be Protestant, clarifying the prohibition on the dispensing power (by which Charles II and James II authorized individuals to disobey the law), and adding a preamble and segues; but the language regarding standing armies and the right to arms remained identical to that used in the Declaration of February 12.¹⁸⁸ In that form, the right to arms remains established in Britain to this day.¹⁸⁹

The earliest draft of the Declaration of Rights, known as the Heads of Grievances, said more about arms and the militia than the final versions of the Bill of Rights and the Declaration. The Heads of Grievances, reported by a radical Whig-dominated rights committee in

184. See SCHWOERER, *supra* note 178, at 7, 291, *passim*.

185. See *id.* at 267.

186. See *id.* at 126-27, 25-26.

187. See generally *id.* at 267-80.

188. See *id.* at 27-28.

189. See MALCOLM, *supra* note 9, at 165. But consider that this right has not interfered with any subsequent parliament's ability to place stringent curbs on ownership and use of firearms, most recently with the Firearms (Amendment) Act, 1997, ch. 5 (U.K.), outlawing ownership of hand guns in the wake of the Dunblane Primary School massacre.

the House of Commons on February 2, 1689, ten days before the Declaration passed, included the statement that “[t]he acts concerning the militia are grievous to the subject,”¹⁹⁰ and further circumscribed the right to arms by stipulating that “[i]t is necessary for the public safety, that the subjects, which are Protestants, should provide and keep arms for their common defense, and that arms which have been seized and taken from them be restored.”¹⁹¹

Recently, much debate concerning the amendments that the American Congress proposed in 1789 has focused on the clauses enacted and rejected by the English Parliament in 1689. One argument favored by Joyce Lee Malcolm and a growing entourage of individualist interpreters of the Second Amendment concerns the deletion by the House of Lords of the just-quoted language from the arms and militia clauses proposed in the Heads of Grievances. Striking this language—and in particular deleting the “arms for their common defense” clause—Malcolm argues, demonstrates that the Convention Parliament was concerned not with protection of the militia, but rather with preserving a private, personal, and individual liberty to keep weapons for any purpose whatsoever.¹⁹² While Malcolm’s analysis dwells heavily on deleted passages, she pays less attention to the plain meaning of the text actually enacted. Moreover, her argument concerning the likely significance of the deletions suffers from its failure to take count of the legislative context in which the “common defense” clause was expunged.

The original draft submitted by the rights committee called for the protection of two sorts of rights: those which were—at least arguably—already established by English law, and those which would require enactment of new statutes to become part of the *corpus juris*. Responding to suggestions made by the Upper House when it reported back its marked-up copy of the rights committee’s draft, the full House of Commons first classified enumerated rights based on whether or not their establishment required creation of new law, and then voted to

190. THE HEADS OF GRIEVANCES art. 5, *reprinted in* SCHWOERER, *supra* note 178, app.2 at 299. This article refers to the Restoration Militia Acts, which confirmed royal command of the militia, royal appointment of officers in the militia, and royal use of martial law to compel the militia to engage in objectionable and allegedly illegal acts, such as confiscation of arms held by subjects deemed opposed to the king or his military and religious policies. See SCHWOERER, *supra* note 178, at 76. Shifting command of the militia (and indeed, command of the army and the power to make war) from king to parliament was among the radical Whig objectives left unfulfilled by the Glorious Revolution. *Cf. id.* at 289.

191. THE HEADS OF GRIEVANCES art. 7, *reprinted in* SCHWOERER, *supra* note 178, app.2 at 299.

192. See Malcolm, *supra* note 99, at 307-12.

strike *each and every* clause guaranteeing a right not firmly established under existing law.¹⁹³ This “shift to the right” eliminated not only the proposed injunction against militia disarmament containing the “common defense” clause, but ten other cherished Whig principles as well.¹⁹⁴ It struck from the Declaration all of the radical Whig assertions as to what new laws the new king should accept, and left intact only the “undisputed” and “ancient” rights that King James stood accused of violating and Prince William was asked to acknowledge before accepting the crown. By curtailing the scope of the rights proffered by the radical Whig-dominated rights committee, party managers hoped to render the constitutional settlement less revolutionary in appearance, and hence more palatable to moderate Whigs, Tories, conservative elements in the House of Lords, and to Prince William himself.¹⁹⁵ In this light, elimination of the militia clause and the other putative statutory innovations did not reflect the triumph of privatistic individualism, but rather a concession to corporatist traditionalism. This was common ground to Whig, Tory, aristocrat, gentleman, guild member, and craftsman alike, all united in resistance to absolutism. At the same time, the deletion helped conciliate parliamentary lawyers who opposed the Stuarts’ extralegal rule, but scrupulously stayed within the bounds of the established law as they indicted the old regime.¹⁹⁶

The plain meaning of the enacted language, like the legislative context from which that language emerged, also undermines Malcolm’s reading. If the rights committee version allowed subjects to have “arms for their common defense,” the enacted language allows subjects “[a]rms [only] for their Defence suitable to their Conditions and as allowed by Law.”¹⁹⁷ This statutory language patently stops short of conveying an unfettered general license to carry weapons. And in so far as our ultimate concern remains with text that actually became (codified or memorialized) law, the insertion rather than the deletion is of course the most significant feature of the Lords’ amendment. Instead of guaranteeing arms to all who would mobilize for the common defense, the Declaration of Rights acknowledged the right to possess such personal arms as were suitable to the subjects’ “conditions,” meaning class or station. And the stipulation that such arms be “allowed by law”

193. See SCHWOERER, *supra* note 178, at 23.

194. See *id.* at 23-25.

195. See *id.* at 284-85.

196. Cf. *id.* at 284-87.

197. An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown (English Bill of Rights), 1689, 1 W. & M., Sess. 2, ch. 2, 7 (Eng.).

not only incorporated all of the restrictive, class-oriented gun and game laws enacted since Parliament first limited small firearms ownership in 1541,¹⁹⁸ but simultaneously held out an invitation to pass new statutes further clarifying and controlling the right to arms, which Parliament quickly accepted.¹⁹⁹ Neither the Declaration nor the Bill of Rights, then, created a new universal right to hold weapons *without* prior parliamentary or customary license.

In any case, in 1789 the framers of the American Second Amendment chose not to employ the language of the English Bill of Rights regarding the right to “have Arms.” James Madison, who had labored so hard to bring about the separation of church and state in Virginia, had no desire to saddle the American Bill of Rights with religious qualifications.²⁰⁰ Still, it is useful to reflect that the language of 1689 resonates with the same powerful suspicions of a potentially subversive military establishment that informed the Second Amendment. Not only did the English Bill of Rights warn against the dangers of a standing army, but it complained that under the closet Catholic, James II, the wrong sort of men—unrepublican men, who took their orders from a foreign prince (the “Bishop of Rome,” i.e., the Pope) rather than arriving at political decisions independently—had been entrusted with arms ownership for service to the state.²⁰¹ If Americans were by 1789 moving slowly away from anti-Catholicism as the touchstone of republicanism,²⁰² they had hardly abandoned the

198. See Michael A. Bellesiles, *Gun Laws in Early America: The Regulation of Firearms Ownership, 1607–1794*, 16 LAW & HIST. REV. 567, 572 (1998).

199. See *id.* at 571. Within weeks after passage of the Bill of Rights, Parliament voted to disarm Catholics, and, in 1691, the Commons voted 169 to 65 to reject an amendment to pending game legislation that would have annulled existing class-based gun ownership restrictions and allowed all Protestants to keep guns. See *id.* One member commented that the proposal would “arm the mob, which I think is not very safe for any government.” *Id.* (quoting Sir John Lowther).

200. See generally THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* 142-48 (1986). Curry describes Madison’s efforts to defeat a proposed assessment giving state government support to clergy of denominations specified by taxpayers and Madison’s subsequent stewardship of Jefferson’s Virginia Statute for Religious Freedom through the Assembly. In Madison’s Virginia, antipopery was still a recognizable and forceful paradigm, but as Curry explains, the Virginia gentry of Madison’s youth were confident enough to take toleration for granted. Madison himself moved one step further and led the vanguard of reformers in advocating complete disestablishment.

201. The suspicion that Catholics were beholden to subversive, alien authority was founded on more than paranoia and prejudice. In 1689, the Bill of Rights expressly required office holders and oath takers to abjure the papal doctrine immunizing assassins of Protestant heads of state and commanding Catholics residing in Protestant governed lands to rise in resistance to local authority. See English Bill of Rights, 1689, 1 W. & M., Sess. 2, ch. 2, 15.

202. For a detailed but impressionistic account of anti-Catholicism in early America, see WILLIAM LEE MILLER, *THE FIRST LIBERTY: RELIGION AND THE AMERICAN REPUBLIC* 280-

belief that there were those whose character and political principles fitted or unfitted them for military service or leadership. Nor had they given up entirely the notion that provisions of the constitutional law might serve to optimize the civic virtue of individuals in military service.²⁰³ But as developed below, a large measure of Madison's innovative genius in the organic Constitution is reflected in his reliance on federalism and formal separation of powers rather than constitutional reification of the republican character to preserve the political stability that came from republican military institutions.²⁰⁴ As we shall see, under the government established by Madison's seven original articles, armed service by Catholics seemed far less dangerous than in Stuart England, not only because Protestantism's enhanced regional and global security made toleration of Catholics inherently less threatening, but because neither of the political branches of the new national government was given the ready ability or impetus to turn a standing army against the nation. Yet unlike Madison, the Antifederalists remained skeptical of any central power, no matter how circumscribed by checks and balances. They insisted that the survivability of republican institutions was linked inexorably to the civic character of individuals, and saw in universal, but noncompelled, militia service not only a safeguard against the monarchic standing army, but

82, *passim* (1986). As Miller makes clear, American anti-Catholicism flourished as a subspecies of nativism from the 1830s onwards. See *id.* at 275-77, 283-84. But this anti-Catholic ideology differed fundamentally from the historically rooted Anglo-American anti-Catholicism nurtured in the English Civil War and hardened by the Popish Plot and Exclusion crisis. It is this earlier incarnation of anti-Catholicism, with all of its overtones of Whiggish constitutionalism, that was on the wane by 1775 as Whiggery blended into Enlightenment rights theory. But see J.C.E. CLARK, *THE LANGUAGE OF LIBERTY, 1660-1832: POLITICAL DISCOURSE AND SOCIAL DYNAMICS IN THE ANGLO-AMERICAN WORLD* 296-381 (1994). Clark argues that anti-Catholicism played a determining role in the decision to separate from Britain, with particular reference to, among other issues, the opposition of the Virginia gentry to the proposed establishment of an Anglican bishopric in the 1770s, see *id.* at 344, and the opposition of New Englanders and Presbyterians throughout the colonies to the Quebec Act of 1774 making Catholicism the official religion of that province, see *id.* at 360, both of which resistance movements cast British policy towards the colonies in the light of popish plots. On the New England response to the Quebec Act, see also MILLER, *supra*, at 280-82. For the purposes of the Quebec Act, the territories in which British authorities recognized the establishment of the Roman religion extended far beyond Quebec proper southwards past St. Louis to present day Cairo and westwards some miles further than Duluth, thus encompassing over half the habitable surface of British North America. See LAWRENCE HENRY GIPSON, *THE COMING OF THE REVOLUTION, 1763-1775*, at 130-31 (1954).

203. Cf. WOOD, *supra* note 113, at 506-10. Wood makes this point with reference to social and political leadership; his insights are especially applicable in the case of the military.

204. Cf. *id.* at 602-15; discussion *infra* notes 318-26 and accompanying text. Again, Wood's discussion is cast in terms of the polity as a whole, but it is particularly relevant to the military situation.

affirmation of the republican character upon which the militia ideal was based.²⁰⁵

4. The Opposition Tradition and Its American Reception

The parliamentary government that emerged in Britain after the accession of George I in 1714 was based on one-party consensus. Nearly every member of Parliament professed himself a Whig and endorsed the Settlement and Bill of Rights of 1689, parliamentary supremacy, Hanoverian rule, and the (parliamentary) union with Scotland of 1707.²⁰⁶ Consequently, British opposition of the period was mainly extraparliamentary. "Country" opponents of the administrative style pursued at court by a narrow circle of ministers and Parliamentarians under the control of Robert Walpole expressed themselves largely by pseudonymous newspaper and pamphlet denunciations of the government. Pamphleteers of this era—most importantly Viscount Bolingbroke and the tandem of John Trenchard and Thomas Gordon—invoked the republican spirit of the past century to serve as a foil to the corrupt, commercial, administrative ethos of the times.²⁰⁷ While remaining marginal in England, the writings of the "Real Whig"²⁰⁸ opposition school resurfaced with renewed vigor in America during the 1760s and '70s.²⁰⁹ As Bernard Bailyn demonstrated in his compilation, *Pamphlets of the American Revolution*,²¹⁰ this

205. These points are developed *infra* Part I.B.4.

206. See WILLIAM B. WILLCOX & WALTER L. ARNSTEIN, *THE AGE OF ARISTOCRACY, 1688 TO 1830*, at 62-64 (4th ed. 1983).

207. See BAILYN, *supra* note 2, at 35-36.

208. The Real Whigs, or Old Whigs, disassociated themselves from the Court Whigs in the 1690s and clung to the principles of 1689. As Lois Schwoerer explains, after coming to power with the accession of William and Mary:

Court Whigs . . . became increasingly conservative. They resisted the efforts of Tories to link them with republican notions, deism, and popular rights and to tar them with the charge of "deposing" James II . . . Old Whigs joined with Country Tories to form a "New Country Party," which generally reiterated the arguments of the right of resistance, the contractual basis of government, and the sovereignty of the people (however "people" was defined) that had appeared in debates and tracts at the time of the revolution. [By 1710, when Court Whigs forsook the Dissenters in favor of Court Tories to form a majority,] the bankruptcy of Court Whiggism was laid bare. Debate on "revolution principles" was no longer the focus. Passive obedience to Parliament and parliamentary sovereignty became official Whig doctrine with the success of the Septennial Act of 1716 and the ascendancy of Sir Robert Walpole. For their part Country Whigs and Country Tories denounced "corruption" and oligarchy.

SCHWOERER, *supra* note 178, at 290. Real Whiggery survived as an extra-parliamentary opposition movement in Hanoverian England, long after Toryism became dormant.

209. See BANNING, *supra* note 103, at 71-72.

210. 1 PAMPHLETS OF THE AMERICAN REVOLUTION, 1750-1776, *supra* note 2. See especially BAILYN, *supra* note 2, at 22-54, where Bailyn consolidates and summarizes the ideology of the hundreds of pamphlets he had studied. See also BANNING, *supra* note 103, at 72-

opposition dogma of early Hanoverian England, in the form of reprints, recapitulations, and pseudonymous rehashing, became the driving intellectual engine of the American Revolution.²¹¹

Antipathy to standing armies was a central precept of Trenchard and Gordon's Real Whiggery that resonated well in American ears.²¹² According to Bailyn, American colonists "universally agreed"²¹³ with Trenchard's famous 1697 *Argument, Shewing, that a Standing Army Is Inconsistent with a Free Government . . .*²¹⁴ There, Trenchard set down how "unhappy nations ha[d] lost that precious jewel *liberty* . . . [because] their necessities or indiscretions ha[d] permitted a standing army to be kept amongst them."²¹⁵ Indeed, militarism was widely blamed for the collapse of republican government in Venice, Sweden, and Denmark,²¹⁶ and militarism was feared as the most likely cause of the demise of republicanism in British America.²¹⁷

Some pamphleteers used the standing army issue as a springboard for individualistic panegyrics on the virtue of provincial militia, and unfavorable comparisons between these stoic rustics and the decayed, shiftless characters who made up Britain's "mercenary" professional army. Thus, in 1773 a "British Bostonian" admonished the home country not to "make the Americans subject to their *slavery*." "Americans," this Bostonian fumed,

will not submit to be SLAVES, they know the use of the gun, and military art, as well as any of his Majesty's troops at St. James's, and where his Majesty has one soldier, who art in general the refuse of

73, 75.

211. See BAILYN, *supra* note 2, at 35-36, 61-63, 112-19.

212. See *id.* at 36; SCHWOERER, *supra* note 134, at 195-96.

213. See BAILYN, *supra* note 2, at 62.

214. JOHN TRENCHARD, *ARGUMENT, SHEWING, THAT A STANDING ARMY IS INCONSISTENT WITH A FREE GOVERNMENT, AND ABSOLUTELY DESTRUCTIVE TO THE CONSTITUTION OF THE ENGLISH MONARCHY* (London 1697). The significance of this pamphlet in its original context is described in SCHWOERER, *supra* note 134, at 174-75. In 1697, in the aftermath of the War of the Grand Alliance, Trenchard and his Real Whig allies campaigned successfully to reduce drastically the scale of King William's wartime army. See *id.*

215. See BAILYN, *supra* note 2, at 62 (quoting TRENCHARD, *supra* note 214).

216. See *id.* at 64-65; WOOD, *supra* note 113, at 30. Wood writes:

In the course of a single year both Sweden and Poland had been enslaved, leaving on the continent only the Swiss cantons and the Dutch provinces free; and their liberty appeared short lived. "Where is the kingdom," devout Whigs asked, "that does not groan under the calamities of military tyranny?"

Id. (quoting Jonathan W. Austin, *An Oration Delivered March 5th, 1778* (Boston 1778)). But the military overthrow of the Danish republic in 1660, as described in Robert Molesworth's *An Account of Denmark* (reprinted ten times in British North America during the eighteenth century), was the colonists' favorite example of the dangers inherent in maintenance of large standing armies. See SCHWOERER, *supra* note 134, at 190.

217. See BAILYN, *supra* note 2, at 63.

the earth, America can produce fifty, free men, and all volunteers, and raise a more potent army of men in three weeks, than England can in three years.²¹⁸

In a similar vein, but with less certainty and a greater sense of balance, the English Real Whig Richard Price commented in the aftermath of the American Revolution that

Free States ought to be bodies of armed *citizens*, well regulated, and well disciplined, and always ready to turn out, when properly called upon, to execute the laws, to quell riots, and to keep the peace. Such, if I am rightly informed, are the citizens of America.

....

The happiest state of man is the middle state between the *savage* and the *refined*, or between the wild and the luxurious state. Such is the state of society in CONNECTICUT, and in some others of the *American* provinces; where the inhabitants consist, if I am rightly informed, of an independent and hardy YEOMANRY, all nearly on a level—trained to arms,—instructed in their rights—clothed in home-spun—of simple manners—strangers to luxury—drawing plenty from the ground—and that plenty, gathered easily by the hand of industry²¹⁹

The eighteenth-century republicanism on which the Revolutionaries drew so heavily focused as much on constitutional balance as on the centrality of arms possession to republican character. In eighteenth-century America, republicanism not only served to champion public over private purposes, the ideology also accommodated itself to a collectivist vision of politics. Thus, in 1774, Josiah Quincy, a future signer of the Declaration of Independence, cautioned that “supreme power is ever possessed by those who have arms in their hands and are disciplined to the use of them.”²²⁰ As Bailyn writes with a nod to Jefferson’s *Rights of British America*, colonists on the eve of independence agreed “absolute danger to liberty lay in the absolute supremacy of ‘a veteran army’—in making ‘the civil subordinate to the military . . . instead of subjecting the military to the civil powers.’”²²¹

218. JOHN ALLEN, AN ORATION, UPON THE BEAUTIES OF LIBERTY, OR THE ESSENTIAL RIGHTS OF THE AMERICANS, at xiii-xiv (Boston 1773), *quoted in* Shalhope, *supra* note 98, at 606.

219. RICHARD PRICE, OBSERVATIONS ON THE IMPORTANCE OF THE AMERICAN REVOLUTION, AND THE MEANS OF MAKING IT A BENEFIT TO THE WORLD 16, 69 (London 1784), *quoted in* Shalhope, *supra* note 98, at 605.

220. JOSIAH QUINCY, JR., OBSERVATIONS ON THE ACT OF PARLIAMENT, COMMONLY CALLED THE BOSTON PORT BILL; WITH THOUGHTS ON CIVIL SOCIETY AND STANDING ARMIES (Boston 1774), *quoted in* BAILYN, *supra* note 2, at 61.

221. BAILYN, *supra* note 2, at 61 (quoting THOMAS JEFFERSON, A SUMMARY VIEW OF THE RIGHTS OF BRITISH AMERICA (1774), *reprinted in* 1 THE PAPERS OF THOMAS JEFFERSON,

Less visionary than Harrington's 1656 treatise *Oceana*, eighteenth-century republicans rehearsed endless object lessons in the demise of actual historical commonwealths that had gone over to corruption and civic passivity.²²² All the while they stressed institutional balance alongside individual virtue as barriers against corruption and absolutism.²²³ The standing army remained their arch symbol of a corrupted polity, but this reflected the standing army's tendency to subvert legislative independence as well as its displacement of virtue from the individual. By the middle of the eighteenth century, fear of power, corruption, and the imperial magistracy were eclipsing the independence of the soldier-statesman as principal icons of republicanism in Anglo-American constitutional discourse.²²⁴

5. Rethinking the Provincial Militia during the Great War for Empire

One reason behind the changing role of the militia in American political thought is that the militia was itself declining as a military and indeed as a cultural institution in the pre-Revolutionary years.²²⁵ As the frontier receded westward during the first half of the eighteenth century, the danger of Indian attack became ever more remote in the settled, relatively populous eastern counties. By the time of the French and Indian War (1757–64), compulsory militia service proved unenforceable.²²⁶ According to Professor Lawrence Cress, Americans in

the middle of the eighteenth century . . . no longer considered defense the responsibility of the entire community. . . . The militia had not disappeared, but it had all but lost its military significance, becoming more a reflection of local political relationships and a lingering symbol of the responsibilities as well as the rights of a citizen in a free society.²²⁷

Not only had the institutional militia decayed in the established

supra note 61, at 121, 134).

222. See SCHWOERER, *supra* note 134, at 191.

223. See BAILYN, *supra* note 2, at 63–64.

224. See LAWRENCE DELBERT CRESS, *CITIZENS IN ARMS: THE ARMY AND THE MILITIA IN AMERICAN SOCIETY TO THE WAR OF 1812*, at 3–8 (1982); cf. POCKOCK, *supra* note 2, at 506–11.

225. See generally DANIEL J. BOORSTIN, *THE AMERICANS: THE COLONIAL EXPERIENCE* 345–69 (1958), for a fascinating impressionistic account of the tension between centrifugal individualism and the metropolitan and provincial governments' quests for organization that characterized the colonial militias. Boorstin reports that only in the immediate frontier environment of the earliest settlements was the organizational impulse readily accepted by the population.

226. See Bellesiles, *supra* note 198, at 580, 583; cf. WEIGLEY, *supra* note 8, at 15–16.

227. CRESS, *supra* note 224, at 3.

colonies, but many, if not most, easterners no longer possessed that familiarity with firearms and marksmanship that frontier existence reputedly instilled in their grandfathers and great-grandfathers.²²⁸ Few even owned guns or complied with regulations mandating that militia members maintain government-issued muskets at home.²²⁹ And with little immediate stake in imperial rivalries between France and Britain, and no sense of peril from France's Indian allies, few eastern farmers of middling means rallied to the royal cause from 1757 to 1764. Those militiamen who made muster tended to vanish when ordered into long campaigns outside the borders of their home colonies.²³⁰ British and provincial authorities soon realized that success against French arms in North America would depend on regulars²³¹—that is, British soldiers—and long-serving colonial volunteers.²³²

George Washington, a militia colonel and wealthy Virginia squire with considerable speculative and patriotic interests at stake in the French and Indian War, was one Anglo-American who shared British sentiments wholeheartedly.²³³ Reflecting on militia units under his command during the early stages of the war, he wrote his British commander:

Militia, you will find, Sir, will never answer your expectation, no dependence is to be placed upon them; They are obstinate and perverse, they are often egged on by the Officers, who lead them to acts of disobedience, and, when they are ordered to certain posts for the security of stores, or the protection of the Inhabitants, will, on a sudden, resolve to leave *them*, and the united vigilance of their officers can not prevent them.²³⁴

Indeed, Washington was so dispirited by the performance of his own militia, and so impressed by the British regulars with whom he served in Braddock's ill-fated campaign and afterwards, that he could only hope exposure to the regulars might help transform the Virginia militia into a respectable and efficient fighting force. "Discipline," he wrote optimistically, "is the soul of an army. It makes small numbers formidable; procures success to the weak, and esteem to all; and may, in a manner peculiar to us, who are in the way to be joined to Regulars in

228. See Bellesiles, *supra* note 198, at 577.

229. See *id.* at 580, 582-83.

230. See WEIGLEY, *supra* note 8, at 14-16.

231. See *id.* at 16; BOORSTIN, *supra* note 225, at 358-60.

232. See CRESS, *supra* note 224, at 3.

233. See WEIGLEY, *supra* note 8, at 16.

234. Letter from George Washington to Colonel John Stanwix (July 15, 1757), in 2 THE WRITINGS OF GEORGE WASHINGTON 96, 97 (John C. Fitzpatrick ed., 1931-44).

a very short time, . . . [set us apart] from other Provincials."²³⁵

The French and Indian War ended successfully for Washington and the Americans, with the Treaty of Paris in 1763 securing British sovereignty in Canada and, in the process, severing the connections between hostile frontier Indians and their French allies and arms suppliers. But in the years after the war, Anglo-American colonists became restive in the face of Britain's increasingly aggressive American tax enforcement policies—policies that resulted largely from victory over the French and the consequent burdens of policing an enlarged New World empire.²³⁶

6. A Constitutional Crisis and a Standing Army: The Republican Nightmare Becomes Reality

In 1763, the subjects of George III's established American dominions seemed the most contented, patriotic, and British of peoples.²³⁷ But in the victory over France and in the completeness of Britain's conquest of North America lay seeds of discontent that ripened into the old Empire's dissolution, consummated only twenty years after the Treaty of Paris in a second treaty of the same name. At the root of the impending troubles was the problem of war debt. The conflict of 1757–63, the fourth of seven titanic struggles for empire that kept Britain and France at war more years than not between 1697 and 1815, was the most expensive yet.²³⁸ George III, young, headstrong, friendless save for his tutor Bute, and determined to rule as well as reign, confronted at war's end a national debt of £122,603,336.²³⁹ To compound the situation, policy considerations favored maintenance of the wartime army rather than demobilization.²⁴⁰ Policing the Indian frontier, keeping up garrisons in the strategic towns of Halifax, Quebec, and St. Augustine, and sinking the record debt required revenue.

All this left the king's new prime minister, George Grenville, desperately seeking fresh sources of income. A wine tax at home irked members of Parliament and their kin; a cider tax produced riots.

235. George Washington, General Instructions to all the Captains of Companies (July 29, 1757), in 2 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 234, at 109, 114.

236. See generally BOORSTIN, *supra* note 225, at 361; J.G.A. Pocock, *Political Thought in the English-Speaking Atlantic, 1760–1790: The Imperial Crises*, in THE VARIETIES OF BRITISH POLITICAL THOUGHT, 1500–1800, at 246, 259 (J.G.A. Pocock et al. eds., 1996).

237. See DON HIGGINBOTHAM, THE WAR OF AMERICAN INDEPENDENCE: MILITARY ATTITUDES, POLICIES, AND PRACTICE, 1763–1789, at 21 (1971).

238. See GIPSON, *supra* note 202, at 55.

239. See HIGGINBOTHAM, *supra* note 237, at 34.

240. See *id.* at 33.

Meanwhile, the American colonies were hardly taxed at all—yet were inhabited by some of the most prosperous and fortunate people on the face of the globe. To the ministry, it seemed all too obvious that the Americans should help pay for the army that delivered them from the French and protected them from the Indians.²⁴¹ The remaining decade of British rule in America was given to futile efforts to discover an effective formula for imposing and collecting this American contribution to the exchequery. Little did Grenville know how deeply he and his successors would offend the colonists' sense of constitutional propriety by imposing imperial taxes.

From the American perspective, the various tax schemes of the 1760s and '70s—the Stamp Act, the Sugar Act, the Townshend Duties, and the Tea Act—presented, with different degrees of vexatiousness, the same series of problems. Principally, the taxes were deemed unprecedented, usurpatory, and, therefore, threatening.²⁴² To the provincial lawyers, printers, and political agitators destined to lead a revolution, these tax-related issues appeared fundamentally as problems of constitutionalism. The American sense of constitutionalism, moreover, was more historical than legalistic. It focused, as we have argued, on a Whiggish interpretation of seventeenth-century British history, and in particular, on the Glorious Revolution, Settlement, and Bill of Rights of 1689.²⁴³ As Britain essayed ever-bolder tax collection schemes, Americans came to realize, with more than a little sense of shock, that the British ministry did not share the Americans' interpretation of the British Constitution. The more Americans stressed the fundamental Whig maxims at the heart of their understanding of the Settlement, the more they realized British officials did not take their Whiggery seriously. In particular, Americans came to the grim realization that British officials did not understand that the Bill of Rights should apply in favor of American provincial legislatures in precisely the same manner that it applied to benefit the Parliament at Westminster.²⁴⁴ And given the Americans' own unwavering commitment to the proposition that the principles of 1689 protected them as well as those other Englishmen across the water, it was a forgone conclusion that ministerial imposition of taxes not voted by the legislature(s) for the purpose of maintaining an army and servicing a

241. See GIPSON, *supra* note 202, at 57-59.

242. See EDMUND S. MORGAN, *BIRTH OF THE REPUBLIC, 1763-89*, at 36 (3d ed. 1992).

243. See HIGGINBOTHAM, *supra* note 237, at 14.

244. See ROBERT MIDDLEKAUFF, *THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION, 1763-1789*, at 132 (1982).

debt must occasion a constitutional crisis.

It would be difficult to overestimate how Whiggish Americans were in the closing days of the old Empire. Reprints of Trenchard and Gordon's *Cato's Letters*, those famous republican denunciations of the Walpole government that ran originally in newspapers of the 1720s, appeared in nearly forty percent of the public and private libraries in late colonial British North America, then the most literate society in the world.²⁴⁵ *Cato* of course laid down a precise, analytic description of the eschatology of a republic's demise.²⁴⁶ And one by one in the 1760s and '70s, *Cato's* steppingstones on the road to subversion surfaced before the colonials' horrified eyes. Not only did the ministry attempt to enforce internal taxes voted by the Westminster Parliament in which the Americans were not represented, but it dispatched a swarm of revenue officers to serve in hitherto unknown posts and established incentives for these officials to seize property, cargo, and even ships for sometimes trivial reasons. Not only did the ministry expand the role of both provincial and Crown executives in local affairs, it sought to free royal governors from provincial legislative control by paying their salaries directly from London.²⁴⁷ When the New York Assembly hesitated to provide funds to compensate property owners for quartering regulars, the ministry ordered the Assembly suspended.²⁴⁸ And when restive locals embarked on a campaign to intimidate royal administrators in Boston—unlike New York, not an established garrison town—the newly established Colonial Office in Whitehall ordered British regulars to occupy the city.²⁴⁹

No aspect of the imperial taxation regime spawned greater resentment than the employment of a standing army to buttress British authority in the unruly colonies. Historically, Americans had not questioned the British army's limited presence in the colonies.²⁵⁰ Smallish coastal garrisons in Savannah and Charleston were welcomed as deterrents against Spanish or Indian raids and even slave insurrection, and the nearby presence of full regiments at St. Augustine afforded both economic advantage and a sense of security.²⁵¹

245. See CRESS, *supra* note 224, at 34-35.

246. See *id.*; BAILY, *supra* note 2, at 43-46.

247. For a succinct summary, see MORGAN, *supra* note 242, at 54.

248. See MIDDLEKAUFF, *supra* note 244, at 151.

249. See GIPSON, *supra* note 202, at 189-91.

250. See HIGGINBOTHAM, *supra* note 237, at 16-17.

251. On the special situation in Florida, Georgia, and South Carolina, see CRESS, *supra* note 224, at 47.

While some citizens in New York complained of crassness and bad manners on the part of soldiers in the town's mid-sized garrison, others welcomed the army and navy's trade. Outside the Deep South and New York City, the army was largely unknown, with the bulk of Britain's American strength stationed in scattered posts in the interior, and large garrisons in Canada and the Caribbean. The standing army was distant, and Americans largely assumed the Bill of Rights and parliamentary supremacy would protect them against the sort of militarist abuses associated with the Stuarts.²⁵² But attitudes changed drastically in the late 1760s as British officials first questioned the applicability of constitutional guarantees to the colonies, and then redeployed substantial western garrisons to New York and Boston to prop up the new customs collection apparatus.²⁵³

The arrival of four regiments of regulars in Boston on October 1, 1768 confirmed the worst fears of Whiggish patriots. It is "the indefeasible right of subjects," the Boston Town Meeting swiftly resolved,

to be *consulted* and to give their *free consent in person* or by representatives of their own free election to the raising and keeping a standing army among them; and the inhabitants of this town, being free subjects, have the same right derived from nature and confirmed by the British constitution as well as . . . [their] royal charter; and therefore the raising or keeping a standing army without their consent in person or by representatives of their own free election would be an infringement of their natural, constitutional, and charter rights . . .²⁵⁴

Although doomsayers had long suspected Governor Bernard would seek the aid of troops from nearby Halifax, few were prepared for the initial sense of dismay, alarm, and disbelief that accompanied the sight of the army disembarking in Boston harbor. "To have a standing army! Good God! What can be worse to a people who have tasted the sweets of liberty!" Andrew Eliot wrote to Thomas Hollis when he first sighted the troop ships in Boston harbor. "Things are come to an unhappy crisis; there will never be that harmony between Great Britain and her colonies that there hath been; all confidence is at an end; and the moment there is any blood shed all affection will cease."²⁵⁵

252. See *id.* at 3-4, 8-11.

253. See generally *id.* at 13. On New York, see MIDDLEKAUFF, *supra* note 244, at 144-45; on Massachusetts, see HIGGINBOTHAM, *supra* note 237, at 39-44.

254. SIXTEENTH REPORT OF THE BOSTON RECORD COMMISSIONERS 263 (1768), *quoted in* BAILYN, *supra* note 2, at 113.

255. Letter from Rev. Andrew Eliot to Thomas Hollis (Sept. 27, 1768), *in* 4

As the ubiquitous republican Cato described presciently the events that would come to pass as an antirepublican conspiracy uncoiled, so too did he set forth in his *Letters* precisely what steps to take to stave off subversion and save the Republic.²⁵⁶ These steps, familiar enough to every sentient colonial, were the very steps taken by the first Whigs in the 1680s, when the party of Shaftesbury and Locke rose in resistance to Stuart usurpation and articulated the fundamentals of Whiggery that in American minds formed the bedrock of English constitutionalism.²⁵⁷ The course of resistance to tyranny flowed naturally from loyalty to the true Constitution. And in the face of illegal taxation, executive usurpation, and army occupation, the colonists' self-evident constitutionalist remedies included refusal of local courts and juries to enforce Crown directives, reassertion of local legislative supremacy, and revival of the local militia.

The presence of the army, in its new, alarming role, signaled the need to implement resistance according to this familiar Whig paradigm. Colonists most attuned to politics and ideology took the lead in goading less radical countrymen into a heightened state of political awareness and participation. Following the occupation of Boston, agitators and philosophers unleashed a torrent of republican anti-army pamphlets celebrating the virtues of provincial citizen militia and denouncing the perceived depravity of the imperial army.²⁵⁸ The *Journal of the Times* articles, syndicated throughout the colonies, furnished a day-by-day account of Massachusetts "under military rule,"²⁵⁹ and the circulars distributed by the Boston committee of correspondence consciously hearkened back to the seventeenth century's radical, insurrectionary opposition.²⁶⁰ But even though Revolutionary theorists and pamphleteers pointed the way towards military confrontation, during the first occupation of Boston (1768–72), violent resistance to Crown authority remained confined largely to intimidation of politicians and officials, tarring and feathering, rioting, and ransacking of houses.²⁶¹ A large majority of the population remained committed on some level to reconciliation and reestablishment of civilian rule within the theoretical

MASSACHUSETTS HISTORICAL SOCIETY COLLECTIONS 428 (4th ser.), *quoted in* BAILYN, *supra* note 2, at 114.

256. See BAILYN, *supra* note 2, 43–46.

257. See ASHCRAFT, *supra* note 119, at 291–333. On the Americans' application of this history to the late imperial constitutional crisis, see CRESS, *supra* note 224, at 35–36.

258. See BAILYN, *supra* note 2, at 112–19.

259. See *id.* at 114.

260. See MIDDLEKAUFF, *supra* note 244, at 232–33.

261. See *id.* at 200–03.

confines of the old order, and local government nowhere crossed over into organized, armed resistance to the established sovereign.²⁶²

The army withdrew not long after the acquittal of the soldiers tried for the Boston Massacre, and the repeal of the Townshend Duties restored a kind of calm before the storm in the early seventies.²⁶³ But in December 1773, the Sons of Liberty dumped the cargo of three British merchantmen into Boston Harbor to protest the Tea Act by which Westminster reasserted its taxing power over the colonies, and Parliament responded quickly with the Boston Port Act (closing the port to trade), the Administration of Justice Act (removing venue to England for criminal trials of Crown officers), the Massachusetts Government Act (vesting legislative and jury functions with the executive), and the Quartering Act (permitting seizure of unoccupied buildings, such as empty warehouses, to serve as barracks).²⁶⁴ Troops returned from Halifax to strengthen the garrison at Castle William in the harbor, and others took up quarters in the town itself.²⁶⁵

Intercolonial economic resistance to British occupation and policy resumed according to patterns of cooperative nonimportation and nonexportation established during the Stamp Act and Townshend Duties crises. But within Massachusetts itself, political resistance via the traditional, constitutional organs of civil government was now defined as illegal, if not treasonous. As appeals to law and reason proved unavailing, the Lockean moment of dissolution of government and the appeal to heaven loomed ever likelier. Thus, the Intolerable Acts inspired Massachusetts's General Court and many of the other provincial legislatures to reanimate their colonies' historic militia to serve as constitutional counterweights to the redcoats. Arms were purchased in Europe,²⁶⁶ militia laws were enforced, and training was intensified.²⁶⁷ By the spring of 1775, when General Gage, commander of the British regiments around Boston and royal governor of Massachusetts, issued orders to surrender to central storehouses militia arms previously kept in private homes and ordered the army to confiscate arms not duly turned over to the government, colonial

262. See MORGAN, *supra* note 242, at 43, 46, 50-51; see also GIPSON, *supra* note 202, at 190-91, 200, 205, 208.

263. See BAILYN, *supra* note 2, at 117-18.

264. See *id.* at 118-19.

265. See generally ROBERT W. TUCKER & DAVID C. HENDRICKSON, *THE FALL OF THE FIRST BRITISH EMPIRE: ORIGINS OF THE WAR OF AMERICAN INDEPENDENCE* 327-28 (1982).

266. See HIGGINBOTHAM, *supra* note 237, at 50.

267. See generally *id.* at 10, 45-46; MIDDLEKAUFF, *supra* note 244, at 256, 259.

hostility towards ministerial policy had swollen to a fever pitch.²⁶⁸ In March, the army seized gunpowder in Charleston and cannon in Cambridge without encountering resistance.²⁶⁹ But shots were fired on April 19, 1775, when provincial militia at Lexington and Concord confronted British regulars searching for colonial powder stores.²⁷⁰ By nightfall, over one hundred soldiers and militiamen lay dead and dying,²⁷¹ and invasion, independence, and eight years of war were in the balance.

7. The Continental Army and the Militia during the American Revolution

Soon after American protest escalated into armed resistance, republican rumination about standing armies clashed with the hard reality of military campaigning. Given his tastes, sentiments, and especially his unsatisfactory experiences with militia units during the French and Indian War, it is hardly surprising that Washington quickly set about forging a regular army upon his appointment as commander in chief by the Continental Congress on June 15, 1775.

“Let us have a respectable Army, and such as will be competent to every exigency,” the commanding general pleaded to Congress.²⁷² While the effort to create a regular army met with considerable hardships through the course of the war, the performance of militia under his command only intensified Washington’s compulsion to mold a European-style professional force under Continental colors.²⁷³ After the American disasters at Long Island and Brandywine during the summer of 1776, Washington informed Congress that if he were “called upon to declare upon Oath, whether the Militia have been most serviceable or hurtful upon the whole; [he] should subscribe to the latter.”²⁷⁴ “Regular Troops,” the general later reflected,

alone are equal to the exigencies of modern war, as well for defence as for offence *No Militia* will ever acquire the habits necessary

268. See HIGGINBOTHAM, *supra* note 237, at 46.

269. See MIDDLEKAUFF, *supra* note 244, at 264.

270. For a rather bloody and macabre account, see *id.* at 269-71.

271. See THE TOLL OF INDEPENDENCE: ENGAGEMENTS AND BATTLE CASUALTIES OF THE AMERICAN REVOLUTION 3 (Howard Peckham ed., Univ. of Chicago Press 1974) [hereinafter TOLL OF INDEPENDENCE].

272. Letter from George Washington to the President of Congress (Dec. 16, 1776), in 6 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 234, at 379, 380.

273. See WEIGLEY, *supra* note 8, at 31-36.

274. Letter from George Washington to the President of Congress (Sept. 24, 1776), in 6 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 234, at 106, 112.

to resist a regular force The firmness requisite for the real business of fighting is only to be attained by a constant course of discipline and service. I have never yet been witness to a single instance that would justify a different opinion²⁷⁵

Washington's opinions, while they were untempered, were hardly idiosyncratic. Indeed, the disillusion of military and political leaders with America's historic militia became general and widespread soon after colonial grievances with Britain erupted into war.²⁷⁶ Still, the militia was not as consistently useless as some of Washington's comments suggest. In the action at Bunker Hill, volunteer companies formed in anticipation of hostilities acquitted themselves very well. But they were defending fixed positions. What Washington realized from the start of the war was that no American militia, not even elite volunteer units who had devoted long hours to training, could successfully engage mainline British regulars in pitched battle on open fields.²⁷⁷ Indeed, Washington did not have sufficient confidence in his Continentals—even after the institution of systematic European-style drill under Inspector General Friedrich von Steuben—to challenge British strength directly with the best of American regular forces.²⁷⁸ American success depended on surprise, maneuver, an excellent artillery arm, and taking outnumbered British detachments at a disadvantage. The principal American victories—Trenton, Princeton, Saratoga, and Yorktown—were all of this pattern. When American infantry units met the main British army head-on, as on Long Island or at Brandywine, the result was invariably a rout. Final victory owed far more to American perseverance, French assistance, and the loss of

275. Letter from George Washington to the President of Congress (Sept. 15, 1780), in 20 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 234, at 49, 49-50.

276. See, for example, Hamilton's retrospective comments on the reputation of the wartime militia:

I expect we shall be told that the militia of the country is its natural bulwark, and would be at all times equal to the national defense. This doctrine, in substance, had like to have lost us our independence. It cost millions to the United States that might have been saved. The facts which from our own experience forbid a reliance of this kind are too recent to permit us to be the dupes of such a suggestion. The steady operations of war against a regular and disciplined army can only be successfully conducted by a force of the same kind The American militia, in the course of the late war, have, by their valor on numerous occasions, erected eternal monuments to their fame; but the bravest of them feel and know that the liberty of their country could not have been established by their efforts alone, however great and valuable they were. War, like most other things, is a science to be acquired and perfected by diligence, by perseverance, by time, and by practice.

THE FEDERALIST NO. 25, at 195 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

277. See WEIGLEY, *supra* note 8, at 33.

278. See *id.* at 35.

British political will than it did to any mythical prowess of the backwoods militiaman.²⁷⁹

On a theoretical level, the demands of a major war for professional armies contradicted a firmly rooted republican ideology that favored citizen-soldiers. Reality, leaders reluctantly acknowledged, was not consonant with their own revolutionary rhetoric, which dwelled heavily the on civic virtue of citizen-soldiers and the abuses of British militarism in order to justify the American cause. Accordingly, the Revolution demanded some degree of accommodation between political theory and experience. To compound matters, the pure republicanism that had ushered colonials towards separation with relative doctrinal ease suffered serious strains as it passed from a mere opposition creed into a principle of majority government. With the war's end, republican ideology necessarily had to become a philosophy of balanced constitutionalism for peacetime, as much as a theory of individual civic courage best suited to moments of military crises.²⁸⁰ It was therefore inevitable that the role of the man of arms in American political theory would be rewritten as America settled into independence after the second Treaty of Paris.

Washington, of course, did not desire to see the new nation's security staked on the historic militia system that had proven so inadequate during war. "The Jealousies of a standing Army," he wrote, "and the Evils to be apprehended from one, are remote; and in my judgement, situated and circumstanced as we are, not at all to be dreaded; but the consequence of wanting one, according to my Ideas, . . . is certain, and inevitable Ruin . . ." ²⁸¹ But as a leading historian of the United States Army has aptly commented, "Washington himself could not base his prescriptions for the future military policy of the United States solely upon the combat experience of the Revolution." ²⁸² Professor Weigley continues,

The nature of a permanent American Army was a political issue, the decision of which could influence the whole larger question of the nature of the United States. A society of free men had grown up in America partly because at the beginning the citizenry had relied on themselves for their own defense. To establish a standing army would be to accept a European import that had been designed in the first place to buttress monarchy. Even if American circumstances minimized any likelihood that an American standing

279. See *id.* at 39-42, 67-68.

280. See WOOD, *supra* note 113, at 398-403.

281. Letter from George Washington to the President of Congress, *supra* note 274, at 112.

282. WEIGLEY, *supra* note 8, at 74.

army would promote a despotism, the creation of such an army might nevertheless contribute to a more centralized and more powerful government than many leaders of the Revolution thought wise.²⁸³

The tension between republican hostility to standing armies and the desire of strong government men for security flared up again and again through the tumultuous 1780s. It was not even tentatively resolved until a new balance was struck with the adoption of the Second Amendment to the United States Constitution.

B. Madisonian Structuralism: The Place of the Militia in the New American Science of Government

1. The Confederation Government Tries—and Fails—to Organize the Militia

The Second Amendment—and the Bill of Rights as a whole—arose in response to Antifederalist fears of powers either vested in or not expressly withheld from the federal government by the Constitutional Convention in 1787. The Convention's delegation of militia powers to Congress and the executive, and partial removal of military powers from the states, was presaged by attempts to establish a military system and to regulate the national militia during the "critical period" before 1787. As early as 1783, the Confederation Congress and army leaders such as Washington, Henry Knox, and von Steuben were directing their attention to the permanent, peacetime organization of the military in the new nation. In April 1783, Congress appointed a committee, which included Hamilton and Madison, to "consider what arrangements it will be proper to make in the different departments with reference to a peace."²⁸⁴ Hamilton wrote to General Washington, who consulted with Knox, chief of artillery for the Continental army, von Steuben, the inspector general, and other top aids before reporting his *Sentiments on a Peace Establishment*.²⁸⁵ Washington bid for the largest regular force he felt Congress might conceivably authorize, but bowing to political necessity, he based his proposed system of peacetime defense largely on the militia.

283. *Id.* at 74-75.

284. CUNLIFFE, *supra* note 75, at 180.

285. This document is set out in JOHN MCAULEY PALMER, WASHINGTON, LINCOLN, WILSON: THREE WAR STATESMEN app. at 375-96 (1930).

The old commanding general argued:

[E]very Citizen who enjoys the protection of a free Government, owes not only a proportion of his property, but even of his personal services to the defence of it, and consequently that the Citizens of America (with a few legal and official exceptions) from 18 to 50 years of age should be borne on the Militia Rolls²⁸⁶

But this was simply his theoretical starting point. His vision of militia in action was decidedly more statist, more federalist, more select, and more professional. He favored twice yearly musters and inspections of the general body, from which would be selected the “Van and flower of the American Forces,”²⁸⁷ a “Continental Militia,” patterned after the Continental army and held ready for service, “nearly in the same manner the Minute Men formerly were”²⁸⁸ Washington’s Continental militia would drill two to four weeks per year, wear federal uniforms, and carry standard equipment supplied from state arsenals. By their example, it would become “universally reputable to bear Arms and disgraceful to decline having a share in the performance of Military duties.”²⁸⁹

Washington would have preferred not to rely on militia at all, but hostility to standing armies was too widespread in and out of Congress to make this a realistic possibility. The best he could hope for was that Congress would authorize a small professional army to be supplemented by a federally supervised militia. The Continental militia Washington envisioned was consequently no ad hoc militia-of-the-whole, and certainly nothing like the self-proclaimed Michigan militia²⁹⁰ of today, but an organized, trained, select reserve army of the United States, equipped with standard issue arms. Supporting the regular American army, Washington’s Continental militia would have become the nation’s first-order reserve.

Washington’s proposal was but the first in a long, unavailing line of efforts to select out from the universal militia a more efficient and better-trained cadre of citizen-soldiers for national service. Plans of

286. *Id.* at 388.

287. *Id.* at 389.

288. *Id.* at 392.

289. *Id.* at 393; *see also* CUNLIFFE, *supra* note 75, at 181.

290. For commentary on today’s self-styled “militia,” *see* Wills, *supra* note 3, which features an interesting photograph of the South Michigan Regional Militia Wolverines 14th Brigade, 4th Division, on a training exercise with dangerous dogs. Justice Scalia has also had occasion to take note of the Michigan militia. While discussing the insurrectionist favorite, Joyce Lee Malcolm’s *To Keep and Bear Arms*, which he labeled an “excellent study,” Justice Scalia added that the author was not even “a member of the Michigan Militia, but an Englishwoman.” (Malcolm is in fact American.) *See* SCALIA, *supra* note 110, at 136-37 n.13.

this type, labeled select militia schemes, quickly aroused the same sort of republican suspicions as proposals favoring standing armies. A few years later, during the ratification debate, the Federal Farmer, one of the most influential antifederal pamphleteers, summed up the republican argument against select militias as follows:

Should one fifth, or one eighth part of the men capable of bearing arms, be made a select militia, as has been proposed, and those the young and ardent part of the community, possessed of but little or no property, and all the others put upon a plan that will render them of no importance, the former will answer all the purposes of an army, while the later will be defenceless.²⁹¹

Just a few months later, the Federal Farmer elaborated on his objections to selection:

These corps, not much unlike regular troops, will ever produce an inattention to the general militia; and the consequence has ever been, and always must be, that the substantial men, having families and property, will generally be without arms, without knowing the use of them, and defenseless; whereas, to preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them; nor does it follow from this, that all promiscuously must go into actual service on every occasion. The mind that aims at a select militia, must be influenced by a truly anti-republican principle . . .²⁹²

The Confederation Congress never acted on the original select militia plan set forth in Washington's *Sentiments*. However, congressional inaction in this instance does not imply principled rejection so much as indifference and inertia. In the lax days after the war, when members yearned to return to private life and the affairs of their own state legislatures, quorums seldom assembled at Princeton, Annapolis, or Philadelphia.²⁹³ Indeed, after the energetic Jefferson left for France in the spring of 1784, Congress accomplished very little of

291. OBSERVATIONS LEADING TO A FAIR EXAMINATION OF THE SYSTEM OF GOVERNMENT PROPOSED BY THE LATE CONVENTION; AND TO SEVERAL ESSENTIAL AND NECESSARY ALTERNATIONS IN IT. IN A NUMBER OF LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN [hereinafter LETTERS FROM THE FEDERAL FARMER] (letter of Oct. 10, 1787), in 2 THE COMPLETE ANTI-FEDERALIST 214, 242 (Herbert J. Storing ed., 1981). At the time of its publication, and for many years thereafter, the Federal Farmer was widely attributed to Richard Henry Lee, but in more recent years scholars such as Herbert Storing and Gordon Wood have raised doubts about Lee's authorship of the Farmer. See also Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI-KENT L. REV. 103, 105, 144 (2000).

292. LETTERS FROM THE FEDERAL FARMER (letter of Jan. 25, 1788), *supra* note 291, at 342.

293. During the 1783-84 sessions, Congress was compelled to change its situs on three occasions, owing to the pressure of anti-Continental mobs demanding debt relief and back pay to veterans. See MALONE, *supra* note 67, at 403-04.

substance for several years. A plan for militia organization suggested by von Steuben was ignored entirely.²⁹⁴

Notwithstanding von Steuben's and Washington's earlier rebuffs, Henry Knox submitted a *Plan for the General Arrangement of the Militia of the United States* soon after his appointment as secretary of war by Congress in 1786.²⁹⁵ More carefully detailed than Washington's *Sentiments*, Knox's *General Arrangement* served for many years as the standard blueprint for reforming the militia by selection. Knox proposed to retain the militia-of-the-whole in theory,²⁹⁶ but to divide it into three corps according to age: an "advanced corps" aged eighteen to twenty, a "main corps" aged twenty-one to forty-five, and a "reserved corps" aged forty-six to sixty.²⁹⁷ The advanced corps would train six weeks a year, while demands on the main and reserved corps would be less severe, thereby reducing dislocation to families and the economy.²⁹⁸ The intensive training required of young militiamen allowed Knox to envision eventual abolition of the regular army, thus holding out some hope that archrepublicans might find the plan palatable. But like Washington's *Sentiments* three years before, Congress neglected Knox's plan during the remaining months of Confederation government.²⁹⁹ When the new federal government eventually assembled in New York in 1789, it inherited a small regular army of some six hundred men from the old regime, but no national militia system was in place, and administration of state militia remained still an entirely local affair.³⁰⁰

2. The Military, the Militia, and the Philadelphia Convention

As Gordon Wood has argued in his *Creation of the American Republic*, the men who would frame the Constitution became increasingly certain in the years after the 1783 Treaty of Paris that

294. FRIEDRICH VON STEUBEN, A LETTER ON THE SUBJECT OF AN ESTABLISHED MILITIA, AND MILITARY ARRANGEMENTS, ADDRESSED TO THE INHABITANTS OF THE UNITED STATES (1784). For a discussion of von Steuben's plan, see CUNLIFFE, *supra* note 75, at 182.

295. Henry Knox, A Plan for the General Arrangement of the Militia of the United States (1786). For a description of Knox's plan with commentary, see PALMER, *supra* note 285, at 84-94.

296. See PALMER, *supra* note 285, at 87.

297. See *id.* at 88.

298. See *id.*

299. See CUNLIFFE, *supra* note 75, at 182.

300. See WEIGLEY, *supra* note 8, at 89. The Act of Sept. 29, 1789, ch. 25, § 1, 1 Stat. 95, 95-96, legalizing the army inherited from the Confederation government, confirmed an earlier act authorizing a force of 840, but only 672 were actually in service at this time. See WEIGLEY, *supra* note 8, at 89.

American domestic politics were headed in the wrong direction.³⁰¹ They shared with men who would become Antifederalists a perception that Americans had fallen away from the public virtue of the Revolutionary War days. In fact, almost all commentators of the mid-1780s remarked (in archetypally republican fashion) that the nation was given up to luxury, to money making, even more to money spending, and to self-service.³⁰² If there was no general agreement as to who the best sort of people were, there was general agreement that they were no longer in national politics.³⁰³ In the 1780s, more than ever before or since, the focus of power was on the states, more precisely in the state legislatures, and more precisely still in the lower or popular houses of the state legislatures. The radical state constitutions of the Revolutionary period provided for generally weak executives, gave wide latitude to the popular branch of the legislature, and prevented the propertied and commercial classes from concentrating greater influence than their numbers alone justified in lawmaking, appointments, and administration. The “failure” of the post-revolutionary state governments was illustrated most dramatically by Massachusetts’s severe difficulties suppressing western rebels who demanded debtor and tax relief.³⁰⁴ The slowness of the militia to respond to orders to put down the Shaysites, and the fact that several units went over to the rebels, highlighted the weakness of the executive and the lack of vigor in any military or law enforcement system depending on the militia to execute the law. Many future Antifederalists considered this lack of vigor to be the beauty of the existing system; but to future Federalists, the militia’s ineffectual efforts against the Shaysite rebels became perhaps the most compelling impetus to the formation of a stronger Union with a more vigorous executive, reliable military, and effective judicial system,³⁰⁵ and

301. See WOOD, *supra* note 113, at 395-96.

302. See *id.* at 416-17.

303. See *id.* at 399.

304. See *id.* at 412; WEIGLEY, *supra* note 8, at 84-85.

305. Madison shared with other Federalists the opinion that, in the postwar climate, government on the state and local level (and there was during the Confederation period little government on the national level) failed to protect the “worthy against the licentious.” See WOOD, *supra* note 113, at 471-75 (quoting JOHN DICKSON, THE LETTERS OF FABIVS IN 1788, ON THE FEDERAL CONSTITUTION; AND IN 1797 ON THE PRESENT SITUATION OF PUBLIC AFFAIRS: WITH ADDITIONAL NOTES (1797), in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 188 (Paul L. Ford ed., 1888)). Nowhere was this more apparent than in western Massachusetts. The rebellious activities of the Shaysites consisted chiefly of preventing creditors from collecting from debtors by mobbing courts, intimidating jurors and judges, and preventing magistrates and sheriffs from executing judgments. See JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 33-34 (1996). Although the governor called out the militia to protect the integrity of the legal process, western militia either failed to make muster, or switched sides and then assisted in seizure of the

the concomitant ability to impose more order on the libertarian and natural rights regimes of the states.

The stronger federal government favored by those who became Federalists would necessitate a readjustment of American constitutional theory and of the role of the military therein. In 1776, American Revolutionaries widely considered themselves upholders of the traditional mixed or English Constitution.³⁰⁶ Under that system, a theoretical balance and equilibrium derived from the tripartite division of the political nation into monarch, lords, and commons, each allotted their respective political competencies.³⁰⁷ The requirement that military funding flow from Parliament (in practice, after the Settlement of 1689, through the annual Mutiny Acts), and the strong voice of stability and aristocracy issuing from the Lords, served in this model to check the magistracy's ability to turn a military establishment to corruption or oppression of the exchequer or nation.³⁰⁸ The balanced Constitution was a theory most prized by pamphleteers on both sides of the Atlantic. It informed Revolutionary sensibilities and influenced the wave of state constitutions enacted during the war.

Crucial, for our purposes, was the balanced Constitution's dependence on a theoretical preference for militia. The alternative standing army—either under control of the magistracy (as in late colonial Massachusetts) or of the legislature (as during the English Commonwealth)—fatally upset the constitutional balance by placing unlimited authority with a single order of society. But theory, by the late eighteenth century, little mirrored reality. In Britain, imperial conflict with France necessitated a vast military establishment. The deleterious effects of standing militarism were mitigated in the home countries by placing chief reliance on the less dangerous navy and by stationing the majority of the army overseas. In the North American colonies, however, the antirepublican impact of garrisoning was eventually received with full force. Meanwhile, in both Britain and in the newly emerging American states, the tripartite structure of the old mixed theory had lost much of its punch. Democratic impulses in America severed constitutional theory from its basis in a traditional

Confederation's arsenal at Springfield. See WEIGLEY, *supra* note 8, at 84. Therefore, as Madison planned for the Philadelphia Convention, he was concerned not only with creating a political system less likely to pass legislation granting debt relief, easy money, and painless bankruptcy, but also with ensuring the very ability of the judicial system to function and government to enforce the law. See RAKOVE, *supra*, at 34.

306. See WOOD, *supra* note 113, at 44-45.

307. See *id.* at 18-19.

308. See *id.*

class system, and during the Revolution, aristocratic and propertied elements largely lacked sufficient clout to endow the upper houses of the legislatures with powers consequent to the quasi-aristocratic theoretical basis of their existence. In fact, many republicans and the Pennsylvania Constitution had gone over to unicameralism, while the upper houses that remained lacked the voting and office-holding qualifications to make them effective reserves of aristocratic power.³⁰⁹ Thus by 1787, in the minds of soon-to-be Federalists, the traditional mixed constitution had either fallen into hopeless disrepair or proven ineffective in lending order to American political culture. To soon-to-be Antifederalists on the other hand, the acknowledged disorder was either desirable or remediable by a return to the civic virtue upon which the old theory was premised.³¹⁰

Gordon Wood's greatest contribution to our understanding of early-American political thought emerges from his description of how radically the constitutionalism of 1787 differed from that of 1776.³¹¹ The difference rested most fundamentally on the Federalists' loss of faith in the attainability, sustainability, and (in the case of Hamilton) even the political desirability of civic virtue.³¹² Inevitably, this Federalist change of heart provoked a profound reassessment of the role of the militia and of that republican archetype, the citizen-soldier, in the newly unfolding system. Unlike radical republican visionaries, Federalists were not fundamentally opposed in all instances to vigorous government.³¹³ A clear case in point is that they would have found vigorous government useful in suppressing the Shaysites.³¹⁴

To Federalists, the principal problem was, rather, that unchecked authority was exercised too severely by the wrong sort of people for the wrong sort of ends. Too powerful state legislatures had fallen under the control of uneducated, unqualified, shortsighted, unprincipled men who pursued easy money policies that served the immediate interests of debtors, but undermined the long range interests in stability of the leading social orders of the Revolutionary years.³¹⁵ The science of

309. *See id.* at 226-37.

310. *See id.* at 471-75, 560-61. For a more paradigmatic perspective, see POCOCK, *supra* note 2, at 530-31.

311. *See* WOOD, *supra* note 113, at 593-615.

312. *See id.* at 474-75.

313. *See id.* at 506-19; *see also* RAKOVE, *supra* note 305, at 29-34; GARRY WILLS, *A NECESSARY EVIL: A HISTORY OF AMERICAN DISTRUST OF GOVERNMENT* 70-82 (1999).

314. *See* WEIGLEY, *supra* note 8, at 84.

315. *See* WOOD, *supra* note 113, at 406-07; *see also* Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 12 *THE PAPERS OF THOMAS JEFFERSON*, *supra* note 61, at 270, 276.

government, Federalists thought, must be practiced by experts whose education, experience, and outlook fitted them for the job. They increasingly rejected the Antifederalists' undifferentiated social theory in favor of specialization.³¹⁶ The specialization that explained the fitness and qualifications for leadership of the traditional political class also called into question the logic of an undifferentiated mass citizen-militia of part-time soldiers, part-time ploughmen and mechanics, and part-time politicians. In time of crisis especially, order required firmer security than that provided by the decaying and undisciplined archdemocratic militias.

Federalists did not abandon all the goals of civic humanism, however. While the radical republican preference for a democratic and unprofessional militia was at least partially subverted by new federal military powers, other core values of the old ideology lived on in the new constitutionalism, now protected by radically new instrumentalities of balance. Although the Philadelphia Constitution did not reject entirely the historical Anglo-American suspicion of standing military establishments, it did concede the necessity of at least some professional soldiering to secure external peace and internal stability. These twinned, countervailing goals are reflected in the overall Madisonian structure and in the Militia and Military Clauses of the organic Constitution.³¹⁷

3. Militia and Military Powers in the Constitution of 1787

Classical republicans feared unchecked power and, especially, absolute unrepubli- can control over the military. In large measure, so did the new Federalists. But at the Philadelphia Convention in the summer of 1787, they devised novel safeguards against the ancient abuses. Most significant was the two-tiered division of military control between the executive and legislative federal branches, and

316. See WOOD, *supra* note 113, at 493-99.

317. See U.S. CONST. art. I, § 8, cls. 12 (Army), 13 (Navy), 14 (Military Rules), 15 (Calling Forth), 16 (Militia); *id.* art. II, § 2, cl. 1 (Commander in Chief). For an analysis, see *infra* text accompanying notes 323-26. See also *Perpich v. Department of Defense*, 496 U.S. 334 (1990). As Justice Stevens aptly wrote:

Two conflicting themes, developed at the Constitutional Convention and repeated in debates over military policy during the next century, led to a compromise in the text of the Constitution and in later statutory enactments. On the one hand, there was a widespread fear that a national standing Army posed an intolerable threat to individual liberty and to the sovereignty of separate States, while, on the other hand, there was a recognition of the danger of relying on inadequately trained soldiers as the primary means of providing for the common defense. Thus, Congress was authorized both to raise and support a national Army and also to organize "the Militia."

Id. at 340.

between the national and state authorities.

Separation of powers was not in itself a radical innovation. Judicial independence had informed resistance to the Stuarts as early 1610 with Lord Coke's famous opinion in *Dr. Bonham's Case*,³¹⁸ and judicial tenure upon good behavior was duly guaranteed in the Act of Settlement of 1701.³¹⁹ Perhaps still more fundamental to Commonwealth philosophy, parliamentary independence from the monarchy developed into a mainstay of English opposition ideology and was enshrined into the Bill of Rights of 1689.³²⁰ Midway through the eighteenth century, Baron de Montesquieu could look across the Channel with envy and celebrate British separation of powers as the most perfect of political systems.³²¹ But the Madisonian model of separation did mark a new departure from its European antecedents. It did so primarily in its frank concession of the necessity, and indeed the advantages, of blending; that is, allowing different branches to partially exercise powers naturally inherent in another branch.³²²

American federalism also marked a novel departure. Unlike the central authorities in the American or Swiss Confederations, or in the Holy Roman Empire, the central government under the Constitution was given authority to bind individuals, not merely member states.³²³ Like Madison's new system of separation of powers, the new federalism emerged clearly in the Military and Militia Clauses adopted by the

318. 8 Co. Rep. 114a, 118a, 77 Eng. Rep. 646, 652 (K.B. 1610) ("And it appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void."). Of course, Coke is really asserting principles of judicial review as opposed to judicial independence from the magistracy, which would come only with tenure upon good behavior. But James I realized that in the context of resistance to his assertions of royal prerogative, this amounted to much the same thing—a challenge to his putatively absolute powers. As quoted by J.P. Sommerville, the king quipped that "if the Judges interpret the lawes themselves and suffer none else to interpret, then they may easily make of the laws shipmens hose." SOMMERVILLE, *supra* note 150, at 96. (Shipmens hose, it should be noted, were loosely cut one-size-fits-all sailor pants.) *Dr. Bonham's Case* was not respected precedent by the age of Mansfield, but it remained an icon of Whiggish sentiment.

319. See SCHWOERER, *supra* note 178, at 289. The Heads of Grievances of 1689 also proposed to secure judicial tenure upon good behavior, but this was one of the radical Whig measures requiring the creation of new law that was struck at the Lords' insistence before passage of the Declaration of Rights. See *id.* at 22-33; *supra* notes 192-95 and accompanying text.

320. See SMITH, *supra* note 151, at 305-06; *supra* notes 178-84 and accompanying text.

321. See CHARLES-LOUIS DE SECONDAT BARON DE MONTESQUIEU, *DE L'ESPIRIT DES LOIS* [THE SPIRIT OF THE LAWS] bk. 11, ch. 6 (1748), translated in 1 THE FOUNDERS' CONSTITUTION 624 (Philip B. Kurland & Ralph Lerner eds., 1987).

322. See WOOD, *supra* note 113, at 550-52; Letter from James Madison to Thomas Jefferson, *supra* note 315, at 274-75.

323. See Letter from James Madison to Thomas Jefferson, *supra* note 315, at 271.

Convention. Article I, Section 8 provided:

Congress shall have Power

. . . .

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; [Clause 12]

To provide and maintain a Navy; [Clause 13]

To make Rules for the Government and Regulation of the land and naval Forces; [Clause 14]

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; [Clause 15]

To provide for organizing, arming, and disciplining, the Militia, and for governing such part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of Officers, and the Authority of training the Militia according to the discipline prescribed by Congress; [Clause 16]

At the same time, Article II, Section 2, Clause 1 provided:

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into actual Service of the United States

Under the Constitution then, Congress was empowered to raise a professional army, and once raised to keep it in the field, but not to provide money for the army's continuance beyond the two-year term for which the House of Representatives was itself elected. A dangerously large army would presumably not be borne by the people to whom the representatives were beholden. And since all funding measures were to originate in the lower house, the question of the army's continuance was never far removed from popular control. Moreover, since any army raised by Congress was to take its orders from the president, congressional control would be less than absolute even during the two-year interval between elections. For his part, the president would not, like the early Stuarts, depend directly on the legislature's acquiescence to respond to military crises, for, assuming Congress made such provision under Article I, Section 8, Clause 15, the president would be empowered to call up the several state militia into the service of the United States to "execute the Laws of the Union, suppress Insurrections and repel Invasions." The militia, in turn, unlike its royalist Restoration counterpart, could be counted on to follow solid local civic preferences, for its officers were subject to state appointment.³²⁴

324. See WEIGLEY, *supra* note 8, at 86-87.

Thus, the dangers of standing armies, which in the republican paradigm had been linked to fear of executive abuse and legislative corruption, were now tempered by Madison's division of authority among Congress, the president, and the states. Madison's solution to the dilemma posed by the need for military power even in a democratic republic was more elaborate, intricate, and structuralist than the British approach of separating the funding and command functions between Parliament and his majesty's cabinet in Parliament. With the constitutional system itself now shorn of much of the former potential for absolutist abuse, the individuals who made up the new legislature and magistracy might safely possess less than perfectly virtuous personal constitutions.

At the same time, the federalism and structuralism of the new Constitution aimed to insure restoration of the right sort of people to leading roles in national policy formation and political stewardship, thereby providing another level of protection against the abusive potential of the standing army.³²⁵ The electoral college, and the staggered, filtered election of senators, served as sureties that unqualified and vulgar populists would not operate direct control over the military forces. This nod to the importance of public character was not a purely civic humanist concession, for Madison envisioned more than virtue as the hallmark of political fitness. Madison saw suitability for public office as a product of education and outlook. With all the optimism of the late Enlightenment, Madison believed qualifications for public office could be studiously acquired, even as his classically republican predecessors believed public character was fleeting and forever subject to decay.³²⁶

4. The Antifederalist Critique of the Federal Military Power and the Crusade for a Bill of Rights

There was a minority who did not share Madison's modern, optimistic outlook. Years ago, Cecelia Kenyon called them the men of little faith.³²⁷ Classically republican until the last, they soon rallied against the outline of government drafted by the Philadelphians. Ultimately, the diligence of these Antifederalists bore fruit in the recognition of the centrality of the militia in the Second Amendment.

In September 1787, the Philadelphia Convention submitted the

325. See WOOD, *supra* note 113, at 507-08.

326. See *id.* at 610-14.

327. See Kenyon, *supra* note 116.

Constitution to Congress to pass on to the state conventions for approval. Heated public debate concerning political theory and the future of the Republic ensued soon after.³²⁸ At first, Antifederalists objected both to the surrender of state powers to the national government and to the scant specific securities for individual rights provided in the proposed Constitution. As adoption became more and more likely, however, opposition—principled and strategic alike—focused on securing a bill of rights to set limits to federal powers. Various themes were sounded as Federalists and Antifederalists debated the desirability of providing concrete guaranties for rights and struggled over which rights would merit such protection. Fear of standing armies, and in particular of a centrally controlled standing army, became a major—but not the leading—theme during the ratification fight.³²⁹ Any putative individual right to possess arms

328. See Letter from James Madison to Thomas Jefferson (Dec. 9, 1787), in 12 THE PAPERS OF THOMAS JEFFERSON, *supra* note 61, at 408, 409, 411 (“The Constitution proposed by the late Convention engrosses almost the whole political attention of America.”); Letter from James Madison to Thomas Jefferson (Feb. 19, 1788), in 12 THE PAPERS OF THOMAS JEFFERSON, *supra* note 61, at 607, 608 (“The public here continues to be much agitated by the proposed federal Constitution and to be attentive to little else.”).

329. NRA President Charlton Heston has commented that the right to bear arms is the most important of the rights secured in the first ten amendments. See Robert J. Spitzer, *Door No. 1: Muskets? Or Door No. 2: Free Speech?*, CHRISTIAN SCI. MONITOR, Sept. 19, 1997, at 19. But as an assessment of the considerations that led Madison and the other framers to pursue a Bill of Rights, and as an evaluation of the implicit hierarchy among the liberties catalogued therein, Heston’s estimation badly misses the mark. If there is a dominant theme in the commentary and the documents surrounding the creation of the Bill of Rights, it is almost certainly fear of potential federal involvement with organized religion. See ROBERT ALLEN RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS, 1776–1791*, at 82 (1955); BERNARD SCHWARTZ, *THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS 174-75* (1977). In several states, the largest Antifederalist constituency comprised Presbyterians, Baptists, and other sectarians who feared federal establishment, or taxes for religious purposes. But not only sectarians lobbied for what we know as First Amendment freedoms. Madison himself, “Father of the Constitution,” leader of the pro-ratification movement in Virginia, and eventually architect of the Bill of Rights, had made his reputation opposing the Virginia general assessment and securing passage of Jefferson’s Virginia Statute for Religious Freedom. See CURRY, *supra* note 200, at 142-48; MILLER, *supra* note 202, at 42-43. Professor Banning, for one, has implied that Madison’s sensitivity to the checking role of factions in a constitutional system derived from his experience in Virginia politics, where the countervailing claims of Anglicans, Presbyterians, and Baptists prevented dictation of a strong state policy on religion, and ultimately facilitated separation of church and state. See LANCE BANNING, *THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC* 84-97 (1995). Madison’s sympathies on issues of religion made him receptive to Antifederalist calls for a bill of rights, notwithstanding his deep personal commitment to ratification of the Constitution as initially written. Letters from his mentor, Jefferson, arguing that “a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference,” see Letter from Thomas Jefferson to James Madison, *supra* note 68, at 440, helped convince Madison that the Constitution should be fortified with guarantees of specific rights. More than any other principles, it was devotion to disestablishment and free exercise that brought Madison around to Jefferson’s view in favor of a bill of rights. According to one Madison specialist, the future drafter of the Bill of Rights

outside the context of collective defense remained a remote and insignificant concern.³³⁰

The Antifederalist critique originated even before dissolution of the Convention, when George Mason, whose vision of constitutionalism had been disappointed at Philadelphia, noted his *Objections*.³³¹ These were published soon thereafter. Mason was especially concerned that state bills of rights could not protect individuals against incursions by the powerful federal government. He lamented the absence of any federal declaration of rights and noted particularly the lack of guarantees for freedom of the press, trial by jury in civil cases, and security against standing armies in peacetime. He made no mention of the desirability of protecting an individual right to arms. When the Constitution arrived before Congress in New York, Virginia's Richard Henry Lee, who had not been at the Philadelphia Convention, endeavored unsuccessfully to attach a set of amendments similar in substance to Mason's *Objections*. Lee proposed guaranteeing freedom of religion, of the press, of assembly, and petition; trial by jury in civil and criminal cases; the independence of judges; and free and frequent elections. He proposed a ban on peacetime standing armies, on excessive bail or fines, and on unreasonable searches and seizures. Like Mason, Lee made no mention of securing to individuals the right to possess weapons for private purposes.³³² From the outset then, two of the most prominent Antifederalist leaders articulated nearly all the major principles that would eventually be written into the Bill of Rights, but made no claim for a purely private right to arms.

A review of the ratification debate simply does not bear out the individualist contention that a demand to secure a personal right to arms was a driving force behind the Antifederalist movement and the

considered First Amendment freedoms and the right to jury trial as the most important liberties embodied in the Virginia Bill of Rights, see RUTLAND, *supra*, at 208, while another commentator, author of a classic Madison biography, calls freedom of religion "Madison's first concern." See IRVING BRANT, JAMES MADISON: FATHER OF THE CONSTITUTION, 1787-1800, at 268 (1950). Charlton Heston labels the right to bear arms the most important political freedom, because in his mind only that right can guarantee the security of all rights. But to James Madison, spiritual and intellectual freedoms rated at the apex of American liberties, because only freedom of the mind rendered liberty meaningful and enduring.

330. See *infra* notes 333-47 and accompanying text for a discussion of the comparatively small number of demands for a purely private right to arms raised during the ratification struggle.

331. See GEORGE MASON, OBJECTIONS TO THIS CONSTITUTION OF GOVERNMENT, reprinted in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 637, 637-40 (Max Farrand ed., 1911); see also Letter from James Madison to Thomas Jefferson, *supra* note 315, at 280.

332. See RUTLAND, *supra* note 329, at 121.

wellspring of the Bill of Rights.³³³ Two leading historians of the ratification process, Robert Allen Rutland³³⁴ and Bernard Schwartz,³³⁵ have noted only slight significance in the sporadic demands to secure an individualistic right to arms. A third, Jack Rakove, argues in this Symposium that private right readings of the Second Amendment fail to come to grips with “the orthodox understanding of the extent of the police powers of the state[s].”³³⁶

Many leading antifederal spokesmen during the critical period belabored issues relating to security for the militia and preservation of the body politic against the dangers of federal standing armies. One of the more famous opponents of ratification was Luther Martin of Maryland, who had refused to sign the Constitution at Philadelphia. Declaiming on the proposed Constitution before the State Assembly at Annapolis, Martin blasted the Militia Clauses as part and parcel of a full-scale transfer of sovereignty from the states to the new central government:

[I]t was urged [at the Constitutional Convention], that, if after having retained to the general government the great powers already granted, and among those, that of *raising* and *keeping* up regular troops without limitations, the *power* over the *militia* should be *taken away* from the *States*, and also given to the general government, it ought to be considered as the last *coup de grace* to the *State governments*; that it must be the most convincing proof, the advocates of this system design the *destruction* of the *State governments*, and that no *professions* to the contrary ought to be *trusted*; and that every State in the Union ought to reject such a system with indignation, since, if the general government should attempt to oppress and enslave them, they could not have any possible means of self-defense . . .³³⁷

Martin’s concerns for state sovereignty were typical of Antifederalists. His fears of the Militia Clauses and of the federal military powers were expressed in a minority report by his own state convention, and echoed in four of the six official state-ratifying-convention petitions in favor of a bill of rights that eventually led Congress to pass the Second

333. See, e.g., Kates, *supra* note 7, at 222.

334. See, e.g., RUTLAND, *supra* note 329, at 82-91. Rutland rates freedom of religion the most important issue in the eyes of the votaries of the day. See *id.* Freedom of religion has 38 entries in his table of contents, as opposed to two entries for the right to keep and bear arms.

335. See, e.g., SCHWARTZ, *supra* note 329, at 105-11, 115-18, 156-59. Schwartz stresses the Antifederalists’ emphatic demands for an express reservation to the states of powers not expressly delegated to the federal government, and for the erection of limitations on the seemingly plenary federal authority to legislate within its delegated mandate.

336. Rakove, *supra* note 291, at 112.

337. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 331, at 209.

Amendment.³³⁸

While Martin's classically republican solicitude for the militia characterized the antifederal mainstream, a small number of Antifederalists supported a more personal right to arms than that needed to provide institutional security for the states and people against a too powerful federal military. These supporters of a constitutional right to own weapons for private purposes were atypical even within the Antifederalist movement and remained insignificant within the nation as a whole. More importantly, as we shall see shortly, their voices, unlike Luther Martin's, did not find their way into the Second Amendment as adopted by Congress and ratified by the states. But before we reach the text of the Amendment itself, let us pause briefly to consider some expressions of the alternative, personal private right to arms that were heard here and there while the controversy over the Constitution raged.

New Hampshire stood out among those states whose conventions appended petitions for a bill of rights to their measures ratifying the Constitution. As we have noted, the Granite State's convention was the only one to put forward a draft amendment that might be read to support a federal personal right to arms outside the context of state or federalized militia service. In addition to a suggested amendment prohibiting the quartering of troops in private homes without the owners' consent and barring maintenance of peacetime standing armies absent approval of three-fourths of both houses of Congress,³³⁹ the New Hampshire convention proposed that "Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion."³⁴⁰ To whatever extent New Hampshire may have desired to create a popular right to arms outside, or partially outside, the aegis of the state by proposing this language, it sought to push the Republic further down the road towards a private, extragovernmental right to arms than any of its sister states desired to go. In neighboring Massachusetts, for example, the ratification convention rejected an amendment proposed by Samuel Adams that would have denied Congress power "to prevent

338. See THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES AND ORIGINS 181-83 (Neil H. Cogan ed., 1997) [hereinafter THE COMPLETE BILL OF RIGHTS]. A collective right to arms was endorsed by a minority of the official Maryland committee, by the conventions of New York, Rhode Island, North Carolina, and Virginia, and by the so-called Pennsylvania minority, which also (perhaps schizophrenically) endorsed a private individual right to arms, which right was also recommended by New Hampshire and a Massachusetts minority. See *id.*

339. See *id.* at 215.

340. *Id.* at 181.

the people of the United States who are peaceable citizens from keeping their own arms.”³⁴¹ The convention did so despite the Bay Colony’s charged history of arms confiscation in the early 1770s, perhaps because delegates were swayed more by the recent Shaysite uprising than by past royal abuses.

In back-country North Carolina, elements of the populist pro-debtor Regulator movement likely supported a purely personal right to arms, in part to facilitate resistance to taxation that the Regulators deemed extralegal.³⁴² Yet even in the Tar Heel State’s assembly, dominated by antifederalist sentiment, advocates of a private right to arms were unable to impress their vision on the state convention. North Carolina adopted verbatim the proposed Virginia bill of rights,³⁴³ except that North Carolina sent its recommendations to Congress with instructions that amendments be adopted *before* the new Constitution took effect. The North Carolina convention refused to ratify the Constitution before federal adoption of a bill of rights, and North Carolina did not join the new federal Union until the new Congress sent the proposed bill of rights to the states in 1789. North Carolina’s tactics played a crucial role in bolstering momentum for amendments to the Constitution,³⁴⁴ but the right to arms that North Carolina endorsed was expressly linked to service in the militia.

In Pennsylvania, as several commentators have pointed out,³⁴⁵ an address favoring a personal right to arms was circulated by a disaffected

341. See WELLS, *supra* note 69, at 267.

342. The heyday of the Carolina Regulators was the immediate prewar period. See, e.g., RICHARD MIDDLETON, *COLONIAL AMERICA: A HISTORY 1585–1776*, at 460–62 (1996). Yet in western parts of the Carolinas and other states, groups calling themselves Regulators continued to assert popular sovereignty in the face of seaboard governance up to and beyond the establishment of federal authority. The Massachusetts “Shaysites” consciously styled themselves Regulators to suggest an affinity with the western Carolina populists. See, e.g., WOOD, *supra* note 113, at 320–21, 325.

343. See discussion of the Virginia proposal *infra* notes 349–58 and accompanying text. In the very words employed by Virginia, North Carolina proposed

[t]hat the people have a right to keep and bear arms; that a well regulated militia composed of the body of the people, trained to arms, is the proper, natural and safe defence of a free State. That standing armies in time of peace are dangerous to Liberty, and therefore ought to be avoided, as far as the circumstances and protection of the community will admit; and that in all cases, the military should be under strict subordination to, and governed by the Civil power.

THE COMPLETE BILL OF RIGHTS, *supra* note 338, at 182.

344. See SCHWARTZ, *supra* note 329, at 154–56.

345. See Robert Dowd, *Federal and State Constitutional Guarantees to Arms*, 15 U. DAYTON L. REV. 59, 62–63 (1989); Col. Charles J. Dunlap, Jr., *Revolt of the Masses: Armed Civilians and the Insurrectionary Theory of the Second Amendment*, 62 TENN. L. REV. 643, 650 n.35 (1995); Shalhope, *supra* note 98, at 609.

“minority” after that state’s convention concluded its affairs.³⁴⁶ Yet this “minority report” turns out, on closer inspection, to reflect no more than the ramblings of a single embittered eccentric who departed the convention in disgust when he was unable to scuttle ratification.³⁴⁷ As such, the failure of Pennsylvania’s one man “minority” merely accentuates the fact that opinion favoring a personal right to arms independent of the militia remained highly marginal in state conventions outside of New Hampshire.

More representative of national opinion than the unofficial address of the Pennsylvania “minority” and the official New Hampshire Petition—and more influential in the formation of the Bill of Rights—were the debates and resolutions of the Virginia Ratifying Convention. Eight states had already voted in favor of ratification by the time delegates convened in Richmond in June of 1788, and another, New Hampshire, voted to ratify before the Virginia convention adjourned, thereby bringing up the minimum nine states required by Article VII for the Constitution to enter into force among the ratifying states. But support of Virginia, the largest and most populous state, remained critical for the Constitution’s ultimate success and for winning over the remaining nonratifying states of New York, North Carolina, and Rhode Island. Thus, the Old Dominion, where opponents of the Constitution were well organized and well represented,³⁴⁸ afforded Antifederalists a last, clear chance to impress their vision on the nation’s design. After long and thoughtful discussions, the Virginia convention, following the lead of Massachusetts, appended a list of proposed amendments to its resolution of ratification.³⁴⁹ These reflected substantial concessions to the Antifederalists, and eventually formed the blueprint Madison used in the First Congress to draft the Bill of Rights.

At the convention, George Mason, antifederal spokesman whose *Objections* had sounded the opening salvo in the ratification struggle,

346. *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents* (Dec. 12, 1787), in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 291, at 145, 151 (originally published in PA. PACKET & DAILY ADVERTISER, Dec. 18, 1787). The Address provided in part

That the people have a right to bear arms for the defence of themselves and their own State, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals

Id.; see also EDWARD DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 174 (1957).

347. See Wills, *supra* note 72, at 65-66.

348. See Letter from James Madison to Thomas Jefferson, *supra* note 328, at 409-10.

349. See RUTLAND, *supra* note 329, at 162-74.

soon expanded the scope of his opposition to encompass the dangers of federalizing the militia. He feared that Congress might use its power over state forces as a pretext for disarming them. "Congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for Congress has an exclusive right to arm them" ³⁵⁰ The flamboyant Patrick Henry echoed Mason's concerns. "When this power is given up to Congress," he asked, "how will your militia be armed?" ³⁵¹ Federalists Marshall and Madison countered correctly that the federal power to arm was not exclusive, so that Virginia might independently arm its militia if Congress declined to do so. ³⁵² In the context of this exchange, it is important to note that Mason and Henry were actuated not by fears that the federal government would disarm individuals and thereby prevent them from protecting themselves, but by solicitude for the state militia's capacity to remain armed in order to protect the community from insurrection and external danger, and, by its very existence, from the political hazards of a large federally controlled army.

The ninth, tenth, and eleventh proposed amendments to emerge from the Virginia convention embodied the delegation's desire to delineate more clearly the scope of respective federal and state military authority. The ninth amendment would have required two-thirds consent from both houses of Congress for maintaining a peacetime standing army, and the tenth would have restricted peacetime enlistments to a maximum of four years. The eleventh—a direct concession to Mason and Henry—expressed each state's power to arm and discipline its militia whenever Congress should neglect so to do, and provided that federal martial law should govern the militia only when duly called in to the service of the United States in time of war, invasion, or rebellion. ³⁵³

More significantly, these proposed amendments built on fundamental principles of government set forth in the declaration that accompanied the Virginia ratification resolution. Three of the principles proclaimed by the Virginia convention bore directly on the future Second Amendment to the United States Constitution. Most important of these was the seventeenth, which held:

350. 3 STATE DEBATES, *supra* note 98, at 379.

351. *Id.* at 386.

352. *See id.* at 382-83, 421.

353. *See* JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 663 (Gaillard Hunt & James Brown Scott eds., int'l ed. 1920).

That the people have a right to keep and bear arms; that a well regulated Militia composed of the body of the people trained to arms is the proper, natural and safe defence of a free State. That standing armies in time of peace are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the Community will admit; and that in all cases the military should be under strict subordination to and governed by the Civil power.³⁵⁴

By these terms, the ratifying convention's concerns with the right to arms were plainly directed towards the service of a collective purpose. From the perspective of delegates in Richmond demanding greater assurances vis-à-vis the new federal government, the people's security in bearing arms went to the heart of political and public liberty, but did not concern individual license.

The Virginians did express some concern for individual autonomy in the military context, but this solicitude did not relate to any claimed right to arm oneself for private purposes. What the delegation favored was protecting householders from quartering of troops³⁵⁵ and guarding the religiously scrupulous against coerced performance of military duty.³⁵⁶ These principles were set down as the ninth and tenth articles in the ratification declaration.³⁵⁷ Sanctity of the home and liberty of conscience were fundamental values of eighteenth-century political theory that pressed for accommodation with the government's demands for military service. Whether republican society depended on republican character or vice versa was then much debated,³⁵⁸ but in either case, banning billeting and recognizing conscientious objection made for reassuringly sound policy from the vantage point of either republican or natural rights theory.

The concerns expressed in the Virginia debates—most particularly the preference for militia over a standing army—echoed numerous Antifederalist pamphlets from all corners of the new nation. Many of these pursued a traditional republican vein, warning of the dangers of

354. *Id.* at 662.

355. Eventually constitutionalized as the Third Amendment to the United States Constitution.

356. Madison's original draft of what we now know as the Second Amendment, introduced in the House of Representatives on June 8, 1789, contained a conscientious objector clause echoing the Virginia convention's concerns. This clause survived floor debates in the House but was later struck at the insistence of the Senate. *See* text accompanying notes 409-11.

357. *See* the eighteenth and nineteenth principles of the Virginia convention in MADISON, *supra* note 353, at 662.

358. *See* DUNCAN J. MACLEOD, *SLAVERY, RACE AND THE AMERICAN REVOLUTION* 65-69 (1974) (discussing this question with reference to the philosophy of Jeffersonian theorist John Taylor of Caroline).

standing armies under absolute control and enfeebled militias unable to restore the political balance. Thus, in the City of Brotherly Love, the pseudonymous “Philadelphiensis” proclaimed:

Who can deny but the *president general* will be a *king* to all intents and purposes, and one of the most dangerous kind too; a king elected to command a standing army? Thus our laws are to be administered by this *tyrant*; for the whole, or at least the most important part of the executive department is put in his hands.³⁵⁹

Another Pennsylvania editorialist, “Centinel,”³⁶⁰ feared a different tyrant. Centinel argued that federalization of state forces through the Militia Clauses would usher in an era of congressional domination of the states. The Militia Clauses, Centinel wrote, would

subject the citizens of these States to the most arbitrary military discipline, even death may be inflicted on the disobedient; in the character of militia, you may be dragged from your families and homes to any part of the continent, and for any length of time, at the discretion of the future Congress.... The militia of Pennsylvania may be marched to Georgia or New-Hampshire, however incompatible with their interests or consciences;—in short, they may be made as mere machines as Prussian soldiers.³⁶¹

Centinel’s concerns were shared by the Bostonian pamphleteer “John DeWitt” (read John the wit, meaning the prescient one, not the jokester). “Let us enquire,” he mused, “why they [Congress] have assumed this power.... The nature of the demand... forces you to believe that it is... for the purpose of consolidating and finally destroying your strength, as your respective Governments are to be destroyed.”³⁶² Reflecting on the rising Federalist conspiracy, DeWitt recalled his republican history. “It is asserted,” he remembered, “by the most respectable writers upon Government, that a well regulated militia, composed of the yeomanry of the county have ever been considered as the bulwark of a free people.... Tyrants have uniformly depended upon [a standing army], at the expense of [a well-regulated militia].”³⁶³

359. *Essays of Philadelphiensis IX*, in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 291, at 127, 128 (originally published in the INDEPENDENT GAZETTEER, Feb. 7, 1788).

360. Centinel has been identified as Samuel Bryan, the hasty compiler of Pennsylvania’s “minority report” discussed *supra* notes 345-47 and accompanying text. See 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 291, at 130, 135 n.3.

361. Letter from Centinel to the People of Pennsylvania (Nov. 5, 1787), in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 291, at 154, 159-60 (originally published in the INDEPENDENT GAZETTEER, Nov. 8, 1787).

362. Letter from John DeWitt to the Free Citizens of the Commonwealth of Massachusetts (Dec. 3, 1787), in 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 291, at 34, 36.

363. *Id.* at 36-37.

Better remembered than even the most familiar antifederal pamphlets are the federal opinions from the pen of Publius. *The Federalist* is revealing because it takes issue with the Antifederalist concerns that Madison, Hamilton, and Jay took most seriously—those concerns that, therefore, had the greatest impact on the Federalists' subsequent constitutional reforms. With the exception of Hamilton's argument that a government of enumerated powers need not be feared, the justifications that Publius offered to the opponents of the Constitution would soon inform efforts in the First Congress to allay the Antifederalists' most legitimate concerns by passing a bill of rights.

A favorite theme of Publius was the necessity of a standing army. Like that of his mentor, Washington, Hamilton's war experience had left him skeptical of the militia's fighting effectiveness. In *The Federalist* Nos. 25, 27, 28, and 29 he argued that a professional army was the only means to combat a professional army, and thus the only true guarantee of national security and independence. An inefficient militia, on the other hand, would be an extravagance without much military value. Since a regular army was a necessity, Hamilton saw no way around accepting its constitutional legitimacy. In his eyes it was far better to provide for structural safeguards against military dictatorship than to wish away the problem of military necessity.³⁶⁴ Happily, the federal system was well calculated to guard against military excess. "As far as an army may be considered as a dangerous weapon," he reflected, "it had better be in those hands of which the people are most likely to be jealous [the federal government] than in those of which they are least likely to be jealous [the state governments]."³⁶⁵ Thus, vigilance, the classical republican requisite for civil-military balance, would actually be enhanced by the new system.

In *The Federalist* No. 46, Madison addressed head-on the radical Antifederalist fear that the national army might serve a tyrant's designs of conquest and empire. In so doing, he conceded frankly the checking value of the general militia within the federal system. "Let a regular army, fully equal to the resources of the country, be formed," he argued,

and let it be entirely at the devotion of the federal government: still it would not be going too far to say that *the State governments with the people on their side would be able to repel the danger*. The highest number to which, according to the best computation, a standing army can be carried in any country does not exceed one hundredth part of the whole number of souls; or one twenty-fifth

364. See generally THE FEDERALIST NOS. 25, 27, 28, 29 (Alexander Hamilton).

365. THE FEDERALIST NO. 25, *supra* note 276, at 193.

part of the number able to bear arms. This proportion would not yield, in the United States, an army of more than twenty-five or thirty thousand men. To these would be opposed a militia amounting to near half a million of citizens with arms in their hands, *officered by men chosen from among themselves*, fighting for their common liberties and united and *conducted by governments possessing their affections and confidence*. It may well be doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops.³⁶⁶

Thus, while Hamilton thought the army necessary because the militia was ineffective, Madison thought the general militia sufficiently effective—if for no other reason than its size—to nullify the threat of a professional army. To both writers, however, the federal structure itself served to lessen the dangers historically associated with standing armies. Madison in particular seemed to engage open-heartedly the fears expressed in the antifederal pamphlets. Clearly, to Antifederalists, the continued vitality of the militia was the only means of rendering an army palatable. While Madison likely still considered enumeration of powers sufficient protection for the militia's constitutional status, he was quickly coming round to an appreciation of the importance of validating the militia in order to secure a consensus behind the new Constitution. Hamilton, for his part, clung to the notion that a government of enumerated powers was inherently undangerous until the very end of *The Federalist* series. In No. 84, the New Yorker argued,

It has been several times truly remarked that bills of rights are, in their origin, stipulations between kings and their subjects, abridgements of prerogative in favour of privilege, reservations of rights not surrendered to the prince. Such was MAGNA CARTA, obtained by the barons, sword in hand, from King John. Such were the subsequent confirmations of that charter by subsequent princes. Such was the *Petition of Right* assented to by Charles the First in the beginning of his reign. Such, also, was the Declaration of Right presented by the Lords and Commons to the Prince of Orange in 1688, and afterwards thrown into the form of an act of Parliament called the Bill of Rights. It is evident, therefore, that, according to their primitive signification, they have no application to constitutions, professedly founded upon the power of the people and executed by their immediate representatives and servants.³⁶⁷

But Antifederalists did not trust Hamilton's logic, and they demanded express guarantees for their traditional rights. Beginning with Massachusetts, five of the last six states to ratify did so with the

366. THE FEDERALIST NO. 46, at 301 (James Madison) (Isaac Kramnick ed., 1987).

367. THE FEDERALIST NO. 84, at 475 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

understanding that the First Congress would amend the Constitution to include a federal bill of rights. That the First Congress proved willing to do so was a direct concession to the strength and cogency of the Antifederalist opposition, and particularly to the eloquence of Patrick Henry and George Mason in the Virginia convention.³⁶⁸ On the whole, Antifederalists had agitated at least as strongly for the principles behind what became the First, Fourth, Fifth, Sixth, Ninth, and Tenth Amendments as they did for those behind the Second.³⁶⁹ Freedom from religious establishment; free exercise of religion; a free press; free expression; freedom to assemble; common law procedural rights; jury trial (civil and criminal); the inability of the federal government to touch other basic common law rights, such as the right against unreasonable searches and seizures; and the integrity of the states as guarantors of those rights had figured as prominently in Antifederalist pamphleteering as the dangers of standing armies.³⁷⁰ The subject of individual arms as source or substance of any right or principle other than security against a standing army arose during the ratification debates only sporadically and on the radical fringe.³⁷¹ It is not surprising then that Madison, when he directed his attentions to fulfilling the

368. See SCHWARTZ, *supra* note 329, at 134-42.

369. See RUTLAND, *supra* note 329, at 28-29 (discussing the relative importance Americans attached to various historical, political, and natural rights during the critical period). Rutland labels the five "fundamental tenet[s] of civil liberty" as government according to laws approved by the people, jury trial, the writ of habeas corpus, freedom of the press, and freedom of religion. See *id.* at 29.

370. See SCHWARTZ, *supra* note 329, at 157-58. Schwartz provides a table listing the references to various future provisions of the Bill of Rights occurring in the recommendations of state ratifying conventions. In all, six state conventions (Massachusetts, New Hampshire, New York, North Carolina, South Carolina, and Virginia) submitted official recommendations. Of these, the reports of Massachusetts and South Carolina were concerned chiefly with federalism, and took only limited account of individual liberties. Schwartz's table also includes references to the so-called report of the Pennsylvania minority, and the recommendations of both the majority and the minority of the committee charged by the Maryland convention with suggesting amendments. None of these last three sets of recommendations were adopted by their respective states. In Schwartz's table, reserved powers appear the maximum eight times, jury trial in civil cases seven times, and religious freedom six times. Next follow the right to bear arms, a free press, the right against quartering of soldiers, the right against unreasonable searches and seizures, and jury trial in criminal cases, with five mentions each. However, only the New Hampshire report and the so-called report of the Pennsylvania minority contemplated a right to arms outside the militia context. If, as Garry Wills suggests, we discount the report of the Pennsylvania minority as the rambling catch-all compendium of one man bent on scuttling ratification, see Wills, *supra* note 72, at 65, we are left with a solitary endorsement of a right to arms for private purposes. That renders the putative private right to arms the least popular of the twenty-three rights suggested by the conventions, just behind the right against double jeopardy, with two mentions—an official endorsement by New York and an unofficial endorsement by the majority of the Maryland committee.

371. See CRESS, *supra* note 224, at 100-01, for an insightful discussion of the Antifederalists' attitude toward the military and the militia, focusing on their hostility to centralization of military power and their increasingly ambivalent and indeed accepting view of professionalism.

Federalists' commitment to provide a bill of rights, did not endeavor to write a guarantee to an unfettered personal right to arms into the amended Constitution.

One further development during the ratification crisis merits serious consideration in our endeavor to understand the mind of the man who served as principal drafter of the Second Amendment. This is Madison's correspondence with Jefferson concerning the desirability of a bill of rights. Eight years Jefferson's junior, Madison had already entered into the "Great Collaboration"³⁷² with the author of the Declaration of Independence by the time Jefferson undertook his six-year ministry to France in 1784. By 1787, when Madison joined the delegates to the Constitutional Convention in Philadelphia, Madison's relationship with Jefferson had been cemented by the younger man's successful stewardship of many of Jefferson's reform bills through the House of Burgesses, including the great Virginia Statute for Religious Freedom.³⁷³ Yet Madison retained then and always a deferential manner towards his political mentor.³⁷⁴ When Madison, aged thirty-one and serving in the Congress at Philadelphia, fell hopelessly in love with a fifteen-year-old girl and took to wasting great amounts of time and money at the barbers, it was Jefferson who chastened him to return to hard work in the service of his country.³⁷⁵ Later, Madison would seek and obtain Jefferson's blessing of his marriage to a stunning young widow, known to posterity as Dolley Madison.³⁷⁶

While Jefferson was in Paris, trans-Atlantic correspondence between the two Virginians flowed steadily.³⁷⁷ Their letters were at once eclectic and erudite. Madison valued Jefferson's encyclopedic

372. See generally ADRIENNE KOCH, *JEFFERSON AND MADISON: THE GREAT COLLABORATION* (1950).

373. See CURRY, *supra* note 200, at 141-48; MILLER, *supra* note 202, at 32-36, 74-75, 85-86.

374. See JOSEPH J. ELLIS, *AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON* 277 (1997).

375. See Letter from Thomas Jefferson to James Madison (Aug. 31, 1783), in 6 *THE PAPERS OF THOMAS JEFFERSON*, *supra* note 61, at 335-36; see also FAWN M. BRODIE, *THOMAS JEFFERSON: AN INTIMATE HISTORY* 174 (1974). Madison's infatuation with Kitty Floyd, daughter of New York Representative William Floyd, with whom Madison shared a Philadelphia rooming house, is discussed in greater detail in IRVING BRANT, *JAMES MADISON: THE NATIONALIST, 1780-1787*, at 283-87 (1948). Madison began spending inordinately at the barbers as soon as he took up lodgings with the Floyds at Mrs. House's famous establishment. *Id.* at 17.

376. See DUMAS MALONE, *JEFFERSON AND HIS TIME: JEFFERSON AND THE ORDEAL OF LIBERTY* 187 (1962) (discussing Jefferson's reaction to Madison's betrothal to Dolley Todd). Madison did not marry until 1794, the year he turned forty-three. See *id.*

377. Between August 1784 and October 1789, when Jefferson was in Europe, he received at least forty-six letters from Madison and sent at least thirty-five in return. See generally 7-15 *THE PAPERS OF THOMAS JEFFERSON*, *supra* note 61.

knowledge of political philosophy, and while some commentators would rate Madison the weightier and more practical of the pair, the truth is that he almost always yielded to Jefferson's political suggestions.³⁷⁸ The advisability of a bill of rights in the federal Constitution is a case in point. With due regard to the secrecy of the proceedings in Philadelphia, Madison had kept Jefferson abreast of the developing shape of the Constitution throughout the Convention summer of 1787. In reply, Jefferson offered critical analysis and historical perspective. He considered Madisonian federalism a stroke of genius. He was especially pleased by the constitutional compromise between the claims of large and small states, and was very favorably disposed towards Madison's system of checks and balances. But, as Jefferson wrote in a letter of December 20, 1787, he did not consider the Constitution to be altogether perfect. "I will now add," the Minister to Paris said of the Philadelphians' handiwork,

what I do not like. First the omission of a bill of rights providing clearly and without the aid of sophisms for freedom of religion, freedom of the press, protection against standing armies, restriction against monopolies, the eternal and unremitting force of the habeas corpus laws, and trials by jury in all matters of fact triable by the laws of the land and not by the law of Nations.³⁷⁹

Thus protection from standing armies—but not an individual entitlement to arms—numbered among the rights for which Jefferson sought express protection. Six weeks later Jefferson wrote to Madison proposing a mechanism whereby a bill of rights might be secured. "I am glad to hear that the new constitution is received with favor," he began, referring to the prospects for ratification in the upcoming state conventions.

I sincerely wish that the 9 first conventions may receive, and the 4. last reject it. The former will secure it finally, while the latter will oblige them to offer a declaration of rights in order to complete the union. We shall thus have all it's good, and cure it's principal defect.³⁸⁰

Whether by coincidence, or by force of his wide American influence,³⁸¹ Jefferson's prognostication approximated very nearly the future course

378. See MILLER, *supra* note 202, at 32, 34-35; BRODIE, *supra* note 375, at 177-78.

379. Letter from Thomas Jefferson to James Madison, *supra* note 68, at 440.

380. Letter from Thomas Jefferson to James Madison (Feb. 6, 1788), in 12 THE PAPERS OF THOMAS JEFFERSON, *supra* note 61, at 568, 569-70.

381. Jefferson's letters to Madison advocating a bill of rights were not intended for public distribution. However, they came into wide circulation at the height of the ratification debate through the efforts of Uriah Forrest, an American who while traveling in Europe had corresponded with Jefferson concerning the state of developments at home and had been favored by Jefferson with replies enclosing copies of his letters to Madison commenting on the

of ratification. The first nine state conventions ratified,³⁸² and while only two of the remaining states rejected the Constitution, it was their rejection, and the amendments proposed by five of the last six ratifying states—in particular those proposed by Virginia—that paved the way for the Bill of Rights.³⁸³

5. The Second Amendment: The Last Act of Classical Republican Constitutionalism?

In April 1789, when the First Congress assembled in New York, James Madison took his seat as a representative from Virginia. The emergence of organized parties was still some years off, and there was not in 1789 any equivalent to the majority leader of today, but Madison soon established himself as one of the chief architects of legislation in the House. His driving purpose during the spring and summer of 1789

course of ratification. The letters were much publicized by the Antifederalist press, and became a godsend to advocates of amendments. See RAKOVE, *supra* note 179, at 153.

382. In late July 1788, Jefferson expected imminent arrival of the welcome news that Virginia had assented to the Constitution and that the constitutional quorum of nine states had been reached, see Letter from Thomas Jefferson to Edward Rutledge (July 18, 1788), in 13 THE PAPERS OF THOMAS JEFFERSON, *supra* note 61, at 377, 378 (Jefferson had not yet learned that New Hampshire had become the ninth state to ratify), and by the last day of the month, Jefferson was able to congratulate Madison on the constitutional achievement. At the same time, Jefferson reminded Madison of the desirability and demand for a bill of rights, and in particular amplified his concerns about standing armies. See Letter from Thomas Jefferson to James Madison (July 31, 1788), in 13 THE PAPERS OF THOMAS JEFFERSON, *supra* note 61, at 440. “It is a good canvas,” Jefferson wrote of the Constitution,

on which some strokes only want retouching It seems pretty generally understood that this should go to Juries, Habeas corpus, Standing armies, Printing, Religion and Monopolies If no check can be found to keep the number of standing troops within safe bounds, while they are tolerated as far as necessary, abandon them altogether, discipline well the militia, and guard the magazines with them. More than magazine-guards will be useless if few, and dangerous if many. No European nation can ever send against us such a regular army as we need fear, and it is hard if our militia are not equal to those of Canada or Florida.

Id. at 442-43. Given his recent experiences as a displaced wartime governor of an occupied Virginia, Jefferson doubtless was engaging in wishful thinking about the feebleness of European armies. And given the desperation of the former chief executive’s pleas for Continental assistance during that British invasion of Virginia, his confidence in the American militia’s ability to protect the nation also seems rather too optimistic. But more importantly for our purposes, it is worth remarking that Jefferson once again made no references to any arms-related rights other than the right of the people to be protected from standing armies. In this light, Jefferson’s letters from Paris advocating a bill of rights make an interesting contrast to his letter to his young nephew describing the sporting benefits of shooting. Individualist interpreters of the Second Amendment may be fond of citing such maxims in praise of sport shooting as evidence that the framers favored a right to keep weapons for private purposes, but as the just-quoted language reflects, in a political context relating to the establishment of legal rights, such as the debate on whether to propose constitutional amendments, Jefferson’s discourse on arms remained focused firmly on the old Whig militia/army paradigm, and hence directed squarely to the collective purpose of preservation of the militia.

383. See SCHWARTZ, *supra* note 329, at 134-59.

was attainment of a bill of rights. Although originally somewhat hesitant, Madison was by now firmly convinced that a series of amendments would serve felicitously to round out the work begun at Philadelphia. Several events explain his change of heart.

In the first place, his election to Congress had been hard-fought. Arch-Antifederalist Patrick Henry had used his influence in the Virginia General Assembly to thwart Madison's bid for the Senate, and then backed the candidacy of James Monroe in Madison's congressional district, all the while branding Madison a foe of amendments.³⁸⁴ Madison owed his narrow victory in part to assurances he gave his constituents that he would back amendments.³⁸⁵ More importantly, he felt duty-bound to honor implicit guarantees to Antifederalists made by the Virginia and other ratifying conventions that a bill of rights would follow ratification.³⁸⁶ More fundamentally still, from the perspective of political theory, his trans-Atlantic exchange of letters with Jefferson had brought Madison around to principled belief in the desirability of a bill of rights.³⁸⁷ And from the standpoint of political tactics, Madison was eager to move forward on the amendments as quickly as possible, fearing that delay would stir discontent among the late antifederal opposition and lend credence to calls for a disruptive, and perhaps fatal, second convention.³⁸⁸

Thus, on May 4, 1789, Madison informed the House that he intended "to bring on the subject of amendments to the constitution" on May 25.³⁸⁹ This shrewd move stole much of the antifederal thunder and sapped some of the urgency from Theodorick Bland's May 5 introduction of a Patrick Henry-engineered application by the Virginia General Assembly for a second convention,³⁹⁰ and from a similar application by New York read the following day.³⁹¹ But on the whole, Congress was more concerned with legislation setting up the new government and righting the nation's finances than with securing a bill of rights. Consequently, members devoted most of their time through the first summer session to selecting a permanent seat of government, establishing executive departments and the judiciary, and hammering

384. *See id.* at 161.

385. *See id.*

386. *See* 1 ANNALS OF CONG. 440-41 (Joseph Gales & William Seaton eds., 1789) (statement of James Madison in the House of Representatives on June 8, 1789).

387. *See* Letter from Thomas Jefferson to James Madison, *supra* note 68, at 440.

388. *See* SCHWARTZ, *supra* note 329, at 163.

389. 1 ANNALS OF CONG. 257 (Joseph Gales & William Seaton eds., 1789).

390. *See id.* at 258-60.

391. *See id.* at 282.

out the schedule of tariff rates. As Congressman James Jackson from Georgia reasoned, “Without we pass the collection bill we can get no revenue, and without revenue the wheels of Government cannot move.”³⁹²

Madison, however, kept a bill of rights firmly in view. With Antifederalists outside Congress again mounting calls for a second convention, Madison intervened decisively on June 8 to redirect Congress’s attentions to the amendments. “This day,” he reminded the House,

is the day assigned for taking into consideration the subject of amendments to the Constitution. As I considered myself bound in honor and in duty to do what I have done on this subject, I shall proceed to bring the amendments before you as soon as possible, and advocate them until they shall be finally adopted or rejected by a constitutional majority of this House.³⁹³

Considerable effort was required for Madison to convince his colleagues to lay aside other pressing business and consider constitutional amendments. But Madison was a great persuader. As Chief Justice Marshall recalled years later, if eloquence included the art of “persuasion by convincing, then Mr. Madison was the most eloquent man I ever heard.”³⁹⁴

In this spirit, Madison reassured members that he was “sorry to be accessory to the loss of a single moment of time by the House.”³⁹⁵ He accommodated them by yielding his motion that Congress sit in a Committee of the Whole to consider amendments. In its place, he urged that “a select committee be appointed to consider and report such amendments as are proper for Congress to propose to the Legislatures of the several States, conformably to the fifth article of the constitution.”³⁹⁶ And he pointed out that further delay would spark suspicion that Congress was not acting in good faith. “It cannot be a secret to the gentlemen in this House,” he reminded members,

that, notwithstanding the ratification of this system of Government . . . yet still there is a great number of our constituents who are dissatisfied with it We ought not to disregard their inclination, but, on principles of amity and moderation, conform to

392. *Id.* at 442; *see also id.* at 446-48 (comments of Congressman Vining during the debates of June 8, 1789).

393. *Id.* at 441.

394. SCHWARTZ, *supra* note 329, at 162 (quoting John Marshall).

395. 1 ANNALS OF CONG. 448 (Joseph Gales & William Seaton eds., 1789).

396. *Id.*

their wishes and expressly declare the great rights of mankind³⁹⁷

Madison then read his proposed amendments into the record.³⁹⁸ These were based on his review of the long lists of suggested amendments submitted from the state conventions, the bills of rights embodied in the state constitutions, the English Bill of Rights of 1689, and a stream of letters and reports from citizens and congressmen. He also had access to a widely circulated pamphlet compiling the amendments proposed by Virginia, North Carolina, and four other states, to which he referred in a letter to Jefferson.³⁹⁹ But he relied most heavily on the Virginia recommendations.⁴⁰⁰ Madison contemplated at this stage a series of clauses integrated into relevant portions of the organic text of the Constitution, but Roger Sherman's well-thought argument in favor of the separate catalogue we know today eventually won out before the full House.⁴⁰¹

Madison's original draft of what we know as the Second Amendment was incorporated along with (in order) the precursors of the First, Third, Fifth, Eighth, Fourth, Sixth, and Ninth Amendments in a lengthy provision to be inserted into Article I, Section 9 between Clauses 3 and 4, placing further express limitations on the powers of Congress. It provided, "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."⁴⁰²

After renewed debate on the advisability and timing of amendments, the House ignored Madison's tactical concession to form a select committee and voted instead to go into Committee of the Whole to consider amendments to the Constitution.⁴⁰³ This appeared finally to short-circuit the drive for a second convention, but another six weeks passed without members taking any action. On July 21, Madison again "begged the House to indulge him in the further consideration of amendments," and go into Committee of the Whole in accordance with the motion of June 8.⁴⁰⁴ This time, the House voted instead to send

397. *Id.* at 449.

398. *See id.* at 450-53.

399. *See* Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 14 THE PAPERS OF THOMAS JEFFERSON, *supra* note 61, at 16, 18.

400. *See* SCHWARTZ, *supra* note 329, at 165.

401. *See id.* at 173.

402. 1 ANNALS OF CONG. 451 (Joseph Gales & William Seaton eds., 1789).

403. *See id.* at 467-68.

404. *Id.* at 685.

Madison's motion along with the amendments proposed by various states to a Select Committee consisting of one member from each state.⁴⁰⁵ Madison was named as the representative from Virginia, and he exercised persuasive influence over the committee during its week-long proceedings.

The Select Committee reported on July 28, but the report was ordered to lie on the table.⁴⁰⁶ It followed Madison's scheme of weaving amendments into the fabric of the seven articles of 1787, and in substance remained essentially faithful to Madison's original June 8 proposal. The Select Committee did however alter the text of the future Second Amendment in four respects. It reversed the order of the militia and right to bear arms clauses, so that the ringing endorsement of the "well regulated militia" moved to the beginning of the text, where it remains in the version ratified by the states. The committee also inserted a seven-word qualification of the militia, characterizing it as "composed of the body of the people," and deleted Madison's stipulation that the militia be "well armed." Most significantly, the Select Committee substituted "State" for "country" as the referent of the "best security" clause, so that the proposed amendment now addressed more directly antifederal solicitude for state security. Finally, the committee draft dropped the qualifier "in person," from the conscientious objector provision, suggesting that religious pacifists might well have a constitutional right not only to avoid militia duty, but to avoid paying for a substitute as well.⁴⁰⁷

Not until August 13 did the House finally resolve itself into Committee of the Whole to consider the Select Committee report.⁴⁰⁸ Congress parsed, refined, and partitioned the fifteen proposed substantive amendments. Ultimately, twelve were approved by both houses, and ten ratified by the states.⁴⁰⁹ On its course to passage, the

405. *See id.* at 690.

406. *See id.* at 699.

407. The Select Committee draft provided in full that "A well regulated militia, composed of the body of the people, being the best security of a free State, the right of the people to keep and bear arms shall not be infringed, but no person religiously scrupulous shall be compelled to bear arms." SCHWARTZ, *supra* note 329, app.B at 235-36.

408. 1 ANNALS OF CONG. 730-44 (Joseph Gales & William Seaton eds., 1789).

409. *See* SCHWARTZ, *supra* note 329, at 184, 186. The first of the proposed amendments, requiring periodic congressional reapportionment to ensure small constituencies, failed to gain the approval of three-fourths of the existing states. *See id.* The second proposed amendment, preventing congressional pay raises from taking effect during the life of a sitting Congress, also fell short originally. *See id.* But after lying dormant until the 1980s, the proposed amendment was revived and finally ratified in 1992, becoming the Twenty-seventh Amendment 203 years after submission to the states. Ratification of the Twenty-seventh Amendment owed much to the efforts of Gregory Watson, a Texas college student who embarked upon a letter writing

draft of the Second Amendment⁴¹⁰ emerged unscathed from debates in the full House, but was pruned by the Senate, which deleted the conscientious objector clause.⁴¹¹ Both chambers rejected other proposed changes and, in the process, cast considerable light on the Amendment's intended meaning.

On August 17, 1789, the full House opened debate on the Second Amendment. Elbridge Gerry of Massachusetts, a delegate to the Philadelphia Convention who had refused to sign the Constitution, objected immediately to the conscientious objector clause Madison had drafted.⁴¹² Gerry's hostility arose not from any contempt for those of tender conscience—in fact he proposed replacing the draft language with a clause more narrowly tailored to protect exclusively those belonging to religious sects scrupulous of bearing arms—but from his arch-antifederal and republican principles. Gerry feared that the proposed clause would empower the federal government to declare *per se* rules as to conscientious ineligibility, thereby excluding whole groups from military service and effectively disarming the militia. "I am apprehensive," Gerry told the House, "that this clause would give an opportunity to the people in power to destroy the constitution itself. They can declare who are the religiously scrupulous, and prevent them from bearing arms."⁴¹³

"What, sir, is the use of a militia?" he next asked the Speaker. "It is," Gerry continued in answer to his own question,

to prevent the establishment of a standing army, the bane of liberty. Now, it must be evident, that, under this provision, together with their other powers, Congress could take such measures with respect to a militia, as to make a standing army necessary. Whenever Governments mean to invade the rights and liberties of the people, they always attempt to destroy the militia, in order to raise an army upon their ruins. This was actually done by Great Britain at the commencement of the late Revolution. . . . The Assembly of

campaign on behalf of the proposed amendment in 1981, and in due course persuaded enough governors and state legislators of the amendment's merits to secure its passage. *See* RAKOVE, *supra* note 179, at 192 n.12.

410. The familiar Second Amendment was the fifth of seventeen amendments submitted by the House to the Senate, *see* SCHWARTZ, *supra* note 329, app.C at 238-40, and the fourth of the twelve amendments proposed by Congress for ratification, *see id.* app.D at 242-44. It appeared second among the catalogue of ten amendments ratified in 1791 because the two proposals atop the list submitted to the states in 1789 failed to attain ratification along with the rest of the Bill of Rights. *See supra* note 409 and accompanying text. For the sake of convenience, we shall refer to the proposed amendment as the draft of the Second Amendment throughout the remainder of this paper.

411. *See* SCHWARTZ, *supra* note 329, at 183.

412. *See* 1 ANNALS OF CONG. 778 (Joseph Gales & William Seaton eds., 1789).

413. *Id.*

Massachusetts, seeing the rapid progress that administration were making to divest them of their inherent privileges, endeavored to counteract them by the organization of the militia; but they were always defeated by the influence of the Crown.⁴¹⁴

At this point, Gerry's monologue on political theory was interrupted by Mr. Seney of Maryland, who "wished to know what question there was before the committee, in order to ascertain the point upon which the gentleman was speaking."⁴¹⁵ Gerry soon cut to the chase. "Now, if we give a discretionary power to exclude those from militia duty who have religious scruples, we may as well make no provision on this head [i.e., for preserving the militia from federal destruction.]"⁴¹⁶ Discretionary authority to declare whole segments of the population ineligible for service would vitiate the militia, or at the very least sap its republican character. Gerry wished, therefore, "the words to be altered so as to be confined to persons belonging to a religious sect scrupulous of bearing arms."⁴¹⁷ The motion lost by two votes in the House,⁴¹⁸ which carried the Amendment as reported. Later, at the Senate's insistence, the conscientious objector clause was struck in its entirety by the House-Senate conference, and it formed no part of the Amendment eventually submitted for ratification.⁴¹⁹

The whole tenor of the House debates indicates clearly that the framers sought to protect the constitutional status of the militia rather than a personal liberty to carry arms for private purposes. Consider the example of Congressman Benson of New York, who objected to the conscientious objector clause for reasons quite distinct from those articulated by Gerry. "No man can claim this indulgence of right," Benson maintained. "It may be a religious persuasion, but it is no natural right, and therefore ought to be left to the discretion of the Government."⁴²⁰ Benson, like Madison, was concerned that the Constitution not become cluttered with guarantees of rights that were not fundamental to political liberty, and which would therefore

414. *Id.*

415. *Id.*

416. *Id.* at 779. Gerry's specter of selective disarmament under the guise of coerced conscientious objection remained plausible in late-eighteenth-century America, in part because religious tests for office excluding Catholics (and in some instances certain sectarians) from government posts persisted in various states and in England. See MILLER, *supra* note 202, at 108.

417. 1 ANNALS OF CONG. 779 (Joseph Gales & William Seaton eds., 1789).

418. See *id.* at 780.

419. See 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1146 (1971).

420. *Id.*

routinely require balancing against other rights and the demands of sound government. "If this stands part of the constitution," Benson continued, "it will be a question before the Judiciary⁴²¹ on every regulation you make with respect to the organization of the militia, whether it comports with this declaration or not. It is extremely injudicious to intermix matters of doubt with fundamentals."⁴²² If the rights of conscientious objectors were not constitutionalized in part because they were not considered fundamental, then certainly the putative right to arm oneself for private purposes—which, although favored by a few radicals outside Congress,⁴²³ was not even reported by the House Select Committee—remained beyond the scope of the Second Amendment passed by both houses and sent to the states for ratification.

A second failed motion by Elbridge Gerry affords additional evidence of the framers' military understanding of the Second Amendment. Gerry thought the first part of the Amendment phrased ambiguously, and feared that "[a] well regulated militia being the best security of a free State, admitted an idea that a standing army was a secondary one."⁴²⁴ This motion, however, was not seconded. Probably, less radical members considered Article I, Section 10, Clause 3⁴²⁵ an

421. Note that fourteen years before *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), Benson takes for granted judicial review and the invalidation of "regulations" (i.e., statutes) that violate the proposed amendment. The case that judicial review of state and federal legislation was envisioned by the framers in 1787, and that Justice Marshall did not, therefore, create the mechanism from whole cloth in 1803, is argued in detail by Jack N. Rakove in *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031, 1038, 1040-41, 1047-48, 1050 (1997).

422. 1 ANNALS OF CONG. 780 (Joseph Gales & William Seaton eds., 1789). It must be emphasized that Benson, like Gerry, was not hostile to conscientious objectors, but rather believed their rights ill suited to constitutional protection. Thus, Benson continued on from the passage quoted above to inform the House that "I have no reason to believe that the Legislature will always possess humanity enough to indulge this class of citizens in a matter they are so desirous of; but they ought to be left to their discretion." *Id.*

423. A private right to possess weapons for purposes broader than military service numbered among the amendments proposed by the New Hampshire Ratifying Convention, see THE COMPLETE BILL OF RIGHTS, *supra* note 338, at 181, and a one man "minority" of the Pennsylvania Ratifying Convention, see Wills, *supra* note 72, at 65-66; see also *supra* notes 345-47 and accompanying text. Samuel Adams moved the Massachusetts Ratifying Convention to propose a broadly based, private right to arms amendment to Congress, but Adams's motion was rejected. See WELLS, *supra* note 69, at 267.

424. 1 ANNALS OF CONG. 780 (Joseph Gales & William Seaton eds., 1789).

425. "No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time 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 delay." U.S. CONST. art. I, § 10, cl. 3. It is interesting that "troops" so evidently referred to standing armies only and not to militia, and that Antifederalists made no effort to seize on the just-quoted constitutional language as evidence of a conspiracy to disarm the states and set up a national army of dangerous proportions. That "troops" implied

ample guarantee against states maintaining independent standing armies. It may also be that Gerry's reference to a standing army as a secondary source of "State" security invoked in members' eyes a federal rather than a provincial regular force, serving ostensibly to secure either individual member states or the whole Union. If Gerry did mean to imply that neither states nor the Union should have the protection of any federal regulars whatsoever, this was further than any of his colleagues wished to push the anti-army issue. That principal, at least as a matter of absolutes, had already been settled in favor of the Federalists by ratification of the Philadelphia Constitution. For antifederal members of the First Congress, the real military question on both the constitutional and policy level now centered on ensuring a significant role for the historic militia so as to minimize the dangers of the army. And in this light, Gerry's failed amendment—whether it referred to state or federal armies—only enhances the impression that the issue before Congress was the protection of political liberties from the baneful effects of a military establishment.

Another indication that the House considered the Second Amendment a public surety against the abuses of a large standing army rather than a private allowance to keep weapons for personal purposes emerges from the debate to amend its text to require two-thirds consent by both houses for setting up a standing army during peacetime. While Gerry received no floor support for his thinly veiled suggestion that the Constitution be amended to bar standing armies entirely, Erasmus Burke of South Carolina felt bold enough to essay a slightly less radical proviso. Burke proposed that

[any] standing army of regular troops in time of peace is dangerous to public liberty, and such shall not be raised or kept up in time of peace but from necessity, and for the security of the people, nor then without the consent of two-thirds of the members present of both Houses; and in all cases the military shall be subordinate to the civil authority.⁴²⁶

standing, kept, paid soldiers as opposed to civilian militia can be seen in Hamilton's usage in *The Federalist* No. 25:

The Bill of Rights of that State [Pennsylvania] declares that standing armies are dangerous to liberty, and ought not to be kept up in time of peace. Pennsylvania, nevertheless, in a time of profound peace, from the existence of partial disorders in one or two of her counties, has resolved to raise a body of troops; and in all probability will keep them up as long as there is an appearance of danger to the public peace.

THE FEDERALIST NO. 25, *supra* note 276, at 195.

426. 1 ANNALS OF CONG. 780 (Joseph Gales & William Seaton eds., 1789).

This amendment to the Amendment failed by a margin of thirteen votes,⁴²⁷ but no one disagreed with Burke's implied point that the militia served as a hedge against the army establishment. Instead, Hartley of Pennsylvania objected that super-majority provisions were undemocratic,⁴²⁸ and Vining of Delaware protested that the Amendment had just been approved and thus was no longer subject to debate.⁴²⁹

Notwithstanding the fact that the House had already voted to approve the Select Committee version of the proposed Amendment, debate was rejoined concerning the conscientious objector clause on August 20, 1789. The speeches of two members, Thomas Scott of Pennsylvania and Elias Boudinot of New Jersey, are memorialized in the *Annals*. Boudinot favored retaining the conscientious objector provision on grounds of religious liberty and out of concern that unwilling citizens not be compelled to go to war.⁴³⁰ Scott, meanwhile, returned to the theme sounded three days earlier by Gerry and expressed fears that under the proposed clause, conscientious objectors could "neither be called upon for their services, nor [could] an equivalent be demanded."⁴³¹

427. *See id.* at 781.

428. *See id.* at 780.

429. *See id.* The draft sent by the House to the Senate on August 24, 1789, read in full:

ARTICLE THE FIFTH. A well regulated militia, composed of the body of the People, being the best security of a free State, the right of the People to keep and bear arms, shall not be infringed, but no one religiously scrupulous of bearing arms, shall be compelled to render military service in person.

SCHWARTZ, *supra* note 329, app.C at 239. The phrase "composed of the body of the People," like the conscientious objector clause, was pruned by the Senate. Generally, the upper house tightened and consolidated the text of the amendments, and it may have considered the "body of the People" clause a redundant reference to the militia. Alternatively, the Senate may not have wished to trample on the power of the states to determine who would be born on the militia rolls, although Congress ultimately took steps in that direction by specifying age requirements for service in the Militia Act of 1792, acting, presumably, under its Article I power to organize the Militia. It seems worth noting that the plainest meaning, and the most neglected, of the right entitlement under the Second Amendment may well go directly to the issue of who may be born, or to put it more clearly, who may be excluded, from the militia rolls. In other words, the right to keep and bear arms, taken seriously, to use Professor Van Alstyne's phrase, could well have much more to do with whether gays are constitutionally entitled to serve in the National Guard or even the Reserves without fear of status-based federal disqualification than with whether good ole boys may stockpile AK-47s in the barn without interference by the ATF. This dimension of the Second Amendment, for all its amenability to the "rights talk" and rights-based jurisprudence more typical of the other amendments comprising the Bill of Rights, is not discussed by other commentators, and to our knowledge has never been raised in court, for which reasons it is not part of the debate of this Symposium, and for which reasons we neglect to say more about it here.

430. 1 ANNALS OF CONG. 796 (Joseph Gales & William Seaton eds., 1789).

431. *Id.*

Under such circumstances, Scott warned, “a militia can never be depended upon. This would lead to the violation of another article in the constitution, which secures to the people the right of keeping arms, and in this case recourse must be had to a standing army.”⁴³² Now, if “the right of keeping arms,” as Scott calls it, referred to a right of keeping weapons for purposes other than serving in the militia, it is difficult to see how that right could be violated by exempting Quakers and other professing pacifistic sectarians from the right and obligation of militia service. Quite the contrary, excusing objectors from militia duty would have no impact whatsoever on any individualistic and private right to weapons possession for personal purposes. At the same time, it is not at all clear that violating a right to weapons possession for private, nonmilitary purposes would so weaken the militia’s manpower pool as to require creation of a large standing army to defend the nation. Scott, clearly, must have had militia service in mind when he spoke of the “right of keeping arms.”

To be sure, a single legislator’s comments cannot define the elusive contours of a legislature’s intent.⁴³³ But placing Scott’s comments in their proper context is enlightening precisely because Scott’s remarks have been cited glibly for the proposition that there is “another article in the constitution, which secures to the people the right of keeping arms,” in order to suggest that the militia-focused right enshrined in the Second Amendment can be divorced from an entirely distinct, private right to arms.⁴³⁴ On closer inspection, this turns out to be a highly contrived construction. Scott differentiates not between separate constitutional protections for rights to arms for public and private purposes, but between the right to arms for public purposes and the proposed right of conscientious objection. His concern was that constitutional protection for objector status would undermine the sense of public duty and obligation that alone rendered the right to arms meaningful. As Scott explained, he did not consider conscientious objection a constitutional right at all, but rather a question of policy for state legislatures:

I conceive it . . . to be a legislative right altogether. There are many sects I know, who are religiously scrupulous in this respect; I do not mean to deprive them of any indulgence the law affords; my design is to guard against those who are of no religion. It has been urged

432. *Id.*

433. For a classic statement of the argument that legislative intent is generally unascertainable, see SCALIA, *supra* note 110, at 32, *passim*.

434. See, e.g., Shalhope, *supra* note 98, at 611.

that religion is on the decline; if so, the argument is more strong in my favor, for when the time comes that religion should be discarded, the generality of persons shall have recourse to these pretexts to get excused from bearing arms.⁴³⁵

Again, one is hard-pressed to imagine godless pacifists or shirkers feigning Quakerism in hopes of being excused from the exercise of their constitutional right to keep weapons for hunting or shooting burglars. Indeed, a review of the House debates makes clear that no issues relating to self-defense or hunting were contemplated in the context of the future Second Amendment. Twelve members spoke,⁴³⁶ airing their differences over a variety of topics, principally the advisability of affording constitutional protection to religious objection. No one spoke for the unleavened virtue of standing armies, or for a right to arms for private purposes, or for a right to carry arms for any purpose other than service in the state militia or in the federalized militia called up into national service.

Our knowledge of proceedings in the Senate is far more sketchy, because the Senate's affairs were conducted behind closed doors until 1794, and no official record of Senate debates was kept until thereafter. Even Senator William Maclay's journal, generally a source of useful information and lively opinion on Senate debates during the First Congress, falls silent on the Bill of Rights, as the Pennsylvanian spent much of September 1789 in his sickbed lambasting the Federalists and bewailing the Quaker State's fading chances of becoming the permanent seat of government.⁴³⁷ We do know from the bare-bones account in the *Senate Journal*⁴³⁸ that the Senate joined the House in rejecting a motion to restrict the powers of Congress to maintain a standing army during time of peace, and that the Senate parted company with the House in rejecting the conscientious objector provision that had engendered so much debate among the representatives.⁴³⁹ In addition, the Senate struck the "body of the people" tag that the House Select Committee had appended to its

435. 1 ANNALS OF CONG. 796 (Joseph Gales & William Seaton eds., 1789).

436. Elbridge Gerry of Massachusetts, Roger Sherman of Connecticut, Egbert Benson of New York, Thomas Hartley and Thomas Scott of Pennsylvania, Elias Boudinot of New Jersey, John Vining of Delaware, Joshua Seney and Michael Jenifer Stone of Maryland, William Smith and Aedanus Burke of South Carolina, and James Jackson of Georgia. See *id.* at 778-80, 796.

437. See THE DIARY OF WILLIAM MACLAY, reprinted in 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 143-55 (Kenneth R. Bowling & Helen E. Veit eds., 1988).

438. The *Senate Journal* coverage of proceedings related to the Bill of Rights is reprinted in 2 SCHWARTZ, *supra* note 419, at 1147-57.

439. See *id.* at 1146.

description of the militia as the “best security of a free state,”⁴⁴⁰ which description the Senate then recast as “necessary to the security of a free state.”⁴⁴¹

But the Senate also took up at least one proposed change not considered in the other house. The Senate considered a motion to insert “for the common defence” between “bear arms” and “shall not” in the bear arms clause.⁴⁴² Had this motion carried, the Amendment would have read in full: “A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms *for the common defence* shall not be infringed.” The motion to insert this four-word qualifier failed,⁴⁴³ however, and interpreters favoring a private right reading of the Second Amendment are much inclined to argue that the Senate’s decision not to include this “common defence” provision suggests that the drafters had private, personal defense in mind.⁴⁴⁴

There are, however, at least two other explanations for the Senate’s decision to reject the proposed insertion, and they more nearly reflect what we know about the Senate’s general approach to the Bill of Rights and the antifederal mandate for amendments than does the individualists’ model. First, the Senate’s revision of the House draft of the Bill of Rights focused on efficiency. According to the editor of the *Documentary History of the Bill of Rights*, “the Senate performed the important job of tightening up the language of the House version, striking out surplus wording and provisions.”⁴⁴⁵ Indeed, the Senate trimmed the Bill of Rights from seventeen to twelve amendments, and in the process cut its overall length by some thirty percent.⁴⁴⁶ This

440. See *id.* at 1122, 1149. The deletion of the “body of the People” clause is discussed *supra* note 429.

441. See *id.* at 1154.

442. See *id.* at 1153-54.

443. See *id.* at 1154.

444. See Wills, *supra* note 72, at 63-64. As Wills explains:

The Standard Modelers draw on an argument made by Steven Halbrook, an argument often cited by the NRA: “The Senate specifically rejected a proposal to add ‘for the common defense’ after ‘to keep and bear arms,’ thereby precluding any construction that the right was restricted to militia purposes and to common defense against foreign aggression or domestic tyranny.”

Id. (citing STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* (1984)).

445. 2 SCHWARTZ, *supra* note 419, at 1145.

446. Cf. SCHWARTZ, *supra* note 329, app.C at 238-41 (Amendments Passed by House of Representatives, Aug. 24, 1789); *id.* app.D at 242-44 (Amendments Passed by Senate, Sept. 9, 1789). It must be acknowledged, however, that the Senate trimmed not merely with a view to efficiency (although this was its overriding purpose). House-reported substantive provisions, among them the conscientious objector clause, see *id.* app.C at 239, and an amendment binding

concern to prune away excess verbiage from the House-reported bill of rights hardly suggests that senators would have wished to burden the pending Second Amendment with surplusage of their own creation, given that invocation of arms bearing in the militia already clearly proclaimed a common purpose to eighteenth-century ears. By saying that the right protected in the proposed Amendment was that of *bearing arms*, the drafters invoked terms of art with an unambiguously collective reference, and had no need to repeat themselves by saying the Amendment targeted the *common defense*.⁴⁴⁷

Quite apart from these considerations of efficiency and redundancy, inserting a reference to the “common defence” would have introduced an element of inconsistency into a provision already linked in its first clause to the “security” of a “free State.” There is little doubt that militia service in units assigned to stand against invading troops or hostile Indian tribes would be constitutionally protected by language guarding “the right to bear arms for the common defence.” But what of service with militia units under governors’ orders to suppress insurrection, quell a riot, or remain trained so that army expansion need not become necessary? Bearing arms in these instances would be constitutionally sanctioned by language describing the militia as a requisite of state “security,” but if arms bearing were qualified as necessary only to the “common defence,” the very concerns at the heart of the Antifederalist crusade would be no better off than before the Bill of Rights. The Antifederalist mandate, after all, focused on the militia precisely because it served as a protective force on the state level,⁴⁴⁸ and localism remained a close corollary of anti-army principles to the more Whiggish members of the First Congress.

Without a record of the Senate debates, any analysis of Senate intent must remain part speculation. Still, it is well to keep in mind that senators—then far more than now—considered theirs the states’ rather than the peoples’ chamber, and in that regard, senators perceived their primary responsibility as protection of state rather than popular

the states to respect what have become known as “First Amendment freedoms” and the right to jury trial in criminal cases, *see id.* app.C at 240, were also deleted.

447. *See* Wills, *supra* note 72, at 64, 68, *passim*; *see also* discussion *infra* pp. 593-94 (discussing the phrase “bear arms” as a term of legal art with a pointed military reference).

448. *See, e.g.,* Gerry’s Convention-floor indictment of proposed federal militia powers: “This power in the [United States] as explained is making the States drill-sergeants. [I] had as lief let the Citizens of Massachusetts be disarmed, as to take the command from the States, and subject them to the Genl Legislature. It would be regarded as a system of Despotism.” 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 331, at 385.

interests.⁴⁴⁹ The Senate, after all, was revising an amendment aimed at least in part at preserving a degree of state authority over the militia, or, at the very least, at ensuring that state militia should not be left unarmed unless the states severally chose to leave them so. In this context, senators could not have forgotten that in provisions of the Articles of Confederation relating to the militia, the terms “common defence” had been used to mean joint state action under federal control to defend collectively the United States.⁴⁵⁰ With this background in view, a state-militia-focused reading of the Senate’s rejection of the “common defence” insertion is reinforced by reference to the above-mentioned substitution of “State” for “country” in the House Select Committee draft of the Second Amendment.⁴⁵¹ When the militia was labeled the best security of a free “country,” it seemed to have an exclusively national purpose, but when redefined as the best security of a free “State,” its local purpose was clearly preserved. The Senate, of course, rearranged the clause to read “necessary to the security of a free State,” thereby retaining, and emphasizing, the pointed local reference. Linked to the House switch from “country” to “State,” the Senate’s rejection of the “common defence” clause thus reflects an Amendment concerned with federalism, and the preservation of states’ capacities to defend themselves against disorder, insurrection, and invasion whenever the national government should refrain from acting or find itself unable to act under the federal military or militia powers.

Much of this Article has been devoted to exploration of the original meaning and context of the terms of the Second Amendment. “Bearing arms” and “Militia,” in particular, were freighted in the late eighteenth century with significance not perhaps apparent at a first casual examination in our own time.⁴⁵² In large measure, this significance becomes understandable only in the light of detailed examination of the rich, textured intellectual history in which those terms existed. Yet, in the end, only the language written into the final version of the Amendment—passed by both houses and ratified by the states—remains binding. While little discussion of eighteenth-century context and theory will be entirely off point, many of the ideas long associated with arms or the militia did not work their way into the words finally expressing the right to bear arms that comes down to us

449. Cf. RAKOVE, *supra* note 305, at 57-70.

450. See Wills, *supra* note 72, at 64.

451. See *supra* text accompanying notes 402-07.

452. See Wills, *supra* note 72, at 65-67.

today. And notwithstanding citations by “standard modelers”⁴⁵³ to English game-law cases⁴⁵⁴ and the *Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania*,⁴⁵⁵ one of these related constructs not codified into the Second Amendment was the right to keep arms for private purposes.

Some radicals out of Congress, such as Samuel Adams in the Massachusetts convention, had sought to join that very issue.⁴⁵⁶ Formulations that would have constitutionalized such a right were readily available.⁴⁵⁷ Yet they were not only rejected by the drafters,⁴⁵⁸ they were not even raised in the House debates. We are left instead with the single sentence of Madison’s—rearranged,⁴⁵⁹ culled,⁴⁶⁰ and, in two instances, altered⁴⁶¹—giving us the familiar Second Amendment ratified in 1791. Understanding its terms, and its terms only, in the light of then-familiar usage and theory, a right serving a collective, essentially

453. Champions of an unfettered constitutional right to weapons possession, although actually insurgent revisionists, and most typically not affiliated with academic institutions or with any other organ of orthodox constitutional history, quite uniformly label their interpretation of the Second Amendment the “standard model.” For an insightful discussion of this phenomenon, see *id.* at 62.

454. See, e.g., Malcolm, *supra* note 99, at 309-13.

455. See, e.g., Robert J. Cottrol, *Introduction to Gun Control and the Constitution*, in 1 GUN CONTROL AND THE CONSTITUTION: SOURCES AND EXPLORATIONS ON THE SECOND AMENDMENT, at ix, xvi (Robert J. Cottrol ed., 1993). The *Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents* is discussed *supra* notes 345-47 and accompanying text.

456. Adams proposed denying Congress the power to prevent “the people of the United States who are peaceable citizens from keeping their own arms.” WELLS, *supra* note 69, at 267.

457. See, for example, the proposal of the New Hampshire Ratifying Convention that “Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion.” THE COMPLETE BILL OF RIGHTS, *supra* note 338, at 181.

458. Nearly one hundred different substantive provisions were suggested by the eight state ratifying conventions to submit official and/or unofficial minority proposals. See SCHWARTZ, *supra* note 329, at 157. As Professor Schwartz has emphasized:

Madison’s job as draftsman of the Federal Bill of Rights was [not] that of [a] mere compiler. On the contrary . . . Madison was able to play a most important creative role. He had to choose from the myriad of state proposals those which were worthy of being raised to the federal constitutional level. He also had to refine their language, so that the Federal Bill of Rights would be, at the same time, both an eloquent inventory of basic rights and a legally enforceable safeguard of those rights.

Id. at 159. And in the case of the right to arms for nonmilitary purposes proposed by New Hampshire and in the *Address* of the (one man?) Pennsylvania minority, Madison and the Congress pointedly opted against inclusion.

459. The House Select Committee reversed the order of the militia and bear arms clauses. See *supra* note 407 and accompanying text.

460. The House Select Committee deleted the qualification that the militia be “well armed,” see *supra* note 407 and accompanying text, while the Senate struck the conscientious objector clause, see *supra* text accompanying note 419.

461. The House Select Committee replaced “free country” with “free State,” see *supra* note 407 and accompanying text, while the Senate rephrased “being the best security of” as “being necessary to the security of,” see SCHWARTZ, *supra* note 329, at 242.

republican purpose emerges: a right of the people of the states and of the Union to keep and bear arms in the militia—for federal purposes when duly required under the Constitution, and for state purposes when federal demands fall silent. The Amendment's introductory clause, meanwhile, leaves us with a wish, expressed in precatory words, by which our constitutional testators implored their heirs to rely, to the extent possible, on the citizen militia rather than on a corruptible standing army, and by which they defined expressly the context that gives meaning to the right the Amendment secures.

II. FROM MILITIA TO NATIONAL GUARD

We have argued that the text of the Second Amendment and the historical context in which that text was articulated point decisively to the conclusion that, to the framers, the Second Amendment right to keep and bear arms depended on maintenance of a viable militia. We now turn to the history of the American militia during the two centuries following ratification. Our objective is to ascertain whether the militia contemplated by the framers has changed so fundamentally as to alter the contemporary legal significance of the constitutional provision designed to protect that militia from undue federal encroachment. We should emphasize that we do not say that change—change in the meaning of referents of words or in the social context of their utterance—necessarily undermines meaning or saps an expressed precept of force or effect in the altered circumstances. As we develop more fully in Part III below, we mean to say only that when the purpose of a constitutional right is expressed directly in the Constitution, there may come a point in the evolution of an object or institution where the original edict can no longer be applied without fundamental rewriting and unacceptable divergence from the contemplated purpose. Our mission here is to examine the institution of “the militia” to determine whether it has evolved so far that the eighteenth-century term can no longer be applied to the modern version without a fatal distortion of meaning. Crucial to our understanding of this evolution of the militia is a comparison of the context in which the militia functioned at the framing and that in which it operates now.

A. *The Decay of the Old Militia, 1789–1840*

1. Federalism and the Militia: Attempts at National Revival under Federalists and Jeffersonians

In the years 1789–91, the operational role of the militia reflected the military dualism of the founders, who envisioned both a smallish standing army and a serviceably effective militia, each held in check by the federal structure. Writing for a unanimous Court in *Perpich v. Department of Defense*,⁴⁶² Justice Stevens aptly summarized the ideological bipolarity at the heart of the nation's early constitutional and statutory military law:

Two conflicting themes, developed at the Constitutional Convention and repeated in debates over military policy during the next century, led to a compromise in the text of the Constitution and in later statutory enactments. On the one hand, there was a widespread fear that a national standing Army posed an intolerable threat to individual liberty and to the sovereignty of the separate States, while, on the other hand, there was a recognition of the danger of relying on inadequately trained soldiers as the primary means of providing for the common defense.⁴⁶³

As developed above, the constitutional compromise described by Justice Stevens authorized a federal army under executive command but dependent on Congress for biannual appropriations, and simultaneously established federal authority to prescribe militia training and equipment and to call the militia into federal service for limited purposes.⁴⁶⁴ Two years later, the Second Amendment reflected its framers' aspirations that the nation rely on militia for the national defense, and made clear that the federal government lacked the power to disarm the state militia.⁴⁶⁵ In deference to the passion of the Antifederalists, the Second Amendment, like other elements of the Bill of Rights, prohibited the federal government from exercising a power never expressed or delegated in the original seven articles of 1787.

The dualistic military theory embodied in the Constitution proved harder to implement than to expound. As Justice Stevens noted, "Congress was authorized both to raise and support a national Army and also to organize 'the Militia' . . . [but] [i]n the early years of the Republic, Congress did neither."⁴⁶⁶ The failure to organize either citizen

462. 496 U.S. 334, 340 (1990).

463. *Id.* (footnotes omitted).

464. See U.S. CONST. art. I, §§ 8, 12; *id.* art. II, § 2; discussion *supra* Part I.B.3.

465. See discussion *supra* pp. 500-09.

466. *Perpich*, 496 U.S. at 342.

or regular soldiery resulted not from inattention or dereliction, but from unbridgeable differences of principle between the administration and Congress, and from culturally entrenched antimilitarism within the public at large.

The Washington administration inherited a regular establishment of 672 men from the Confederation.⁴⁶⁷ With such a small regular force available, the western frontier appeared highly vulnerable to native attack and to British incursion from forts along the Great Lakes, which remained in royal hands despite clear provisions of the Treaty of Paris demanding their prompt evacuation.⁴⁶⁸ But even with strengthened federal powers in place under the new Constitution, the nation's Revolutionary-era republicanism lived on to speak loudly for reliance on the common militia. In a climate of pervasive suspicion towards all aspects of potential central military power, the Congress of 1789 confronted the dual tasks of providing for the standing army Washington desired (if on a much smaller scale than the chief executive thought wise) and at the same time organizing the nation's militia pursuant to the Militia Clauses of the Constitution and the historic expectations of the states.⁴⁶⁹

But the first president and the First Congress were not writing military policy on a clean slate. Throughout the Confederation period, Washington had vainly pressed the old Congress to increase the size of the army.⁴⁷⁰ The Confederation Congress lacked the authority to impose the general's desires on the states, but it had resisted Washington's suggestions for reasons of ideology as well as impotence.⁴⁷¹ Given the scope of antifederal hostility to a potentially vigorous federal military establishment, Washington understood that the new Congress was not likely to legislate a substantially larger army, even if the legislature was now endowed with authority to do more than merely ask the states for troops as its predecessor had done. Beyond the new powers to establish and maintain an army directly, Congress now also had the novel authority to organize the state militia for national purposes. Here Washington hoped to encounter less congressional resistance, and he personally urged Congress to act to

467. The Act of Sept. 29, 1789, ch. 25, § 1, 1 Stat. 95, 95-96, legalizing the army inherited from the Confederation government, confirmed an earlier act authorizing a force of 840, but only 672 were actually in service at this time. See WEIGLEY, *supra* note 8, at 89.

468. See 1 SAMUEL ELIOT MORISON ET AL., *THE GROWTH OF THE AMERICAN REPUBLIC* 235-36 (7th ed. 1980).

469. Cf. CUNLIFFE, *supra* note 75, at 43-48, 182-84; WEIGLEY, *supra* note 8, at 88-91.

470. See WEIGLEY, *supra* note 8, at 79-80, 85-86; see also *supra* Part I.B.1.

471. See WEIGLEY, *supra* note 8, at 81-82; see also *supra* Part I.B.1.

organize the militia in August 1789.⁴⁷²

Congress, we have seen, was preoccupied during its first session with establishing the revenue system and the basic administrative and judicial machinery.⁴⁷³ When Congress did take up systematization of the militia at the opening of its second session in January 1790, members became embroiled in controversy over “selection” or “classification.”⁴⁷⁴ On behalf of the administration, War Secretary Knox presented to Congress a bill to establish a select, classified national militia, grouping the eligible population by age and requiring substantial service and training from the youngest cadre.⁴⁷⁵ The administration hoped to effect benefits equivalent to those of a sizable standing army without arousing antifederal suspicions, but Knox’s proposal quickly spawned resistance focused on the very issues that had generated the standing army dispute during the ratification struggle and animated the debates over the future Second Amendment in the previous congressional session.

A select—as opposed to a common or general—militia had been a favorite notion of Washington, War Secretary Knox, and Treasury Secretary Hamilton since they first addressed the permanent organization of the nation’s military immediately after independence.⁴⁷⁶ All three were dissatisfied with the performance of amateur soldiers during the war and favored the creation of a substantial professional army, but had come to realize that this goal was not politically attainable. They therefore embraced the select militia as the next best option. To create an effective militia, Washington and his cabinet urged, militia soldiers required more training and discipline than could possibly be instilled by the states mustering their entire adult male population for a single or at best a few days each year. To bring a better-trained militia into existence, the administration favored classifying the nation’s male population into three age-based groups subject to differing levels of service and preparation. Under the militia plan that Knox proposed to Congress,⁴⁷⁷ young men aged eighteen to

472. See CUNLIFFE, *supra* note 75, at 182-83.

473. See *supra* note 392 and accompanying text.

474. See CUNLIFFE, *supra* note 75, at 182-83.

475. See WIEGLEY, *supra* note 8, at 89.

476. See CUNLIFFE, *supra* note 75, at 180-83; *id.* at 45-48 (analyzing THE FEDERALIST NOS. 24-26 (Alexander Hamilton)).

477. Henry Knox, A Plan for the General Arrangement of the Militia of the United States (1790), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS 6-13 (Walter Lowrie & Matthew Clarke eds., 1832) [hereinafter Knox Plan]. The Knox Plan can also be found in 1 ANNALS OF CONG. app. at 2141-61 (Joseph Gales & William Seaton eds., 1790). The Knox Plan largely traced Knox’s 1786 proposal to the Confederation Congress. See WIEGLEY, *supra* note 8, at 89; CUNLIFFE, *supra* note 75, at 182-84; *supra* discussion accompanying notes 295-99. Knox read his

twenty were to form an “advanced corps” and train up to thirty days a year under regular army supervision. Men from twenty-one to forty-five would form the “main corps” and train four days a year, while men from forty-six to sixty would form a “reserved corps.”⁴⁷⁸

Knox hoped to fashion a federal defense system capable of meeting all crises, “whether arising from internal or external causes.”⁴⁷⁹ This severe federal implement was needed, according to Knox, because “convulsive events, generated by the inordinate pursuit of riches or ambition, require[d] that the government should possess a strong corrective arm.”⁴⁸⁰ Knox could not have chosen more incendiary language. If classifying men according to age and selecting only the youngest group for training and active service made sense in military and economic terms, it also entailed formation of fighting bands less firmly rooted to their communities by family and property than the historic common militia.⁴⁸¹ While this scheme would have mitigated the

plan aloud to Congress and lobbied hard for its adoption. During Washington’s first administration, cabinet officers followed the British practice of appearing in person before the legislature to advocate legislation and answer questions. This practice was abandoned after the president himself decided it would be improper to appear in person before Congress to debate the merits of pending legislation.

478. Knox Plan, *supra* note 477, at 8-10.

479. *Id.* at 6.

480. *Id.*

481. A telling criticism of plans to base the nation’s defense policy on a revitalized militia focused on the economic and social dislocation associated with militia members’ extended absences from home and family. Consider Alexander Hamilton’s reservations expressed in *Federalist No. 29*:

To oblige the great body of the yeomanry and of the other classes of citizens to be under arms for the purpose of going through military exercises and evolutions, as often as might be necessary to acquire the degree of perfection which would entitle them to the character of a well-regulated militia, would be a real grievance to the people and a serious public inconvenience and loss. It would form an annual deduction from the productive labor of the country to an amount which calculating upon the present numbers of the people, would not fall far short of a million pounds. To attempt a thing which would abridge the mass of labor and industry to so considerable an extent would be unwise: and the experiment, if made, could not succeed, because it would not long be endured.

THE FEDERALIST NO. 29, at 209-10 (Alexander Hamilton) (Isaac Kramnick ed., 1987). Knox’s classification scheme would have minimized the adverse social and economic effects of militia duty by restricting service in the “advanced corps” to young men between 18 and 20 years of age. At a time when 90% of the population still engaged in agricultural pursuits, men this young were unlikely to be proprietors of their own farms or bear responsibilities for providing for wives and children. Particularly in land-scarce New England, men often had to wait until their late twenties before they were in a position to purchase or inherit a farm, or acquire a parcel of land as part of a marriage settlement. See WILLIAM PENCAK, *WAR, POLITICS & REVOLUTION IN PROVINCIAL MASSACHUSETTS* 201-03 (1981). Land shortage, large families (averaging five and six children), and long-lived parents contributed to a sense of restlessness among young New Englanders, to which circumstance several scholars have attributed Massachusetts’s leading role in the Revolution. See *id.* at 201. With the frontier opened for settlement after independence in 1783, New England men streamed westwards and laid out the new communities of western New York State and the Old Northwest. Other sons of the old

economic disruption associated with sending heads of families and proprietors of farms on extended training assignments or campaigns, it also would have vested each state's military power in the group of citizens most susceptible to demagoguery and most likely to support a Caesarist conspiracy. Thus, classification may not have implied that the nation would rely on a regular military establishment, but it did imply that the militia would be less than optimally republican.

For more than two years Congress wrestled with the Knox bill and its successors,⁴⁸² but the Militia Act that finally passed into law on May 8, 1792⁴⁸³ embodied no meaningful resolution of the selection issue, lacked any mechanism for federal enforcement, and therefore relied on the states to implement a largely hortatory organizational scheme. The Act also abandoned provisions for separation of the militia-of-the-whole into age groups, for federally standardized training, and for federally supervised exercises. Instead, Congress simply laid out the organizational form of the nation's militia, dividing the force into divisions and battalions that were in turn subdivided into regiments and companies to match the structure of the regular force, leaving to the states the question of what citizens would fill out these units. In addition, the Act limited the president's power to call forth the militia so that no one man would be called to serve for more than a maximum of three months in any one year, and no single individual would be burdened any more "than in due rotation with every other able-bodied man of the same rank."⁴⁸⁴ More importantly for our purposes, the Act provided that citizens, for whom militia service was required, furnish their own standard arms and equipment. The command that citizens appear for militia duty fully armed and equipped could scarcely have been more explicit. The Act stated

That every citizen so enrolled and notified, shall, within six months thereafter, provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch with a box therein to contain not less than twenty-four

New England went to sea in trading ships and carried the Stars and Stripes to China and the far reaches of the Globe. Within a generation, as her sons fled westwards and took to the seas, Massachusetts was blessed with a superabundance of young women. See BOORSTIN, *supra* note 1, at 28-29. Leaving their parents' farms at 14 or 15, these "Lowell" girls often worked a term in the new factory towns, where life was regimented but not unwholesome by later industrial standards, and where the workers acquired attributes and skills deemed useful for later family life. See *id.* at 29.

482. See CUNLIFFE, *supra* note 75, at 183.

483. Uniform Militia Act of 1792, ch. 33, § 1, 1 Stat. 271, 271, *repealed by* Dick Act, ch. 196, 32 Stat. 775 (1903).

484. *Id.*

cartridges, suited to the bore of the musket or firelock, each cartridge to contain a proper quantity of powder and ball: or with a good rifle, knapsack, shot-pouch and powder-horn, twenty balls suited to the bore of his rifle, and a quarter of a pound of powder; and shall appear, so armed, accoutred and provided, when called out to exercise, or into service, except, that when called out on company days to exercise only, he may appear without a knapsack.⁴⁸⁵

Similar clauses set forth standards by which officers should arm themselves.⁴⁸⁶

Thus the Second Congress amplified the vision of the militia as the time-honored “*constitutional army*”⁴⁸⁷ that had informed the First Congress’s drafting of the Second Amendment less than three years before. The Second Amendment guaranteed the right to keep and bear arms in the militia; the Militia Act laid down a detailed description of the weapons militiamen must keep and bear when called to serve. These were pointedly and unequivocally military arms (“a sufficient bayonet and belt, . . . a pouch with a box therein to contain not less than twenty-four cartridges, . . . each cartridge to contain a proper quantity of powder and ball”): arms necessary for meeting the security needs of the nation, arms falling within certain standards and regular limits defined by Congress, and arms that were not necessarily also weapons corresponding to each individual’s sense of convenience or perceived need to defend himself and family independent of military obligation.⁴⁸⁸

485. *Id.* We have already excerpted from this critical provision, *see supra* text accompanying note 71, but because of the importance of this language to our argument—and because of the number of intervening pages—it seemed convenient to quote the statute again at this stage.

486. *See id.*

487. *See* POCOCK, *supra* note 2, at 414, 416-17 (discussing the sacrosanct status of the historic English county militia under the “ancient” constitution venerated by the Real Whigs); WEIGLEY, *supra* note 8, at 101 (describing the federalized militia President Washington led out against the Whiskey Rebellion as the “Army of the Constitution”).

488. Uniform Militia Act of 1792, ch. 33, § 1, 1 Stat. 271, 271, *repealed by* Dick Act, ch. 196, 32 Stat. 775 (1903). While the rifles described in the Act of 1792 were useful for private purposes as well as military ones, the muskets—less expensive to acquire and far more common than rifles among both regulars and militiamen—had little utility outside a military context because of their notorious inaccuracy. A company arrayed along a firing line two or three tiers deep became effective in the military parlance of the day because of “volume of fire.” *See* WEIGLEY, *supra* note 8, at 21. In a crack eighteenth-century regiment, soldiers were expected to load and fire three times per minute, but were not instructed to aim at a particular target. As an enemy formation closed within range, it could thus expect to meet a hail of musket balls, with one rank of a three-tiered formation firing every ten seconds. *See generally* PARKER, *supra* note 141, at 147-48. But even a good shot could not consistently hit a barn door with a musket fired at sixty paces. Bellesiles, *supra* note 8, at 436. Thus, while militarily useful, a musket was not a practical tool by late-eighteenth-century standards for hunting or even for pursuing a fleeing felon. *See id.* at 439; WEIGLEY, *supra* note 8, at 21. “Fowling pieces,” more accurate but unwieldy and less powerful than muskets, were better tools for shooting birds but fall outside the terms of the Militia Act. *See generally* Bellesiles, *supra* note 8, at 431 n.13, 435. Likewise

If the Militia Act of 1792 was preceptive in form, in operation it remained little more than a catalogue of congressional exhortations to the states. While some of the states enacted early measures seeking to bring into effect the Act's provisions, all states had abandoned any pretence of compliance long before the Civil War.⁴⁸⁹ The Act stayed on the books until 1903.⁴⁹⁰ For 111 years it represented not simply the cornerstone, but virtually the entire edifice of federal militia law,⁴⁹¹ long outlasting the military utility of the muskets, firelocks, and spare flints it called on citizens to hold ready for the service of their states and country. Throughout that long period, all efforts of presidents, secretaries of war, and congressional leaders to flesh out the federal government's regulatory oversight of the myriad state militias stalled short of legislative fruition. Ultimately, from Knox's proposed classification scheme, through Secretary John C. Calhoun's attempt at centralizing reform after the repeated debacles of the War of 1812,⁴⁹²

the antiquated blunderbuss, which, if still in working order, remained a marginally suitable tool for shooting an intruder in the bedroom or a would-be highway man aside one's Conestoga wagon, if, that is, one spotted the malefactor in time to lift and fire the cumbersome trumpet shaped relic. *See generally id.* at 434, 441.

489. The states were required to furnish the secretary of war with an annual report on their militia. According to Cunliffe, "[e]ven from the outset the reports were scrappy, in some cases nonexistent." CUNLIFFE, *supra* note 75, at 185. Jefferson, in his final State of the Union address delivered on November 8, 1808, remarked to Congress, "[i]t is . . . incumbent on us, at every meeting, to revise the condition of the militia Some of the States have paid a laudable attention to this object; but every degree of neglect is to be found among others." 9 THE WRITINGS OF THOMAS JEFFERSON 213, 223 (Paul Leicester Ford ed., 1898). Delaware and Mississippi (following its admission in 1817) routinely failed to file reports; by the 1830s, only Massachusetts and Connecticut were reporting some semblance of an organized general militia. *See* CUNLIFFE, *supra* note 75, at 211. Delaware did away with fines for nonattendance at militia musters in 1814; most states that revised their constitutions during the Jacksonian period incorporated abolition of imprisonment for nonpayment of fines for nonattendance as part of their new fundamental law. *See id.* Compulsory militia service was abolished by law in Massachusetts in 1840; in Maine, Vermont, and Ohio in 1844; in Connecticut and New York in 1846; in Missouri in 1847; and in New Hampshire in 1851. *See id.*

490. *See* Dick Act, ch. 196, 32 Stat. 775 (1903).

491. The Uniform Militia Act of 1792 was supplemented by the Calling Forth Act of 1795, which provided in part:

That whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States to call forth such number of the militia of the state, or states, most convenient to the place of danger, or scene of action, as he may judge necessary to repel such invasion, and to issue his orders for that purpose, to such officer or officers of the militia, as he shall think proper.

Act of Feb. 28, 1795, ch. 36, § 1, 1 Stat. 424, 424.

492. The uncharacteristically large regular army of the War of 1812, which swelled to about 35,000 by 1814 and would have numbered over 60,000 if recruited to authorized strength, was quickly demobilized following the Treaty of Ghent. *See* WEIGLEY, *supra* note 8, at 120-21. Congress scaled back the regular force to 6,000 men by 1821. *Id.* at 139-40. Monroe's young, then ardently nationalistic, Secretary of War John C. Calhoun proposed a variety of precocious reforms to render the streamlined force effective, including a peacetime general staff and a

down to the ambitious and highly controversial selection plan proposed by Secretary Joel R. Poinsett during Martin Van Buren's administration,⁴⁹³ the same intractable dilemma thwarted every effort to make the historic militia into a serviceable defender of American national security: although a disorganized, undifferentiated militia that made few financial or personal demands on the people was militarily useless, anything more was unpalatable to voters. While some voters remained committed to republican rhetoric, for many, the value of a republican militia now took second place to the value of private pursuits.⁴⁹⁴ By the time the federal government finally assumed meaningful and effective supervision of the militia in 1903,⁴⁹⁵ the ancient War Department dream of achieving effective national security through reform or reorganization of the common militia had long been abandoned by even the most zealous critics of a vigorous military establishment.⁴⁹⁶

Notwithstanding these subsequent developments, loyalty to the common militia ideal behind the Second Amendment—and concomitantly aversion to the establishment of an effective military, whether professional or “selectively” amateur—remained powerful during the early national period. Militarism seemed in those early days anything but a chimerical danger. Numerous episodes between 1783 and 1798 highlight the stark reality behind classically republican-inspired fears that a military coup could be directed to the subversion of the infant republic. These incidents serve to highlight the pivotal stabilizing function of the legitimate militia envisioned by the framers of

system of expansibility to absorb trained reserves into regular units in the event of emergency. *See id.* at 141-43. Congress ignored the secretary's proposals. *See id.* at 142. The reforms Calhoun envisioned were not implemented until the eve of World War I. *See id.* at 142-43.

493. Poinsett's plan would have divided the country into eight militia districts, each with a force of 12,500 in active service and another 12,500 in ready reserve, giving the nation an enormous organized militia of 200,000. *See CUNLIFFE, supra* note 75, at 197. Congress rejected it out of hand. *See id.* at 197-99. The unpopularity of Poinsett's proposal contributed substantially to Van Buren's defeat by William Henry Harrison in the presidential election of 1840. *See id.* at 198-99. Antimilitary rhetoric, broadsheets, and pamphlets—still classically republican in tone—took a prominent place in the first stump and whistle stop campaign. *See id.*

494. *See id.* at 184.

495. *See* Dick Act, ch. 196, 32 Stat. 775 (1903); *see also* detailed discussion *infra* notes 556-57 and accompanying text.

496. Opponents of America's expansion overseas and emergence as a colonial/military power during the Spanish-American War generally preferred to rely on America's geographic isolation, coastal artillery, the navy, or simply naïve pacifism for security. While arguments that citizen-soldiers were better suited to defend a democracy than career professionals were commonplace at the turn of the twentieth century, no one then seriously argued that soldiers as lightly trained and disciplined as the founding-era general militia had been could serve any serious military purpose.

the Second Amendment.

Late in the winter of 1783, the war was over. But no peace had been ratified, and the Continental army had neither disbanded nor received its pay. This presented a situation all too similar to that existing at the close of the (first) English Civil War.⁴⁹⁷ A group of disgruntled officers circulated the so-called Newburgh Addresses through the Continental camps, threatening that the army would take matters into its own hands if Congress did not act to rectify pressing back pay and pension demands. Only Washington's timely address to the officers on March 15 of that year (this was the famous "I have not only grown gray, but almost blind in the service of my country" or "spectacles" speech) diffused the situation short of a march on Philadelphia.⁴⁹⁸ Later that spring, Hamilton openly suggested that the army intervene in government, and, much to the alarm of a then ultra-Whiggish nation, General von Steuben chose the same juncture to announce the founding of the Society of Cincinnati, a secretive and hereditary association of veteran officers of the Revolution that appeared to republicans a conspiratorial first step towards the establishment of a titled, privileged military aristocracy on the European model.⁴⁹⁹ In June, after news of the Treaty of Paris reached America, new recruits in Philadelphia deserted, and barricaded Congress in the State House demanding pay and bonuses. Happily, this mob simply dispersed when Congress bravely adjourned for the night without acting on the soldiers' threats.⁵⁰⁰ But before it disbanded, the Continental army seemed poised on the brink of intervention in civil politics and a ready tool for any aspirant dictator desiring to cow the legislature. For precisely these reasons, newly independent Americans feared armies and preferred entrusting their security to the less dangerous hands of the citizen militia.

Three years after the Continental army finally decamped, Shays's

497. Cf. HILL, *supra* note 165, at 85-86. As Hill explains:

Parliament . . . resolved on 18 February [1647] to disband the Army without making any provision for payment of arrears or pensions for widows and orphans of those killed in Parliament's service, or even for indemnity for illegal actions committed under orders during the fighting. The troops might be permitted to re-enlist for service in Ireland . . . [but would receive no other compensation]. The rank and file of the Army were at once up in arms. During March . . . regiments . . . appointed Agitators or delegates to represent them.

Id. The consequent politicization of the English army (along with the intransigence of king and Presbyterians in Parliament and revolts in the provinces) led within a year to the second civil war. *See id.* at 88-97.

498. *See* WEIGLEY, *supra* note 8, at 77-78.

499. *See id.* at 77; BOORSTIN, *supra* note 225, at 371.

500. *See* WEIGLEY, *supra* note 8, at 78.

Rebellion was put down (haltingly) by Massachusetts militia. But the progress of that insurrection was facilitated when discontented members of western county militia crossed over to the rebels and assisted in the seizure of the Continental arsenal at Springfield.⁵⁰¹ This evidence of the militia's unreliability sparked the Federalist movement that led to the Constitutional Convention and ultimately to the rise of the Federalist Party.⁵⁰² But if suspicions of the archdemocratic militia gave rise to Hamiltonian federalism in the 1780s, so too suspicions of a Caesarist federal military helped usher in Jeffersonian Republicanism in the 1790s.⁵⁰³ Washington himself led the federalized militia that put down the Whiskey Rebellion in 1794, but he was visibly worn and aged, and the prospect of his lieutenant Hamilton at the head of the 13,000 strong "constitutional army"⁵⁰⁴ marching through Pennsylvania alarmed even moderates.⁵⁰⁵

In 1798, President Adams called on Pennsylvania militia and 500 regulars to put down another tax revolt, this time instigated by Revolutionary veteran John Fries who led western Pennsylvania's resistance to revenue officers' attempts to collect a "window tax" designed to finance an enormous army to fight the quasi-war with France. Adams showed great and characteristic moderation in pardoning Fries.⁵⁰⁶ While he is rightly celebrated as the father of the navy, the second president remained at heart a Whiggish and historicist common lawyer, distrustful of over-large standing armies and committed to constitutional rule, no matter how much he resented the principles and tactics of the opposition. We cannot say the same of his erstwhile colleague Hamilton. The former treasury secretary had been disgraced by sex scandal and departed from government, but as the leader of the "High Federalists" he was the real moving force behind the proposed army.⁵⁰⁷ Indeed, it was Hamilton's plans for an ideologically purged army of 60,000 to fight a nonexistent war that most agitated the republican opposition. Rumors abounded that Hamilton intended to use the army to prevent Jefferson from taking power as the

501. *See id.* at 84.

502. *See id.*; WOOD, *supra* note 113, at 465, 498.

503. *Cf.* POCKOCK, *supra* note 2, at 528.

504. *See supra* note 487 and accompanying text; SCHWOERER, *supra* note 134, at 13.

505. *See* WEIGLEY, *supra* note 8, at 100-02.

506. *See* WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* 48-49 (1992).

507. For a detailed (if somewhat hostile) account of Hamilton's scandals, resignation, and continued influence, see generally MALONE, *supra* note 376, at 325-34.

election of 1800 approached,⁵⁰⁸ and republican governors in Pennsylvania and Virginia made secret plans to countermarch their militias on Washington.⁵⁰⁹ Happily—although fully funded by Congress—the enormous phantom army never assembled, and when Adams was defeated and the electoral college convened, Hamilton showed his better nature by endorsing the republican leader Jefferson as a lesser evil than the “Cataline” Burr.⁵¹⁰ As Richard Hofstadter pointed out, this marked the first time in modern history that power passed peacefully from one elected party to another,⁵¹¹ but it was perhaps a much closer call between civil war and peaceful transition than is generally acknowledged.

2. The Last Years of the Militia-of-the-Whole: Popular Discontent and Government Inertia

Notwithstanding the prominence of real and imaginary regular armies in the political crises of the 1780s and '90s, and the related persistence of republican rhetoric focusing on the constitutional importance of the militia, and despite the hortatory intentions embodied in the Militia Act of 1792, compulsory universal militia service disintegrated during the early years of the Republic. In state after state, the militia-of-the-whole fell into disfavor and disrepute.⁵¹² In the years after the Revolution, fewer and fewer men made muster on militia days.⁵¹³ One reason was the increasing number of exceptions to the universal service obligation enacted by various state legislatures, who by the early nineteenth century had excused from military

508. See WEIGLEY, *supra* note 8, at 101-03.

509. See DUMAS MALONE, *JEFFERSON AND HIS TIME: JEFFERSON THE PRESIDENT, FIRST TERM, 1801-1805*, at 6-7, 10-11 (1970). There is documentary evidence that 20,000 Pennsylvania militia were held ready to intervene in the winter of 1801, but only in the event that the electoral college chose someone other than Jefferson or Burr as president, thereby effectively staging a coup. See Letter from Thomas McKean to Thomas Jefferson (Mar. 21, 1801), *discussed in* MALONE, *supra*, at 10-11.

510. Hamilton, it turns out, was prophetic. A year after fatally wounding Hamilton in a duel in Weehawken, New Jersey, former Vice President Burr did conspire to commit treason against the Republic by handing over the old Southwest to Spain and setting himself up as a sort of military Vice-Royal in New Orleans. He was acquitted of treason in a highly politicized trial presided over by Chief Justice Marshall in Richmond, in part because the scheme he orchestrated with General Wilkinson was poorly planned and ill conceived and thus not clearly documented, but there can be little doubt as to Burr's treacherous intent. For a comprehensive (if pro-Jeffersonian) account of the Burr treason affair, see DUMAS MALONE, *JEFFERSON AND HIS TIME: JEFFERSON THE PRESIDENT, SECOND TERM, 1805-1809*, at 215-346 (1974).

511. See RICHARD HOFSTADTER, *THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1780-1840*, at 128 (1969).

512. See CUNLIFFE, *supra* note 75, at 202-12.

513. See Bellesiles, *supra* note 8, at 425.

obligation not only clergy and conscientious objectors, but such characters as school and university teachers, students, jurors, mariners, and ferrymen.⁵¹⁴ While the rest of the military-aged, white male population generally remained obligated to serve, in practice, more and more people simply could not or did not wish to interrupt their everyday economic activities in an increasingly bustling, productive, and differentiated society in order to appear armed and accoutered on the appointed muster day. In general, nonattendees not entitled to an exemption were subject to fines on the order of ten dollars.⁵¹⁵ These penalties were enforced sporadically and selectively.⁵¹⁶ Adding to the growing resentment many felt at the seemingly irrelevant and obsolete service obligation was the fact that those better off could readily afford to pay the fine for nonattendance as a sort of tax, while for the average farmer or farmer's son, ten dollars remained a formidable burden.⁵¹⁷ Class antagonism grew stronger still as the Northeast industrialized in the first decades of the nineteenth century, and state legislatures added factory owners and foremen to the list of exempted citizens.⁵¹⁸

Several developments during the War of 1812 hastened the demise of the old militia. In the first place, many New Englanders resented war with Britain and Canada. New Englanders did not hasten to make muster with a view to invading Canada, as indeed they had hesitated to bear arms for the purpose of enforcing first Jefferson's Embargo and then Madison's Non-Importation Order against British trade. The unpopularity of service in "Mr. Madison's War" helped sap the vitality of the militia in its New England heartland, where the institution remained more vigorous than in other parts of the nation.⁵¹⁹ Then too, the governors of Massachusetts, Connecticut, Rhode Island, New Hampshire, and Vermont, who had been reluctant to order their militia to enforce the Embargo and Non-Importation Acts against Britain prior to the war, now refused to muster their troops for an invasion of Canada as commanded by the president.⁵²⁰ To be sure, the Constitution did not contemplate the president ordering the militia to serve outside U.S. borders,⁵²¹ and the president lacked clear statutory authorization for so

514. See CUNLIFFE, *supra* note 75, at 206-07.

515. See *id.* at 205. The fine is roughly equivalent to \$1,000 today.

516. See *id.* at 205-06.

517. See *id.* at 205.

518. See *id.* at 207.

519. See *id.* at 202-03.

520. See WEIGLEY, *supra* note 8, at 125.

521. Article II, Section 2, Clause 1 of the Constitution provides that "The President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the

doing;⁵²² but in disobeying the commander in chief instead of seeking judicial relief, New England's chief executives flirted with treason.⁵²³ The constitutional crisis over gubernatorial consent to presidential call-ups was not resolved in favor of the federal executive until the Supreme Court's decision in *Martin v. Mott*⁵²⁴ twelve years after the war's end, and the narrower question concerning withholding of gubernatorial

several States, when called into the actual Service of the United States." But the president's powers as commander in chief of the militia remain circumscribed by the scope of Congress's power to call the militia into federal service in the first place. Article I, Section 8, Clause 15 provides "The Congress shall have Power . . . [t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." The clearest exposition of the territorial limitations of this power is Attorney General Wickersham's in his 1912 opinion discussed *infra*. There, the attorney general wrote,

The plain and certain meaning and effect of this constitutional provision is to confer upon Congress the power to call out the militia "to execute the laws of the Union" within our own borders where, and where only, they exist, have any force, or can be executed by any one. This confers no power to send the militia into a foreign country to execute our laws which have no existence or force there and can not be there executed.

29 Op. Att'y Gen. 322, 327 (1912).

522. The Calling Forth Act of 1795 (really a series of amendments to the Uniform Militia Act of 1792) authorized the president to call up the militia when the country faced "imminent danger of invasion." Act of Feb. 28, 1795, ch. 36, § 1, 1 Stat. 424, 424. According to Professor Weigley, Governor Roger Griswold of Connecticut

asserted that militia could not lawfully be offered since the state officials knew of no declaration by the President that an invasion had taken place. Secretary (of War) Eustis replied that the President declared that an imminent danger of invasion existed. Governor Griswold in turn argued that war was not invasion and the presence of a hostile fleet off the coast represented only a "slight danger of invasion, which the Constitution could not contemplate."

WEIGLEY, *supra* note 8, at 125.

523. *See id.*

524. 25 U.S. (12 Wheat.) 19 (1827). Jacob E. Mott, a private in the New York militia, refused to obey President Madison's August 1814 order to make muster under federal command in New York City to fight against British forces. *See id.* at 21-22. At a subsequent court martial, Mott was fined \$96, which he refused to pay. *See id.* at 36. Mott was then sentenced to one year's imprisonment, while Martin, a U.S. Marshal, executed a forfeiture of Mott's personal property to satisfy the fine. *See id.* at 23. A New York court allowed Mott to replevin his goods from Martin, who, after an unavailing appeal to the New York Senate, which then sat as that state's highest court of appeals, sought relief from the U.S. Supreme Court. *See id.* at 28. In reversing the replevin judgment, Justice Story passed on the Calling Forth Act of 1795 and on the question of ultimate command authority over the militia. He rejected out of hand Mott's constitutional argument that the president's judgment as to whether the danger of invasion warranted calling forth the militia was subject to the review of state officers and militiamen. *See id.* at 32-33. Executive authority, Justice Story held, could not practically be fettered by an implied license for *de novo* review at each subordinate level. Presidential authority under the Calling Forth Act was supreme, and must not be checked by the second-guessing of any soldier or officer, including the governor of a state. *See id.* at 33. Thus, twelve years after the end of the War of 1812, it was firmly settled that the New England governors had acted unconstitutionally in refusing to follow Madison's orders to deploy their states' militia across state lines, and that supreme command of any militia called into federal service rested squarely with the president. *See id.* at 31-32. Story did not reach the question of whether the governors might constitutionally withhold consent for presidentially ordered militia service in foreign territory, which itself appeared facially unconstitutional.

consent to militia service in foreign countries was not finally settled until the *Perpich* case in 1990.⁵²⁵ More generally, the issue of the constitutionality of militia service outside U.S. borders remained a thorn in the side of presidents during the Mexican, Spanish, and First World Wars as well, and continues to inform National Guard policy to this day.⁵²⁶ Over the course of the nineteenth century, uncertainty regarding the president's ability to rely on the militia for extraterritorial service became yet another factor contributing to the old militia's demise.

Yet no development of the second war with Britain bode less well for the old militia than the emergence of the regulars. With a few exceptions, the common militia acquitted itself dishonorably during the War of 1812. Militia serving in a mixed federal/state command under General Dearborn refused to cross the international border at Lake Champlain preparatory to an attack against Montreal, forcing abandonment of the American offensive in the first year of the war.⁵²⁷ Militia ineptitude was also a key factor in the August 1814 sacking of Washington, as British regulars marched through a patchwork army of seamen, handfuls of organized militia, and multitudes of untrained common militia arrayed across the Bladensburg Road, and straight into the capital. This spectacle, marking the low point of national humiliation, unfolded within eyesight of a hapless and helpless Commanding General of the Army and president of the United States, while Secretary of State James Monroe rode about frantically giving confusing orders.⁵²⁸ But while the British expeditionary force was ravaging the Chesapeake, American fortunes were beginning to turn in the far north. Along the Niagara Falls, Winfield Scott's heavily drilled

525. *Perpich v. Department of Defense*, 496 U.S. 334, 354 (1990).

526. See WEIGLEY, *supra* note 8, at 183, 297, 324-25, 337-38, 340, 348-49, 401-02.

527. See *id.* at 120.

528. See *id.* at 122. Admiral Morison offers the following revealing account:

For five days the British army marched along the banks of the Patuxent, approaching the capital of the United States without seeing an enemy or firing a shot. In the meantime, Washington was in a feverish state of preparation. About 7000 militia, all that turned out of 95,000 summoned, were placed under an unusually incompetent general [Brigadier John Armstrong, Jr.] and hurried to a strong position behind the village of Bladensburg, athwart the road over which the invaders must advance. President Madison and some of the cabinet came out to see the fight. After the militia had suffered only 66 casualties they broke and ran, and [General Robert] Ross [commander of the British land forces], delayed a few hours by the bravery of marines and naval gunners, pressed on to Washington that evening (24 August 1814). Some officers arrived in time to eat a dinner at the White House that had been prepared for the President and Mrs. Madison.

1 SAMUEL ELIOT MORISON ET AL., *THE GROWTH OF THE AMERICAN REPUBLIC* 377 (6th ed. 1969). One wonders whether Madison took this occasion to reflect on his famous comment in *The Federalist* about the invincibility of a nation boasting a militia of 500,000. See *THE FEDERALIST* NO. 46, *supra* note 366, at 301.

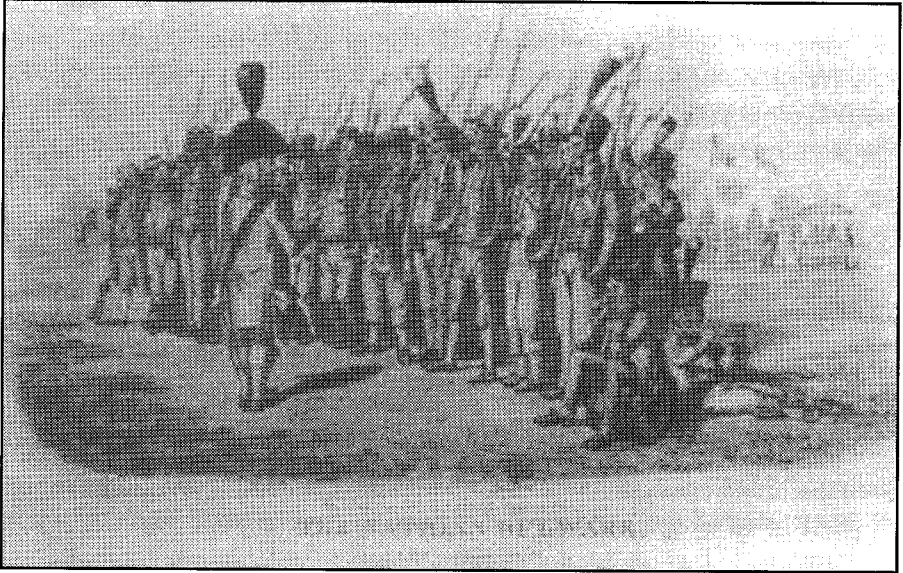
U.S. infantry regiments fought the British to a standstill at Chippewa on July 2, and again at Lundy's Lane on July 25. With Scott's success, America finally appeared capable of defending itself on the ground, even of mounting a ground-based offensive. Crucially for our purposes, the infantry's valor in the Great Lakes campaigns of 1814 "contributed . . . much to the prestige of the Regular Army and its acceptance as the necessary axis of American defense."⁵²⁹ Thereafter, no prominent statesman would argue seriously, as Jefferson and Knox had once done, that a classified militia could wholly replace the U.S. Army. Throughout the nineteenth century, the regular army remained small, numbering between 6,000 and 27,000 in peacetime, slightly more during war.⁵³⁰ But it, and not the militia, was henceforth acknowledged as the backbone of the nation's security.

As enthusiasm for militia service continued to decline after the War of 1812, so too did the ability of the average citizen to appear armed in compliance with the Militia Act of 1792 or applicable state regulations. In the early years of the nineteenth century, it was commonplace for militia captains to complain that more and more members of their companies appeared with no weapon at all, or with such poor makeshifts for guns as umbrellas, broomsticks, farm tools, and garden implements.⁵³¹ And as citizens came to lack the desire and equipment needed for militia service, so too they began to ridicule and burlesque the very concept of the citizen army. Two New England cartoons depicting typical musters of the 1820s and '30s are illustrative (see opposing page).

529. WEIGLEY, *supra* note 8, at 131.

530. *See id.* at 597-98.

531. *See* Bellesiles, *supra* note 8, at 430 (on the declining percentage of militia members possessing firearms (1803: 235,000 of 524,000; 1810: 308,000 of 678,000; 1820: 400,000 of 837,000; 1830: 359,000 of 1,129,000)). Also consider the 1855 comments of New York's Adjutant General J. Watts de Peyester regarding his own troops: "We always associate the term militia with the rag-tag and bob-tail assemblages armed with broomsticks, cornstalks and umbrellas." *Id.* at 433; *see also* CUNLIFFE, *supra* note 75, at 205.



In this print of 1829, the "Nation's Bulwark" can contrive only a ragged muster. Still, the majority have been able to produce weapons of a sort. A decade or two later, even this much evidence of martial spirit was lacking.

(From *SOLDIERS AND CIVILIANS: THE MARTIAL SPIRIT IN AMERICA, 1775-1865*, by Marcus Cunliffe. Copyright © 1968 by Marcus Cunliffe. Published by Little, Brown and Company (Inc.).)



A militia muster is the subject of this lithograph by David Claypoole Johnston, ca. 1836. The scene is somewhere in New England, perhaps Boston. The ragged lineup could have been seen almost anywhere in the United States. The only man in uniform is the officer on the right; and he has overdone his finery.

(From *SOLDIERS AND CIVILIANS: THE MARTIAL SPIRIT IN AMERICA, 1775-1865*, by Marcus Cunliffe. Copyright © 1968 by Marcus Cunliffe. Published by Little, Brown and Company (Inc.).)

So are Abraham Lincoln's recollections of his youthful experiences of "militia trainings" in the West, where the militia lacked even that fading status that its deep historical roots and the nostalgic memories of aging Revolutionary-era veterans preserved for to the eastwards:

We remember one of these parades ourselves here, at the head of which, on horse-back, figured our old friend Gordon Adams, with a pine wood sword, about nine feet long, and a paste-board cocked hat, from front to rear about the length of an ox yoke, and very much the shape of one turned bottom upwards; and with spurs having rowels as large as the bottom of a teacup, and shanks a foot and a half long. That was the last militia muster here. Among the rules and regulations, no man is to wear more than five pounds of cod-fish for epaulets, or more than thirty yards of bologna sausages for a sash; and no two men are to dress alike, and if any two should dress alike the one that dresses most alike is to be fined, (I forget how much). Flags they had too, with devices and mottoes, one of which latter is, "We'll fight till we run, and we'll run till we die."⁵³²

B. The Era of the Volunteers, 1840-1903

1. The Rise of the Volunteer Guards

In Jacksonian America, citizens retained little interest in compelled service in the old universal militia codified by the Militia Act of 1792 and extolled in the Second Amendment. Neither was service with the small regular army widely esteemed by citizenry or Congress, and the regulars continued to bear the brunt of all the familiar republican critiques, notwithstanding the grudging acceptance accorded the army by the nation and the legislature following its vindication during the War of 1812. But even as an increasingly democratic and individualistic nation walked away from the common militia, and even as antimilitarism burgeoned into standard fare of the democratic press during the 1830s and '40s, a new generation of citizen-soldiers embraced the part-time martial ideal by joining volunteer militia companies. These volunteer companies differed fundamentally from the common militia. As the name implies, the units comprised willing volunteers, not coerced members of the public. The volunteer units were selective and even elite in their membership, and consciously distanced themselves from the contemptible militia-of-the-whole. Volunteers trained more frequently and more regularly than the common militia had done, and many units took pride in staging target shoots, military displays, and

532. Speech to the Springfield Scott Club (Aug. 14, 1852), in 2 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 135, 149-50 (Roy P. Basler ed., 1953).

parades. They wore showy, ornate uniforms fashioned after famous European units of the day. And while volunteer units were increasingly licensed and recognized by the states in which they were based, and incorporated into their states' military organizations,⁵³³ the units were not typically (at least in peacetime) formed under state auspices, but through private initiative.

As the cities grew and the economy boomed, busted, and boomed again in the Jacksonian years, volunteer militia companies became commonplace on the urban landscapes. Typically, these new militias served as social clubs as well as military organizations, putting on balls and exhibitions in addition to engaging in military exercises. Many of the companies were affiliated with, or even coextensive with, volunteer urban fire brigades. Rivalries between companies in the same cities were not uncommon, and brawling between native Protestant and Irish Catholic militia units was common sport at midcentury.⁵³⁴ While some volunteer companies specialized in socializing and preening in fine uniforms, a number of elite units aspired to a genuine measure of military skill. Jefferson Davis's own Mississippi Rifles distinguished themselves in the Mexican War, and generally the organized volunteer units fought far better in Mexico than the bands of unorganized Southwestern militia who hastened across the border notwithstanding the constitutional prohibition against foreign service. When the Civil War came, it was the presence of established volunteer companies—often fantastically uniformed like Elmer Ellsworth's New York Zouaves—that enabled Winfield Scott to put an army in the field to defend Washington while the government organized recruitment and gathered the regulars.⁵³⁵

Before the Civil War, volunteers acquired their arms, equipment, and elaborate uniforms wholly by their own means.⁵³⁶ In this respect, too, they differed from the common militia. The Militia Act required that citizens enrolled in their states' militia provide themselves with standard arms and equipment, but soon after the Act's passage, states not already budgeting for militia arms typically set aside money for muskets for citizens unable to afford their own arms, or even contracted

533. On the eve of the Civil War, many states' adjutants general listed *only* volunteer units in their organizational charts. See CUNLIFFE, *supra* note 75, at 220-22.

534. See *id.* at 88-95, 227, 230.

535. See *id.* at 203 on Jefferson Davis's Mississippi Rifles; *id.* at 252-54 on the role of established, elite Volunteer units during the initial defense of Washington in 1861; *id.* at 5-7 on the Zouaves and other gaily uniformed Volunteers at First Bull Run.

536. Some companies even maintained their own armories under state license, or rented neglected arsenals from their local government. See *id.* at 219-20; *cf. id.* at 227.

to purchase muskets directly.⁵³⁷ And in the hopes of counteracting the lax approach of many states to military affairs, in 1808 Congress first appropriated federal funds for the militia, passing a statute that set aside \$200,000 annually that the states could claim to purchase arms.⁵³⁸ This marked Congress's initial halting step down a long road leading, in the early twentieth century, to the federal government's full-scale assumption of the responsibility for arming the militia that the Militia Act of 1792 had lodged with the individual, able-bodied man.⁵³⁹ For many years, most of the money set aside annually under the 1808 law went unclaimed, attesting to the growing apathy with which state governments and citizens alike viewed service in the "constitutional army."⁵⁴⁰ Not until bloodletting in Kansas and the *Dred Scott* decision heightened sectional tensions in 1857 did some of the Southern states begin to tap the federal well for militia moneys with a view to replenishing armories, which, like those of their sister states throughout the country, had been neglected for many years.⁵⁴¹

2. A Nation of Volunteers: The Grand Army of the Republic

Secession brought an end to Southern claims for federal funds, and Congress did not raise the militia appropriation during the Civil War. Instead, the War Department quickly assumed the task of directly arming the vastly expanded forces required to suppress the Southern insurrection.⁵⁴² The Civil War marked the first time the nation

537. On the states' role in providing arms for militia members prior to 1792, see Bellesiles, *supra* note 198, at 581, 585 (regarding Virginia and Connecticut, respectively). On federal dissatisfaction with state efforts to arm the militia to come into compliance with the 1792 Act, see Bellesiles, *supra* note 8, at 429-35; CUNLIFFE, *supra* note 75, at 192-203, 209-12.

538. Act of Apr. 23, 1808, ch. 55, § 1, 2 Stat. 490, 490, analyzed in CUNLIFFE, *supra* note 75, at 193. The law remained on the books until 1887, when Congress increased the annual militia appropriation to \$400,000. See *infra* discussion accompanying note 554.

539. See Uniform Militia Act of 1792, ch. 33, § 1, 1 Stat. 271, 271, repealed by Dick Act, ch. 196, 32 Stat. 775 (1903). For an analysis of the Uniform Militia Act of 1792, see *supra* discussion accompanying notes 482-88; CUNLIFFE, *supra* note 75, at 184; WEIGLEY, *supra* note 8, at 93-94.

540. See CUNLIFFE, *supra* note 75, at 193, 209-11.

541. See WEIGLEY, *supra* note 8, at 195 (discussing Southern rearmament after Kansas); CUNLIFFE, *supra* note 75, at 209-12 (discussing prior nationwide indifference).

542. See WEIGLEY, *supra* note 8, at 201-04. As of December 31, 1860, the Union retained intact the regular army of 15,000, which the Thirty-sixth Congress, just before dissolving, increased by nine regiments of infantry, one of cavalry, and one of artillery. See *id.* at 199-200. About 40% of the officers defected to the Confederacy, but Lincoln could later boast that not one enlisted man abandoned his post. See *id.* at 199. Prior to Lincoln's assumption of office, President Buchanan did absolutely nothing to counter the insurrection. When Lincoln took office on April 15, 1861, he called on the states for 75,000 volunteers for three months' service under the Uniform Militia Act of 1792 to put down rebellious combinations in seven states. See *id.* at 198. 91,816 men answered the call. See *id.* at 200. On May 3, 1861, without congressional authorization, Lincoln increased the size of the regular army by 22,714, and called for 40

confronted the need for mass mobilization under the Constitution, and the war was fought largely by citizen-soldiers, but not by the common militia. Rather, the Union army was made up overwhelmingly of Volunteers (capitalized in Civil War parlance) who rallied to the federal flag. They arrived in units raised by the states in response to calls by Congress or the president, and enlisted directly into the service of the United States before embarkation to the front.⁵⁴³ And after considerable initial confusion regarding the bounds of state and federal authority, all arms used by the 2,666,999 soldiers who served in the Union armies⁵⁴⁴ were procured and issued by the federal government.⁵⁴⁵ Over ninety percent of these men were Volunteers. These citizen-soldiers assumed a role more closely akin to that of the federalized National Guard units in the twentieth-century world wars than to the early-nineteenth-century, part-time volunteer regiments. They served under federal command, wore standard-issue federal uniforms, and received federal pay (supplemented by state and federal enlistment bounties). Civil War recruitment amounted to a Napoleonic *levée en masse*, and while the overwhelming majority of Union soldiers were

regiments, or 40,000 men, to serve as three-year Volunteers. *See id.* By July 1, over 200,000 had enlisted. *See id.*

The Thirty-seventh Congress convened on July 4, 1861, and voted an additional 500,000 three-year Volunteers, and another 500,000 Volunteers for the duration of the war. *See id.* The latter actually enlisted as three-year men. *See id.* By December 3, the federal recruiting service replaced the separate state recruiters, and although it was suspended on January 15, 1862, when Stanton replaced Cameron as secretary of war, by June 6, 1862, the federal service was back in operation and continued to handle all recruitment for the rest of the war. *See id.* at 206. On July 2, 1862, Lincoln called on the states for 300,000 more Volunteers. *See id.* On July 17, 1862, Congress amended the Militia Act, delegating to the president the authority to specify a period of service for up to nine months whenever he called up the militia, and granting him plenary power to make all necessary rules and regulations for states lacking adequate laws to govern their militia. *See id.* at 207. Pursuant to his newly acquired authority, on August 4, 1862, the president called for 300,000 nine-month militia. *See id.* Congress acted decisively on March 3, 1863, passing the Enrollment Act, which bypassed the militia powers altogether and for the first time availed itself of the power to "raise and support armies." *Id.* at 208. The Act imposed military duty on all able-bodied male citizens between 20 and 45 years of age. *See id.* Controversially, the Act permitted substitution and commutation for \$300. *See id.* at 209. That summer, tens of thousands of irate, chiefly Irish New Yorkers, took to the streets, burning, looting, and lynching to protest the class aspects of the draft law. *See CUNLIFFE, supra* note 75, at 94. The riot was not controlled until federal troops arrived via train fresh from the battlefields of Gettysburg. *See FONER, supra* note 30, at 33. Resistance and riots notwithstanding, or perhaps because of those very factors, only six percent of soldiers to serve in the Union army were draftees. *See WEIGLEY, supra* note 8, at 210. 1863 also witnessed the beginning of black recruitment, and by the war's end nearly 200,000 men had served with the U.S. Colored Volunteers and U.S. Colored Troops. *See id.* at 211-12. On July 18, 1864, Lincoln called for 500,000 federal Volunteers, and on December 18 he called for 300,000 more, the last recruits to see action in the war. *See id.* at 215.

543. *See WEIGLEY, supra* note 8, at 204; Wiener, *supra* note 8, at 191.

544. *See WEIGLEY, supra* note 8, at 246.

545. *Id.* at 203-04.

enlistees rather than draftees, the Grand Army of the Republic partook of the universality of the old common militia, even as it acquired the training and professionalism characteristic of the regulars.

3. Revitalization and Professionalism

At the end of the Civil War, the two-million-plus wartime Volunteers were swiftly demobilized, the regulars dispatched to police the occupied South and the Indian frontier, and the few prewar volunteer companies that survived the war as fighting units decamped and went home. Prewar-style volunteer companies, old and new, remained part of the Northern social scene, but for a time, as the nation tried to heal its wounds, the volunteers' passion for martial exercises seemed to wane. However, the outpouring of patriotism that accompanied the Centennial sparked renewed interest in volunteer soldiering, and when industrial turmoil swept the nation in 1877, state governors called on organized state volunteers to put down riots. Indeed, industrial unrest prompted state legislatures to renew interest in their state forces. Legislators made no pretence of reviving the long-defunct militia-of-the-whole, but did all they could to foster the respectable part of society's interest in joining organized and newly forming volunteer units, which pointedly kept their distance from the unorganized militias memorialized in the ancient laws.⁵⁴⁶ In part to distinguish themselves from the disreputable unorganized militia, organized volunteer companies styled themselves guards or national guards. The revitalization of state national guards coincided with a passion for reform and improvement then sweeping all the professions, and national guard officers aggressively pursued recognition and accreditation for themselves and their organizations.⁵⁴⁷ Organized militia officers from across the country joined forces in 1878 to form the National Guard Association ("NGA") with the objective of obtaining funding and recognition from state legislatures and Congress.⁵⁴⁸ As state legislatures quickly acted to revive their militia codes and acknowledge the organized militia as their states' official National Guards,⁵⁴⁹ the Supreme Court resolved the important issue of standing to raise Second or Fourteenth Amendment claims asserting a right to

546. See DERTHICK, *supra* note 81, at 13; SCOTT SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES* 104-05 (1982).

547. See SKOWRONEK, *supra* note 546, at 92-95.

548. See *id.* at 93.

549. See *id.* at 104-05.

arms, stating in *Presser v. Illinois* that only arms bearing in the legally recognized, state-licensed militia was entitled to constitutional protection.⁵⁵⁰

Formation of the NGA reflected the professional aspirations of many late-nineteenth-century militia officers and a desire on their part to keep pace with the increasing technical complexity of officership in an industrial age. The National Rifle Association also dates from these years, and it had its origins in some of the same concerns that animated the new NGA.⁵⁵¹ The Rifle Association aimed not at aspiring officers, but at young men (particularly the wholesome, rural, native-born, non-unionized type) who might be called upon to fill out the rank and file of a rapidly mobilized, mass army of citizen-soldiers. Civilian America, according to both the NGA and the NRA, would benefit by acquiring a modicum of military knowledge—not simply because this fostered such Victorian values as self-improvement, sport, and outdoorsmanship—but because military preparedness was a patriotic duty. National respectability as well as national security invoked the volunteer martial spirit, as America seemed less and less isolated on an increasingly imperialistic and competitive world stage. Compared with the millions of full-time soldiers and trained reserves assembled by the powers of continental Europe, America's tiny Indian constabulary army of some 30,000 seemed insignificant indeed.⁵⁵² Only isolated military reformers like Emory Upton urged America to keep pace with the Europeans, and the overwhelming majority of voters remained antimilitarist in outlook. Still, no one doubted that a war with a major power would require mobilization on a scale surpassing even the Civil War. If America were to avoid humiliation, its prospective citizen-soldiers must have prior training, and to this end, the NRA saw itself fulfilling a vital purpose by fostering marksmanship and firearms skill in the military eligible population.⁵⁵³

While the NRA staged target shoots and formed rifle clubs, the NGA organized seminars and retreats, circulated periodicals, and

550. See *Presser v. Illinois*, 116 U.S. 252, 267 (1886). *Presser* is discussed in detail *supra* notes 38-53 and accompanying text.

551. See generally Bellesiles, *supra* note 8, at 453 (citing Russell Stanley Gilmore, *Crackshots and Patriots: The National Rifle Association and America's Military-Sporting Tradition, 1871-1929* (1974) (unpublished Ph.D. dissertation, University of Wisconsin) (on file with the University of Wisconsin Library); AMERICANS AND THEIR GUNS: THE NATIONAL RIFLE ASSOCIATION STORY THROUGH NEARLY A CENTURY OF SERVICE TO THE NATION (James B. Trefethen compiler & James E. Serven ed., 1967)).

552. See SKOWRONEK, *supra* note 546, at 85.

553. See Bellesiles, *supra* note 8, at 435.

lobbied state and federal officials. As the nineteenth century drew to a close, Congress began to take notice of the state guards and the NGA alike. Washington increased the annual militia appropriation for the first time in 1887, doubling funding under the 1808 law to \$400,000 per annum. Congress acted again in 1900, increasing appropriations to \$1,000,000 annually.⁵⁵⁴ When Congress next increased federal militia funding in 1903, it simultaneously replaced the minimalist and hopelessly obsolete federal militia rules laid down in the Acts of 1792 and 1795 with comprehensive National Guard legislation embodied in the Militia Act of 1903 (the "Dick Act"). From that time onwards, increases in federal funding for the guard entailed ever-greater army and War/Defense Department supervision of the constitutionally recognized militia.

C. The United States Army and the United States Army National Guard in the Twentieth Century

1. Birth of the Modern National Guard

At the close of the nineteenth century, mobilization of state guard units to fight in the Spanish-American War was characterized by scandal and disorder. The disastrous preparation for war was duly recorded by the busy yellow press, who made the most of the stupidity of politicians, brass, and high command, as well as of the misfortunes experienced by regulars and civilian soldiers alike. Prior to the invasion of Cuba, regular army and volunteers spent months awaiting transport out of Tampa, or stranded on sidings stretching back to South Carolina hoping for passage along the single rail line leading into the west Florida port. The soldiers' equipment was neither standardized, serviceable, appropriate, nor up to date. Guardsmen in particular went into combat wearing woolen uniforms too sweaty for the Tropics, and carrying smoky, single-shot rifles far inferior to the models borne by their Spanish adversaries. The most notorious reports of organizational ineptitude dwelled on servicemen suffering through spoiled canned beef and succumbing to epidemics at a time when advances in technology had made refrigeration readily available and inoculation against typhoid fever practicable. Few observers doubted that a more formidable adversary than Spain would have bested the logistically challenged Americans.⁵⁵⁵

554. See DERTHICK, *supra* note 81, at 22.

555. See generally WEIGLEY, *supra* note 8, at 298-305. It should perhaps be added that,

In 1903, following further debacles involving mobilization of state guard units to police the newly won empire and put down the Philippine insurrection, Congress finally acted under pressure from President Roosevelt to subdivide the militia-of-the-whole—by then entirely fictitious—into an active militia (the National Guard) and an unorganized militia (the nonenrolled male population between eighteen and forty-five).⁵⁵⁶ At the same time, the federal government standardized state units and equipment, and, in return for massive increases in federal funding, the states accepted vastly enhanced federal supervision of militia training.⁵⁵⁷

Congress acted again in 1908 to make the National Guard the country's first-line reserve, providing that as the Organized Militia, the National Guard would be called forth before the raising of new federal volunteers.⁵⁵⁸ More fundamentally, Congress waived existing territorial limitations on National Guard call-ups, thereby attempting to bypass the issue of the constitutionality of militia service outside the United States, which had plagued the president and War Department in the Wars of 1812–15, 1846–48, and 1898–1901. Within a few years, however, both the attorney general and the judge advocate general of the army had written reports finding this use of the militia to be unconstitutional,⁵⁵⁹ presenting Congress anew with the problem of legally deploying American reservists overseas.⁵⁶⁰

This controversy came to a head during the preparedness movement that proceeded American entry into the First World War. With war raging in Europe, American pacifists, socialists, and isolationists opposed any military expansion at all, while states-rights-conscious Southern Democrats (and many Midwestern Republicans)

thanks to America's vast naval and industrial superiority, the outcome of this war was never in doubt.

556. See Dick Act, ch. 196, § 1, 32 Stat. 775, 775 (1903). For analyses of the Dick Act, see *Perpich v. Department of Defense*, 496 U.S. 334, 342 (1990); DERTHICK, *supra* note 81, at 26-27; WEIGLEY, *supra* note 8, at 320-22; Wiener, *supra* note 8, at 193-96. The Act provided in relevant part:

That *the militia* shall consist of every able-bodied male citizen of the respective States, Territories, and the District of Columbia, and every able-bodied male of foreign birth who has declared his intention to become a citizen, who is more than eighteen and less than forty-five years of age, and *shall be divided into two classes—the organized militia, to be known as the National Guard of the State, Territory, or District of Columbia, or by such other designations as may be given them by the laws of the respective States or Territories, and the remainder to be known as the Reserve Militia.*

Dick Act, ch. 196, § 1, 32 Stat. 775, 775 (1903) (emphasis added).

557. See Dick Act, ch. 196, § 3, 32 Stat. 775, 775-76 (1903).

558. See Militia Reform Act of 1908, ch. 204, § 1, 35 Stat. 399, 399.

559. See 29 Op. Att'y Gen. 322 (1912).

560. See WEIGLEY, *supra* note 8, at 324-25.

typically favored no more than incremental augmentation of the National Guard (notwithstanding the constitutional problems associated with foreign deployment). Meanwhile, the newly minted general staff and many pro-British Eastern progressives pushed for conscription, establishment of a reserve component wholly independent of the states, and the aggressive expansion of the regular army.⁵⁶¹ The bitterly contested National Defense Act of 1916 “federalized” the Organized Militia, thenceforth known only as the National Guard, and integrated it into the command structure of the War Department and the regular army.⁵⁶² The Act specified the guard units the states were to maintain, set standards for guard officers, and made provision for federal drill pay to guardsmen.⁵⁶³ New enlistees swore an oath to obey the president and uphold the U.S. Constitution.⁵⁶⁴ Upon congressional authorization, the president was empowered to draft guard members into federal service for the duration of the emergency specified in the authorization bill. In the years before World War I, then, the state militias were integrated into a federally supervised U.S. Army National Guard and supplied with standardized, congressionally prescribed arms purchased with federal funds and kept in state arsenals, which were themselves increasingly financed by the national government. During the same period, the states acknowledged delegation of the provision of security against invasion to the U.S. Army and the Organized Reserves, laying the framework of state-federal relations that allowed the massive mobilization of citizens into soldiers in both world wars.⁵⁶⁵

2. Continued Evolution of the Guard and Reserves during the Age of Statism

Expansion of the armed forces to wartime strength during World War I departed markedly from the systems of recruitment and mobilization established during either the Civil War or the Spanish-American conflict, when militia entered federal service in response to presidential calls to the states. Spanish-American War policy allowed individual guard members to volunteer for duty overseas and maintained intact each state unit from which three-quarters of personnel enlisted for federal service. By 1917, organized state volunteer units had been federalized and standardized under the rubric

561. See generally *id.* at 344-47.

562. See National Defense Act of 1916, ch. 134, § 1, 39 Stat. 166, 166.

563. See WEIGLEY, *supra* note 8, at 348.

564. See *id.*

565. See *id.* at 344-50.

of the National Guard, and many guard members had been training regularly with their regiments since the beginning of the preparedness campaign during the early years of the European war. But General Pershing was convinced, perhaps rightly, that engagement against battle-hardened German veterans required not only further training of guard members under the auspices of the U.S. Army, but breakup of the guard units and integration of the state soldiers into components of the U.S. Army.⁵⁶⁶ Fully sixty-seven percent of the 3.68 million Americans serving with the army by Armistice Day were drafted directly into the U.S. Army under the Selective Service Act of 1917.⁵⁶⁷ Still, hundreds of thousands of guard members saw active duty during the Great War. Their units, however, did not, as state components disappeared from War Department organizational charts and entered into virtual suspension as America prepared to fight the war in Europe.⁵⁶⁸

Guard officers resented not only the disappearance of their units, but also the time-honored hauteur regular officers displayed towards their civilian-soldier colleagues.⁵⁶⁹ In the aftermath of demobilization, the NGA was determined to resurrect the old state units and to preserve the guard's role as the nation's primary reserve in the face of heavy opposition from reform-minded centrists in the War Department, who favored development of a purely federal reserve component of the army.⁵⁷⁰ The guard's aims coincided perfectly with the popular rejection of reform and centralization that marked postwar reaction and the return to normalcy and isolationism. The NGA had not yet built up the Capitol Hill lobbying machine that Generals John McAuley Palmer and Milton A. Reckord commanded during and after the Second World War, but thanks to the anticentrist leanings of many rural representatives, the NGA managed to stave off a War Department campaign to oust the guard in favor of federal reserves and even secured, at least initially, an increased level of federal funding.⁵⁷¹

Under the National Defense Act of 1920, the National Guard was confirmed as the nation's first-line reserve, but the president was authorized to call out the guard only when greater troop strength than

566. *See id.* at 375-76.

567. *See id.* at 356-58.

568. *See id.* at 386-87.

569. *See* SKOWRONEK, *supra* note 546, at 244; WEIGLEY, *supra* note 8, at 397-400.

570. *See* WEIGLEY, *supra* note 8, at 395-400.

571. *See* DERTHICK, *supra* note 81, at 44-47, 49; *id.* at 93-107 (regarding the NGA's lobbying machine of the forties and fifties). On the lobbying effectiveness of Palmer, Reckord, and the NGA during the interwar years, *see id.* at 94.

that provided by the regulars was required.⁵⁷² Still, Congress relied forthrightly on citizen-soldiers to provide the bulk of the nation's resources in the event of war and called for 435,000 guard members to be maintained in federally funded state units.⁵⁷³ At the same time, the Defense Act restored to the guard a greater degree of control over its own affairs, with the Militia Bureau in the War Department coming under the direction of a guard general. Training the guard was to be part of the army's responsibility, but as more ROTC graduates became available, citizen-soldiers were expected to take a larger role in instructing their own brigades. For all of the National Guard's success on the Hill during the waning days of Wilson's presidency, during the Harding, Coolidge, and Hoover administrations the guard suffered from the same fiscal austerity that then plagued other federally supported programs, and rarely were guard formations recruited to their full strength during these years of retrenchment.⁵⁷⁴

The course towards federal integration and consolidation of America's citizen-soldiery resumed with vigor during the Hundred Days of the New Deal. But the NGA was able to ensure that rationalization and reform preserved more than merely a dignitary role for the states and the state adjutant generals' offices in the nation's federally supervised citizen reserve. Steering a compromise course between the claims of the War Department and the guard, Congress amended the Defense Act of 1916 to ensure that state units would continue intact when mobilized for overseas wars. More fundamentally, Congress gave express recognition to the dual status of the guard. Henceforth, guard units were to have twinned identities, being at once the militia of the states and a permanent reserve component of the U.S. Army. As a result of the 1933 amendments, the states accepted the dual enlistment system that continues to this day, whereby guard members take simultaneous oaths to serve in their state units and in the regular army when called up to national duty.⁵⁷⁵ For the first time, the National

572. Eventually, in 1952, Congress abandoned the requirement of an emergency and gave the president essentially discretionary authority to call up National Guard units with gubernatorial consent. See *Perpich v. Department of Defense*, 496 U.S. 334, 346 (1990).

573. See WEIGLEY, *supra* note 8, at 401.

574. See *id.*

575. The dual enlistment system continues in force to this day. In the words of Justice Stevens,

Since 1933 all persons who have enlisted in a State National Guard unit have simultaneously enlisted in the National Guard of the United States. . . . [U]nder the "dual enlistment" provisions of the statute that have been in effect since 1933, a member of the Guard who is ordered to active duty in the federal service is thereby relieved of his or her status in the State Guard for the entire period of federal service.

Guard became part of the army structure during peacetime as well as war, and the guard's federal administration was justified not under the Militia Clauses, but under the Army Clause of the Constitution.⁵⁷⁶ In the process, lawmakers "eliminated the word 'Militia' from the War Department organization by changing the name of the supervisory agency to National Guard Bureau."⁵⁷⁷

Notwithstanding a heightened level of army-guard integration, regulars retained their suspicions of guard members as America poised for entry into World War II. But the progress the guard achieved during the interwar years of army-supervised training left the nation far better prepared in 1941 than it had been in 1917. By the time Nazi divisions swept across the Polish frontier, 200,000 American guard members were on active-duty status under six-year enlistments, training forty nights a year and performing an additional two weeks of field exercises each summer.⁵⁷⁸ This citizen army seemed paltry compared to the German, Japanese, Soviet, or French establishments, but the availability of semiexperienced guard components was of vital importance in freeing up regulars for the important job of training draftees and recruits as the army expanded to wartime strength.⁵⁷⁹

Guard units remained together under their familiar regimental designations during World War II and contributed much to the overall success of America's civilian army against the more thoroughly professional and regimented German and Japanese forces. As the War Department anticipated victory and partial demobilization, it envisioned a continued role for the guard. The government's commitment to allow civilian soldiers to return home was now tempered by an appreciation for the demands of America's much expanded military role abroad.⁵⁸⁰ Doctrinaire hostility to nonprofessional soldiers was finally fading among top defense strategists, but some regular officers retained concerns over the guard's joint state-federal loyalties,⁵⁸¹ concerns partially born out by Southern

Perpich, 496 U.S. at 345-46.

576. See Act of June 15, 1933, ch. 87, 48 Stat. 153.

577. Wiener, *supra* note 8, at 209. Wiener adds, "the 1933 Act proved conclusively that a well-regulated militia is impossible of attainment under the militia clause, and can be organized only by resort to the plenary and untrammelled powers under the army clause." *Id.*

578. See WEIGLEY, *supra* note 8, at 420.

579. See *id.* at 436.

580. See *id.* at 486.

581. See *id.*

governors' mobilization of guard units to resist federally mandated racial integration in the 1950s and '60s.⁵⁸²

From the earliest days of the Republic, the preoccupation of the army's thought in peacetime has been the question of manpower, that is, how to muster from an historically civilian people adequate numbers of competent soldiers in the event of a major war.⁵⁸³ For much of our history, good fortune and isolation rendered this an abstract rather than a practical question. During the two wars with Britain, the enemy lacked both the political will and a coherent strategy for bringing its superior military resources to bear effectively against what was then still a highly diffuse country.⁵⁸⁴ In 1846, Mexico's military establishment was no larger than our own and outclassed by the professionalism, gunnery, and engineering skills of the tiny cadre of West Pointers at the head of the invading army.⁵⁸⁵ During the Civil War, the South was, pretensions at chivalry notwithstanding, no more militaristic or war-ready than the North, and the Union's lack of military preparedness placed it at no disadvantage.⁵⁸⁶ In 1898, Spain was an exhausted imperial power, utterly lacking in the industrial and manpower resources required to repel simultaneous invasions of Cuba, Puerto Rico, and the Philippines by a top flight naval and industrial power, no matter how disorganized the attacker's military planning.⁵⁸⁷

More than good luck, economic power, and optimism were required to fight and win the twentieth-century world wars. Victory

582. Prominent cases of governors ordering state militia to defy federal court orders relating to desegregation include actions by John Patterson of Alabama in 1956 (Autherine Lucy case), Orval Faubus of Arkansas in 1957 (high school integration), and Ross Barnett of Mississippi in 1962 (state university integration). In each instance, the state militia was subsequently federalized by order of the president (i.e., called up into National Guard duty), and ordered to enforce federal law. The most famous case is that of Alabama Governor George Wallace in 1963. Wallace responded to a federal injunction preventing state troopers from obstructing integration by replacing the troopers with militia. President Kennedy federalized the guardsmen, who reluctantly ordered the governor to stand aside from a schoolhouse door he had ostentatiously obstructed. See DAN T. CARTER, *THE POLITICS OF RAGE* 113, 154 (1995); CHARLES & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* 33-34 (1985). Interestingly, Wallace toyed after his election in 1962 with the idea of forming an irregular state militia apart from the National Guard, which would not have been subject to presidential command and thus could have conscientiously followed the governor's orders to enforce segregation. See CARTER, *supra*, at 113.

583. See WEIGLEY, *supra* note 8, at 497.

584. See generally MIDDLEKAUFF, *supra* note 244, at 575-81 (regarding the Revolutionary War); I MORISON ET AL., *supra* note 468, at 384-85 (regarding the War of 1812).

585. See generally WEIGLEY, *supra* note 8, at 184-85.

586. On the similarity of Northern and Southern militia and military cultures in the antebellum years and the insubstantiality of the Southern chivalric myth, see CUNLIFFE, *supra* note 75, at 337-384.

587. See generally WEIGLEY, *supra* note 8, at 305, 307, 309.

over the Central Powers and the Axis required mobilization of the manpower of the entire nation. In both instances, millions of American civilians were organized and trained into armies capable of standing up to the most professional soldiers from the most militaristic countries, and far more quickly than conservative strategists in the regular establishment thought prudent or possible. Success in the world wars therefore weakened the case for the old general staff/War Department argument that American security required permanent militarization of the population on the Prussian model.⁵⁸⁸ Yet no strategist could underestimate the value of training or preparedness, and no one failed to credit the professional officer and noncommissioned corps for their remarkable ability to impart knowledge, system, and skill to millions of their compatriots as the army set itself on a wartime footing. Thus, rejection of Continental-style militarism did not amount to a rejection of professionalism, or augur a reversion to the inchoate amateurism of the colonial militias. Quite the contrary, the wartime experience pointed to the necessity of maintaining a thoroughly professional, if not over large, regular army, but with sufficient links to civilian society to prevent both debilitating hostility of the general populace towards the army and dangerous contempt for the people by the soldiers. The National Guard was ideally suited to play a prominent role in this system of security.⁵⁸⁹

Military strategists, of course, have a pronounced tendency to plan to fight the last war rather than the next one. The vision just described was in fact a vision premised on preparedness for mass mobilization of the civilian population to fight a prolonged ground war on several foreign fronts against formidable military adversaries similarly arrayed. It was therefore premised in part on the ideal of universal military training ("UMT"), which was to enable the democratic/civilian societies, led by the United States, to mobilize their civilian populations with maximum speed and efficiency, while the regular army responded to the initial aggressions of a hostile, totalitarian coalition.⁵⁹⁰ This vision was also obsolete before it was reduced to statute. On August 6, 1945, the U.S. Air Force dropped an atomic bomb on Hiroshima, Japan, all but ending the Second World War and ushering in a radically different strategic age. The advent of the American nuclear monopoly changed military planning almost overnight.⁵⁹¹

588. See generally *id.* at 497.

589. See generally *id.* at 486-87, 497.

590. See *id.* at 498.

591. See *id.* at 500.

At the dawn of the atomic age, the air force, newly separated from the army, became the glamour wing of the armed services and the favorite of strategists and planners in the Defense Department and on Capitol Hill. Army and NGA lobbyists struggled to justify continued funding for the oldest and most traditional military arm, for it was widely assumed that no potential antagonist would be possessed of sufficient folly to challenge American nuclear might. Ground forces retained a constabulary style function in the occupied Axis countries, and as the cold war developed, forward positioning of troops provided a visible check against communist expansion. But a showdown, if it came, was expected to be quick, nuclear, and dispositive. No one seriously considered the possibility that America might ever again be compelled to mobilize the entire nation in the manner characteristic of the major wars from Napoleon's day to Hitler's. The historic role of the guard, as the strategic, trained personnel reserve of the nation, seemed relegated to irrelevancy, and plans for UMT were left to gather dust in Pentagon archives.

As it turns out, advance notice of the guard's impending demise was greatly exaggerated. When the Soviet Union shocked the world by testing atomic and then hydrogen bombs long years before the intelligence community thought feasible, America's first response was the doctrine of massive retaliation, or mutual assured destruction.⁵⁹² Nuclear attack against America or its allies would be met by an overwhelming nuclear counterstrike, calculated to destroy the Soviet Union and likely to bring an end to life on earth. But the nuclear brinkmanship of the Dulles era soon wore thin, and more flexible, less apocalyptic policies were fashioned for the benefit of frazzled nerves on both sides of the Iron Curtain. Neither of the principal regional wars of the cold war era—the Korean nor the Vietnam War—led to nuclear confrontation or escalated into worldwide conflict. In both instances, America's global commitments—and, principally, the forward positioning of NATO troops in Germany—so burdened the regular army that military expansion proved necessary to meet the requirements of war raging in Asia.⁵⁹³ At the same time, conventional preparedness strategy dictated that trained reserves be maintained to facilitate further, rapid expansion in the event open hostilities should erupt in Europe or elsewhere around the globe while substantial

592. *See id.* at 525-26, 535-36.

593. *See id.* at 533-34.

American strength was committed to fighting on the Pacific Rim.⁵⁹⁴ Vastly exaggerated reports of Soviet army strength militated in favor of a sizeable, professionally trained reserve.⁵⁹⁵ All this said, fighting substantial but limited Asian wars, even in a global security context, did not require mobilization of the entire nation.⁵⁹⁶ Short of feeding and paying them, the army would not have known what to do with ten or twenty million soldiers. This need for one or two million more personnel than during peacetime—but no more than that—presented grave ethical and political difficulties for the Selective Service, the Defense Department, and the government.⁵⁹⁷ Compelling wartime service of some—but not all—Americans generated bitter anger and resentment as the U.S. death tolls climbed to fifty and fifty-eight thousand in the respective Asian wars.⁵⁹⁸

All of these factors combined to redefine and solidify a mission for the National Guard in the later years of the twentieth century. The Vietnam War proved, in myriad ways, a political disaster, and neither the defense community nor the larger nation was ever quite the same after America suffered its first military defeat. Perhaps the least popular aspect of the war was the draft, and in 1972 Congress repealed the Selective Service Act in favor of the volunteer principle.⁵⁹⁹ The army's reversion to the recruitment system redoubled its reliance on the guard and, by now, a substantial separate army reserve arm to meet future requirements for expansion and mobilization. This had the effect of cementing the mutual dependency and linkage between army and guard. With mutual assured destruction and the draft both discredited, the guard's future in the closing decades of the twentieth century seemed far more certain than in the immediate postwar years. But the ever more federal, wholly army-trained, all volunteer National Guard of the Reagan years bore no familial resemblance to the old, independent, universal state militia.⁶⁰⁰

As far removed as the cold war National Guard was from the militia described in the Second Amendment and the Militia Act of 1792, twentieth-century America never completely forgot the civic republican fears that once animated Antifederalist advocates of a constitutional

594. *See id.*

595. *See id.* at 508.

596. *See id.*

597. *See id.*

598. *See generally id.* at 509-10, 534-35.

599. *See id.* at 558.

600. *See generally id.* at 578-92.

right to keep and bear arms. In his farewell broadcast of January 17, 1961, President Eisenhower warned of the growing power of the military-industrial complex.⁶⁰¹ The bloated defense budgets, procurement scandals, and defense industry lobbyists that left the former Commanding General of the Army so uneasy had their counterparts in the standing (i.e., inactive and useless) armies, salaried placemen, and overburdened exchequers of Elbridge Gerry's or James Harrington's day. True, by Eisenhower's time, few Americans feared a military coup. But there had always been more to the republican anti-army ideology than the worry that janissaries might seize the palace or oust legislators from their seats. Much more insidious was the threat that the imperial army would burden the body politic with enervating debt and burden policymakers with improper dependencies and obligations. In this respect, republican misgivings hardly seem relics of a forgotten time.

Happily however, the republicans' most gothic fears of a polity corrupted by an army have not materialized in the democratic Republic they helped to found. Civilian control of the military has never been challenged—a remarkable fact in a constitutional system now two hundred eleven years old. Most of our great generals who became presidents—Washington, Grant, Eisenhower—proved decidedly anti-Cesarist in the Oval Office (perhaps this is somewhat less true of Jackson). Indeed, throughout our history, professional military officers have demonstrated a notable commitment to civic values and respect for the democratic process. The anti-army prejudices of the nineteenth century have steadily faded, and today the army is truly perceived as an instrument of the people, and not as a threatening alien organ. Localism endures in and on behalf of the National Guard, but as a species of provincial politicking and state-level patronage rather than as a genuine military counterweight to federal power. Away from the peripheral fringe, even the nation's most ardent anticentrists are now devotees of the army. More often than not, the military is the only aspect of federal power for which our modern antifederalists have any affection at all.

601. In Eisenhower's words:

This conjunction of an immense military establishment and a large arms industry is new in the American experience. . . . We recognize the imperative need for this development. Yet we must not fail to comprehend its grave implications. . . . In the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex. The potential for the disastrous rise of misplaced power exists and will persist.

THE OXFORD DICTIONARY OF MODERN QUOTATIONS 73 (Tony Augarde ed., 1991).

Quite apart from reflecting on the contemporary relevance or irrelevance (or persistence or disappearance) of the ancient republican paradigm, our thesis ultimately turns on the evolution of the militia. And by the late twentieth century, that institution had developed into a creature all but unrecognizable from the perspective of the Second Amendment. In the years since World War II, the role of a mass reserve in assuring national security has seriously diminished in consideration of the technical complexity of equipment and tasks required of a thoroughly professional modern army, and because nuclear deterrence has made a mass war drawing all the personnel reserve of the country unlikely. The need for a whole nation in arms has—in all likelihood, permanently—disappeared. At the same time, conscription has become so unpopular as to border on being politically unfeasible.⁶⁰² In this climate, the volunteer principle has again supplanted the draft as the recruiting mechanism for fighting the limited wars that characterize the nuclear age, leaving no shadow of the old militia's universality or compulsion about today's National Guard.⁶⁰³

It is not only the volunteer recruitment principle that distinguishes the early-twenty-first-century organized militia from the common militia of 1789. The issue of the militia's necessity to the security of the states and nation has been fundamentally recast. In 1789, the regular army numbered 681 men; the common militia, Madison boasted, numbered nearly half a million. Today, the regular United States military establishment numbers some 1.4 million soldiers, sailors, air personnel, and officers, while the U.S. Army National Guard (i.e., the statutorily defined organized militia) accounts for less than 361,000.⁶⁰⁴ With the help of lobbying by the NGA, Congress has judged and continues to judge the National Guard necessary to the nation's security and funds it handsomely in every federal budget (\$6.4 billion in fiscal year 1999—10% of the army budget and 2.4% of the defense budget). In the most recent budget, Congress adjudged the guard worthy of 2.3% of the total of \$282 billion it deemed necessary to secure the defense of

602. See WEIGLEY, *supra* note 8, at 509-10, 534-35, 558.

603. See *id.* at 505-06.

604. In addition to the 357,000 National Guard personnel, our citizen defense force includes 1,064,912 army reserves, of whom 395,038 are ready reserves, 684 standby reserves, and 669,190 retired reserves. See *Situation Report* (visited Nov. 11, 2000) <<http://www.dtic.mil/soldiers/jan2000/pdfs/sitrep1.pdf>>; *U.S. Army Reserve: End Strength* (visited Nov. 11, 2000) <<http://www.army.mil/usar/briefings/civilian/sld005.htm>>. The regular establishment comprises 491,707 active duty army; 381,203 active duty navy; 363,479 active duty air force; and 172,632 active duty marine personnel. See THE WORLD ALMANAC AND BOOK OF FACTS 1999, at 204 (Robert Famighetti et al. eds.).

the United States.⁶⁰⁵ The states too fund their guards—or at least some of them do—albeit very much less generously than the federal government. In fact, according to Justice Stevens, “[t]he Federal Government provides virtually all of the funding, the materiel, and the leadership for the State Guard units.”⁶⁰⁶ In contrast to the National Guard, the unorganized militia—the shadow of the common militia so extolled by the framers of the Second Amendment—has not been funded by Congress since at least 1903. It is unclear that any state appropriated any of the funds Congress set aside for the common militia after Reconstruction, or that any state provided funds for the unorganized militia after 1877, or even after 1850. And by walking away from the muster points and parade grounds en masse during the first half of the nineteenth century, the American people themselves voted in the most direct way that their security, whether national or state, had nothing to do with the common militia. The old militia had died a natural death long before anyone now living was born. Indeed, it would be difficult to conceive of any institution *less* necessary to the security of the fifty free states in the year 2000 than the vanished common militia.

One more vital difference remains between the organized militia of today and the militia of 1789/91. It is the most striking of all. The Militia Act of 1792 required citizens to acquire specified arms and keep them in their homes, ready to bear on muster day and when called up in emergencies. No matter that noncompliance was the rule—that less than ten percent of households actually contained firearms, let alone functioning, regulation arms.⁶⁰⁷ The Militia Act embodied the norms envisioned in the Second Amendment. And those were that militiamen keep their required, regulation arms in their own homes. This was then the most practical approach. Armories contained some small arms as well as field pieces and powder, but the delays and inefficiencies occasioned by first reporting to a state armory, perhaps many miles distant, and then rallying to meet one’s fellows where public danger loomed, would have been intolerable given the limits of eighteenth-century transportation and communication. Moreover, arms then required constant oiling and repair, meaning they could be better

605. See *Situation Report* (visited Nov. 11, 2000) <<http://www.dtic.mil/soldiers/jan2000/pdfs/sitrep1.pdf>>; *Situation Report* (visited Nov. 11, 2000) <<http://www.dtic.mil/soldiers/jan2000/pdfs/sitrep3.pdf>>; *Budget of the United States Government: Fiscal Year 2000*, at 158 (visited Nov. 11, 2000) <<http://w3.access.gpo.gov/usbudget/fy2000/pdf/budget.pdf>>.

606. *Perpich v. Department of Defense*, 496 U.S. 334, 351 (1990).

607. See *Bellesiles*, *supra* note 8, at 428.

maintained in the home, assuming householders were diligent in their charge.⁶⁰⁸ Perhaps more fundamentally still, balls, cartridges, and shot did not begin to be standardized until Eli Whitney, after long delays, delivered on his 1798 contract to furnish the War Department with ten thousand mass-production muskets assembled on the interchangeable parts principle.⁶⁰⁹ Prior to the rise of standard-issue arms, each gun was an individual tool, almost a piece of art, cartridges for which were best assembled by the hands of the proprietor rather than in a factory under government contract.

Today, standard, mass-produced U.S. Army automatic rifles are issued to the National Guard by the army and kept safe in armories. The very same pieces are used by both the army and the guard, maintained according to the same manuals, and sometimes returned to the same armories, where they are stored under lock and guard until next issued to reservists, regulars, or guard members for exercise or duty. If repairs are necessary, army specialists perform them. Ammunition and firing pins are the subjects of meticulous record keeping and are issued separately from the weapon at the beginning of exercises.⁶¹⁰ Congress, the Department of Defense, the secretary of the army, and the state adjutants general have decided national and state security is best served by this system, under which identical, interchangeable equipment centrally stored can be issued to guard members and soldiers as training and military necessity demand. For reasons of efficiency and public safety, it is implausible that any member of Congress or official in the Department of Defense, army, or state adjutant general's office should advocate a return to the policy of keeping the arms used by the organized militia in guard members' homes. Most fundamentally of all, the arms once purchased by the militiamen themselves are now government property and require the safekeeping accorded any other U.S. property—and especially dangerous property at that. In the year 2000, the militia world contemplated by the Second Amendment no longer exists, and no plausible analogy to that nexus can be reconstructed.

608. *See id.* at 434.

609. *See* BOORSTIN, *supra* note 1, at 31-33. Whitney executed the contract during the third year of John Adams's presidency and did not make delivery of the last of the 10,000 muskets until Jefferson was preparing to leave office in January 1809. *See id.* at 32-33.

610. The statements concerning modern administrative practice relating to arms issuance in the guard reflect Mr. Merkel's personal experience and observations as a reservist training with the U.S. Army and Maryland National Guard while an ROTC cadet at Johns Hopkins University in the 1980s.

III. THE MEANING OF MEANING

A. *Text and Context*

The main clause of the Second Amendment recognizes—perhaps even grants—a right of access to arms. The question before the house is: how does one derive the meaning of that right. Whenever an authoritative but incomplete or ambiguous text is examined for meaning, difficult questions arise concerning the appropriate sources for elucidation. And when centuries have passed since its inscription, the complexity of those questions enters a new dimension. We have no intention of entering the lists in the ancient and ongoing scholarly joust⁶¹¹ on the superiority of unreconstructed textualism, any of the varieties of intent-flavored originalism, or unashamed, policy-activated noninterpretivism.⁶¹² Professor Boris I. Bittker has ably demonstrated that none of these sources of illumination casts better than a weak and flickering beam.⁶¹³ However, we do associate ourselves with those who insist that the text of the Constitution has meaning for us today beyond the invitation to improvise on the suggested theme in a manner pleasing to modern sensibilities.⁶¹⁴ We do not believe that the meaning of the

611. Professor H. Jefferson Powell informs us that as early as 1796, Congressman William Vans Murray of Maryland, during debate on the constitutionality of a resolution calling on President Washington to transmit to the House files of John Jay's negotiation of a treaty with Great Britain, expressed surprise that James Madison and others present at the Constitutional Convention in Philadelphia had not shared with the House their recollections of the intentions of the draftsmen. See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 920 (1985). Vans Murray's reference to actual original understanding met with a rebuke the following day from Albert Gallatin of Pennsylvania. See *id.* As Professor Powell recounts it, Gallatin maintained that "[e]ven if it were proper to use the views expressed in the debates of a legislative body in interpreting that body's acts—a proposition Gallatin doubted—the opinions of the Philadelphia framers were as irrelevant as those of the legislative clerk who penned a statute." *Id.*

612. A Westlaw search produces 126 articles and book reviews published over the last decade (since January 1, 1990) with some form of the word "originalism" in the title. We mention here only a few of the most recent entrants: Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765 (1997); Raoul Berger, *Jack Rakove's Rendition of Original Meaning*, 72 IND. L.J. 619 (1997); Jack N. Rakove, *The Original Intention of Original Understanding*, 13 CONST. COMMENTARY 159 (1996).

613. See Boris I. Bittker, *Interpreting the Constitution: Is the Intent of the Framers Controlling? If Not, What Is?*, 19 HARV. J.L. & PUB. POL'Y 9 (1995).

614. By way of qualification, we must add that there are some provisions of the Bill of Rights that seem to invite just such perpetual reconstitution. Nothing in the linguistic or social context of the term "cruel and unusual" in the Eighth Amendment suggests just what punishments are prohibited, nor does the Fourth, by language or by social convention, decree what searches and seizures are to be deemed "unreasonable." For these, we suppose, it would be a mistake to define them according to ancient uses. Rather the intent of the framers appears to have been to delegate to future generations the construction of the terms according to evolving notions of cruelty or reasonableness.

text is “fluid,” perpetually rewriting itself to keep up with the changing times.⁶¹⁵ The words and phrasing, carefully chosen, count. And if the document is worthy of respect, the message embedded in the text must be sought as conscientiously as a string quartet seeks to know what Beethoven had in mind as he wrote the great Opus 59.

So, in searching for that meaning today, we find ourselves among those who take account of the original understanding of the text in the context of the contemporary uses and assumptions of eighteenth-century society.⁶¹⁶ It seems obvious to us that the meaning of the words employed in the text of the Second Amendment are inflected by a complex set of understandings, conventions, and assumptions peculiar to the times and shared among like-minded prisoners of the culture in which the text was created. It is for the sake of textual integrity that we insist that the drastic change in the position of the militia in the array of protections against the overreaching of the central government does not entitle us simply to cut adrift the first phrase of the Second Amendment and enforce the remaining clause to the hilt. The framers thought the right to arms to be closely associated with the military security of the free state, they wrote it thus in the charter, the ratifiers so understood it, and the linkage endures.

It might be worthwhile to unpack this bundle of shared assumptions and extrinsic referents to sort out those that are so critical to the interpretation of the text that, upon a change of context, the significance of the text changes. Or evaporates entirely.

1. Linguistic Context

In the instance of the Second Amendment, the unadorned linguistics are themselves informative. The right to arms is declared by the verbs, “keep and bear,” a phrase selected in preference to

615. But see William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, in INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT, *supra* note 110, at 23. See generally Morton J. Horowitz, *The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 116 (1993) (“The central problem of modern constitutionalism is how to reconcile the idea of fundamental law with the modernist insight that meanings are fluid and historically changing.”).

616. In this we are in accord with Professor Lawrence Lessig, who takes “text” to mean “any artifact created at least in part to convey meaning,” and “context” to be “the collection of understandings within which such texts make sense. . . . Text and context make meaning,” he says, and “[f]idelity is the aim to preserve meaning.” Lessig, *supra* note 96, at 402. Fidelity requires understanding of the context of creation and the context of application. As H. Jefferson Powell states: “We can understand the original meaning of the Constitution . . . only by ‘plunging [ourselves] into the systems of communication in which [the Constitution] acquired meaning.’” H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 675 (1987) (alterations in original).

alternatives such as “have,” “own,” “carry,” or “possess.” Scholars have informed us that the chosen terms have a distinctly military connotation, especially the verb “to bear,” which would not have been used in the eighteenth century—as it would not be today—to connote purely private use of arms. You do not bear a shotgun to go duck hunting. But we need not rely entirely on that language in the announcement of the right in the main clause. We have, as we have emphasized throughout this paper, a clear and unequivocal expression of the linguistic context of the primary right in the introductory phrase that accompanies it. The mere presence of the militia phrase sharing a single sentence with the arms clause has, as we have argued throughout, inescapable significance.

In addition, the way the two parts of the provision are expressed amplifies the significance of their conjunction. The critical introductory language does not aver the relationship of the militia to a free state in a simple declarative clause—a form that might have established two severable propositions:⁶¹⁷ the importance of a militia and the right to arms. Rather, in the first part, the verbal vehicle elected for the verb “to be” is a participle, yielding a phrase known to grammarians as an “ablative absolute construction.”⁶¹⁸ This construction characterizes a phrase modifying the substance of the main clause as an adjective would modify a noun, often expressing the condition or circumstances of the assertion of the main clause. It creates an indissoluble link between the two parts of the sentence and grammatically subjects the right to arms to the rule of the militia modifier. As a simple matter of grammar, the participle modifier is essential for the declarative clause to occur. Had the two statements—regarding the importance of a militia and the right to arms—not been linked in this manner, it might have been possible to

617. The two clauses of the Fourth Amendment provide a good example of joined but independent entitlements:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

618. Fowler (in his second edition) defines the absolute construction thus: “it consists in English of a noun or pronoun that is not the subject or object of any verb or the object of any preposition but is attached to a participle or an infinitive, e.g. *The play being over*, we went home.” H.W. FOWLER, A DICTIONARY OF MODERN ENGLISH USAGE 4 (2d ed. 1965). As another example, “Let us toss for it, *loser to pay*.” *Id.* An eminent grammarian has this to add:

The absolute phrase has a great potential of polished economy. . . . [b]ut the ablative absolute . . . is removed from the main clause, borrowing tense and modifying only by proximity. . . . And it is actually more common than you may suppose. . . .

The . . . pattern (noun plus participle) marks the ablative absolute. . . .

SHERIDAN BAKER, THE PRACTICAL STYLIST 51-52 (4th ed. 1977).

argue that even if the first declaration ceases to be true, the second is undiminished. And it seems to us significant that the drafters chose the structure they did. The linguistics were certainly understood to the framing generation (who were more likely to know the niceties of Latinate grammar than we are). Taken together then—as they must be—these two components of the provision grant the people such right to arms as will preserve or empower the militia to assure the security of the community. The question then becomes, has the term “militia” been so eroded by history that in today’s social context the concept behind the right expressed retains none of its original meaning?

2. Social Context

We are aware that interpretation—particularly interpretation in the light of changed social context—is a problematic undertaking. As Professor H. Jefferson Powell has reminded us, interpretation of any sort was once thought anathema by the literalist Protestants and republicans who feared that legislative or judicial reconstruction of text would lead to despotism.⁶¹⁹ Over the many years of our long-lived Constitution, however, many terms of the original text have been reconstructed to accommodate changes in the social context of the document, adjustments that most of us have come to accept as crucial to the endurance of the constitutional regime. To Madison and the other founders, the term “papers and effects” meant handwritten documents and other personal possessions. It did not mean spoken words or body fluids (though both were known to the founding generation)—much less electronically stored data (which, of course, was not). Security against unreasonable acquisition of conversations or body chemistry was not included in the Fourth Amendment because contemporary technology had not presented the citizen with the danger of such intrusions. When private conversations could be audited with no human eavesdropper lurking nearby, when blood and urine became the source of incriminating evidence, the social context shifted materially. Faithful to the concept of “security,” faithful to the interpretive delineation of privacy that the term “security” implied, we were able to construe the language of the Fourth Amendment to apply to oral communication, body chemistry, and electronic data. And few today believe that the art of construction to accommodate changed circumstances and understandings paved the way to tyranny.

619. See Powell, *supra* note 611, at 885.

B. *The Metamorphosis of the Concept of a Militia*

These comfortable accommodations to alterations of context cannot be made in every instance where linguistic or social development has changed the meaning or reference of the original text. In some instances, the reinterpretation of the provision simply departs too far from the original concept, faithful only on the most attenuated level of abstraction. As Professor Henry Monaghan has explained, the crux of the matter is the level of abstraction at which the language of the Constitution can bear. While a certain amount of generality is inevitable—and tolerable—in the modern application of any ancient precept, generalization can dilute meaning to the point that the pretense of fidelity becomes illusory.⁶²⁰ Faithful reading of authoritative text requires both the distillation of the essence of the provision and sensitivity to the hazards of overaccommodation of the altered circumstances of its application.

The concept of the militia embedded in the Second Amendment has so radically changed over the centuries since its adoption that the right to arms, constructed to serve it, is fundamentally deactivated. Changes in the concept expressed by the word *militia* have been gradual, and their impact on the meaning of the arms clause has been progressive, as we have shown. Certainly, the word continues to connote a trained and organized military force. At the same time, it is difficult for twenty-first-century ears to discern the echoes of the overtones that two centuries before were characteristic of the term. More critically, the social context of today—the society served by the militia and the nature of the militia's service to society—no longer resembles the social context of the militia in 1789. So, although the word “militia” retains meaning, the word “militia” as written in the Second Amendment has no referent and hence no application in the United States today.

As we have recounted—and as all scholars agree—the founding generation of Americans conceived of a militia as a group composed of all free white males between age eighteen and forty-four⁶²¹ (except for

620. As Professor Monaghan puts it, “[t]hey [academic lawyers] have sought to sterilize the concept [of original intent], most typically, by conceptualizing original intent at a level of abstraction that, in effect, removes it as an interpretive constraint.” Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 378 (1981).

621. The ages at which men were required to render militia service varied from time to time, colony to colony, and state to state before 1792, often set between 16 and 45, or even at 16 until death. See Bellesiles, *supra* note 8, at 428; Bellesiles, *supra* note 198, at 582. Under the Uniform Militia Act of 1792, which remained in force until 1903, men aged 18 through 44 were carried on the rolls.

the conscientious objectors and others entitled to an exemption), responding as needed for the common defense, at the call of local authority, and, above all, as a viable alternative to the feared standing army. This renaissance republican conception was soon recognized as the romance of revived classicism, and the militia gradually lost their characteristic charisma. By the early twentieth century, they were called by, trained by (1903), commanded by, armed by (1903), and deployed by federal authority. Losing all distinction from the regular army (1933), they were, by the middle of the twentieth century, nothing but a shadow of the founders' dream. Even their image as the personification of civic virtue had been fouled by disgraceful episodes and disastrous campaigns dating back to the days when the sainted George Washington was their commanding general.⁶²²

This seems to us such a drastic change in the context of the term that we are led to conclude that there is no contemporary, evolved descendant of the eighteenth-century "militia" on today's landscape. Although the present day National Guard units (successors to the militia) still receive a sizable chunk of the federal defense budget⁶²³ and generally take their training and patriotism seriously, they are hardly of the same genus as the militia as understood in the eighteenth century. To cite only the most glaring distinction, they are part of the standing army rather than an alternative to it. And if today's National Guard fails to fit the concept of a militia, the notion is little short of ludicrous that the constitutional term applies to the scattered, small, unregulated bands of fatigue-clad, gun-loving, self-appointed libertarians taking secret target practice in the woods.

In modern usage, then, the word "militia"—insofar as it is heard at all—describes no organization genetically related to the ennobled assembly identified by the term as originally written in the Constitution. Therefore, the introductory clause of the Second Amendment is today devoid of meaning, an empty vessel from which time and history have sucked every trace of the considerable substance it once had. And the right standing upon it—as the right memorialized in the second clause does—collapses for lack of footing.

622. Regarding disgraceful performances by the militia during the Revolution, and Washington's reactions thereto, see *supra* Washington's comments accompanying notes 272-75.

623. In 1999, 10% of the army allocation went to the guard, which amounted to 2.4% of the total defense budget. See *supra* discussion accompanying notes 604-05.

C. *Generic Fidelity*

The key to the distinction between those provisions that can and cannot accommodate contextual shifts is *generic fidelity*. The test question is whether the text in issue refers to a generic classification that survives the contextual modification such that the provision of text can be applied in the altered context without loss of fidelity to the original conception. To us, this means that the critical term of text has a core meaning that is readily applicable to new things or events that fall within the clearly defined genus of the original term. Thus, technological evolution produces changes in applications, but not of generic meaning. And “arms” means exactly what it did, generically, in the eighteenth century, though the actual weapons are much different. So too, social context can affect application.

Had our military establishment evolved into a complex organization that included a well-organized local contingent resembling the Israeli or Swiss model of universal military service by citizens for whom soldiering is not their primary vocation, its lineal descendant might be alive today. The supposition is rather far-fetched, especially if we include the factor of personal responsibility for providing the weaponry. But, speculation aside, the right to arms acknowledged by the Second Amendment has lost meaning today because it does not have a generic application. Our militia has not evolved within its original genus; it has, rather, become extinct. And the right cannot be reinterpreted to mean a right to arms for sport or personal defense without abandoning the imperative of fidelity. Such uses of weapons are simply not of the same class or character as support for a well-organized military corps that the framers envisioned. Hence, the change of social context that saw the disappearance of the genus militia deprived the right associated with it of meaning.

D. *The Second Amendment Today*

Proponents of a viable and vigorous Second Amendment like to affiliate the rights expressed therein with the eternally youthful First, Fourth, Fifth, Sixth, and Eighth Amendments.⁶²⁴ This active and vigorous subset has survived all sorts of changes: linguistic, social, and

624. Levinson hints at this argument in the context of his metaphor regarding the *New Yorker*-style map of the Bill of Rights, with the neo-rightist version of the map featuring the Second Amendment in the foreground and the First Amendment vanishing into the Pacific. See Levinson, *supra* note 7, at 637.

technological—indeed, many have been reborn and came into their prime in the latter half of the twentieth century. Of the lot, only one might someday qualify as a parallel to the Second: the Eighth Amendment right not to be held in excessive bail. One can imagine an era when every defendant (save those truly dangerous people held in custody under a pretrial preventive detention law like the federal Bail Reform Act of 1984)⁶²⁵ will be automatically released for the pretrial wait with some sort of electronic monitoring device to deter flight. This sort of arrangement would make much sense and, let us suppose, it totally replaces monetary bail as the means for securing future attendance in court. It would thereby instantly render the excessive bail provision of the Eighth Amendment obsolete. Monetary bail itself would be anachronistic. The right not to be held awaiting trial on bail that is too high, then, would become a meaningless entitlement and would join the Second Amendment in a graceful (and indolent) retirement.

All the other rights embodied in the Bill of Rights, as we read them, are distinguishable from the right granted by the Second Amendment. A minor distinction might first be drawn between rights granted as assurances against experienced or imagined government abuses on the one hand and, on the other, rights granted as enabling entitlements. The disappearance of an abuse that motivated the adoption of the text does not render inactive the right proclaimed. If we were fortunate enough to live in a time when confessions were no longer coerced (and setting aside for the moment the *Miranda* decision which may or may not be derived from the Fifth Amendment), the right not to be compelled to be a witness against oneself would not lapse. So too we might say that, even without threat of unwelcome soldiers claiming a bed in our houses, we all still enjoy the right accorded by the Third Amendment to be free of the visit.

The same sort of reasoning cannot be employed to preserve the viability of the right granted by the Second Amendment. No abuse, real or potential, motivated the adoption of that provision—unless you count the perceived (though not firmly rejected) threat of a standing army. The right granted was an enabling provision, providing the means for the maintenance of an effective militia, rather than a

625. 18 U.S.C. §§ 3141-51. The provision was validated by the United States Supreme Court in *United States v. Salerno*, 481 U.S. 739 (1987), against a challenge under the excessive bail provision of the Eighth Amendment, among other grounds. The Court clearly held that the Constitution does not limit the grounds for pretrial detentions to the prevention of flight, nor does it entitle every defendant to a conditional release. See *id.* at 741.

proscriptive one. The change in social context is not the removal of the threat, real or imagined, but rather the disappearance of the enabled institution. A right—ascending to the abstract, perhaps—remains viable so long as the threatened activity may recur. It is a negative entitlement: the right not to have an abuse imposed upon you. A negative entitlement is, by nature, somewhat abstract. The affirmative right to guns, by contrast, is active only insofar as it serves the social purpose for which it was awarded. Because it is meaningless to enable a defunct institution, the right decays with the decay of the institution it serves.

The primary distinction between the Second Amendment and its companions can be traced to a subtle shift in the intellectual framework of American “rights talk” over the last half of the eighteenth century. The Anglo-Americans discovered few, if any, new abstract rights during the years surrounding or following the Revolution. Indeed, the rights enumerated in the first ten amendments would have been familiar to Locke or even Cromwell as aspects of constitutionalist doctrine. (This is not to say that all the rights in the American Bill of Rights had enforceable antecedents in actual English practice.) What had changed so markedly by 1791 was not so much the content of Whig rights and liberties, but the context in which those long familiar rights were articulated and the theoretical foundations upon which they were now constructed.

For most of the seventeenth century, English liberties were explained, invoked, and grounded by reference to the ancient, mixed, balanced constitution. They were considered important because they preserved order and balance in a corporatist society. The constitution (often called ancient or gothic) balanced the interests of three social and political orders: the one (monarch), the few (lords), and the many (commons). When the king, or the judiciary acting at his bidding, disregarded ancient constituted liberties of subjects by imprisoning them without charge or indictment, by refusing the writ of habeas corpus, or by denying trial by jury, the magistracy endangered the political equilibrium among the orders of society and, hence, imperiled the mixed constitution.⁶²⁶

Under the old way of thinking, liberties served to protect the constitution. Rights were deemed just because they were (or were claimed to be) ancient and established—that is to say, constituted. When Charles I arrested the parliamentary leader John Pym and

626. See generally POCOCK, *POLITICS*, *supra* note 116, at 80-103.

imprisoned him without sufficient, legally cognizable cause or adequate procedure, parliamentarians were concerned not so much because Pym's individual freedoms had been violated, but because his privileges as a subject and parliamentarian were constituted safeguards against an overreaching monarch, and the Crown's disregard for these safeguards threatened imbalance. Pym's champions asserted his rights from a corporatist perspective. They looked to preservation of the political equilibrium among the social orders; their ultimate goal was preservation of the balanced constitution by enforcing constituted liberties.⁶²⁷

Nearly half a century later, John Locke was perfectly at home in the political universe just described. As a 1680s Whig, he remained a 1640s Commonwealthman at heart. But he was also a great figure of the Enlightenment, and he supplemented his Commonwealth understanding of rights and liberties with a radical new set of arguments.⁶²⁸ In addition to being ancient, provident, constituted—and therefore just and reasonable—the familiar catalogue of rights became, in Locke's mind, *rational*. They were justified on the grounds that it was logical and progressive that they should be respected. Rights became to Locke not just cherished instrumental heirlooms, but fundamental logical postulates of just political society.

Locke's *political* influence on pre-Revolutionary America was more as a representative old Whig than as an apostle of reason, and in this capacity his status fell short of Cato's or the Whig martyr Algernon Sydney's.⁶²⁹ But Locke had an enormous impact on American *philosophical* sensibilities as the author of the *Letter Concerning Toleration* as an epistemologist, as a moralist, and as a vision theorist.⁶³⁰ And this enlightened philosophy, so pervasive in the eighteenth century, gradually reshaped the world in which the old Whiggish rights existed. When twenty-two-year-old Madison returned from Princeton and saw Baptist preachers imprisoned in Orange County, Virginia, he was troubled not only for the instrumental reason that it was politically and constitutionally destabilizing for the state to presume to exclude or punish discourse or belief, but also because this imprisonment lacked rational justification and therefore was unjust.⁶³¹

627. See generally SOMMERVILLE, *supra* note 150, at 163-83.

628. On Locke's contributions to the development of political thought, moral theory, and rationalism, see generally JOHN DUNN, *LOCKE passim* (1984).

629. See WILLS, *supra* note 119, at 170.

630. See *id.*

631. Cf. MILLER, *supra* note 202, at 95-96.

Jefferson, like Locke, was as Whiggish as any Commonwealthman. But in his both brilliant and representative mind, the Whig foundations for the rights of Englishmen were supplemented by thoroughly enlightened, rationalistic, and theoretical justifications. In *A Summary View of the Rights of British America* (1774),⁶³² Jefferson justified colonial rights against parliamentary abuse by masterfully blending the Whiggish and the rational. By 1776, in the Declaration of Independence, Jefferson postulated American and universal rights on wholly rational grounds and, in so doing, created the Enlightenment's quintessential natural rights theory-based political manifesto.

Thirteen years later, the American Bill of Rights marked a new departure in "rights-talk" every bit as fundamental as the much discussed and more abrupt departure in structuralism established by the Constitution.⁶³³ In 1789, all of the elements of the Bill of Rights were in a sense "bilingual," partaking of both the new natural rights learning and their Whiggish English heritage; but the new discourse was clearly ascendant—except in one (or maybe two) instances: the right to keep and bear arms (and maybe the right against quartering). The right to keep and bear arms was simply too wedded to balanced, corporatist, historically rooted constitutionalism, and too steeped in the English political experience to transition into a wholly rational, enlightened, and abstract discourse about the fundamental postulates necessary to elevate a just political order out of the state of nature. While the procedural rights that once served to check the monarchy and preserve the balance among orders easily became bulwarks of individual liberty, the right not to be excluded from militia duty did not. An individual liberty to participate in collective service to the commonweal was simply a non sequitur.

Over the course of the nineteenth century, individualists like John Stuart Mill cultivated a notion of rights essentially linked to the desire to be left alone by the state. In this context, the right not to be charged without grand jury indictment, so useful in preventing Charles I from establishing an intimidatory absolutist state that would have undone the corporatist balance, was just as useful for an individual who simply wanted to be ignored by the trial courts unless the authorities had very good cause. However, the right not to be prevented by the Crown from doing militia duty so that the Crown could not justify the existence of a

632. JEFFERSON, *supra* note 221.

633. The classic interpretation of the new structuralist departure of Madison's Constitution is of course WOOD, *supra* note 113, at 593-615.

bullying standing army was not much use at all if one simply wanted to wander in solitude about Walden Pond.

As Professor Powell and others have noted, the Second Amendment and the Constitution as a whole descended from a republican system of beliefs that featured a strong dose of communitarian responsibility.⁶³⁴ But while, as Powell suggests, the Second Amendment must be understood as a republican provision, the rest of the Bill of Rights reflects more closely a rational, enlightened, even liberal conception of individual rights; a conception shaped by James Madison's tutelage in the classic writings of the Scottish, English, and French Enlightenment under the eminent Scottish theologian and philosopher James Witherspoon at Princeton,⁶³⁵ and sharpened and refined fifteen years later by his correspondence with Jefferson and immersion in the crates of eighteenth-century texts on political theory his friend sent from Paris.⁶³⁶ These other rights announced in 1789—understood later as entitlements even against the majority of the people or the communal interest—are in a sense antithetical to the ideals of selfless service for the public weal that characterize the republican model and the Second Amendment. While it is possible to view the freedom of speech and press—even of religion—as serving communitarian objectives, it seems much more comfortable today to think of them as personal entitlements. The founding generation, while still beholden to an older corporatist learning, was the first to conceive of rights broadly according to this new paradigm. Jefferson and Madison could readily offer historical, instrumental, and collective justifications for the intellectual and procedural liberties they cherished, but the nonmilitary rights ratified in 1791 no longer required the old Whiggish props. They could stand, naturally, on their own footing.

It is largely in this then novel, natural, and individualistic guise that the majority of the rights secured in 1791 have been transmitted to us

634. Speaking of constitutional text, Professor Powell writes:

[T]o the extent that the interpreter needs or wishes historical illumination on their meaning, he is obligated as a historian to place them in a complex and unfamiliar setting: classical-republican thought about the autonomous and virtuous citizen, the British Country ideology that was developed in opposition to the Court administrations of the early 1700's, notions ultimately derived from ancient Greece concerning the inevitably redistributive tendencies of democracies, common law and Whig ideas about traditional English liberties, and so on.

Powell, *supra* note 616, at 675.

635. See MILLER, *supra* note 202, at 88-91.

636. See Letter from Thomas Jefferson to James Madison (Aug. 30, 1785), in 8 THE PAPERS OF THOMAS JEFFERSON, *supra* note 61, at 460; Letter from Thomas Jefferson to James Madison (Aug. 2, 1787), in 11 THE PAPERS OF THOMAS JEFFERSON, *supra* note 61, at 662.

today. Considering for instance the Fourth and Fifth Amendments, there seems little social purpose in prohibiting the search of private spaces for inculpatory evidence, or even proscribing the enlistment of an unwilling defendant in his own prosecution. These rights resonate not because they serve the collective welfare, but because they protect individuals (and all of us individuals) against abuse. Like the rights of the Fourth and Fifth Amendments, the basic trial rights detailed in the Sixth Amendment might be said to enhance the social fabric by establishing a "fair" system of criminal justice. But it is a stretch, even if we could come to a universal understanding of "fair." The trial rights of the Sixth and the guarantees of fair bail and punishment expressed in the Eighth Amendment are, in essence, personal rights of a liberal democracy. The Second Amendment right to bear arms in the militia is typologically different. It does not speak to individual liberty, and it is neither procedural nor intellectual in character. It is not even, ahistorically speaking at least, political. It is social and instrumental. Perhaps the founders linked it to a stated collective purpose because it seemed intuitively unable to stand on its own as an unqualified assertion of an individual's sovereign immunity against state interference. In fact, to have meaning, the Second Amendment right required state activation, or even, according to its own terms, "regulation."

Thus, we conclude as we began: the personal right to possess arms constitutionalized in the Second Amendment must be understood in the context in which it was written, as a grant to the individual constituents of a communal military organization the means of making the militia effective. The Amendment established an individual right serving a collective, republican purpose. It was a grant of instrumental, enabling power to individuals. No more. And for such an enabling right, responsive to no threat of abuse of personal freedom, a change in the underlying social assumptions so radically alters the context of the enactment that the meaning must be rediscovered in the new context. History has clearly written the conclusion: Today, no remnant of the original context of the Second Amendment language survives. Without those referents, linguistic and social, the meaning of the provision has been lost and the right must be deemed to be in suspension.

This conclusion, we recognize, will be unpalatable to those who claim that the threat of enforced disarmament posed today by comprehensive gun control is just the sort of threatened abuse of personal liberties that all the rights in the 1791 bill were designed to preclude. It is no solace to them that the framers perceived no threat of abuse of liberties in the restriction of weapons owned for purely private

ends. It is enough for them that they perceive such a threat today. We reply: Well it may be, but if such is your concern your resort must be to the democratic institutions for remedy. The Constitution offers only that protection articulated in its text, understood in the light of prevailing context, and applied in new circumstances only to the extent consistent with generic meaning. And all the historical evidence points to a right heavily dependent on public purpose. Legislation must do the rest.

E. Other Interpretations Considered

We have argued for the interpretation of the Second Amendment that seems to us most closely in accord with the provision's text and context, and most clearly consistent with late-eighteenth-century-era understanding of its historically-rooted terms of art. There are, of course, other interpretations of the Amendment's well-known paired clauses. We pause here to note in some detail only three of the most interesting academic perspectives that differ in varying degrees from our own reading.⁶³⁷ Of these, the first two, proffered by Professors Carl Bogus and Sanford Levinson, relate to original intent, while the third, argued by Professor William Van Alstyne, relies entirely on the Amendment's "plain" facial meaning, obviating inquiry into intent. Dividing the three on a different scale, Bogus favors a "collectivist" reading while Levinson and Van Alstyne side with the "individualist/insurrectionist" group. After coming to grips with the challenges to our own thesis inherent in these three perspectives, we return—in conclusion—to the question of how far fundamental changes to the militia during the last two centuries effect the vitality of constitutional language premised on the continuance of an institution no longer meaningfully analogous to its founding-era antecedent, and give our final answer.

1. Carl Bogus: An Armed Militia Being Necessary to the Security of a Slave State

One scholar who has proposed an alternative to our republican interpretation of the Second Amendment is Professor Carl Bogus of Roger Williams University, a participant in and guiding spirit of this Symposium. In his thoughtful and challenging *Hidden History of the*

637. We do not mean by this economical selection to disparage other contributions to the debate, some of which have been widely cited.

Second Amendment,⁶³⁸ Professor Bogus advances two fundamental propositions. The first is that the Second Amendment was designed to secure a collective right rather than a personal liberty.⁶³⁹ The second is that the framers' purpose of preserving a collective right to arms responded directly to strong Southern fears that Congress might disarm the Southern state militias and thereby undermine social control over the slave population.⁶⁴⁰

Bogus's first proposition, linking the right to arms to service in the militia, puts him in good company. Indeed, it is premised ultimately on the same classically republican propositions that underlie our reading of the Amendment,⁶⁴¹ even if Bogus at one point dismisses anti-army sentiment as no more than recycled newspaper rhetoric.⁶⁴² To be sure, we differ with him on the importance of the Amendment's main clause establishing a personal right. However, our difference on this point is largely a matter of emphasis, as the individual right to arms, in our view, is expressly conditioned on collective civic responsibility.⁶⁴³

But Bogus's second proposition is, we think, misguided. It is novel, and explicit documentary evidence to support it is scarce. Thus, Bogus is forced to build his argument on a series of inferences, some of which, we feel, are seriously mistaken. For instance, Bogus relies heavily on the Stono, South Carolina rebellion of 1739. But major slave uprisings on the North American continent were diminishingly rare—in the eighteenth century even more so than in the nineteenth.⁶⁴⁴ In fact, the

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

639. See *id.* at 408 ("The Amendment deals with keeping and bearing arms in the militia, subject to federal and state regulation. Therefore, to the extent original intent matters, the hidden history of the Second Amendment strongly supports the collective rights position.").

640. See *id.* at 321. In Professor Bogus's words:

The Second Amendment . . . was written to assure the Southern states that Congress would not undermine the slave system by using its newly acquired constitutional authority over the militia to disarm the state militia and thereby destroy the South's principal instrument of slave control. In effect, the Second Amendment supplemented the slavery compromise made at the Constitutional Convention in Philadelphia and obliquely codified in other constitutional provisions.

Id.

641. Bogus relies on the same recent classics of republican historiography as the present authors. See WOOD, *supra* note 113, at 3-90; POCOCK, *supra* note 2, at 506-52. For documentary sources supporting a republican interpretation of the Revolution and Constitution, see 1 PAMPHLETS OF THE AMERICAN REVOLUTION, 1750-1776, *supra* note 2, *passim*, and especially the pamphlets cited therefrom in WOOD, *supra* note 113, at 629-33.

642. See Bogus, *supra* note 638, at 356.

643. Bogus also sets out to demonstrate that the "insurrectionist" interpretation—founded on a translation of English experience a century before—is deeply flawed. See *id.* at 386-404. In this, too, we heartily join forces with Professor Bogus, endorsing his reliance on several sources, authorities, and persuasive arguments.

644. See EUGENE D. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE*

Stono rebellion, along with a Long Island/New York City insurrection of similarly ancient vintage, was one of only two notable domestic slave revolts to have occurred before 1789, when the First Congress took the Second Amendment under consideration.⁶⁴⁵ Thus, when the militia

596-97 (Vintage Books 1976) (1972). Although slave rebellion was rare in America in the late eighteenth century, slave resistance was endemic, and resistance frequently took a violent turn. From "stealing" food to breaking tools to sabotaging crops to burning woodlands, violence against property formed part of the annual cycle on the plantation. *See id.* at 597-621; JOHN W. BLASSINGAME, *THE SLAVE COMMUNITY* 225 (1979). The potential for escalation from vandalism into violence against people lurked, at least dully, in the back of every planter's mind. *See id.* at 225, 235-37; GENOVESE, *supra*, at 595. Occasionally, when the newspapers reported that a slave was tried for murder of a white person, that unrest had flared in the West Indies, that slaves aboard a slave ship had mutinied, Southern planters' awareness became keen and direct. *See id.* at 615-17. Vigilance was heightened. *See id.* Suspicion of poisonings became rampant. *See id.* Less enlightened planters feared the conjurers and medicine men. *See* BLASSINGAME, *supra*, at 113; GENOVESE, *supra*, at 224-25. And occasionally, as when the refugees from the Haitian Revolution arrived in 1791-93, when Gabriel Prosser plotted in 1800, and when Nat Turner rose in 1831, whites reacted systemically, if not entirely consistently. Gabriel's plot hastened the repeal of Virginia's liberal revolutionary era manumission laws (accomplished 1806). *See* 1 WILLIAM W. FREEHLING, *THE ROAD TO DISUNION* 131 (1990). Nat Turner's Rebellion prompted Thomas Jefferson Randolph to introduce a post-nati emancipation measure in the Virginia legislature which could well have passed had western counties been proportionately represented. *See id.* at 186-88.

645. In his most systematic analysis of slave resistance in the New World, Eugene Genovese—probably the foremost authority on the history of American slavery—acknowledges that full-blown slave rebellions were notably rare on the North American mainland. *See* EUGENE D. GENOVESE, *FROM REBELLION TO REVOLUTION: AFRO-AMERICAN SLAVE REVOLTS IN THE MAKING OF THE MODERN WORLD* 49-50 (1979). Notwithstanding his ideological identification with the heroism of the rebels, Genovese joins many other historians in taking issue with the tabulation of 250 American slave rebellions and conspiracies cited by Bogus. Those calculations, performed by Herbert Aptheker some fifty years ago, rated abortive conspiracies in the same column as revolts and rebellions. In William Freehling's words, "[h]istorians have rightly emphasized that Herbert Aptheker's *American Negro Slave Revolts* . . . is a history not of revolts achieved but of alleged plans gone awry." 1 FREEHLING, *supra* note 644, at 579 n.6. According to Genovese, over the entire 243-year period of African slavery in mainland British North America and the United States, there are records of only four sustained violent slave uprisings involving large numbers of slaves or large-scale loss of white life (New York/Long Island 1712 (approximately 25 slaves involved); Stono, South Carolina, 1744 (approximately 100 slaves involved); St. John the Baptist Parish, Louisiana, 1811 (up to 500 slaves organized into military units may have been involved); Nat Turner's Revolt, Southampton County, Virginia, 1831 (60-70 slaves involved, as many as 70 whites killed) (omitting the Seminole War of 1835-1842, involving campaigns by U.S. regulars against the Seminole Indians of Florida and their maroon allies, who had escaped from slavery in Georgia and South Carolina, often many years before, and costing the U.S. Army 1600 dead and \$30-40 million)). *See* GENOVESE, *supra* note 644, at 588; GENOVESE, *supra*, at 41-50, 73. But even if major revolts were uncommon in America, Southern fear of the potential for violence was pervasive, in part because of the example of the West Indies and South America, where violent resistance, and even war, was endemic. *See id.* at 49-50. The comparatively much larger white population on the North American mainland stacked the odds in favor of the whites, and served as a deterrent to insurrection, while less oppressive conditions—at least outside of the Carolina rice coast—made the impetus to rebellion less desperate than in the islands or South America. *See id.*; BLASSINGAME, *supra* note 644, at 214-15. Ultimately however, Genovese concurs with Bogus and Aptheker on the essential point that mainland Anglo-American whites were wary, and that they relied on their militia, the lynch mob, and disproportionate retribution to maintain security in the plantation districts. *See* GENOVESE, *supra*, at 42, 106-07.

Amendment was drafted, slaveholders were likely less obsessed with potential revolts than Bogus supposes.

And yet his suspicions are not wholly misplaced. It is true that Southerners during the critical period were at least dully aware of the latent potential for violent resistance,⁶⁴⁶ and that Southern militia took prominent and leading roles in putting down the major slave disturbances of the nineteenth century. To give Bogus his due, Southern state militias suppressed the Gabriel Plot in Virginia in 1800, the Denmark Vesey Conspiracy in South Carolina in 1822, and Nat Turner's Rebellion in Virginia in 1831.⁶⁴⁷ But it is well to keep in mind that these attempts at insurrection occurred nine, thirty-one, and forty years after the Second Amendment was ratified. In 1788, when the Virginia Ratifying Convention—on whose deliberations and motivations Bogus's thesis avowedly turns—called for assurance of the rights of local militiamen to bear arms, the plantations appeared quiet, Stono (nearly fifty year's distant) was more legend than recollection, and no one foresaw the nineteenth-century insurrections.

Notwithstanding the seeming settled tranquility on the mainland plantations during the summer of constitutional ratification, Bogus might have marshaled stronger circumstantial evidence to support a claim regarding the minds of the Virginia ratifiers of the Bill of Rights in 1791. Of more immediate impact than Stono on the last ratifiers of the Second Amendment were very recent events that Bogus fails to mention.⁶⁴⁸ On August 22, 1791, the largest slave revolt in Western history erupted on the island of Haiti, when the 200,000 slaves in the French colony of Saint-Domingue rose against the island's 20,000 *gens du couleur* and 20,000 whites.⁶⁴⁹ Most of the colony's whites were killed

646. See GENOVESE, *supra* note 644, at 117. But even Genovese makes the point that this realization did not acquire sufficient force to drive Southern political behavior until Haiti, Gabriel Prosser, St. John the Baptist Parish, Denmark Vesey, and Nat Turner had amplified the slave rebels' image in American planters' minds, that is to say, until after the Second Amendment had been ratified. *Cf. id.* at 113-25.

647. Then again, the militia lost its nerve at Harper's Ferry in 1859, and stood by idly while Colonel Robert E. Lee and a detachment of marines from Washington stormed the arsenal. For an interesting account of the events surrounding the John Brown-led abortive slave insurrection, see *The Santa Fe Trail*, a 1940 feature film starring Errol Flynn (as J.E.B. Stuart), Ronald Reagan (as George Armstrong Custer), Olivia de Havilland (as Jefferson Davis's daughter, and the love interest of both the aforementioned), and Alan Hale, who later gained fame as the Skipper on Gilligan's Island (as a comical sutler turned field gunner).

648. Perhaps the explanation is Bogus's heavy emphasis on the debates of 1788 on the ratification of the main body of the Constitution and the animating fears behind them. He looks more to the call for the right to arms than the ratification of the Second Amendment as the critical bit of business. He thus ignores the state of mind that might have illuminated the meaning of the provision that the Virginian assembly adopted in the Bill of Rights.

649. See generally THOMAS O. OTT, *THE HAITIAN REVOLUTION 1789-1804* (1973).

by 1793, but several hundred refugees made it safely to Virginia, and a smaller number to other Southern states. Their arrival touched off an obsessive and soul-searching debate on slavery, security, and manumission in the Virginia newspapers, running many pages of print in the commonwealth's numerous weeklies and semi-weeklies. This debate began before Virginia became the ninth state to ratify the Bill of Rights and the Second Amendment passed into law, and thus certainly impacted the state senators who considered the Second Amendment in the fall of 1791.⁶⁵⁰

Whether events in Haiti—striking as they were—influenced the Virginians' understanding of the militia-related language they were ratifying in late 1791 is, however, another question. The outcome of that inquiry (and, indeed, the validity of the hypothesis that slaveholders feared an abolitionist plot to disarm the militia by means of the federal militia powers) must be called into question by the subsequent Southern stance on the creation of new federal militia law. It was in 1792, at the very height of the violence in Haiti, that the national government made its first concerted effort to regulate and standardize the state militia under the militia powers by passing the Uniform Militia Act. If Bogus were right about the legislative intent behind the Second Amendment and the adamancy of Southern insistence on local control of the militia qua slave patrol, then one would expect that the same men who championed a Second Amendment focused on slave control would have made themselves heard regarding the Militia Act. But no member of the House, Southern or otherwise, voiced slavery-related opposition to the federal control over the militia established in the Act, even though the impending militia legislation was hotly debated for many months.⁶⁵¹

650. The influx of refugees from Haiti did not peak until the summer of 1793, when white resistance to the revolution collapsed. But even as the Virginia Senate considered the Bill of Rights in the fall of 1791, Southern newspapers obsessed about what was already history's bloodiest revolution against white colonial rule. See *id.* at 53. Nor were Southern state governments silent on Haiti while ratification of the Second Amendment was under consideration. In September 1791, Governor Charles Pinckney of South Carolina dispatched the following to the Colonial Assembly of Saint-Domingue: "When we recollect how nearly similar the situation of the Southern States and St. Domingo are in the profusion of slaves—that a day may arrive when they may be exposed to the same insurrections—we cannot but sensibly feel for your situation." *Id.* Thus, by the time the Virginia Senate ratified the Second Amendment on December 15, 1791, the senators were well aware that thousands of whites and tens of thousands of blacks had been killed in Saint-Domingue/Haiti. But when Madison drafted the Amendment in 1789, his nearest domestic reminder of the potential for slave insurrection of a scale sufficient to challenge the collective safety of white Southerners was indeed Stono, then 48 years distant.

651. See, e.g., 1 ANNALS OF CONG. 1851-75 (Joseph Gales & William Seaton eds., 1790); *supra* discussion accompanying notes 482-91.

The absence of such statements renders doubtful the proposition that Southern members feared a Northern plot to use the federal militia powers to disarm the Southerners with a view to unleashing a second Haiti on the mainland. If Southern members had no such fears in 1792, with the political climate sensitized by the much reported slaughter of their fellow planters, it seems even less likely that they were burdened by fears of federal disarmament on behalf of putative slave rebels during the relatively (racially) tranquil summer of 1789 when Madison and associates drafted the Amendment.

In the absence of explicit documentation, Bogus relies on the Second Amendment's "hidden" history to make his case that white fear of black violence generated constitutional protection for the collective right to keep and bear arms in the militia. He points out that it is not altogether surprising that expressions of the true purpose of the Second Amendment are lacking since slavery, and certainly the repression of slaves, was seldom mentioned by name in the state papers and manifestos of the Revolutionary years.⁶⁵² And true enough, of the twelve members to speak while the proposed Amendment was under consideration, not one mentioned slavery.⁶⁵³ "A decent respect to the opinions of mankind," to use the Jeffersonian locution, dictated that the issue, if broached at all, be broached delicately. It is, however, significant that when questions bearing directly on local control over slaves and slavery were raised in the Constitutional Convention,⁶⁵⁴

652. In Staughton Lynd's words:

[W]e know why the Founders did not use the words "slave" and "slavery" in the Constitution. Paterson of New Jersey stated in the Convention that when, in 1783, the Continental Congress changed its eighth Article of Confederation so that slaves would henceforth be included in apportioning taxation among the States, the Congress "had been ashamed to use the term 'Slaves' and had substituted a description." Iredell, in the Virginia ratifying convention, said similarly that the fugitive slave clause of the proposed Constitution did not use the word "slave" because of the "particular scruples" of the "northern delegates"; and in 1798 Dayton of New Jersey, who had been a member of the Convention, told the House of Representatives that the purpose was to avoid any "stain" on the new government. If for Northern delegates the motive was shame, for Southern members of the Convention it was prudence. Madison wrote to Lafayette in 1830, referring to emancipation: "I scarcely express myself too strongly in saying, that any allusion in the Convention to the subject you have so much at heart would have been a spark to a mass of gunpowder."

Staughton Lynd, *The Abolitionist Critique of the United States Constitution*, in *THE ANTI-SLAVERY VANGUARD: NEW ESSAYS ON THE ABOLITIONISTS* 209, 215-16 (Martin Duberman ed., 1965).

653. See 1 ANNALS OF CONG. 778-80, 796 (Joseph Gales & William Seaton eds., 1789).

654. See WILLIAM M. WIECEK, *THE SOURCES OF ANTI-SLAVERY CONSTITUTIONALISM* 68 (1977) (South Carolina's Pierce Butler instructed the Convention that "[t]he security the Southn. States want is that their negroes may not be taken from them which some gentlemen within or without doors, have a very good mind to do." (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 331, at 605)). As Wiecek comments, "[i]f Butler seriously thought any of his colleagues contemplated emancipation, he was hallucinating. But

slavery was defended—by name in the debates and by euphemism in the constitutional instrument itself.⁶⁵⁵ South Carolina was then and always in the vanguard of proslavery militancy, and when the vital interests of slavery were at issue—however remotely—South Carolinians were the first to speak. But they were not heard on slavery during the debate on the Bill of Rights. South Carolina was clearly not as animated in 1789 by concerns that Congress or the president might disarm the militia as it was in 1787 by concerns that the Northeast might carry disproportionate weight in the federal Congress or unduly burden the South with debt under the proposed Constitution. In 1789, unlike 1787,⁶⁵⁶ 1819–20,⁶⁵⁷ 1832–33,⁶⁵⁸ 1844–46,⁶⁵⁹ 1848–50,⁶⁶⁰ 1857,⁶⁶¹ or 1860–

he had expressed an elemental slave-state response to real or imagined exogenous pressures on slavery that would characterize southern constitutionalism until the Civil War.” *Id.*

655. Wiecek identifies ten clauses of the Constitution “that directly or indirectly accommodated [eight aspects of] the peculiar institution” in 1787. *Id.* at 62. Wiecek lists these as (1) Article I, Section 2 (apportionment of representation according to three-fifths ratio); (2) Article I, Section 2 and Article I, Section 9 (apportionment of direct taxes among the states according to the three-fifths ratio); (3) Article I, Section 9 (twenty-year moratorium on congressional action to abolish the international slave trade); (4) Article IV, Section 2 (Fugitive Slave Clause); (5) Article I, Section 8 (Congress granted power to call forth state militias to suppress insurrections); (6) Article IV, Section 4 (federal government required to protect states against domestic violence); (7) Article V (provisions of Article I, Section 9, Clauses 1 and 4 (regarding slave trade abolition and direct taxes) made unamendable); and (8) Article I, Section 9 and Article I, Section 10 (prohibition on taxing exports). *See id.* at 62–63. Only the clauses listed at one through four on Wiecek’s list address slavery directly, and none mentions slavery by name. *Cf.* DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 19-27* (1978) (identifying only three clauses addressing the existence of slavery). The euphemisms employed in the constitutional text are: Article I, Section 2 “three fifths of all other persons”; Article I, Section 9, Clause 1 “such Persons as any of the States now existing shall think proper to admit”; and Article IV, Section 2, Clause 4 “Person held to Service or Labour in one State, under the Laws thereof.” *Id.* at 27. Fehrenbacher makes the point that by not sanctioning slavery by name, and only dealing “with [certain] peripheral features of the institution,” the Constitution of 1787 cannot be said to have legitimized slavery. *Id.* at 26.

656. The crisis over counting slave population for purposes of apportioning states’ representation in Congress and share of direct federal taxes was resolved by the “Great Compromise” at the Constitutional Convention, establishing the three to five ratio. *See* FEHRENBACHER, *supra* note 655, at 20.

657. The crisis over Missouri’s application for admission as a slave state was resolved by the Compromise of 1820. *See id.* at 100–13.

658. The crisis over South Carolina’s nullification of the so-called Tariff of Abominations eased when South Carolina acknowledged federal authority and Congress lowered the tariff rates. *See* 1 FREEHLING, *supra* note 644, at 272–86.

659. The crisis surrounding the annexation of Texas. *See* FEHRENBACHER, *supra* note 655, at 124–28.

660. The crisis surrounding the status of slavery in the territories ceded by Mexico after her defeat in the Mexican-American War was resolved by the Compromise of 1850. *See id.* at 157–63.

661. The crisis surrounding Kansas’s petition for admission under rival “free” and “slave” Constitutions, and the announcement of the Supreme Court’s decision in the *Dred Scott* case festered until secession. *See id.* at 203–08.

61,⁶⁶² no threats of disunion issued, no secessionist stock phrases were uttered, and no fighting honor was invoked.⁶⁶³ South Carolina did not, along with whatever support it could rally among its Southern kindred, threaten to walk out of the Union if slavery was not vouched safe for the ages.⁶⁶⁴ The Bill of Rights debate, and more particularly the House debate on the proposed Second Amendment, simply lacks this telltale sign and, all told, did not bear the hallmarks of a slavery-focused constitutional crisis. Rather, the debate sounded in terms of civic humanism and other values that did not divide along latitudinal lines.⁶⁶⁵

Ample and readily accessible evidence attests to the anxiety of Southern whites over social control and safety in the plantation districts,⁶⁶⁶ but this local concern hardly proves that Southern drafters of the Second Amendment feared an abolitionist cabal to disarm the patrols. Occasionally, Bogus hedges his bets and appears to say no more than that the preservation of an armed local military force was of paramount importance in the states where slavery was most widespread and firmly rooted, and this much is little more than a truism. More frequently, however, Bogus asserts forthrightly that the Southern imperative for slave control created the need for, determined the content of, and ultimately led to the adoption of the Second Amendment.⁶⁶⁷ This much the familiar evidence will not bear.

662. The final constitutional crisis over slavery ushered in secession and the Civil War. See *id.* at 544-45, 555-56.

663. 1 ANNALS OF CONG. 778-80 (Joseph Gales & William Seaton eds., 1789).

664. See 1 FREEHLING, *supra* note 644, at 253-86, *passim* (relating an interesting if slightly unorthodox analysis of the recurring pattern of secessionist posturing during the great antebellum constitutional crises).

665. For an authoritative discussion of the pervasiveness of republicanism across all regions of the country (discussing the drafting of the state constitutions), see WOOD, *supra* note 113, at 125-255.

666. For exposition and examination of numerous documents relating to slave resistance of varying levels of violence, see GENOVESE, *supra* note 645; and the controversial HERBERT APTHEKER, AMERICAN NEGRO SLAVE REVOLTS (1949). But see discussion *supra* note 645 (cautioning about the accuracy of Aptheker's findings).

667. See "strong forms" of the argument set out in Bogus, *supra* note 638, at 368 ("As a Virginian, Madison knew that the militia's prime function in his state, and throughout the South, was slave control. His use of the word 'security' is consistent with his writing the amendment for the specific purpose of assuring the Southern states, and particularly his constituents in Virginia, that the federal government would not undermine their security against slave insurrection by disarming the militia."); *id.* at 371 ("Madison's colleagues in the House and Senate almost certainly considered the Second Amendment to be part of the slavery compromise."); *id.* at 407-08 ("The Constitution had given Congress the power to organize and arm the militia. Focusing on this provision, the anti-Federalists sent a chill down the spine of the South: would Congress, deliberately or through indifference, destabilize the slave system by 'disarming' the state militia? . . . [T]he Second Amendment was written to assure the South that the militia—the very same militia described in the main body of the Constitution—could be armed even if Congress elected not to arm them or otherwise attempted to 'disarm' them."). But compare "bet-hedging" variations of the argument set out by Bogus in *id.* at 408 ("Whether

Equally problematic is the failure of Bogus's argument to take account of cross-sectional support for the Second Amendment. The Antifederalist movement that gave impetus to the adoption of the Bill of Rights drew support broadly in the new states. While, as Bogus reminds us, Virginia was a crucial state in the process of securing constitutional protection for the right to keep and bear arms,⁶⁶⁸ republican misgivings concerning a standing army, and hence popular emphasis on the importance of the citizen's militia, came as strongly from the North as from the South.⁶⁶⁹ And given the pacifistic, nonconfrontational character of the late-eighteenth-century antislavery movement,⁶⁷⁰ we think it highly unlikely that Virginia and other plantation states could have feared that Northern abolitionists would so dominate the federal government that they might deprive their Southern brothers of arms in order to encourage slave revolt.⁶⁷¹

Perhaps the most serious quarrel we have with the Bogus slave-suppression thesis is that it ignores the linkage between the maintenance of a militia and the prevalent repugnance for a professional standing army. This association of ideas seems to us to be so open, strong, and pervasive that it easily overcomes the marginal energy the movement might have acquired from sectional anxiety. In the face of what seems to us manifest, Bogus disparages the importance of the founding generation's support for the militia as an alternative to the feared standing army. Thus, he says: "While some anti-Federalists continued to talk about the evils of a standing army, they had lost this argument in Philadelphia."⁶⁷² Presumably, he means that the Constitutional Convention itself had resolved the issue: Congress was granted the power to establish a peacetime army. From this resolution, Bogus suggests that there could have been no residual concern with the dangers of a professional army to motivate the adoption of measures protecting the armament of the civilian alternative. Hence he argues, in effect, the reason for the formulation and adoption of the Second

Madison personally shared this fear cannot today be known . . ."; *id.* at 366 ("We do not know why Madison chose to draft his provision precisely this way.").

668. See, e.g., *id.* at 358, 364.

669. See discussion of militia-related Antifederalist critiques of the Constitution *supra* Part I.B.4 (demonstrating strong Northern support for amending the Constitution to support what Jefferson called the right "against standing armies").

670. See discussion *infra* notes 696-710 and accompanying text.

671. Bogus asserts that the Virginia delegates to the ratifying convention in Richmond "knew that the Northern states were increasingly disgusted by slavery," and he cites the egalitarian preamble to the Declaration of Independence along with Northern "[a]bolition[ist] fervor." Bogus, *supra* note 638, at 328-30.

672. *Id.* at 349.

Amendment must have been some other concern, and the most likely, although covert, candidate is slave control.

It is certainly true that the troubling issue of the power of the central government to raise, train, and maintain a regular army was settled by the time the draft constitution was ratified in 1789. The standing army was to be supported only in two-year intervals, at the will of Congress, and was subject to civilian command; but the regular army was indeed a federal fact. To that extent, Bogus is right: the Federalists had had their way. But the issue was far from resolved against republican apprehensions. The first Congress authorized a standing army of only two thousand men. It was clear—and still a matter of high priority on the Antifederalist agenda—that the professional army was to be only part of the military story. The same instrument that established the army recognized an independent militia, albeit a militia that was largely under the control of Congress and the president. Contrary to Bogus's thesis, we see the Second Amendment as a response to the Antifederalists' urgent concern that the new-fledged regular army not be allowed to overwhelm and obviate the citizen brigades.⁶⁷³

Professor Bogus stresses the importance of the Virginia Declaration of Rights—the score of proposed amendments and second score of hortatory provisions that became the model for the Bill of Rights. In particular, he relies on the seventeenth provision, which contains language very much like the Second Amendment. It provides:

That the people have a right to keep and bear arms; that a well regulated Militia composed of the body of the people trained to arms is the proper, natural and safe defence of a free State. That standing armies in time of peace are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the Community will admit; and that in all cases the military should be under strict subordination to and governed by the Civil power.⁶⁷⁴

Bogus's reliance on this document is somewhat puzzling. In one breath, he disparages the proclaimed right to arms as "a cathartic exercise for the defeated anti-Federalists,"⁶⁷⁵ consisting of nothing but "rhetoric recycled from newspaper articles and from speeches made and rejected at the Constitutional Convention in Philadelphia."⁶⁷⁶ In the next, he regards the Declaration as a significant departure from the Virginia Bill of Rights of 1776, which contained no provision for a right

673. See *supra* Part I.B.4.

674. THE COMPLETE BILL OF RIGHTS, *supra* note 338, at 182.

675. Bogus, *supra* note 638, at 356.

676. *Id.*

to bear arms. Between 1776 and 1788, Bogus contends, "Mason and Henry had raised the specter of the national government undermining the slave system by disarming the state militia."⁶⁷⁷ Thus, he would have us believe, the model for the Second Amendment included the provision of an armed militia in direct response to Virginians' fears of slave revolt (itself hardly an exercise in empty rhetoric).

We are not persuaded. It seems to us highly unlikely that this Declaration consciously departed from Virginia's 1776 Bill of Rights to send a secret message for perpetuation of an ad hoc system of slave repression. We do not stress the irony that such a proposal should be made to defend a slave state by reciting the importance of defending a free state, as other language in the Virginia Declaration more clearly asserts a different purpose than saving the militia from the abolitionists. Most obviously, the text expresses support for the armed militia as the preferred alternative to a standing army. The face of the provision could hardly be more explicit, the safe defense by a militia being immediately juxtaposed to the dangerous standing army. This cannot be fairly dismissed as recycled newspaper rhetoric; rather, the army-militia dichotomy goes to the heart of military-related rights set out in the Virginia Declaration. Moreover, no covert hint can be discerned in the language that the people of Virginia sought domestic tranquility by the exercise of police power. The document might have been drawn otherwise if, as Bogus suggests, Virginians conceived of their militia primarily as a patrol force rather than a hedge against a standing army. There were, of course, no domestic police units in the eighteenth century; the concept of a local peacekeeping and law enforcement body wholly independent of the military did not really arrive on the American scene until the middle of the nineteenth century.⁶⁷⁸ But Virginians could, if such was their thinking, express the value of the armed militia as domestic peacekeepers without ever mentioning the forbidden word. Rather than calling for a well-regulated and armed militia as an alternative to a standing army, they might have appealed to the need to protect the lives and property of law abiding citizens from the depredations of outlaws or savages, as was done in the passages of the Declaration of Independence indicting Britain for inciting slave revolt,⁶⁷⁹ or to the importance of bringing criminals to justice, as was

677. *Id.* at 357.

678. See, e.g., SAMUEL WALKER, *POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE* 52-53, 55 (1980); WILBUR R. MILLER, *COPS AND BOBBIES* 73 (1973).

679. See *THE DECLARATION OF INDEPENDENCE* para. 29 (U.S. 1776) ("[The king of Great Britain] has excited domestic Insurrections amongst us.").

done in the Fugitive Slave Clause of the Constitution.⁶⁸⁰ It is, we submit, significant that the framers of the Virginia Declaration of Rights chose not to do so. More fundamentally still, as even Bogus acknowledges, the right to bear arms did not originate in Richmond. Several states, including Massachusetts, which abolished slavery by judicial decision in 1783,⁶⁸¹ had already incorporated the right to bear arms in their constitutions before the federal Constitution was ratified in 1789.⁶⁸²

Bogus also turns to the Declaration of Rights to search for clues to the mind of James Madison, reluctant champion of the Bill of Rights and drafter of the Second Amendment.⁶⁸³ Bogus thinks there is little doubt that item seventeen of Virginia's Declaration became the template for the Second Amendment. He therefore skillfully employs the textualist's literary device and examines for significance the words dropped or changed. He is not surprised to find that the architect of federalism substituted the word "country" for "State" in the Declaration.⁶⁸⁴ He discusses the syntactical change from a right granted, as expressed by the Virginia draft, to a restraint on infringement of a presumably inherent right in the Madisonian style that we know today.⁶⁸⁵ He suggests that Madison dropped the language defining the militia as "composed of the body of the people trained to arms" because it appeared to undercut the provision in Article I, Section 8 granting to

680. The Fugitive Slave Clause provides:

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

U.S. CONST. art. IV, § 2, cl. 3.

681. See *Commonwealth v. Jennison*, (Mass. 1783) (unreported), reprinted in PAUL FINKELMAN, *THE LAW OF FREEDOM AND BONDAGE* 36 (1986). *Jennison* is discussed in ROBERT COVER, *JUSTICE ACCUSED: ANTI-SLAVERY AND THE JUDICIAL PROCESS* 43-50 (1975). In a series of cases relating to Jennison's efforts to keep Quock Walker enslaved and avoid prosecution or liability for beating him, terminating in the above referenced case, Massachusetts established the illegality of slavery. See *id.* One of the grounds cited for this decision was that slavery violated Article I of the Massachusetts Declaration of Rights of 1780, which provided "All men are born free and equal." *Id.* at 44. Thus, in Massachusetts, the same state bill of rights that protected the right to bear arms, see *infra* note 682, in language strikingly similar to Virginia's and that of the future Second Amendment, was responsible for ending slavery, not securing it.

682. The Massachusetts Constitution of 1780 provided:

The people have a right to keep and to bear arms for the common defence. And as in time of peace armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it.

THE COMPLETE BILL OF RIGHTS, *supra* note 338, at 183.

683. See Bogus, *supra* note 638, at 366-69.

684. See *id.* at 368.

685. See *id.* at 367.

Congress the authority to “provide for organizing” the militia.⁶⁸⁶ The exegesis then arrives at Madison’s editorial alteration critical for Bogus’s thesis.

Where the Virginia model stipulated that the militia is “the proper, natural and safe defence of a free State,” Madison wrote, “the best security of a free country.” Passing the substitution of “best” for “proper, natural and safe,” Bogus emphasizes that the myth of a militia as a defense against foreign invasion had been long discredited,⁶⁸⁷ but Madison knew that *security*—in the South, at least—meant protection against slave revolt. The implication of Professor Bogus’s point is unmistakable: Madison, a Southern slave owner, crafted the Second Amendment to serve the purposes of slave control.⁶⁸⁸ The argument is, we think, mistaken.

Security, we concede, suggests a broader purpose than *defense*. But *security* itself implies a broader concept than social control on the plantations. Either *security* or *defense* might be employed to express several potential uses of a well-regulated militia in the new nation, including provision of protection against frontier Indian tribes or incursion by foreign troops. But beyond these basic military purposes, *security* could apply to a variety of functions less aptly labeled defensive, such as suppression of antitax or debt-relief mobs like the Shaysites. And while *security* better describes the function of stamping out domestic insurrection than does *defense*, it also aptly captures the state of being politically *secure* against the dangers of expensive and corrupting standing armies, a function *defense* entirely fails to address.⁶⁸⁹

686. See *id.*

687. See *id.* at 368. Veteran officers may well have despaired of the militia’s fighting effectiveness. See *supra* notes 274-81 (Washington) and note 364 (Hamilton) and accompanying text. But, from the standpoint of political ideology as opposed to military policy, the perhaps “mythological” effectiveness of the militia as a bulwark against foreign invasion remained a powerful symbol. See, for example, Madison’s invocation of the militia near half a million men in *The Federalist No. 46*, discussed *supra* text accompanying note 366.

688. In fairness, Professor Bogus says only that his exegesis is “consistent with” the purpose he suggests, not that it is compelled by it. See Bogus, *supra* note 638, at 368. But we think the argument is nonetheless mustered to support the thesis.

689. While defense implies making resistance to a real or potential physical attack, security suggests additionally and much more broadly maintaining a state of safety. Financial instruments and insurance policies afforded in the eighteenth century, and continue to afford in the twenty-first, a sense of security (and can even be traded as securities), but they were not then and are not now called defensive weapons. When Jefferson informed Madison that the people were entitled to “a bill of rights providing . . . for . . . protection against standing armies,” see Letter from Thomas Jefferson to James Madison, *supra* note 68, at 440; discussion *supra* notes 379-80 and accompanying text, he did not mean military protection against a huge marching army so much as political security that such an army would not be assembled in the first place and financial security that such an army would not be funded by taxation or debt. Both defense and security imply protection. But security has a wider reference, and the safety

Moreover, there was still—among the die-hard Antifederalists, at least—substantial concern that the autonomy and integrity of the individual states would be transgressed by the central government, and *security* against such a threat better expressed the object of antifederal militia enthusiasts than *defense*. Indeed, the word *secure*, used in its other location in the Bill of Rights, the Fourth Amendment, refers quite pointedly to protection against federal governmental incursion.

In arguing for his thesis, Bogus recites the comments, the speeches, and the subjective consciousness of the Virginia delegates to the ratifying convention in Richmond in 1788 as though this band of patriots had devised, promoted, and by themselves enacted the Second Amendment.⁶⁹⁰ Meanwhile, Bogus ignores the commentary of congressmen during the floor debates in the U.S. House of Representatives relating directly to the pending Amendment itself. During the debates in the House, Elbridge Gerry of Massachusetts was the Amendment's most devoted and long-winded advocate, notwithstanding the many changes he favored to the version reported from the Select Committee.⁶⁹¹ Nearly as vocal was Congressman Benson of New York.⁶⁹² While six of the twelve members to join the debate in favor of the Second Amendment were Southerners (expansively defined),⁶⁹³ an equal number of Northerners (restrictively

that comes with security can be of a type several levels removed from confrontation with real or potential physical aggression. The Defense Department assures one type of safety, the Social Security Administration another. The National Security Administration, if it really exists, presumably provides for both military and political security. From a classical republican perspective, the militia provided both security in the form of military defense, and security in the form of political stability.

690. "But for the events at Richmond," Bogus writes, "it is doubtful that Madison would have included a right to bear arms in his proposed list of rights." Bogus, *supra* note 638, at 364. Later he states, "The events at the Richmond ratifying convention in June 1788 provided the impetus for embodying a right to bear arms in the Bill of Rights." *Id.* at 375.

691. See 1 ANNALS OF CONG. 778-80, 796 (Joseph Gales & William Seaton eds., 1789).

692. See *id.* at 779-80.

693. See *id.* at 778-80 (Joshua Seney and Michael Jenifer Stone of Maryland, John Vining of Delaware, James Jackson of Georgia, and William Smith and Aedanus Burke of South Carolina). Note that these six Southerners included a member from Delaware and two from Maryland. Seney's remarks, moreover, were of a humorous rather than a political stripe. And while South Carolina's Burke was indubitably a Deep South member with slavery's interests at heart, his commentary affords perhaps the clearest evidence that Congress was animated by civic-humanist concerns rather than fear of slave rebellion. Burke did not think the Second Amendment strong enough security against the dangers of standing armies, and

proposed to add to the clause just agreed to, an amendment to the following effect: "A standing army of regular troops in time of peace is dangerous to public liberty, and such shall not be raised or kept up in time of peace but from necessity, and for the security of the people, nor then without the consent of two-thirds of the members present of both Houses; and in all cases the military shall be subordinate to the civil authority."

Id. at 780.

defined) spoke in favor of the Amendment.⁶⁹⁴ More telling, however, is the breakdown of states whose ratifying conventions appended recommended amendments: Georgia recommended none, and South Carolina recommended only mechanical changes to the federal system unrelated to the militia (but very likely related to the security of slavery). The states to recommend an amendment protecting the right to bear arms in the militia were Pennsylvania, New Hampshire, Virginia, and North Carolina.⁶⁹⁵ In 1789, these states were considered hotbeds of republicanism, not of the slavocracy.

In a larger sense, Bogus is right, of course: passage of the Second Amendment, with its recognition of the importance of the militia's role in maintaining social peace, was not irrelevant to the future of slavery. But slave repression was also not an issue that pitted Northern interests against Southern or even Deep Southern. At the time of the Constitutional Convention, most delegates, North and South, assumed, perhaps mistakenly, the existence of a broad, moderate, nationwide antislavery consensus, at least among the educated classes.⁶⁹⁶ To the north of Georgia and South Carolina at least, the enlightened elite generally agreed that slavery was unjust and that it should one day be abolished. What, if anything, to do about working its abolition was generally a different—and much harder—question.⁶⁹⁷ But among a smaller subset of thinkers with evangelical or philosophical inclinations (again, and more emphatically here, north of South Carolina) it seemed increasingly certain that termination of the trans-Atlantic slave trade was a liberal, enlightened, and Christian short-term objective in its own right, and perhaps a necessary or even sufficient step towards emancipation as well.⁶⁹⁸ A canvass of delegates at the Constitutional Convention would have revealed that, as one moved further South, the abstract antislavery commitment waned by degrees, becoming

694. See *id.* at 778-80, 796 (Elbridge Gerry of Massachusetts, Roger Sherman of Connecticut, Egbert Benson of New York, Elias Boudinot of New Jersey, and Thomas Hartley and Thomas Scott of Pennsylvania).

695. See SCHWARTZ, *supra* note 329, at 157-58.

696. The argument for a transsectional Revolutionary-era consensus on (anti)slavery—or at least the widespread illusion of such a consensus—is set forth cogently in MACLEOD, *supra* note 358, at 29-38. On the emergence of worldwide antislavery opinion in the late eighteenth century, see DAVID BRION DAVIS, *THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770-1823*, at 41-49 (1975).

697. Nevertheless, during the Revolutionary period, significant numbers of Southerners endorsed with varying degrees of commitment private manumissions, slave trade abolition, and colonization-linked emancipation. See MACLEOD, *supra* note 358, at 29-31. Southerners also took permissive stances on freedom suits. See *id.* at 109-26; DAVIS, *supra* note 696, at 196-212; 1 FREEHLING, *supra* note 644, at 121-43.

698. See DAVIS, *supra* note 696, at 48.

tempered in the major slaveholding regions by a sense that—evil or not—slavery remained necessary for the sake of social stability until African deportation could be effected.⁶⁹⁹ Only in the extreme South—in South Carolina and Georgia—was slavery justified openly for the sake of economic utility, for without coerced labor, the fertile rice marshes of South Carolina and Georgia would revert to wasteland.⁷⁰⁰ But even South Carolinians hesitated to speak openly of slavery's unmitigated virtues in the Revolutionary years. And with fire-eating not yet ascendant, Northern antislavery advocates remained quiescent, sharing with most of their enlightened compatriots in the North, and even the upper South, the belief that slavery, left to its own devices and the munificent course of progress and unforced policy, would continue quietly along a course towards ultimate extinction.⁷⁰¹

In these optimistic, forward-thinking Revolutionary years, Southerners had little reason to fear the abolitionist zeal of the Northern states. The North was still in the process of effecting gradual emancipation on its own turf, and before 1800, the lower tier of Northern states hardly seemed farther down the road to freedom than the upper tier of Southern ones.⁷⁰² No Northerners articulated a desire to interfere actively with Southern slavery in the constitutional period. No Northern antislavery man or woman of that day would have

699. The archetypal post-Haiti Jeffersonian variation of this theme was that while slave ownership was inherently immoral, rapid whole-scale emancipation without removal of the freedmen would lead to intolerably bloody social dislocation, or even racial Armageddon. Consider Jefferson's famous formulation of this position during the Missouri controversy, by which time more radically antislavery ideals he had entertained during the Revolutionary era had been subsumed by temporizing and rationalization:

The cession of that kind of property, for so it is misnamed, is a bagatelle which would not cost me a second thought, if, in that way, a general emancipation and *expatriation* could be effected; and, gradually, and with due sacrifices, I think it might be. But as it is, we have the wolf by the ears, and we can neither hold him, nor safely let him go. Justice is in one scale, and self-preservation in the other.

Letter from Thomas Jefferson to John Holmes (Apr. 22, 1820), in 15 THE WRITINGS OF THOMAS JEFFERSON 248, 249 (Andrew A. Lipscomb & Albert E. Bergh eds., 1905).

700. Rawlins Lowndes issued a classic exposition of this position during the South Carolina legislature's debates on ratification. He warned that Northerners would avail themselves of powers vested in the federal government to foist slave trade abolition on South Carolina. According to the reporter's summary, Lowndes argued that

[w]ithout negroes, this state would degenerate into one of the most contemptible in the Union; . . . [Lowndes] cited an expression that fell from General Pinckney on a former debate, that whilst there remained one acre of swamp-land in South Carolina, he should raise his voice against restricting the importation of negroes. . . . Negroes were our wealth, our only natural resource; yet behold how our kind friends in the north were determined soon to tie up our hands, and drain us of what we had!

4 STATE DEBATES, *supra* note 98, at 272-73, quoted in Bogus, *supra* note 638, at 357.

701. See generally 1 FREEHLING, *supra* note 644, at 121-31; MACLEOD, *supra* note 358, at 41-49.

702. See DAVIS, *supra* note 696, at 23-32, 84-89; MACLEOD, *supra* note 358, at 98-99.

dreamed of disarming any Southern militia to facilitate slave insurrections. This was simply not the style of late-eighteenth-century antislavery. Benjamin Franklin was no John Brown.⁷⁰³ The consensus among antislavery leaders in the 1780s and '90s hardly favored slave rebellion, let alone slave rebellion instigated by Northern intervention in the South.⁷⁰⁴ Franklin and the other American Revolutionaries had long been desperate to proclaim that their own rebellion was no rebellion at all, but a legitimate exercise of authority to preserve the British Constitution from perversion.⁷⁰⁵ Stirring up an actual social rebellion such as the one unfolding in France was anathema in the eyes of the staid, enlightened gradualists who first spoke out against slavery during the late eighteenth century. Antislavery was a respectable, not a heretical, cause.⁷⁰⁶ In the Revolutionary era, antislavery leaders pursued abolition of the slave trade, freedom suits on behalf of individual slaves, state-level gradual emancipation laws, and improvement of the condition of freed people.⁷⁰⁷ Thus, their programs could take much the same form on either side of the Mason-Dixon Line. In the 1780s and '90s, the overwhelmingly Quaker—and hence pacifist—American Convention (of state-level abolition societies) did not seek to set the plantations aflame with righteous liberty, and its devotees did not pray the Lord to wash away the sins of the nation in a sea of blood.⁷⁰⁸ When

703. See DAVIS, *supra* note 696, at 84. Far removed from Garrisonian immediatism, Franklin warned (in true Jeffersonian fashion) that “slavery is such an atrocious debasement of human nature, that its very extirpation, if not performed with solicitous care, may sometimes open up a source of serious evils.” *Id.* Franklin was chairman of the Pennsylvania Abolition Society. See *id.* at 100.

704. See *id.*

705. See WOOD, *supra* note 113, at 12-13.

706. See DAVIS, *supra* note 696, at 48 (regarding the emergence of an antislavery mainstream in the Western world); see also ROBIN BLACKBURN, *THE OVERTHROW OF COLONIAL SLAVERY, 1776-1848*, at 121-22 (1988).

707. See WIECEK, *supra* note 654, at 84-88.

708. See DAVIS, *supra* note 696, at 215-22. But consider also the following commentary of Luther Martin at the Constitutional Convention:

[N]ational crimes . . . frequently are punished in this world, by national punishments; and . . . continuance of the slave-trade, . . . giving it a national sanction and encouragement, ought to be considered as justly exposing us to the displeasure and vengeance of Him, who is equally Lord of all, and who views with equal eye the poor African slave and his American master.

Id. at 323 (quoting 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 331, at 211 (eighteenth-century emphasis of nearly every word omitted)). To be sure, Martin feared that the Lord might take to washing away sins if America did not repent of its slaveholding ways, but this is not the same thing as bidding Him haste to do so in the later day fashion of John Brown. It should also be noted that Martin was addressing the slave trade rather than slaveholding, and that his perspective was absurdly millennial by the deistic standards of the late eighteenth century. See *id.* at 322-23. Thus even the most extreme antislavery formulation of the constitutional period lacks the interventionist quality of late 1850s radical abolitionist rhetoric. It was also expounded—less threateningly from the Southern viewpoint—not by a

the Second Amendment was ratified, South Carolinians, ever slavery's sentinels, had no activists to fear among the philosophically inclined antislavery salons of Philadelphia, and they had not yet conjured millennialists like Nat Turner or John Brown out of the American social fabric.⁷⁰⁹

In sum, in 1789, and surely by the fall of 1791 (when news of Haiti was pouring in), some Southern slaveholders saw in the promise of the Second Amendment, assurance that their local armed militia troops would be free to continue patrols to discourage major slave uprisings and to suppress occasional lawlessness. But such sentiment was scattered and incidental, and hardly the motivating and actuating force that generated the drafting and adoption of the Second Amendment. Professor Bogus can come up with no historical evidence that Southern champions feared that Northern abolitionists would deprive them of arms, leaving them helpless in the face of a slave rebellion. Nor is his thesis plausible in the light of what we know of the moderate character and gradualist inclinations of the influential political figures of the day. The inescapable historical fact that torpedoes Professor Bogus's theory is that the call for an Antifederalist limitation on the powers granted by Article I, Section 8 of the Constitution came from Northern as well as Southern states. Conversely, his root premise that Southerners from 1787 to 1791 feared Northern-instigated federal intervention to facilitate slave violence in the plantation districts cannot accommodate the Article IV, Section 4 guarantee that "[t]he United States . . . protect each of [the states] . . . on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence," or the broad support that that provision garnered from Northern and Southern delegates alike. And so we return to what seems to us obvious on the face of the historical record: the guarantee of an armed militia was sought and enacted to counterbalance the federal army and to assure states that they would remain securely free of federal military oppression.⁷¹⁰

New Englander, but by a delegate from Maryland who was considered somewhat eccentric.

709. They soon would do precisely that, blaming "Jacobin" intermeddlers for Haiti and the death of thousands of their fellow slave masters. See MACLEOD, *supra* note 358, at 154-58.

710. While we disagree with Professor Bogus's thesis that the Second Amendment was designed to secure the South against potential abolitionist-inspired disarmament of the militia, we should hasten to add that his supposition of a threat by abolitionist-minded Northern politicians to weaken slavery in the South through aggressive use of the federal powers does not strike us as historically misguided, but only as chronologically misplaced. Commitment to use powers constitutionally vested in the federal government to attack slavery became a mainstay of Republican Party ideology in the late 1850s, and this commitment was incorporated in the platform of 1860. See ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF*

2. Sanford Levinson: Citizen Guerillas Being Necessary to the Security of a Free State

Professor Sanford Levinson disagrees with us that the Second Amendment slumbers alongside its dormant companion, the Third. He vehemently protests any suggestion of obsolescence shared with letters of marque and reprisal and the granting of titles of nobility.⁷¹¹ “The Second Amendment,” he writes, “is radically different from these other pieces of constitutional text.”⁷¹² Support for this assertion is not summoned from history or doctrinal analysis. Rather, Levinson cites the frequent appearance of letters to the editor, congressional campaigns, and the deep concern of members of both the ACLU and the NRA. He thus casts his contribution to the debate in distinctly political terms.

In his short, oddly casual comment, published in 1989, Levinson’s only purpose appears to have been to rouse interest in what he believed to be an unjustly ignored provision of the Bill of Rights. Courts and scholars, he complained, had failed to give the Second Amendment the attention that the peoples’ interest demanded. Indeed, as he later explained,

The point of my own Essay, *The Embarrassing Second Amendment*, as I have tried on occasion to explain to journalists who want me to take a strong substantive position, is that this wooden reliance on *Miller*,⁷¹³ coupled with a refusal to confront seriously the arguments made by such thoughtful opponents of federal regulation of guns as Senator Orrin Hatch, is fundamentally disrespectful.⁷¹⁴

Levinson insists that it is not his “style to offer ‘correct’ or ‘incorrect’ interpretations of the Constitution,” and that his only aim is

THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 76-80, 83-87 (1970). Thus, by the time Lincoln first sought the presidency, at least the radical wing of his party favored using the commerce power to restrict or terminate the interstate slave trade, congressional action to moot *Dred Scott* and banish slavery from the territories, and declaration that every federal enclave—including the District of Columbia—was free soil. No doubt Sumner and Chase would have favored disarming the patrols as well, if that were within the federal power. The Second Amendment, however, assured that such action could not withstand constitutional scrutiny. But when the Amendment was proposed some seventy years before, disarmament for the slaves’ sake was without the realm of possibility, or even contemplation. Antifederalists feared the specter of Caesarism, not of a mad John Brown elected Speaker of the House.

711. See U.S. CONST. art. I, § 10; *id.* § 9, cl. 8.

712. Levinson, *supra* note 7, at 641.

713. The 1939 decision of the Supreme Court holding that the purpose of the Second Amendment was to “assure the continuation and render possible the effectiveness of [the militia].” *United States v. Miller*, 307 U.S. 174, 178 (1939); see also *supra* discussion accompanying notes 34-36.

714. Sanford Levinson, *Is the Second Amendment Finally Becoming Recognized As Part of the Constitution? Voices from the Courts*, 1998 BYU L. REV. 127, 129.

to introduce “skepticism” regarding the “elite, liberal” views epitomized by Professor Laurence Tribe’s then “offhand treatment” of the subject.⁷¹⁵ However, Levinson’s somewhat rambling tour of the subject is susceptible of the reading that it has been commonly accorded: support for those who contend that the provision prohibits any interference by Congress with the private possession of guns. Thus he writes: “[I]t seems tendentious [presumably in the sense of partisan] to reject out of hand the argument that one purpose of the Amendment was to recognize the individual’s right to engage in armed self-defense against criminal conduct.”⁷¹⁶ Further departing from his ostensible neutrality, Levinson notes that he, for one, has been persuaded that the term “militia” does not have the “limited reference” to a “communitarian right” but instead refers to “all of the people, or at least those treated as full citizens of the community.”⁷¹⁷ Levinson, regrettably, is far from forthright about the point of his conversion to the individualist interpretation.

He abandons, somewhat reluctantly, the notion (today associated with Professor Lott)⁷¹⁸ that private firearms curtail crime. Thus, he writes: “Circumstances may well have changed in regard to individual defense, although we ignore at our political peril the good-faith belief of many Americans that they cannot rely on the police for protection against a variety of criminals.”⁷¹⁹ Levinson then comes to what may be the crux of this odd—almost coy—argument. While disclaiming anarchy and withholding the claim that the state is “necessarily tyrannical,” he cites the suppression of the people on Tiananmen Square to demonstrate that “it seems foolish to assume that the armed state will necessarily be benevolent.”⁷²⁰ This leads to what he terms “the principal point, that a state facing a totally disarmed population is in a far better position, for good or for ill, to suppress popular demonstrations and uprisings than one that must calculate the possibilities of its soldiers and officials being injured or killed.”⁷²¹ So Levinson arrives ultimately at the neo-Lockean assertion that, in the

715. Levinson, *supra* note 7, at 642. Professor Tribe has since revised his assessment of the Second Amendment and adopted a position that resonates more closely with Levinson’s. See 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 897 n.211 (3d ed. 2000).

716. Levinson, *supra* note 7, at 645-46.

717. *Id.* at 646-47.

718. See JOHN R. LOTT, JR., *MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS* (1998).

719. Levinson, *supra* note 7, at 656.

720. *Id.*

721. *Id.* at 657.

final analysis, the right of armed insurrection is a necessary safeguard against a tyrannical state.

Yet to the extent—circumlocutions and disavowals notwithstanding—that Levinson's sketchy but influential paper comes down to a reading of the Second Amendment as assurance that the people, as individuals, will have the means to resist the oppression of the state, it is highly dubious even under the republican banner that Levinson unfurls. Although Levinson does not pursue the point to its theoretical foundations, the Second Amendment is based on Whig ideology and political heritage that postulated constitutional justifications for armed resistance to illegitimate governance and tyranny in seventeenth-century Stuart England. These doctrines in turn played a prominent role in legitimizing the American Revolution. The crucial point for present purposes, we insist, is that this aspect of radical Whiggery was forsaken with the adoption of the first seven articles of the Constitution.

The question of how to remedy tyrannical rule was hardly one of first impression for the seventeenth-century Whigs or Revolutionary Americans. Resistance to tyranny is one of the oldest problems of political thought, forming a central theme in the historical and philosophical writings of the Greeks and Romans. More precisely, the question was not so much how to bring about the end of illegitimate or impolitic rule—banishment and indeed tyrannicide were direct and obvious solutions—but how to justify those ultimate remedies, and when to invoke them.⁷²² In seventeenth-century England, particularly after the execution of Charles I, the answer to this question assumed a distinctly republican cast that foreshadowed the drift towards American independence in the second half of the next century. To most post-Restoration Whigs, the remedy against tyranny involved, in the last instance, coerced substitution of one king for another rather than abolition of the monarchy. But this violent substitution had now become enmeshed in layers of legitimizing nuance and constitutional doctrine that specified limits on kingly government and defined tests by which to establish whether those limits had been transgressed. John Locke's *Second Treatise of Government*, a quasi-official manifesto for the failed revolutions of 1683⁷²³ and 1685⁷²⁴ and the successful one of

722. See, for example, PLATO, *THE REPUBLIC* 568D-569C, on the desires of the *demos* (people) to end tyrannical rule; ARISTOTLE, *POLITICS* 1315b11-1316b27, on the impermanence of tyrannies and the scarcity of long-lived tyrannical states; PLUTARCH, *LIFE OF CAESAR* paras. 57-61, on the reasons justifying the assassination of Julius Caesar.

723. For commentary on the constitutional issues behind the Rye House Plot of 1683, see ASHCRAFT, *supra* note 119, at 338-407.

724. For a discussion of the constitutional implications of the Duke of Monmouth's

1688–89,⁷²⁵ epitomizes the Whigs' canonical approach to resistance theory.

To Locke, the right of resistance was premised on the "Dissolution of Government," for nothing could have been more alien to his Whiggish purpose than the forceful overthrow of just, legitimate polity.⁷²⁶ Although Locke developed the people's right to resist arbitrary power as a fundamental, timeless right, his immediate objective in the *Second Treatise* was to justify resistance against the specific abuses of Charles II, and in so doing firm up the resolve of conspirators planning a general insurrection and an attempt on the king's life outside the "Rye House" as he made his way back to the capital from races at Newmarket.⁷²⁷ Locke argued, much as Jefferson later would in the Declaration of Independence, that the king had violated the peoples' trust in the magistracy, effectively "unkinging" himself and so dissolving the civic compact. To this end, Locke considered two fundamental conditions under which "governments are dissolved from within," namely (1) "alteration" of the legislature⁷²⁸ and (2) violation of the public trust.⁷²⁹ These amounted, in more modern parlance, to means whereby the executive might assume or subvert the lawmaking function of the legislature or the law-finding function of the judiciary. The first condition arose whenever power to make laws was usurped in contravention of the law, and popularly delegated authority thereby excluded from power. The second obtained wherever corruption became so endemic as to preclude the processes of legitimate governance in any branch.

Locke took pains to argue that removal of Charles II would not constitute treason. He defined rebellion narrowly as opposition to just authority "founded only in the Constitutions and Laws of the Government."⁷³⁰ By this definition, whenever princes, ministers, or legislators violated the constitution and thereby brought about the dissolution of government, it was they who were guilty of rebellion. In the literal Latin sense of *rebello*, they returned to a state of war by dissolving the laws preserving "Society and Civil Government."⁷³¹ To

Rebellion of 1685, see *id.* at 447-70.

725. See discussion of the Glorious Revolution *supra* Part I.A.3.

726. JOHN LOCKE, TWO TREATISES OF GOVERNMENT bk. II, § 212 (Peter Laslett ed., student ed. 1988) (3d ed. 1698).

727. See ASHCRAFT, *supra* note 119, at 364-65.

728. See LOCKE, *supra* note 726, § 212, at 407-08.

729. See *id.* § 221, at 412.

730. *Id.* § 226, at 415-16.

731. *Id.*

Locke and the radical Whigs he spoke for, there remained no doubt but that Charles had breached his trust by invading the "lives, liberties, and estates of the people."⁷³² In so doing, he dissolved the government. The people and the monarch, then, were placed in opposition, but there remained no earthly court to hear their dispute. The king's refusal to rule under law and abide by the law caused a return to the pre-political state of perpetual war, and left the people no appeal but to heaven for vindication of their abridged rights and liberties.

Lockean overtones are unmistakable in the Declaration of Independence. Jefferson's list of grievances against George III mirrors Locke's indictment of Charles II for dissolving the government from within, both by altering the legislature and by breach of trust. Jefferson, of course, did not simply derive his grievances from Locke. Not only do the Declaration's grievances correspond to particular acts of the Westminster Parliament in the 1760s and '70s, they largely rehearse a list established by the Continental Congress in its Bill of Rights and List of Grievances and Declaration of Causes.⁷³³ Nonetheless, a comparison of the *Second Treatise* and the Declaration of Independence reveals a remarkable continuity in Whig ideology and in Whig resistance theory. The Revolution of 1688–89 provided more than a historical lens through which Americans understood their own Revolution. It established the typology of revolutionary politics that Americans applied to their experiences. And it proved particularly apt in that the ministry of George III possessed an uncanny capacity to repeat the failed measures of the past century as it confronted increasingly intractable colonial legislatures, growing ever more adamant in their insistence that the guarantees settled in the last revolution applied in America as in England.

More even than their hostility to arbitrary power, Locke and Jefferson shared a suspicion of ministerial conspiracy against liberty, and a conviction that such conspiracy justified resistance. In this respect, some have argued that Jefferson was so compelled by Locke's language that he chose to incorporate it into the Declaration.⁷³⁴ In the

732. *Id.* § 240, at 426–27.

733. See The Bill of Rights [and] a List of Grievances, *reprinted in* A DECENT RESPECT TO THE OPINIONS OF MANKIND: CONGRESSIONAL STATE PAPERS 1774–1776, at 49, 49–57 (James H. Hutson ed., 1975); A Declaration: By the Representatives of the United Colonies of North-America, Now Met in General Congress at Philadelphia, Setting Forth the Causes and Necessity of Their Taking Up Arms, *reprinted in* A DECENT RESPECT TO THE OPINIONS OF MANKIND: CONGRESSIONAL STATE PAPERS 1774–1776, *supra*, at 89, 89–98.

734. For an interesting discussion on whether the *Second Treatise* exercised direct influence on Jefferson's drafting of the Declaration of Independence, see WILLS, *supra* note 119, at 167–

Second Treatise, Locke warned,

But if a long train of abuses, prevarications and artifices, all tending the same way, make the design visible to the people, and they cannot but feel what they be under, and see wither they are going; it is not to be wondered, that they should then rouse themselves, and endeavour to put the rule into such hands which may secure to them the ends for which government was first erected.⁷³⁵

Ninety-seven years later, in the Declaration, Jefferson wrote,

But when a long train of abuses and usurpations, begun at a distinguished period and pursuing invariably the same object, evinces a design to reduce the [people] under absolute despotism, it is their right, it is their duty to throw off such government, and to provide new guards for their future security.

Thus Jefferson's Declaration of 1776, although developed independently and adapted to different political purposes—abolishing the monarchy rather than altering the monarch—resounds unmistakably in the language of Lockean resistance theory. Indeed, if the Second Amendment were an appendage to the Declaration of Independence, one might plausibly argue that its context (though not its text) suggested a purpose of preserving a right to insurrection, if only in cases where the government of the day was guilty of a long series of illegal and extraconstitutional transgressions of the class meticulously described in the Declaration and in Locke's *Second Treatise*. But the Second Amendment, of course, is not amended to the Declaration, but to the Constitution of 1787. And how different Madison's constitutional universe of 1787 was from Jefferson's of 1776!⁷³⁶ After 1787, with

80, *passim*, which excerpts Jefferson's own rebuttal to the charge of plagiarism, leveled nearly forty years after the fact when Locke's *Treatises* had become more widely known in America than they were at the Revolution. Wills takes the unorthodox position that Jefferson's phrasing owed more to mid-eighteenth-century Scottish writings (particularly those of Francis Hutcheson) than to any manifestoes, pamphlets, or treatises from the Real Whig tradition. Our view is in harmony with Jefferson's own above referenced characterization that "[a]ll [the Declaration's] authority rests . . . on the harmonizing sentiments of the day, whether expressed in conversation, in letters, printed essays, or in the elementary books of public right, as Aristotle, Cicero, Locke, Sydney, etc., &c." See *id.* at 172. In other words, Jefferson sounds like Locke, not because he consciously echoes Locke, but because they both spoke the language of Whiggery (leavened to differing degrees by enlightened sentiments), and both developed fundamentals of Whig resistance theory that were as commonplace among the American patriots as they had been among the Real Whigs of Shaftesbury's, Sidney's, Robert Ferguson's, Molesworth's, and Locke's day.

735. See LOCKE, *supra* note 726, § 225, at 415.

736. For a fascinating discussion of Jefferson and Madison's exchanges on constitutionalism after Jefferson's retirement, see ELLIS, *supra* note 374, at 275-79. At times in old age, the "Constitution" apparently meant to Jefferson, not Madison's articles of 1787 and the subsequent amendments, but the principals of the "Good Old Cause" literature on resistance to the Stuarts! At these moments, for Jefferson, Real Whiggery still trumped ratification. To Madison, of course, the written Constitution was self-evidently the highest law of the land. It seems odd that Jefferson should "just not get it," and deny the fundamental reality at the core of

remedies against usurpation defined in the constitutional instrument itself, recourse to external bodies of law or theory was no longer required to right the ship of state if the government became corrupted. For purposes of American constitutionalism, Lockean resistance theory was therefore relegated into dormancy.

The Madisonian specification of instrumental remedies against tyranny effected the most profound transformation in American constitutional history.⁷³⁷ By spelling out precisely what remedies were available to defined bodies of the peoples' magistrates or representatives in the event of unconstitutional governmental action, Madison bypassed two unanswerable questions that had forever vexed Whiggish constitutionalism, namely (1) who constituted the people entitled to determine when the sovereign had unkinged himself and (2) what means other than the sword might arbitrate between rival factions claiming to embody the vox populi in the event of constitutional crises. Mooting these old conundrums worked two fundamental consequences. First, civil war ceased to be the court of last resort for troublesome constitutional questions (excepting, ultimately, only the question of federal territorial jurisdiction over slavery, and even this question required resolution by war only because secession dictated forceful reintegration of the South as a precondition for the reestablishment of federal authority). Second, the impossible demands that the old constitutional paradigm had placed on popular civic virtue now fell silent. No longer was constitutional legitimacy linked to the sainthood of the voting and office-holding classes. No longer was the incessant conspiracy watch a lynchpin of legitimacy. Institutional avenues of balance redressment now replaced the fateful heroes who once stood guard against corruption. In short order, these institutional systems acquired legitimacy in the popular eye. Constitutional disputation (at

the American political system. The truth is that he obviously had grasped the situation back in 1787; indeed, it was Jefferson who argued to Madison that the Bill of Rights would be no mere parchment barrier because the federal courts would be able to exercise judicial review of government actions and enforce the amendments. See Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), in 14 THE PAPERS OF THOMAS JEFFERSON, *supra* note 61, at 659, 659. But in retirement Jefferson traveled back blissfully from the world of structuralism to the constitutionalism of his rebellious youth. There is a wonderful irony that the man who had been the most Francophile, most enlightened, most rational, most anti-English, most progressive, and most egalitarian of the American Revolutionaries should at the end of his days rediscover that he was at heart still a seventeenth-century English Country Whig.

737. For the classic statement of the argument that the Constitution should not be conceived of as a counter-revolutionary reaction against the liberalism of the Revolution, but rather that the fundamental theoretical innovations embodied in Madison's structuralism and instrumentalism ushered in a revolutionary new style of democratic constitutionalism unlike anything known before, see WOOD, *supra* note 113, at 593-615; discussion *supra* Part I.B.2-3.

least constitutional disputation unrelated to slavery) lost its martial edge.

In his *Embarrassing Second Amendment*, Levinson endeavors an extra-textual resurrection of the old heroic doctrine of violent resistance two-hundred-odd years after its abandonment by the ratifiers. This effort is ill advised. It is imprudent, in that the Madisonian structural model, since its installation in 1788, has worked better than the old “system” of constitutional arbitration. And it is dangerous because the self-anointed vigilantes of today are far removed in outlook, virtue, perspective, education, experience, and public-spiritedness from the Lockeans of yesteryear. The Earl of Shaftesbury, John Locke, and Algernon Sidney in the 1680s, like John Adams, Benjamin Franklin, and Thomas Jefferson in the 1770s, were the most educated and forward-looking public servants of their times. They spoke for substantial bodies of thoughtful, public-spirited people committed to the rule of law, who nevertheless believed that a right of resistance against extreme forms of extralegal rule represented a rational, principled, and positive alternative to a hopeless subordination to unchecked, arbitrary absolutism. In their hands, the public weal was truly safer than in those of royal placemen and salaried fools who flattered themselves unanswerable to the law. The old Whigs nobly laid the foundations of American republicanism. Their refusal to accept the Stuarts’ asserted civic duty of nonresistance, like their hostility to military establishment, helped prevent the English-speaking world from falling under the absolutism that reigned in seventeenth- and eighteenth-century Europe. But in 1787, their doctrine of entitlement to resist arbitrary authority was supplanted by the new constitutionalism and the fixation of a nonarbitrary system of government in America. And no matter how low our opinion of twenty-first-century American politicians or civil servants, today’s gun-wielding insurrectionists’ claim to have better title to determine policy (or annul policy) for the nation than the constitutionally established and constitutionally answerable government cannot be justified by implausible analogy to historical principles long since forsaken. Perhaps Levinson can picture today’s American “militia” safeguarding our independence by raising their beloved assault weapons against government tanks on some future Tiananmen Square. Alas, we cannot.

The insurmountable problem with the insurrectionism Levinson endorses is its hopeless vagueness and the fundamental irresolvability of any political question submitted to its arbitrage. The “principle” of insurrectionism, particularly in the modern, postdeferential society we

live in, is no principle at all unless it comes to grips with the question of who is justified to undertake armed resistance in the face of tyranny, usurpation, or difference of opinion on constitutional issues. One of the old answers to this ancient question was the army. This was the Cromwellian solution,⁷³⁸ and it is also the solution of modern Turkish constitutionalism, which provides that the army has the duty to intervene in civil affairs to protect the constitutional system and maintain constitutional rule.⁷³⁹ Army intervention, however, becomes decidedly unrepugnant if the army does not represent the virtuous nation in arms, but instead serves the heavy hand of a corrupted magistracy or a tyrannical usurper.

Another historically favored solution, to which this paper has devoted considerable attention, is of course the common militia composed of virtuous citizens under the command of their elected natural leaders. In that guise, the militia embodied the people or acted as agent for the people. The conventional Whig view of the militia as the “constitutional army” or even as the “army of the constitution” thus required only slight reformulation along less martial and more political lines to yield Locke’s solution of 1683, John and Samuel Adams’s of 1774–75, and Jefferson’s of 1776 that the “people” were entitled to determine if and when the government had breached its trust, and in the event that it had, to intervene and institute new government. But this principle of popular intervention as a last resort for reestablishment of constitutional rule brings us all the way back to the original dilemma of determining who defines the people entitled to intervene—all the more so because pivotal constitutional questions by their very nature foster differences of opinion and passionate factionalism. Locke himself wrestled elsewhere (in the *Letter Concerning Toleration*) with the unknowability of complete truth and inevitable prevalence of error in human society.⁷⁴⁰ The appeal to arms or to heaven represented the invocation of a higher authority to arbitrate between rival claimants to the truth. The results of such appeal in constitutional cases could be very bloody. In 1688 they were not, because the anti-Stuart consensus

738. See, e.g., POCKOCK, *supra* note 2, at 372, 376–77; discussion *supra* notes 165–74 and accompanying text.

739. See TURK. CONST. preamble; *id.* art. 122; see also Ergun Özbudun, *Constitutional Law*, in INTRODUCTION TO TURKISH LAW 19, 22–25 (Tuğrul Ansay & Don Wallace, Jr. eds., 1996) (discussing army interventions in the name of the preservation of constitutionalism carried out in 1960 and 1980 and leading to the establishment of new constitutional instruments in 1961 and 1982). Mr. Merkel thanks noted Ottomanist Can Erimtan of Istanbul and Lady Margaret Hall, Oxford, for bringing this aspect of Turkish constitutionalism to his attention.

740. JOHN LOCKE, A LETTER CONCERNING TOLERATION (1689).

was so strong that once the Dutch army took the field, the English militia joined them and the English army melted away. In 1775, things were very different. One-third of the population favored the patriot cause, one-third were loyal to the Crown, and one-third tried to stay neutral. By 1783, perhaps twenty thousand had been killed on the battlefields, and tens of thousands of loyalists were dispossessed and exiled.⁷⁴¹

The Philadelphia Convention of 1787 devised a third way to adjudge constitutional disputes, one involving appeals to heaven by neither army nor people. This was the Madisonian solution of constitutionally defined mechanisms to resolve impasses and rectify abuses.⁷⁴² Under the system ratified in 1788, frequent, regular elections were fixed permanently on foundations more solid than those underlying the Septennial Act of 1716, and the old Whig doctrine that legislators must periodically be reduced to civilian status was placed beyond the reach of Congress. After ratification, when executive officials—including the president of the United States—claimed to be immune to process, or to be the ultimate, unilateral arbiters of the constitutionality of their actions or inactions, or even, in the most extreme cases, to be beyond accountability to the law, they could now be compelled by judicial order to answer to and comply with judicially determined standards of constitutional propriety (consider *Marbury v. Madison*, the Aaron Burr trial, the *Steel Seizure Cases*, and *United States v. Nixon*). When the president refused to assent to salubrious laws or to execute existing laws, Congress might now resort to the override or to impeachment (both illustrated by the Thirty-ninth Congress's showdown with Andrew Johnson). When states overstepped their bounds and judged or legislated in derogation of the Constitution, federal judicial review now provided a corrective (asserted in *Martin v. Hunter's Lessee*, *Cohens v. Virginia*, and *McCulloch v. Maryland*). The case for the radicalism of Madison's innovations and the related case for ratification's overthrow of the old Whig right of insurrection are buttressed by Professor Jack Rakove's convincing argument that the Convention intended federal judicial review to extend also to

741. Howard Peckham lists 6,824 battlefield deaths out of 25,324 deaths in service on the "American" side alone. See TOLL OF INDEPENDENCE, *supra* note 271, at 130. Imperial losses (British, German, and free black) were listed as high as 70,000 by contemporary critics of the War, but this figure appears greatly exaggerated. *Id.* at 132. Peckham does not estimate Native American losses. As a proportion of the population, only the Civil War took a more gruesome toll on the nation.

742. Cf. WOOD, *supra* note 113, at 543-62.

congressional lawmaking.⁷⁴³ In fact, Representative Egbert Benson's above-referenced comments during the debates on the Second Amendment⁷⁴⁴ afford strong evidence that, with ratification, judicial review of federal lawmaking was integrated by the framers into the constitutional design in 1788, rather than spun from whole cloth by Chief Justice John Marshall with the *Marbury* decision in 1803. And finally, the Constitution established the process of amendment in case the constitutional system itself should prove insufficient to meet unforeseen crises (consider the Twelfth Amendment as a response to the near theft of the presidency by Aaron Burr) or inadequate to cope with fundamentally altered circumstances (addressed by the Thirteenth, Fourteenth, and Fifteenth Amendments). The variety and diversity of remedies provide additional assurance that no usurper could nullify them all. Thus, so long as these constitutionally guaranteed mechanisms endure, constitutional government continues capable of unseating a tyrant and of resisting an abusive office holder; and the moment of Lockean reversion to first principles need never, and (from the perspective of constitutional legitimacy) can never, come.

With ratification in 1788, Madisonian structuralism supplanted the old panoply of Whiggish constitutional doctrines, including the much contested radical Whig principle of justified resistance to illegal rule famously memorialized in Locke's *Second Treatise*.⁷⁴⁵ And while the American Bill of Rights can be understood as a series of limited, if meaningful, reassurances and concessions to Antifederalists still deeply wedded to the old Whig theory of the English Constitution, no radical right to insurrection can be read into the textually specified guarantees ratified by the Americans in 1791. Indeed, the Senate, while debating the Bill of Rights, chose to reject a proposed amendment condemning as "slavish" the "doctrine of non-resistance"⁷⁴⁶ once espoused by the

743. See Rakove, *supra* note 421, at 1047, *passim*; RAKOVE, *supra* note 305, at 81-82, 175-77, 345.

744. See discussion *supra* notes 421-22 and accompanying text. Benson noted on the House floor that writing a conscientious objector clause into the Bill of Rights would present "a question before the Judiciary on every regulation you [i.e., Congress] make with respect to the organization of the militia, whether it comports with this declaration or not." 1 ANNALS OF CONG. 780 (Joseph Gales & William Seaton eds., 1789).

745. See ASHCRAFT, *supra* note 119, at 521-89, *passim*.

746. 2 SCHWARTZ, *supra* note 419, at 1150-51. As reported in the *Senate Journal*:

On Monday, the 7th [of September, 1789] . . . [t]he following propositions to add new articles of amendment were then successively made and decided in the negative . . . 2. That government ought to be instituted for the common benefit, protection, and security of the people; and that the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind.

Vatican, Archbishop Laud, and the Stuarts, and in so doing turned its back on perhaps the most favored mantra in the whole Lockean discourse of resistance.

In sum, the arrival of Madisonian constitutionalism has deprived seventeenth-century Whiggish radicalism of any claim on the interpretation of the right to arms embodied in the Second Amendment. Despite its apparent influence on Jefferson's thinking in 1776, after ratification in 1788, Locke's remedy for tyranny was obsolete. And insofar as Levinson has sounded the ancient trumpet for armed resistance, he is living in a pre-constitutional era. Though we find the source of its considerable influence elusive, Professor Levinson's famous paper has surely accomplished its ostensible purpose of raising interest—and controversy—in the Amendment that, as he charges, has been all-but-ignored by the Supreme Court. Beyond that, we think it regrettable that his unpersuasive thesis has lent respectability to outlaw libertarians who claim to be the legitimate guardians of American freedom.

3. William Van Alstyne: The People Having a Right to Arms, the Security of a Well-Regulated Militia and a Free State Are Assured

Like Professor Levinson, Professor William Van Alstyne professes confusion at the wording of the Second Amendment.⁷⁴⁷ It is the ill-matched first clause that makes him stumble. Without it, the provision would make sense in the same natural “unforced” way as the “right of the people” is understood in the neighboring Fourth Amendment. Also echoing Levinson, Van Alstyne bemoans the paucity of Supreme Court exegesis on the Second Amendment. He then calls upon his readers to commence the development of a jurisprudence of the Second Amendment by considering the possibility that the interpretation favored by the NRA is not wrong after all. Consideration of this possibility brings him to the point that, notwithstanding its regrettable discontinuity, the language of the Second Amendment can be read as simply as that of the Fourth Amendment—or the First—plainly, to create a personal right to the possession of firearms.⁷⁴⁸

Id.

747. See Van Alstyne, *supra* note 8, at 1236. Levinson goes so far as to suggest it could well be the worst written of the lot, see Levinson, *supra* note 7, at 644; while Van Alstyne contents himself with the observation, “[T]here is an apparent non sequitur . . . in midsentence,” Van Alstyne, *supra* note 8, at 1236. As indicated throughout, we believe the Second Amendment, understood as it was to the founding generation, expresses well its internally harmonious intent.

748. While not labeling himself a textualist or using the term “plain meaning,” Van Alstyne appears to favor that mode of analysis. Thus, he writes, “The stance of those inclined to take

Van Alstyne says that one of the propositions accepted by “those inclined to take the Second Amendment seriously”⁷⁴⁹ is that the provision cannot be read to mean that Congress may restrict the people’s right to keep and bear arms so long as the restriction is not inconsistent with the maintenance of some kind of militia that is necessary to the security of a free state.⁷⁵⁰ We take the Amendment seriously, but we dispute this proposition. We contend that the Amendment does not prohibit congressional restriction of the possession of guns that are not part of the armament of a well-regulated militia. Van Alstyne then asserts (on his own authority, it seems) that the guarantee to the people to have arms is “the predicate” for the militia, in that “it looks to an ultimate reliance on the common citizen . . . as an essential source of security of a free state.”⁷⁵¹ Thus, despite his initial confession of confusion, he intuitively understands the meaning of the Amendment to be that a free state and well-regulated militia depend on the guarantee of private armament.⁷⁵²

the Second Amendment seriously reverts to the place we ourselves thought to be somewhat worthwhile to consult—namely, the express provisions of the Second Amendment.” Van Alstyne, *supra* note 8, at 1241. His alignment with the personal right contingent may be derived from the following (one of the propositions accepted by “those inclined to take the Second Amendment seriously”):

The very assumption of the clause, moreover, is that ordinary citizens (rather than merely soldiers, or merely the police) *may* themselves possess arms, for it is from these ordinary citizens who as citizens have a right to keep and bear arms (as the second clause provides) that such well regulated militia as a state may provide for, is itself to be drawn.

Id. at 1242.

749. The boundaries of the group including “those inclined to take the Second Amendment seriously” are left undefined. Does Van Alstyne mean to include among those taking it “seriously” writers who believe the Amendment worth study (which would include, presumably, the present authors), or does he refer only to those who take the Amendment to establish an immutable right of the people? Van Alstyne provides a hint when he tells us that “serious people” are those who “decline to trivialize” the Second and Fourteenth Amendments. *Id.* at 1254. Yet, he does not take it so “seriously” that he does not admit of circumscription by a “rule of reason.” *Id.* at 1250-52, 1254 (“There is a ‘rule of reason’ applicable to the First Amendment, for example, and its equivalent will also be pertinent here.”).

750. We think this is what he says though the meaning of his text is not always plain. What he actually writes is:

Nor is there any basis so to read the Second Amendment as though it said anything like the following: “Congress may, if it thinks it proper, forbid the people to keep and bear arms if, notwithstanding that these restrictions it may thus enact are inconsistent with the right of the people to keep and bear arms, they are not inconsistent with the right of each state to maintain some kind of militia as it may deem necessary to its security as a free state.”

Id. at 1242-43.

751. *Id.* at 1243.

752. We should note that insofar as Van Alstyne means only to note the original connection between an armed citizenry and an effective militia, we completely agree. Bolstering this interpretation is the sentence Van Alstyne writes somewhat further along: “The precautionary text of the amendment refutes the notion that the ‘well-regulated Militia’ the amendment

Van Alstyne's argument from plain meaning depends ultimately on deference to ratified language on the grounds that this language embodies the voice of the people at the sovereign, constitutional moment. Yet throughout *The Second Amendment and the Personal Right to Arms*, Van Alstyne reads the words of the Second Amendment as though they were parcels of late-twentieth-century common parlance instead of late-eighteenth-century terms of legal art. This unwillingness to heed his own injunction to take seriously the terms of the Amendment, combined with his confusion of originalism with what might be called the perceived plain meaning of words as they are sometimes sloppily used today, seriously undermine Van Alstyne's argument.

He begins by asserting that "[t]he reference to a 'well regulated Militia' is in the first as well as the last instance a reference to the ordinary citizenry."⁷⁵³ But in truth the militia was never coextensive with the "ordinary" population, nor even with the special segment of citizens afforded civil or political rights. Nor was it a self-generating or self-defining organization. The militia had always been a creature of provincial or state law, which sprang into being at the command of the legislature.⁷⁵⁴ As Professor Michael Bellesiles's exhaustive research has shown, throughout colonial and early national times, colony and state legislatures determined the extent and composition of the militia, defined precisely who was to bear arms in such militia, and prohibited

contemplates is somehow a militia drawn from a people 'who have no right to keep and bear arms.' Rather, the opposite is what the amendment enacts." *Id.* at 1249.

753. *Id.* at 1241.

754. Apart from and in addition to eighteenth-century legal practice, the militia could be, and was, explained and justified with reference to the "ancient" or "gothic" constitution favored by some opposition thinkers and radical Whigs. The argument here was that the militia was Saxon in origins, predated the imposition of feudal law under the Normans, and therefore had a quasi-common law legitimacy that transcended its statutory underpinnings. Logic of this sort became useful in explaining the local as opposed to the royal command of the militia, and in providing authority for summoning the legitimate militia when, to use the Lockean terms, the government under the constitution was dissolved because of executive usurpation and the inability of parliament to convene. Thus, even to the extent that eighteenth-century thinkers conceived of the militia as the "nation in arms," they did so to highlight its ancientness and to contrast it to the royal, Norman feudal array and to the standing army, and not to suggest that the militia's foundations lay outside the law, let alone that the militia required no legal foundations to begin with. And these champions of the gothic constitution laid particular emphasis on ancient regulations defining, according to class and station, who was obligated to serve in the militia and what arms each man was required to furnish. They were thus neither anarchists nor universalists. They were eccentrics. Jefferson and James Otis invoked gothic militia theory, but most American Revolutionaries spent much more time in the state house reflecting on, modifying, and improving the statutory regime governing their provinces' militia, particularly from 1774 onwards, when the possibility of armed resistance to the imperial administration demanded that long dormant militia forces be revived.

other classes of people not only from serving in the militia, but from owning weapons for military or other purposes.⁷⁵⁵ Bellesiles sums up his comparative review of eighteenth-century colonial statute books in the following terms:

Local communities and colonial assemblies passed regulatory legislation throughout the colonial period. As in Britain, American governments sought to regulate the quality, sale, and storage of firearms and munitions; the maintenance of arms used for public purposes; where, when, and by whom firearms could be carried and fired. Legislatures also granted officials the right to expropriate firearms during internal or external crises and to conduct gun censuses. And, most important, legislatures followed the English example in denying the right to own guns to potentially dangerous groups: blacks, slave and free; Indians; propertyless whites; non-Protestants or potentially unruly Protestants. These laws worked because the political community supported their enforcement, fearing the consequences of unregulated access to firearms and munitions.⁷⁵⁶

Thus, Van Alstyne's reading is contradicted by the historical reality that the late-eighteenth-century militia was nowhere coextensive with the citizenry, and that its membership was everywhere subject to statutory definition and control. The text of the Amendment itself so provides, using the words "well regulated" to remind us that the "Militia" the framers had in mind is a creature of statute, defined and governed by laws and regulations.

Despite his insistence that he is only reading the clear language of the text itself, Van Alstyne ignores not only the implications of the modifier, "well regulated," but the fact that the critical phrase, "right . . . to keep and bear arms" does not have a timeless and universal meaning. Rather, in eighteenth-century usage, the terms had a clearly recognized meaning quite apart from "own and carry." As Garry Wills has demonstrated with scholarly depth and precision—as well as humor—(and as we have noted heretofore), bearing arms had, from its earliest recorded employment and through the late eighteenth century, an exclusively military connotation. "One does not bear arms against a rabbit," Wills points out.⁷⁵⁷ "By legal and other channels," he elaborates,

[the Latin] *arma ferre* entered deeply into the European language of war. To bear arms is such a synonym for waging war that Shakespeare can call a just war "just-borne arms" and a civil war

755. See Bellesiles, *supra* note 8, at 435; Bellesiles, *supra* note 198, at 566.

756. Bellesiles, *supra* note 198, at 576.

757. Wills, *supra* note 72, at 64.

“self-borne arms.” Even outside the phrase “bear arms,” much of the noun’s use alone echoes Latin phrases: to be under arms (*sub armis*), the call to arms (*ad arma*), to follow arms (*arma sequi*), to take arms (*arma capere*), to lay down arms (*arma poenere*). “Arms” is a profession that one brother chooses as another chooses law or the church. An issue undergoes the arbitrament of arms.⁷⁵⁸

Wills might have added the most famous use of all, the opening stanza of Vergil’s *Aeneid*, *arma virumque cano*, wherein the poet sings of arms and a man, recounting an epic tale of wars and a hero.⁷⁵⁹ These uses recurred countless times in the literature and legal writing with which the ratifiers as well as the framers in the First Congress were fully familiar. Thus, to late-eighteenth-century ears, bearing arms unequivocally meant rendering military service. But in his perception of meaning on the surface of the text, Van Alstyne accords the words “bearing arms” an entirely different connotation—broader, more casual, and not strictly martial—from that which it conveyed to the ratifiers and to the drafters in the First Congress.

When Van Alstyne finally lays aside his own intuitions and inferences and comes at last to a reference to the framers, he cites—of all people—James Madison to make the point that the United States was distinct from European nations in its trust in the citizenry to bear arms. Van Alstyne’s reference to constitutional history is confined, pretty much, to a single sentence in which he writes: “And the quick resolve to add the Second Amendment, so to confirm that right [the right to keep and bear arms] more expressly, as not subject to infringement by Congress, is not difficult to understand.”⁷⁶⁰ The sentence itself is not easy to understand. It appears to postulate a preexisting right to bear arms and attributes to the Amendment nothing more than express—if quick—confirmation.⁷⁶¹ It would surely come as a surprise to the vehement Antifederalists to learn that their prized Amendment was nothing but a restatement of law already established under the new Constitution. To be sure, there was a firmly rooted, preexisting Whig tradition that a militia was the natural defense of a free people, and that the right to bear arms in the militia should not be infringed by just government. But given the sweeping powers expressly delegated to the federal government

758. *Id.*

759. VIRGIL’S *AENEID* 3 (John Dryden trans., Frederick M. Keener ed., Penguin Books 1997) (“Arms, and the Man I sing . . .”).

760. Van Alstyne, *supra* note 8, at 1245.

761. Somewhat further along, Van Alstyne notes that the adoption of the Bill of Rights in 1791 made the right to arms “doubly secure.” *Id.* at 1247.

under the written Constitution—powers including the authority to raise and maintain armies—preservation of the personal liberty, duty, and right to bear arms in the local militia required its reaffirmation in the contemplated amendments.

Rather than rely upon historical context or examine linguistics, Van Alstyne is fond of reasoning by analogy and favors in particular the comparison with the First Amendment. Thus, he says that the proper interpretation of the Second, as it is of the First, is that while a person may be held accountable for an abuse of the entitlement granted, those who use it responsibly must be left alone.⁷⁶² Van Alstyne repeats the point in his concluding section where he concedes that “restrictions generally consistent merely with safe usage . . . are not all per se precluded.”⁷⁶³ Again associating the Second Amendment with the First, he says “[t]here is ‘a rule of reason’” which may limit, for example, the type of arms one is permitted to keep or the location in which one is permitted to bear them.⁷⁶⁴ Apart from the dubious analogy—which we dispute because of the unique first clause of the Second Amendment specifying its scope and purpose—Van Alstyne fails to pause over the contradiction of an absolute entitlement with the limitations implied by the uncertain contours of “abuse” or the “rule of reason” (his examples: noncriminal use of weapons, nonlibelous speech).⁷⁶⁵ In the final rinse, Van Alstyne’s reliance on common sense and plain meaning is stunning. Recovering fully from any stumble on the first reading of the Amendment, he announces that the provision is neither mysterious, equivocal, nor opaque.⁷⁶⁶ It is only unwelcome to those who would limit arms to the police: “[I]t is for them to seek a repeal of this amendment (and so the repeal of its guarantee), in order to have their way. Or so the Constitution itself assuredly appears to require, if that is the way things are to be.”⁷⁶⁷ Reliance on assured appearances may satisfy those who believe all should be free of any government control of arms, but it hardly satisfies the requirements of rhetorical sufficiency for those not already convinced.

762. *See id.* at 1250.

763. *Id.* at 1253-54.

764. *Id.* at 1254.

765. *Id.* at 1250.

766. *See id.* at 1250. At another point, Van Alstyne again demonstrates his comfortable reliance on his constitutional intuition when he says, “It is difficult to see why they [those who “decline to trivialize” the Second Amendment presumably by construing it as according full individual entitlement] are less than entirely right in this unremarkable view.” *Id.* at 1254.

767. *Id.* at 1250.

Moving to postbellum events and the applicability of the Second Amendment to the states, Van Alstyne contents himself with quoting Senator Howard of Michigan delivering the report of the Senate Committee on Reconstruction, who informed the body that the Privileges and Immunities Clause of the Fourteenth Amendment restrains the states from interfering with the "right to keep and bear arms," along with the other rights protected by the first eight amendments. Not only the remarks of Senator Howard, but also the comments of John A. Bingham, who led the fight for adoption of the Fourteenth Amendment in the House, support the idea that at least some members of the Congress intended to bind the states to the first eight amendments wholesale by the guarantee of federal "privileges and immunities."⁷⁶⁸ Indeed, there is reason to believe that some thought it necessary to put beyond state infringement the personal right to possession of firearms, even divorced from its original service to the organized militia, in order to vouchsafe to the emancipated slaves the means to protect themselves against the Ku Klux Klan and other Reconstruction thugs.⁷⁶⁹

Notwithstanding these sentiments, the case for incorporating into the Fourteenth Amendment a right to keep arms for private purposes is not so straightforward as Van Alstyne supposes. Let us assume that radical Republicans, including the House manager Bingham and Senate manager Howard, intended the Fourteenth Amendment Privileges and Immunities Clause to incorporate the Bill of Rights, and that some radical Republicans even intended this incorporation to extend to a personal right to arms unlike anything envisioned by the framers of the Second Amendment. This does not prove Van Alstyne's case, because the text of the Fourteenth Amendment does not establish any such objective on the part of its drafters or anyone else. Only the text as ratified is binding, and passage required support for the amendment not just from radical Republicans, but also support from at least some moderate Republicans, conservative Republicans, and moderate Democrats. And it is quite apparent from the debates of the Thirty-ninth Congress and from newspaper accounts from across the nation that moderates and conservatives did not intend the Fourteenth Amendment Privileges and Immunities Clause to incorporate the whole of the Bill of Rights.⁷⁷⁰

768. See FONER, *supra* note 30, at 258.

769. See *id.* at 258-59, 342-43, 425-44.

770. See *id.* at 258-59; see also discussion of Senate Judiciary Chairman Lyman Trumbull's later argument on this point in *Presser supra* notes 38-53 and accompanying text. A moderate

Instead, moderates and conservatives agreed to join radicals in reaching a compromise on less sweeping and more ambiguous language. Thus, the Fourteenth Amendment does not proclaim, "The Bill of Rights, including a personal right to arms for private purposes such as self-defense, shall apply against the states." The support required by Article V—adoption by two-thirds of both houses of Congress and by three-quarters of the states—could not have been mustered for such language, and for such dramatic alteration of the federal balance. Rather, the Fourteenth Amendment as ratified says—perhaps a little ambiguously—"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . nor deny to any person within its jurisdiction the equal protection of the laws."

As far as judicial construction is concerned—a matter that appears to interest Van Alstyne far less than it interests us—it must first be noted that when the Court got around to the slow process of incorporating most of the first eight amendments into the Fourteenth, it was not the language of privileges and immunities but of due process that was selected as the vehicle.⁷⁷¹ This choice puts deeper into the dubious category Van Alstyne's reliance on the preferences of the senator from Michigan as the authoritative guide to the applicability of the Second Amendment to the states. Even a devoted originalist, not to say textualist, would scruple to rely on the expressed purpose of a senator or two that has been overwhelmed by an unbroken line of Supreme Court cases to the contrary. Surely, *stare decisis* counts for something with Van Alstyne.

As we see it, the fundamental weakness in the link Van Alstyne seeks to construct between the First and Second Amendments is simply that the two provisions are designed to protect against altogether different evils, one of which is readily applicable as a restraint against state government and the other is not. The First announces a prohibition against government interference with peoples' rights of expression, worship, assembly, and protest. It is obviously a prohibition that can (and should) be readily applied against all government, national or local. In contrast, the Second is not about private rights, but about federalism: the power of the central government to disarm state military units. If the right of the

Republican, Trumbull did not make an individual right argument in his Second Amendment defense of Presser.

771. See *supra* notes 16-29 and accompanying text.

people to keep and bear arms were, as Van Alstyne would like to have it, like the right of free expression or worship, one could argue that neither state nor federal government should be allowed to curtail it. But, as we have sought to demonstrate throughout, that is not a fair way to describe the import of the Second Amendment. Neither the ratifying generation nor the courts that have subsequently touched upon the issue have seen it thus. Hence the analogy fails.

So the Van Alstyne paper concludes, with little more analysis or authority than what appears to the author self-evident, that the “essential claim” of the NRA is “extremely strong.”⁷⁷² Not to disparage Van Alstyne’s educated intuition or the importance of plain meaning in the interpretation of texts, we must protest that in this instance, there is more to it than that. As we have attempted to show, agitation for, debate about, and ultimately the adoption of the constitutional provision on arms and the militia were embedded in historically significant events and attitudes. These conditions of enactment not only inform the reading of the text as written, but are essential to understanding the meaning of the document as transmitted through the centuries to us today.

CONCLUSION

Inspired by the classical republican model—reinvented in the Renaissance, expounded by Machiavelli, and transmitted to the founders’ mind-frame by English and colonial pamphleteers—the Second Amendment guaranteed the individual right to all (all free, white, adult men, anyway) to own and carry firearms. That individual right is, however, limited by both text and context to the service of communal security by provision for a well-regulated military force known as a militia. By *militia* is meant a trained, organized, and armed collection of qualified males, save those of conscientious scruple and others exempted from service by their states, called together from their normal pursuits to respond to occasional and particular threats, internal or external, to community peace. Thus conceived, the eighteenth-century militia stood in contrast to—and for many, in preference to—the professional standing army. To the consternation of the Antifederalists, however, the professional national army—which Washington knew deserved the most credit for winning the American War of Independence—was also tolerated by

772. Van Alstyne, *supra* note 8, at 1255.

the Constitution. By the dawn of the twentieth century, it had replaced the long-defunct local militia as America's primary fighting force. Long before the Mexican War, moreover, private arms had ceased to supply the ordnance of such state militia units as still lingered. By the time of the Civil War, the old state militia had vanished, losing all corporeal existence beyond the ghostly whisper of a name, a faded banner, and, in some instances, a proud, if ill-defined, history. Elite Volunteer companies had taken their place, but their members' weapons, the *Presser* Court made clear in 1885, were constitutionally protected only insofar as they were held pursuant to statute, authorization, or license from the state government that chartered the company. The regular army and existing Volunteer companies could not meet the enormous manpower demands of the Civil War, but the newly formed state units that answered "Father Abraham's" call⁷⁷³ were sworn into federal service as soon as they made muster and were promptly issued U.S. government arms purchased pursuant to act of Congress and War Department orders. With America's rise to world power in the twentieth century, the U.S. Army ballooned to levels previously unthinkable during peacetime. But in order to facilitate further rapid wartime expansion, Congress realized the nation needed a more reliable reserve than the nineteenth-century-style volunteer state "National Guards." Starting in 1903, Congress legislated to create a modern, professional, federal National Guard, and over the course of the century, the U.S. Army and the War/Defense Departments assumed larger and larger roles in the administration of the guard. By midcentury, all guard members took a federal oath upon enlistment, guard units were trained and supervised by the army, and the guard was issued U.S. Army weapons and equipment kept in state arsenals built to federal specifications with federal dollars.

This drastic change in the nature, status, and even vitality of the militia has utterly drained the Second Amendment right of meaning in modern America. To conceive of a constitutionally enshrined personal right to weaponry independent of communal, republican obligations is to distort beyond recognition the constitutional design. And with no contemporary descendant to inherit the framers' concept of a republican militia, the incidental right of citizens to bear

773. President Lincoln's July 2, 1862, call to the states for 300,000 federal volunteers inspired the popular recruiting song "We Are Coming, Father Abraham." See WEIGLEY, *supra* note 8, at 206. To that tune, thousands decamped from the training fields with their regiments and left home for the front.

and to keep the arms necessary to the life of such a militia has atrophied; it has simply lost any relevant application in today's world.

What this means is that on the pressing issue of gun control, the Constitution is neutral. The Second Amendment would take no notice if Congress, appalled by the prevalence of gun-assisted crimes, outlawed all handguns and assault rifles in private hands. By the same token, Congress could vacate the field, and with a similar retreat by the states, the NRA would realize its fondest wish, and every clean, competent adult would be allowed free purchase and proud ownership of firepower of every description. So, we conclude: let the great debate continue to rage—in the democratic branch where it belongs. But let us understand at last that the Second Amendment has no voice in the matter.