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Necessary to the Security of a Free State: Federalism and the Original Meaning of the Second Amendment

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NECCESARY TO THE SECURITY OF A FREE STATE: FEDERALISM AND THE ORIGINAL MEANING OF THE SECOND AMENDMENT

by

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(Under the Direction of Johnathan O'Neill)

ABSTRACT

Interpretations of the Second Amendment's original meaning encompass two extremes: an "individual rights" interpretation which argues that it protects each person's right to own and use weapons for any non-criminal purpose; and a "collective rights" interpretation which asserts that it protects only the states' right to maintain a National Guard force. Both positions cater to contemporary political agendas, display excessive presentism, lack lucid historical analysis, and ignore federalism and its bearing on the Second Amendment's original meaning.

This thesis uncovers the ideological and historical origins of the right to keep and bear arms and interprets the original meaning of the Second Amendment in the context of the ratification debates and the Bill of Rights. Antifederalists opposed any expansion of national authority over military power, fearing it would create a monster willing and able to destroy the people's rights. Federalists argued that the people's militia and America's federalist structure would uniquely preserve liberty. In the end, the Antifederalists succeeded only in slowing, not stopping, the nationalist juggernaut. The ensuing Bill of Rights codified Federalist assumptions about the limits of constitutional power but failed to scale back national jurisdiction. The Second Amendment preserved national power intact but assuaged Antifederalist fears by codifying the Federalists' public arguments in favor of the universal militia and concurrent state jurisdiction over it.

This thesis advances a new interpretation of the meaning and purpose of the Second Amendment. The "federalist" interpretation argues that the right to keep and bear arms was an auxiliary right which guaranteed that America's citizens could control their own constitutional destiny by overthrowing oppressors; that the framers intended the Second Amendment to preserve the states' capacity to check potential national oppression with their militias; that the Second Amendment restricted the jurisdiction of the national government by preventing it from disarming American citizens or creating a select militia; and that the amendment's connection with federalism indicates that it did not— and logically cannot —restrict the jurisdiction of the

states. The Second Amendment protected individual rights only by preserving the ability of the states to maintain the balance of power vis-à-vis the national government.
INDEX WORDS: Second amendment, Federalism, Bear arms, Keep and bear arms, Ratification, Auxiliary rights

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DEDICATION

To my father, Douglas Walker Sr., whose academic triumphs and trials have inspired and guided my own studies.

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Above all, I would like to thank Dr. Johnathan O'Neill. His contributions on both a theoretical and editorial level were instrumental to completing my work. I also want to thank Dr. Lisa Denmark and Dr. Solomon Smith, whose insightful comments, questions, and editing helped me refine my thesis.

TABLE OF CONTENTS

INTRODUCTION

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"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."— Second Amendment to the U.S. Constitution

These twenty-seven words, written over two-hundred years ago, have produced an avalanche of literature attempting to explain them. Long ignored by constitutional scholars, over the last several decades the intense debate surrounding the ownership and use of weapons has imbued the Second Amendment with a new relevance. People are asking what the Constitution does or does not say about this controversial issue, and the ensuing dispute has produced more heat than light. What makes the debate over the Second Amendment so unique—and frustrating—is the fact that competent scholars on both sides appeal to the amendment's original meaning to support their case. Some claim the Constitution forbids regulation of firearms, while others argue that it allows such regulation. Thus, modern Americans approach the Second Amendment with intense scrutiny but poor historical analysis. This work attempts to challenge prevailing viewpoints and shed new light on the original meaning of the Second Amendment.

For the last several decades, a stark dichotomy has dominated interpretations of the Second Amendment's original meaning. On the one hand, the "individual rights" interpretation asserts that the amendment protects every American citizen's individual, personal right to own and use firearms for both collective and individual self-defense. Within this group, disagreement exists regarding what firearm regulations are constitutionally permissible, but all agree that the Second Amendment provides wide latitude to own and use private weapons. Further, most believe that the Second Amendment applies to the states as well as to the national government. On the other side, the "collective rights" interpretation holds that the Second Amendment protects only the right of the states to possess an organized militia force—today's National Guard. Firearm ownership or use outside of this narrow context is subject to state and congressional regulation or prohibition.

While both sides deal with the same historical material, each emphasizes different types of evidence. Individual rights scholars stress the commitment of the founders to universal white male participation in the militia and contemporary statements made in support of gun ownership (whatever realities existed regarding rates of gun ownership or the military preparedness of the average citizen). They typically note the use of the phrase "the people" in the amendment's text,

not "the states," as well as the inclusion of "keep" as well as "bear," to argue for an expansive meaning. Collective rights scholars point to the context of the Second Amendment in the debate on the Constitution and Bill of Rights, which, they argue, focused on control of the militia rather than individual rights. They also note the historical connection of the phrase "bear arms" with participation in the militia, and emphasize Congress's constitutional authorization to organize, arm, and discipline the militia, which they interpret to mean defining the scope of the militia. Finally, they refute the notion of a right to armed self-defense by pointing to the existence of rather intrusive firearms legislation from the period.

Both sides must resolve several incongruities between their claims and the evidence. The individual rights view must first resolve the purpose of the amendment, which is crucial to determining its original meaning. This task involves settling the validity of insurrection vis-à-vis the Second Amendment. Did the founders give American citizens a right to revolt, as well as (presumably) possess any arms necessary for that end? This stance implies that Congress and the states (through incorporation) could not regulate possession of heavy artillery, bazookas, and automatic machine guns. Second, if the purpose of the Amendment included personal self-defense, hunting, and other private activities, why does this concern not appear in the historical record among those who actually adopted the Amendment? Third, if the Second Amendment resulted from Antifederalist fears of national oppression, why should it be incorporated against the states, as virtually all individual rights supporters believe? Finally, since the Amendment states that the right in question "shall not be infringed," are any regulations of the right permissible? If so, how does a judge determine which regulations are permissible and which are not? If no regulation is permissible, does that invite anarchy? The collective rights interpretation, for its part, must answer several questions as well. Why does the Second Amendment refer to "the right of the people" if it is actually a "states' right?" Also, given the preponderance of evidence that the militia in 1791 included all white male citizens, how can any interpretation that equates the militia with today's National Guard be consistent with the original meaning? Lastly, if the Second Amendment was intended to prevent Congress from regulating the militia out of existence, how can Congress have plenary authority to govern the militia or disarm American citizens?

A careful examination of the evidence reveals that the Second Amendment cannot be squeezed to fit the confines of contemporary politics. Interpreters of the Second Amendment do

not—in fact, cannot—work in a vacuum, and personal opinion influences even the most fair-minded historians. Thus it is no coincidence that the two primary interpretative camps align their conclusions with modern positions on firearms regulation. The individual rights faction supports the wide spectrum of American opinion that rejects regulation of guns, regardless of whether it comes from the state or national government. The collective rights group legitimates the constitutionality of the push for both state and national gun regulation. In addition to debating the merits of regulation on its own terms, both sides muster evidence to portray their side as the true "original" meaning of the Second Amendment. This paper seeks to escape the political factors that dominate contemporary Second Amendment scholarship. It advances a new interpretation that, in contrast to competing paradigms, explains all the available evidence and provides an escape from politicized scholarly and judicial interpretation.

This paper comprises four chapters. The first chapter examines the intellectual inheritances of the Second Amendment through a study of republican Whig ideology and the English Bill of Rights. Responding to the rise of the fiscal-military state during the late seventeenth century, English Whigs valorized the citizens' militia and denounced standing armies. In 1688, the concept of lawful resistance to the king was written into the Bill of Rights, which protected the right of Protestant citizens to have arms. Republican ideas permeated Britain's North American colonies and fostered the view that America was a refuge of virtue uniquely capable of republican self-government. The English heritage greatly contributed to positive perceptions surrounding arms-bearing and militias, because much of the rhetoric Antifederalists used to attack the Constitution derived from the English Whigs. Understanding this background helps to define the terms and context of the Second Amendment itself.

The second chapter covers the formation of the militia clauses of the Constitution and the intense debate over the allocation of military power during the ratification debates. The Constitution's nationalization of military power—particularly its endorsement of standing armies and transfer of control over the militia to Congress—provoked a sharp reaction from many Americans. Antifederalists argued that standing armies threatened liberty while popular militias upheld it. Furthermore, they charged that Congress would neglect or disarm the militia in order to remove obstacles to its policies. To correct these deficiencies, they advocated the removal or dilution of national control over military power and wanted the Constitution to explicitly prohibit standing armies and protect the militia. Federalists responded to these criticisms by assuring

Americans that states would exercise concurrent jurisdiction over the militia and that the Constitution did not authorize Congress to disarm the people or create a select or nationalized militia. The most sophisticated Federalists articulated a description of federalism that viewed the Constitutional allocation of military power as a system of checks whereby either level (state or national) could use its military power to combat abuse or oppression from the other.

The third chapter analyzes the creation of the Bill of Rights in general and the Second Amendment in particular. Federalists argued that a bill of rights was not necessary because the Constitution specifically enumerated the limited powers of the national government and because Americans' commitment to liberty would check their rulers. Antifederalists, however, succeeded in convincing most Americans that a bill of rights was necessary to secure the people against potential violations of their liberty by Congress. When Congress took up the task of proposing amendments, states sent hundreds of suggested amendments for appraisal, including a number relating to the right to keep and bear arms. Congress, led by James Madison, approved the Second Amendment, which protected the people's right to keep and bear arms without taking away Congress' power to raise armies or control the militia. While the debates in Congress over the Bill of Rights reveal little specific information about the founders' view of the Second Amendment, they confirm the link between the amendment and the Federalists' arguments during ratification that Congress could not disarm the American people or create a select militia.

The fourth chapter reviews all of the evidence—the relevant inherited ideologies, the context of the ratification debates, and the commentary during and after the amendment's creation—and advances a new interpretation of the Second Amendment. This so-called "federalist" interpretation advances four central claims. First, the right to keep and bear arms was not primarily an individual, collective, or civic right. Rather, in the parlance of British constitutional law, it was an "auxiliary" right that—though closely connected to militia service—first and foremost sheltered private ownership of weapons from governmental regulation. The founders believed that an auxiliary right to keep and bear arms maintained liberty by protecting the people's ability forcefully to resist governmental oppression. Second, consistent with the logic of an auxiliary right, the Second Amendment upheld the military power of the states and people by preserving concurrent national/state jurisdiction over the militia and preventing Congress from tampering with the universal militia. This division of power meant that states could arm and discipline their militias to prepare for potential national tyranny, while Congress

could marshal the military resources of the nation to ensure republican government in each state. Third, the Second Amendment restricted Congress' jurisdiction, forbidding it from disarming the people or creating a select militia. Under the federalist interpretation, the national government could not restrict ownership and access to weapons or prevent the states from forming and regulating their own militias. Fourth, the Second Amendment reflected the Antifederalists' special fear of the national government and was not intended to restrict state-level regulation of firearms. By proscribing national regulation but leaving state regulation intact, the federalist interpretation provides an escape from the perplexing and divisive dispute as to which regulations are constitutional. In its place it offers a solution that is both politically palatable and historically faithful.

Historiography

A more detailed examination of modern literature on the Second Amendment is necessary before addressing the historical material. Perhaps the most extreme defender of an individual rights view is Stephen P. Halbrook. In *That Every Man be Armed: The Evolution of a Constitutional Right*, Halbrook laid out the primary elements of that case. Declaring that "the philosophical origins of the Bill of Rights, including the Second Amendment, may be found in the Greek and Roman classics and in English Whig thought," Halbrook traced classical, medieval, and early modern ideologies that attacked standing armies and praised the militia. In fact, he argued, the basic meaning of the Second Amendment—"that a militia of the body of the people is necessary to guarantee a free state and that all of the people all of the time (not just when called for organized militia duty) have a right to keep and bear arms"—is based on that body of thought. Thinkers such as Aristotle, Cicero, and Machiavelli believed the freedom of the people depended on their having arms to resist outside enemies as well as internal tyranny. An armed population, organized into a universal militia force, did not have to submit to the dictates of an autocrat. In the seventeenth and eighteenth centuries, the English Country Party—including men such as John Trenchard, Thomas Gordon, and Algernon Sidney—lamented the emergence of a standing army and praised the ideal of the citizen-soldier. Next, Halbrook traced the emergence of the right to bear arms in English common law. The right to keep and bear arms held a central place in English law, and the common law protected a right to keep and use arms

for self-defense. The English Bill of Rights ushered in during the Glorious Revolution established the constitutional right of all Protestant English citizens to have arms.[1]

Halbrook argued that Americans transmitted this ideology into the text of the Second Amendment itself. He concluded that the "Americans who participated in the Revolution of 1776 and adopted the Bill of Rights held the individual right to have a use arms against tyranny to be fundamental."[2] Thus, Halbrook adopted the "insurrectionary" view of the Second Amendment, which holds that its primary purpose was to give Americans a "right of revolution" to overthrow the government if necessary. He noted that the founders valued militias and considered disarmament to be a step towards tyranny. Further, the militia in question was composed of the body of the people, not a select few chosen by the government. Halbrook argued that Antifederalists feared the new national government would establish a standing army or "select militia" and impose tyranny, and that the Second Amendment was intended to obviate this possibility.

Halbrook believed the right to keep and bear arms extended beyond revolution to incorporate private uses of arms, such as hunting or defense against criminals. Citing the viewpoint that the Second Amendment protects only the state's right to maintain a militia under the control of Congress, Halbrook stated: "If anyone entertained this notion in the period during which the Constitution and Bill of Rights were debated and ratified, it remains one of the most closely guarded secrets of the eighteenth century." This could be inferred, he said, from the structure and ratification of the amendment and evidence from contemporaries. Halbrook furthermore argued that "the Second Amendment is written in a universal form, which suggests that it provides protection against both federal and state infringement." The evidence suggested that it "precludes any federal or state infringement whatsoever," rendering any infringement of the right off limits to both the national and state governments. He concluded that "the Second Amendment recognized the absolute individual right to keep arms in the home and to carry them in public."[3]

Don B. Kates also defended an individual rights view in his article "Handgun Prohibition and the Original Meaning of the Second Amendment." Like Halbrook, his first line of defense

[1] Stephen P. Halbrook, *That Every Man Be Armed: The Evolution of a Constitutional Right*, 2nd ed. (Oakland: The Independent Institute, 1994), x; 8.
[2] Ibid., 54.
[3] Ibid., 83; 84; 87.

was also the structure and wording of the amendment. First, the phrase "militia," used in modern parlance to mean a professional, organized fighting force, meant something different to the founders. It meant the entire body of free adult men, who were to be called out when the public safety required. Second, the phrase "the people" was used in an unambiguously individualistic sense elsewhere in the Bill of Rights, specifically in the First, Fourth, Ninth, and Tenth Amendments. In fact, the Tenth explicitly distinguishes between the people and the states, making it all the more unlikely that "the people" of the Second Amendment really means "the states." Finally, although the right to "bear" arms was almost exclusively used in a militia context, "keeping" arms was used to refer to individual—not merely governmental—possession of arms.

Kates argued that the proposal and ratification of the Second Amendment also supports an individual rights view. In fact, he said, both Federalist and Antifederalists accepted the notion that the people possessed a right to keep and bear arms. The Federalist Tench Coxe adopted that position, and his view was endorsed by none other than James Madison, the architect of the Bill of Rights. The only source of disagreement for the founders was whether an amendment was the best way to guarantee the right in question. In the end, Kates concluded that "the context here . . . consistently supports an individual rights intent."[4] He identified three purposes guaranteed by the amendment: crime prevention, national defense, and defense against domestic despotism. Although he sidestepped the issue of permissible regulation, he believed that the Second Amendment's restrictions should apply to state as well as federal authority.

Sanford Levinson wrote an influential article on the Second Amendment in 1989. Noting the absence of much scholarship on the subject, Levinson surmised that this resulted from "a mixture of sheer opposition to the idea of private ownership of guns and the perhaps subconscious fear that altogether plausible, perhaps even 'winning' interpretations of the Second Amendment would present real hurdles" to gun-control legislation.[5] Stating that he does not like to give "correct" constitutional interpretations, his article nevertheless shows enormous sympathy with an individual rights argument, especially the "insurrectionist" idea of resistance to oppression. He summarized the individual rights position and challenged its opponents to come up with better reasons than personal distaste or the amendment's supposed irrelevance in the

[4] Don B. Kates, "Handgun Prohibition and the Original Meaning of the Second Amendment," *Michigan Law Review* 82, no. 2 (1983): 225.
[5] Sanford Levinson, "The Embarrassing Second Amendment," *The Yale Law Journal* 99 (1989): 642.

modern world. Levinson's arguments were not particularly new but had added force because he was a prominent liberal and a self-described "elite."

The primary defender of the collective rights view in the 1980s was Lawrence Delbert Cress. While admitting the centrality of the militia in the founders' ideology, he argued that "seventeenth and eighteenth century theorists understood access to arms to be a communal, rather than an individual, right." Rather than viewing arms as instruments of personal self-defense, the "republican notion that arms had an acceptable function in society only in the service of the common good" held great weight with the founders. Despite believing that militias were the best counter to overweening government, "at no time did anyone express concern about the right of individuals to carry weapons." The Second Amendment, for Cress, prohibited Congress from "taking any action that might disarm or otherwise render the militia ineffective." It sustained the right of the states to have organized militia forces, but did not confer a right on any individual. Cress thus implied that Congress could regulate who can be included in the militia and disarm those outside of that context.[6]

In the early 1990s the rising constitutional scholar Akhil Reed Amar lent his respected voice to a version of the individual rights argument. He examined the entire Bill of Rights in a lengthy law journal article, hoping to "refute the prevailing notion that the Bill of Rights and the original Constitution represented two very different types of regulatory strategies." Specifically, conventional wisdom stated that the Constitution deals with "issues of organizational structure and democratic self-governance: federalism, separation of powers, bicameralism, representation, and constitutional amendment," whereas the Bill of Rights was meant "to vest individuals and minorities with substantive rights against popular majorities."[7] Amar maintained that instead the founders intended the Bill of Rights to empower majorities as well as minorities to protect the people against self-interested government. He accused modern scholars of being blinded by a nationalist tradition that views state, not national, governments as threats to liberty and a habit of viewing the Bill of Rights in light the Fourteenth Amendment's incorporation, which applies its restriction to the states. Originally, many Americans viewed the national government as a threat to be controlled, and wrote the Bill of Rights to apply only to it, not the supposedly less dangerous states.

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[6] Lawrence Delbert Cress, "An Armed Community: The Origins and Meaning of the Right to Bear Arms," *The Journal of American History* 71, no. 1 (1984): 24; 36; 38.

[7] Akhil Reel Amar, "The Bill of Rights as a Constitution," *The Yale Law Journal* 100, no. 5 (1991): 1132.

Regarding the Second Amendment, Amar asserted that "as with our First Amendment, the text of the Second is broad enough to protect rights of discrete individuals or minorities; but the Amendment's core concerns are populism and federalism." For him, a right to arms was closely connected to popular sovereignty, because defeating tyrannical government required an armed population; thus, it was a right of citizens, not all persons. Thus, like the right to petition, the right to keep and bear arms originally belonged first and foremost to white males. Amar wrote that while private concerns can be protected under the Second Amendment, "to see the Amendment as primarily concerned with an individual right to hunt, or protect one's home, is like viewing the heart of the speech and assembly clauses as the right of persons to meet to play bridge, or to have sex." Originally, these amendments had a structural part to play in preserving free government.[8]

Federalism was important to the original meaning of the Second Amendment for Amar. Whereas opposition to government in a unitary state would be disorganized and chaotic, "in the event of central tyranny, state governments could do what colonial governments had done in 1776: organize and mobilize their Citizens into an effective fighting force capable of beating even a large standing army." The amendment was ratified to explicitly forbid any congressional attempt to disarm the people. Despite this emphasis on federalism, however, Amar argued the Amendment does not protect a state right, but is a right "of the people," i.e. the citizens. The "militia" referred to includes "all Citizens capable of bearing arms." Further, he directly supported incorporation, implying that as an individual right "of the people," the right to keep and bear should be incorporated alongside other personal rights.[9]

William Van Alstyne also joined the growing ranks of individual rights proponents. He echoed the view that the militia is "in the first as well as the last instance a reference to the ordinary citizenry." Moreover, he said, right to keep and bear arms was only a prerequisite and foundation for a militia; the clause about the "well regulated militia" only declares the purpose of the right, but does not restrict it in any way. Furthermore, the right cannot be violated in the name of state regulation of its militia as the right exists independently of militia service. He concluded: "the militia to be well-regulated is a militia to be drawn from just such people (i.e., people with a right to keep and bear arms) rather than from some other source (i.e., from people

[8] Ibid., 1162; 1164.
[9] Ibid., 1165; 1166.

without rights to keep and bear arms).” To him, the history of the English Bill of Rights as well as declarations during the ratification debates that the government never possessed a right to disarm the people buttress the individual nature of the right. Alstyne likewise endorsed incorporation. Still, he believed the right to keep and bear arms could be regulated in reasonable ways (for example, by outlawing howitzers).[10]

The emergence of scholarship supporting an individual right prompted a response by supporters of the collective rights interpretation. In an essay published in the *New York Review of Books*, Garry Wills, a celebrated journalist and historian, attempted to refute supporters of an individual rights interpretation, which had come to be called the “Standard Model.” He faulted them for ripping quotes out of context and not understanding the text of the Second Amendment. According to Wills, the Second Amendment’s original wording, which included a clause stating that “religiously scrupulous” people would not be required to perform public military service, related entirely to service in a militia. He argued that the phrase “bear arms” traditionally meant use of weapons in a military context and no other—“one does not bear arms against a rabbit”—regardless of a handful of exceptions.[11] Even the word “keep” in the Second related to communal storage of arms for the militia rather than personal storage at home. Likewise, founders understood the phrase “the people” in a corporate or communal sense and did not imply that every citizen should be a soldier. In short, his argument against the “Standard Modelers” boiled down to this: “They take an isolated odd usage by an idiosyncratic man in a moment of little reflection, misrepresent it as the considered position of a group, and pit it against the vast body of normal usage, as that is qualified by legal usage and military context.”[12]

Furthermore, Wills cast the purpose and regulation of the militia in a thoroughly national context. A militia, according to him, is “well-regulated” only through the agency of the Constitution’s militia clauses, which authorize Congress to arm, organize, and discipline it. In relation to insurrectionist theory, he stated that “only madmen, one would think, can suppose that militias have a *constitutional* right to levy war against the United States . . . yet the body of writers who proclaim themselves at the scholarly center of the Second Amendment’s

[10] William van Alstyne, “The Second Amendment and the Personal Right to Arms,” *Duke Law Journal* 43, no. 6 (April 1994): 1241; 1244.
[11] Gary Wills, “To Keep and Bear Arms,” *New York Review of Books*, September 21, 1995: http://www.nybooks.com/articles/archives/1995/sep/21/to-keep-and-bear-arms/?page=2 (accessed December 13, 2010).
[12] Ibid.

interpretation say that a well-regulated body authorized by the government is intended to train itself for action *against* the government."[13] He stringently denied any connection between the Second Amendment and the existence of a standing army. Rather, he argued that Madison drafted the Second Amendment merely to diminish antagonism to the new Constitution using language associated with opposition to standing armies; like the Third Amendment, the Second was—and is—largely irrelevant.

Don Higginbotham, a respected historian of early America, also took part in this collective rights resurgence. He argued that the Second Amendment was written to assuage Antifederalist concerns about the transfer of power over the militia to Congress and away from the states. Americans began to think differently about the militia after its poor service in the War of Independence, and men like George Washington attempted without success to reform and improve the militia system. At last, the Constitutional Convention gave Congress substantial powers over the militia as a part of their proposed new constitution. Antifederalists countered that such a system would, in Higginbotham's words, lead to "repeated military interventions in the domains of the states and the lives of the people."[14] Eventually the government would resort to "using the body of the people against the people," and the federalized militia would become "a standing army maintained by the states but controlled by the central government."[15]

Higginbotham argued that the Federalist-controlled First Congress, tasked with drafting a Bill of Rights, did not intend to pacify Antifederalist fears or weaken federal control of the militia. In fact, he claimed, the Second Amendment was ambiguous from the beginning as different parties entertained diverging ideas about its meaning. Higginbotham concluded that "by conceding something heavy in emotional content but thin in substance, something that could be interpreted as each reader chose to do, Madison and his supporters in Congress probably hoped to calm Antifederalist fears."[16] He suggested that it seemed to imply that the states retained the authority to arm their militia if Congress did not, and use it when not in national service. Clearly, such a right would not restrict Congress' authority to define and regulate the militia or restrict ordinary gun ownership.

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[13] Ibid.
[14] Don Higginbotham, "The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship," *The William and Mary Quarterly* 55, no. 1 (January 1998): 45.
[15] Ibid., 46-47.
[16] Ibid., 50.

In 2000, Carl T. Bogus edited a book with contributions from supporters of the collective rights model. Framed as a rebuttal of the "Standard Model," the book featured thoughtful, scholarly contributions covering a range of topics relating to the Second Amendment. Two essays in particular address the question of the amendment's original meaning.

The first article was "A Well Regulated Militia: The Second Amendment in Historical Perspective," by Paul Finkelman. He pointed out that "the same men who wrote the Constitution, creating a strong central government, also wrote the bill of rights that amended the Constitution. Contrary to popular myth, the amendments were not a radical revolutionary response to the conservative constitution."[17] Scholars should not read the Amendment through Antifederalist eyes; in fact, Finkelman argued, zealous Antifederalists were not interested in a Bill of Rights per se but sought to use its absence to discredit the entire Constitution. They did not succeed, he continued, and Madison and his colleagues refused to remove the authority they had worked so hard to give the national government. They rejected any structural changes in favor of amendments affirming existing arrangements. One amendment that clearly fit this tame description, according to Finkelman, was the Second, which simply "reconfirmed that though the national Congress would have the primary responsibility for arming and organizing the state militias, if Congress failed to do its job the states could maintain their own militias."[18] The Second was "directed at only one issue: the preservation of the organized state militias as a military force."[19] It was a promise of sorts that the government could not abolish the state militias. However, Finkelman clearly thought that the Amendment does not protect or promote revolution against the government (which is unnecessary in a democratic government), or prevent Congress from making extensive regulations on owning or using weapons.

The second article was written by H. Richard Uviller and William G. Merkel. They began by agreeing that originally the Second Amendment "protected as an individual right . . . the ancient custom of free, adult citizens to keep and carry arms, but only in the context and for the advancement of the organized, communal, military units generally believed to be indispensible to the preservation of political liberty." They suggested that while applying an "ancient text" to new circumstances always presents a difficult problem, the problem is even more challenging with

[17] Paul Finkelman, "A Well Regulated Militia: The Second Amendment in Historical Perspective," in *The Second Amendment in Law and History: Historians and Constitutional Scholars on the Right to Bear Arms*, ed. Carl T. Bogus (New York: The Free Press, 2000), 117.
[18] Ibid., 119.
[19] Ibid., 129.

the Second because "the framers stated explicitly their social and ideological premise in the same breath as the right they enunciated." They argued that two hundred years of history have erased the communal militia of the founding and replaced it with today's National Guard, which has "developed into a creature all but unrecognizable from the perspective of the Second Amendment." After spending most of the article detailing the long transition from one to the other, Uviller and Merkel maintain that this transition had devastating consequences for the applicability of the Second Amendment: "The concept of the militia embedded in the Second Amendment," in their words, "has so radically changed over the centuries since its adoption that the right to arms, constructed to serve it, is fundamentally deactivated." It is a meaningless relict and "would take no notice if Congress, appalled by the prevalence of gun-assisted crimes, outlawed all handguns and assault rifles in private hands."[20]

Nelson Lund, a law professor, wrote an article that cast a wide net over the entire meaning of the Second Amendment and its relation to federalism. He began by linking the phrase "the people" in the Second to language in the First and Fourth Amendments. Noting that those other amendments have always been interpreted as individual rights, he concluded that "the Constitution nowhere uses the term 'the people' to refer to state government." Grammatically, he continued, the first clause ("A well regulated militia, being necessary to the security of a free state . . .") is phrased in the ablative absolute, indicating that it does not modify any word in the second half of the sentence ("the right of the people to keep and bear arms, shall not be infringed."). Thus, the right exists independently of the maintenance of a well regulated militia. Further, he pointed to another clause in the Constitution granting Congress the power to make copyright laws "To promote the Progress of Science and the useful Arts" (Art. 1, Sec. 8, Clause 8). Yet, although this prefatory language much more clearly serves a limiting function, Congress has granted copyrights to many people whose work did nothing to promote science or art. The same treatment, he said, should apply to the Second Amendment. Its prefatory language merely signals that one particular type of regulation is off-limits to Congress: "those that would disarm the citizenry from among which any genuine militia must be constituted . . . the Second Amendment forbids it from disarming citizens under the pretense of regulating the militia." This

[20] H. Richard Uviller and William G. Merkel, "Muting the Second Amendment, The Disappearance of the Constitutional Militia," in *The Second Amendment in Law and History: Historians and Constitutional Scholars on the Right to Bear Arms*, ed. Carl T. Bogus (New York: The Free Press, 2000), 148; 149; 174; 176; 178.

was, he claimed, a position that was widely shared by both Federalists and Antifederalists, which also rendered it uncontroversial and rather meaningless.[21]

Lund believed that the Second Amendment should be incorporated, although he merely cited other scholars to support this claim. However, he admitted that the Supreme Court receives scant guidance from the historical context of the founders when it comes to deciding which regulations are permissible and which are not. Because the Amendment originally applied only to the federal government, it was assumed that regulation would take place at the state level. Incorporation alters this by placing the same restrictions on the federal and state governments. Still, he concluded that "if the Court proves unwilling to supervise the states' experiments with gun control, it will not be because of any tension between its emerging new jurisprudence of federalism and its traditions of protecting traditional constitutional rights from infringement by the state governments."[22]

Recently, Saul Cornell has emerged as a giant in Second Amendment historiography. He moved the debate beyond the traditional dichotomy of individual versus collective rights, declaring that both modern paradigms have "obscured the link between citizenship and bearing arms in the founding era." He advanced a new position, the so-called "civic right" interpretation, which holds that the Second Amendment "guaranteed that citizens would be able to keep and bear those arms needed to meet their legal obligation to participate in a well-regulated militia."[23] According to this view, the right to bear arms was an individual right that guaranteed citizens ownership of their own firearms. At the same time, the purpose and context of the right limited the private use of arms and justified extensive governmental regulation, but never justified a "right to revolution" or insurrection. Gradually, Cornell argued, over the course of the nineteenth century the individual rights position emerged as a response to gun regulation and expanding notions of individualism. Taking seriously the civic right encapsulated in the Second Amendment, Cornell concluded, would entail unacceptable changes to traditional American policy. His primary aim was to explain the emergence of the individual rights movement and refute its originalist credibility. Cornell's view was similar to the collective rights interpretation and he did an inadequate job of separating himself from that viewpoint by specifying how much

[21] Nelson Lund, "Federalism and the Constitutional Right to Bear Arms," *Publius* 33, no. 3 (Summer 2003): 67; 72.
[22] Ibid., 79.
[23] Saul Cornell, *A Well Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* (Oxford, Oxford University Press, 2006), 214. For a concise statement of Cornell's call for a new paradigm, see Saul Cornell, "A New Paradigm for the Second Amendment," *Law and History Review* 22, No. 1 (Spring 2004): 161-167; 2.

(if at all) the Constitution restricts governmental regulation of gun ownership. Still, by placing the mandatory and communal nature of militia service at the center of his interpretation, he provided a deeper historical understanding than previous writers.

Cornell argued that federalism originally was not crucial to the Second Amendment but increased in importance over the next couple of decades after ratification. Although its language "was closer in spirit to the civic model embodied in the first state constitutions, Anti-Federalists and their Jeffersonian heirs came to interpret the Second Amendment within an evolving theory of states' rights . . . the original Anti-Federalists understanding of the Second Amendment was revolutionary, assigning to the state militias the awesome power to resist federal authority by force of arms."[24] Yet for Cornell this interpretation, emphasizing federalism and state militias as checks on national oppression, did not reflect the original understanding. The original understanding protected the citizens' right to keep and bear arms as part of a well-regulated militia, but did not necessarily imbue the militia with insurrectionist or revolutionary potential. Although he discussed early pro states' resistance commentators such as St. George Tucker and even found the origins of this view in the ratification debates, he nevertheless subordinated it to the civic rights model.

A resurgence of Second Amendment scholarship resulted from the 2008 decision of *District of Columbia V. Heller*. Patrick Charles' book, *The Second Amendment: The Intent and Its Interpretation by the States and the Supreme Court,* directly challenged the validity of *Heller's* individual rights ruling, stating that "it is a textual farce for the Supreme Court to imply that the Second Amendment protected individual gun ownership." Rather, it protects only "one's right to use arms in the military (or militia context) in support of just government." In addition, the people legitimately can bear arms only "during times of emergency, rebellion, or invasion" and in subjection to martial law. Charles differed somewhat from other collective rights scholars because he asserted that the reference to "people" in the Second Amendment referred to individuals, not the people collectively. Yet his overall arguments fit into the collective rights paradigm. The ratification debates, for him, demonstrated that the amendment's purpose was to guard against standing armies. He argued that the phrase "bear arms" had a purely military context, and the "keep" did not imply the right to own a weapon, merely to "maintain" or "service" a state-owned weapon. Charles also cited examples of state firearm regulation to imply

[24] Ibid., 5.

that the founders did not hold to an individual right and accepted extensive regulation. In fact, using Ohio as an example, he argued that state-level "second amendments" did not guarantee an individual right either. As is the case with Cornell and many collective rights scholars, Charles' argument emerges indistinctly amid his primary aim of refuting the individual rights position. It is unclear to what extent he thought the Second Amendment should restrict state or national governments in practice, but such restriction would clearly be minimal.[25]

This brief review demonstrates the inadequacy of the existing interpretations and the need for a new paradigm. Scholars have found it difficult, if not impossible, to reconcile the strongly communal and martial context of the Second Amendment with evidence that the founders viewed the right to keep and bear arms in an individualistic and even insurrectionary way. Both a new conception of the right to arms and its relationship to larger constitutional issues (such as federalism) is necessary to establish a convincing interpretation. This study attempts to correct these deficiencies and points toward a new paradigm for the Second Amendment.

[25] Patrick Charles, *The Second Amendment: The Intent and Its Interpretation By the States and the Supreme Court* (Jefferson, NC: McFarland and Co., 2009), 14; 95; 22-30.

CHAPTER 1

THE INTELLECTUAL INHERITANCES OF THE SECOND AMENDMENT

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The Second Amendment did not appear *ex nihilo*. Rather, it was a product of the eighteenth century and reflected its unique concerns. The Second Amendment's ideological antecedents came primarily from the English Country Whig Party, but stretched even further back to the Renaissance and antiquity. Americans adopted preexisting ideas about standing armies, militias, and bearing arms and adapted them to their unique situation. Furthermore, the adoption of a provision protecting the English citizens' right to have arms in the Bill of Rights of 1689 was a significant precursor to the Second Amendment. This chapter explores these inheritances and how they influenced American political and constitutional discourse. Influential ideologies denounced standing armies as instruments of oppression, praised the popular militia as the true defender of the nation's liberties, and urged that bearing arms be constitutionally protected from governmental interference.

Republican Whig Ideology Regarding Standing Armies and the Militia

The ideological origins of the Second Amendment lay within a broader school of thought that historians refer to as "republicanism." The emergence of the concept of republicanism constituted a paradigmatic move away from the liberal tradition that emphasized—to an extreme—the influence of John Locke on the American founders. By contrast, the republican paradigm posited the existence of competing strands of thought that also had an enormous influence in early America.[1] Despite a resurgence of other interpretations, including a modified liberalism, the existence and importance of republicanism has been conceded by the vast majority of contemporary historians.

According to Alan Gibson, republicanism was an "ideology"—an "intellectual universe" or worldview—that allowed Americans to "perceive and structure otherwise random ideas or thoughts," and shaped the meaning Americans ascribed to their actions. Republicanism asserted that "humans achieved self-fulfillment only as autonomous participants in a political community" and struggled to find ways to secure the republic against degeneration or "corruption." The answer lay partly in inculcating "virtue," or disinterested service of the public

[1] See generally Daniel T. Rodgers, "Republicanism: The Career of a Concept," *The Journal of American History* 79, No. 1 (June 1992): 11-38.

good, among the citizens. Republicanism stressed that only self-reliant landowning citizens could be disinterested and unbiased in the public arena. Property gave them a solid stake in society and ensured that they need not rely on the patronage of anyone else. Finally, the republican mindset viewed liberty as fragile and constantly threatened by "power." Liberty required extreme vigilance to protect it.[2] Republicans in both England and America advocated frequent legislative elections, strong limitations on executive power and influence, an agrarian economy, and a militia made up of property-holding citizens.

The republican conception of the arms-bearing independent citizen had roots in ancient history. The Greek democracies and the Roman Republic used citizen armies to defeat enemy after enemy. Aristotle summarized a typical Greek conception of a good republic (one praised by Socrates, no less) as one which required citizens to bear arms in defense of the community: "As a whole the constitution *of the laws* purports to be neither a Democracy nor an Oligarchy but an intermediate form or, to use the common phrase, a polity, as the citizens are all who serve as heavy-armed soldiers."[3] Possession of arms allowed the people of a nation to keep themselves free from tyranny and defeat external enemies. Likewise, in Rome the army was formed of citizens from all social stations. In fact, a Roman citizen's primary social and legal classification derived from his service in the army. The bulk of military power came from the landholding middle classes; the aristocrats served as officers or as (relatively unimportant) cavalrymen, while the destitute served as skirmishers and other light infantry. But the dreaded Roman legion was grounded on infantry foot soldiers taken from the middling sections of Roman society. As the Roman economy transitioned in the second century BC, and small landowners got bought out by vast farms owned by the elites, the Republic found it necessary to enlist primarily poor and unemployed city dwellers. These unrepresentative armies eventually followed ambitious generals against the Republic itself. The transition of Rome's army from independent freeholders to dependent mercenaries, willing to sacrifice the freedom of their country for a share in the booty, offered a trenchant warning to future generations of republicans.

The idea of the virtuous republican citizen bearing arms experienced a resurgence in renaissance Italy. There, small republics vied for survival among monarchical states. Confronting the problem of maintaining a republic, Niccolo Machiavelli, among others, took up the task of

[2] Alan Gibson, *Interpreting the Founding: Guide to the Debates Over the Origins and Founding of the American Republic* (Lawrence, Kansas: University Press of Kansas, 2006), 22-26.
[3] Aristotle, *The Politics of Aristotle*, trans. J.E.C. Welldon (London: MacMillan & Co., 1883), 60.

fashioning a political theory that could prevent the destruction of a republic at the hands of supposedly inevitable and senseless "corruption." Machiavelli believed that by "the institutionalization of civic virtue, the republic or polis maintains its own stability in time and develops the human raw material composing it toward that political life which is the end of man." In such a republic, every citizen must "place the common good before his own" by acts of service to the community.[4] To accomplish this, Machiavelli sought to understand how individuals could be shaped into productive citizens. He argued, in large part, that "military discipline and civic religion" produced virtue, which could only exist in "warrior states which arm the people and give them civic rights."[5] The right to bear arms was both a right and a duty.

Machiavelli's conception of civic virtue entailed several conclusions regarding the place of arms and armies in a republic. He clearly abhorred an army made up of professional, full-time soldiers. Such a force would be "useless and dangerous . . . disunited, ambitious, without discipline, faithless, bold amongst friends, cowardly amongst enemies." Motivated only by the wage they receive, a mercenary force would fight poorly, but always be ready to "despoil" the very state it was hired to defend. Opposed to this was the citizen soldier, who fought for duty and to protect his homeland. Because of the close identification of the citizens with their state, Machiavelli argued, "an armed republic submits less easily to the rule of one of its citizens than a republic armed by foreign forces." Appealing to many examples from ancient and European history, Machiavelli stated that "Rome and Sparta were for many centuries well armed and free. The Swiss are well armed and enjoy great freedom."[6] On the other hand, he noted elsewhere that

> many other states that have been disarmed have lost their liberties in less than forty years . . . [hiring foreign troops is] dangerous because they are more likely to . . . become subservient to the ambitions of a powerful citizen who—when he has nothing to deal with but an unarmed and defenceless multitude—may easily avail himself of its assistance to overturn the established government.[7]

Disarming the citizens would risk the loss of liberty, but an active citizen's militia would produce a virtuous and public-minded citizenry: "If a city be armed and disciplined as Rome was, and all its citizens . . . have the chance to put their virtue and the power of fortune to the test of

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[4] J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition*, rev. ed. (Princeton, NJ: Princeton University Press, 2003), 183-84.
[5] Ibid., 202-03.
[6] Niccolo Machiavelli, *The Prince*, Luigi Ricci trans. (London: Grant Richards, 1903), 47-49.
[7] Niccolo Machiavelli, *The Prince and The Art of War* (London: CRW Publishing, 2004), 221.

experience, it will be found that always and in all circumstances they will be of the same mind and will maintain their dignity in the same way."[8]

James Harrington updated republican ideas for a seventeenth century English audience. Although the intellectual climate was vastly different—in England, Puritan and Calvinistic ideas competed with and altered civic humanism—Harrington thought that in one sense the English republic was much the same as Machiavelli's Florence. In particular, he claimed that the freedom of republics depends on the citizens having independence secured through property, and that the yeomen's militia is the best security for such a state.[9] While a standing army might facilitate the schemes of an ambitious man or party, Harrington wrote that it was "impossible that a party should come to overbalance the people, having their arms in their own hands."[10] An armed militia served as a check against usurpation by an unauthorized individual or group.

Interpreted through the lens of seventeenth century writers such as Harrington, classical and Renaissance legacies greatly influenced the English Country Whig Party—men such as John Trenchard, Thomas Gordon, Algernon Sidney, James Burgh, and Andrew Fletcher—and their American followers. This intellectual tradition valorized arms-bearing by the independent freeholder as an expression of virtue and the best means of maintaining the integrity of the republic. Edmund Morgan wrote that in England and America the "ability of the people to exercise sovereignty and control their government rested on the righteousness, independence, and military might of the yeoman farmer, the man who owned his own land, made his living from it, and stood ready to defend it and his country by force of arms." Writers praised the English because their laws protected property and thus created prosperity for the average citizen.[11] Such conditions ensured that a yeoman militia would benefit the nation rather than hurt it. Sidney articulated the benefits of a militia:

> in a popular or mixed government every man is concerned: every one has a part according to his quality or merit; all changes are prejudicial to all . . . the body of the people is the public defence, and every man is armed and disciplined: the advantages of good success are communicated to all, and every one bears a part in

[8] Niccolo Machiavelli, *Discourses on Livy*, quoted in Halbrook, *That Every Man be Armed*, 22.
[9] Morgan, *Inventing the People*, 156.
[10] James Harrington, *The Political Works of James Harrington*, J.G.A. Pocock ed. (Cambridge: Cambridge University Press, 1977), 425.
[11] Edmund S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (New York: W.W. Norton and Company, 1988), 153-54.

> the losses. This makes men generous and industrious, and fills their hearts with love to their country.[12]

Many English and most Americans, like Sidney, valued the militia because it was composed of common citizens with a stake in the health of the nation who would fight for it from noble motives. Whereas impoverished peasants might be persuaded to destroy constitutional freedom on the promise of monetary reward, a middling freeholder whose livelihood depended on the protection of property would never do so. Who could be more interested in free, just government (often identified with the protection of property rights) than independent property holders?[13] In short, in light of disturbing new threats such as patronage and standing armies, Country Whigs believed "a good militia" was "of such importance to a nation, that it is the chief part of the constitution of any free government."[14]

If the Country Whig Party's ideal was a citizen's militia, its nemesis was a "standing" army composed of professional, full-time soldiers usually drawn from the property-less poor. Standing armies during times of peace were seen as expensive and corrupting because they afforded kings an opportunity to increase their web of corruption by stacking the officer corps with placemen. At his worst, an oppressive king or usurping demagogue could use the army to extinguish popular liberties. Country Whigs vigorously criticized attempts by the king and his servants to "buy off" Parliament with patronage, offices, and money, and to create a professional standing army.[15] The mere existence of a standing army "connoted to whig ideologues that luxury, corruption, power, and tyranny were to varying degrees threatening property, liberty, and life itself."[16] One author declared that "the only Ancient and true Strength of the Nation, the *Legal 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 *Prerogative*, by whom it hath its *idle living* and *Subsistence*."[17] In other words, the livelihood of the militia depended on the health and

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[12] Algernon Sidney, *Discourses Concerning Government*, vol. 1 (Edinburgh, G. Hamilton and J. Balfour, 1751), 280.
[13] The ideal republican militia in England and America was not universal. It was usually limited to all men who were eligible to vote and owned property. Gentlemen served as officers, freeholders and other middling sorts filled the ranks, and the destitute and stayed home.
[14] Andrew Fletcher, *Political Works*, John Robertson, ed. (Cambridge: Cambridge University Press, 1997), 21.
[15] Pocock, *Machiavellian Moment*, 406.
[16] James Kirby Martin, and Mark Edward Lender, *A Respectable Army: The Military Origins of the Republic: 1763-1789* (Arlington Height, Illinois: Harlan Davidson, Inc., 1982), 9.
[17] "A Letter from a Parliament Man to his Friend," quoted in *State Tracts: Being a Collection of Several Treatises Relating to the Government. Privately Printed in the Reign of K. Charles II* (London, n.p., 1689), 66.

freedom of the nation, while the livelihood of a standing army depended on the approval of the King.

Country Whigs supported protections of the people's right to use weapons. Because of a standing army's potential to weaken representative government, the right to bear arms—a right linked to citizenship and constitutional government—"was as important as the right to vote or sit in Parliament."[18] No limitation was "so essential to the liberties of the people, as that which placed the sword in the hands of the subject," claimed Andrew Fletcher, "for he that is armed, is always master of the purse of him that is unarmed." He concluded that "all governments are tyrannical, which have not in their constitution a sufficient security against the arbitrary power of the prince."[19] Establishing a good militia and immunizing it from governmental tampering were primary aims of the Whigs.

John Trenchard and Thomas Gordon, authors of *Cato's Letters*, an influential series of essays attacking the Court Party in the early eighteenth century, also attacked standing armies and linked the citizen militia to republican virtue. For them, the experience of "Liberty" itself was the only cause of "Military Virtue" because "in free Countries, as People work for themselves, so they fight for themselves." Rome offered a lesson in degeneration, because after Augustus Caesar abolished free government (with a professional army of destitute Romans, no less!) "the Power of the Empire continually decayed." Trenchard and Gordon concluded that it "is therefore Government alone that makes Men cowardly or brave," and no army of paid slaves or mercenaries could defeat a free people in arms.[20] In a pamphlet attacking standing armies, Trenchard and Walter Moyle also appealed to history. Arguing that all free governments avoided them, a standing army "must in the hands of an ill prince . . . infallibly destroy our constitution." "Knowing that the sword and sovereignty always march hand in hand," former free governments refused to enlist professional soldiers, but rather

> Trained their own Citizens . . . perpetually in Arms, and their whole Commonwealth by this means became so many several formed Militias: a general Exercise of the best of their People in the use of Arms, was the only Bulwark of their Liberties . . . the People being secured thereby as well against the Domestick

[18] H.T. Dickinson, *Liberty and Property: Political Ideology in Eighteenth-Century Britain* (New York: Holmes and Meier, 1977), 106.
[19] Fletcher, *Political Works*, 3-4.
[20] Trenchard and Gordon, *Cato's Letters*, No. 65, quoted in Jacobson, ed., *The English Libertarian Heritage* (Indianapolis: The Bobbs-Merrill Company, Inc., 1965), 152-159.

> Affronts of any of their own Citizens, as against the Foreign Invasions of ambitious and unruly Neighbors. [21]

Trenchard and Moyle, like Harrington and republican writers, valued the armed citizen's militia most especially as a protection of the liberty of the people against abuse by homegrown oppressors, though it also served to protect against foreign threats.

Although the actual performance of the militia did not live up to the ideal, the myth of the invincible yeoman continued to exert enormous influence. Throughout the seventeenth century, English citizen armies never menaced their opponents.[22] Militia units also performed poorly in the eighteenth century wars. It took British regulars to defeat the French during the Seven Year's War, and George Washington found it necessary to form a regular army to defeat the British. However, despite the fact that the superiority of the militia was almost totally a myth, the belief—as an ideology—carried great weight, especially with Americans. Though many Americans grudgingly conceded that a militia could not overmatch a professional army, it role as a protector of free government was never forfeited. The heroes of Lexington and Concord, the minutemen, were still largely seen as invincible at the close of the War of Independence. Few disagreed with James Burgh's opinion that "a free people ought to have no army, but a militia, or the whole people."[23] This legacy of republicanism shaped the constitutional discourse that led to the Second Amendment. In fact, as James Hutson made clear, the closest ideological counterpart to the Federalists was the English "Court" party, while the Antifederalist thought most clearly resembled that of the English "Country" Whigs.[24]

Transcontinental differences showed themselves both in the actual composition of the militia and in popular conceptions regarding the virtue of American compared to Europeans. Throughout the eighteenth century the English militia remained fairly limited, but in America it became more inclusive because "the ownership of land and arms was more widespread" and because Republican ideas, flamed in the fires of the revolution, took much deeper hold in the

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[21] John Trenchard and Thomas Moyle, *An Argument Shewing, That a Standing Army Is Inconsistent with a Free Government, and Absolutely Destructive to the Constitution of the English Monarchy* (London, n.p., 1697), 6-7. On page 12, they asserted similarly that "a Man that hath a Sword by his side, shall have least occasion to make use of it."

[22] Morgan, *Inventing the People*, 160-61.

[23] James Burgh, *Political Disquisitions, or An ENQUIRY into Public Errors, Defects, and Abuses*, vol. 3 (Philadelphia, Robert Bell and William Woodhouse, 1775), 221.

[24] James Hutson, "Country, Court, and Constitution: Antifederalism and the Historians," *William and Mary Quarterly* 38, No. 3 (July 1981): 356.

United States.[25] As states extended voting rights the militia also expanded. Contemporaries articulated the perception that American men were stronger, hardier, and less corrupted than their European counterparts. According to Robert E. Shalhope, the view that Americans "were a virtuous republican people—particularly when contrasted with decadent European populations—became a common theme in pamphlet literature." American writers "perceived a vital relationship between vigorous republican husbandmen and the possession of arms."[26] Richard Price stated 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."[27] The classical-republican conception of arms bearing as a function of citizenship gained new strength in the American colonies, especially since "opposition thought," while relatively ineffective in England, "was devoured by the colonists."[28]

The Right to Bear Arms in the English Bill of Rights

As one of the few written portions of Britain's largely unwritten constitution, the Bill of Rights was a milestone in its political development. After the Glorious Revolution Parliament forced the new royal couple, William III and Mary II, to accept its supremacy and severe limitations on royal prerogative. These constitutional changes were codified in the Bill of Rights, one section of which protected the right to "have arms." This development served as a precursor to the Second Amendment.

Joyce Lee Malcolm examined the evolution of the right to bear arms in detail in her influential work *To Keep and Bear Arms: The Origin of an Anglo-American Right*. The duty of English citizens to keep and bear arms—so that they could overpower criminals and defend the nation—had existed since the middle ages under lawful and often significant regulation. Malcolm pointed out that the Bill of Rights turned the obligation into a "right." This change was

[25] Morgan, *Inventing the People*, 159.
[26] Shalhope, "The Ideological Origins of the Second Amendment," *The Journal of American History* 69, No. 3 (1982): 605-606.
[27] Richard Price, *Observations on the Importance of the American Revolution, and the Means of Making It a Benefit to the World* (London, 1784), 16, quoted in Robert E. Shalhope, "Ideological Origins of the Second Amendment:" 605.
[28] He continued: "There seems never to have been a time after the Hanoverian succession when these writings were not central to American political expression or absent from polemical politics." Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, Massachusetts: Harvard University Press, 1992), 43. He continued: "There seems never to have been a time after the Hanoverian succession when these writings were not central to American political expression or absent from polemical politics." Ibid.

triggered in part by the draconian 1671 law that, for the first time, abolished the right of most Englishmen to have a firearm. Disarmament had become common in England since the Civil War era, with the "enemies" of the government at the mercy of the rulers. The militia itself became the favored instrument of taking arms away from supposed dissidents. However, Malcolm argued, firearm ownership increased during the interregnum, as did the people's attachment to the militia and the importance of having arms. During the 1660s and beyond, however, the landed aristocrats sided with the king to renew enforcement of the strict game laws, which prevented ordinary citizens from owning hunting weapons. The 1671 game law was especially notorious because it made fire arms *ipso facto* illegal, rather than, as previously, subject to seizure if used for poaching. It also dramatically raised the wealth requirement for hunting game and effectively disarmed over ninety percent of the population. Malcolm argued that while control of poaching was a factor behind the making of the law, its severity suggests another motive: curbing "lower class violence" and unrest.[29]

After the removal of James II, with fears of absolutist monarchy fresh in their minds, the convention of 1689 wanted to establish the new government on a firmer foundation. The establishment of William and Mary on the throne was conditioned on their acceptance of a Declaration of Rights that listed thirteen "true, ancient, and indubitable" liberties of the people of England. One of the rights prohibited a standing army during peacetime. Another, Article 7, declared: "That the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions and as allowed by Law."[30] Understanding the intent and meaning of this provision is important for an understanding of the Second Amendment.

The limited record of the debate suggests that the convention intended Article 7 to prevent the arbitrary disarmament of the previous half century. Convention members expressed outrage at the disarmament of lawful subjects under the aegis of the Militia Act of 1662. The "political use of disarmament to enhance the Crown and its standing army," rather than the severe game laws, Malcolm claimed, produced the grievances addressed in Article 7.[31] Among Sir John Maynard's grievances against the king was that "an Act of Parliament was made to disarm all Englishmen." Sir Richard Temple complained of the king's "power to disarm all

[29] Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* (Cambridge: Massachusetts: Harvard University Press, 1994), 75.
[30] Ibid., 119.
[31] Ibid., 116.

England." Another member pointed out that there was "no safety but the consent of the nation—The constitution being limited, there is a good foundation for defensive arms—It has given us right to demand full and ample security." Another member urged the importance of deciding "whether the power over [the militia was] in the crown or people?"[32] The convention decisively answered that question by proclaiming the right of English Protestants to "have arms," thereby preventing arbitrary disarmament.

As the Bill of Rights got revised over the course of the debates a crucial transformation of the text took place. The wording "*may* provide and keep arms" replaced "*should* provide and keep arms," Malcom noted, changing the provision and keeping of arms from a "positive duty" to a "legal right." Whereas English citizens long had been required, at various times, to provide arms for the public defense, this formulation made such an activity a right that could not be taken away by the king. However, the concluding phrases of the final version—"suitable to their Conditions and as allowed by Law"—ambiguously qualified the right. Backed by the House of Lords and passed by the House of Commons without disagreement, this alteration benefited the Lords because it indicated that the restrictions on firearm ownership in the game laws could remain constitutional. On the other hand, because the convention was not a Parliament, it could not enact legislation. Yet Malcolm insisted that the convention understood that "future legislation would eliminate the discrepancy" between laws and rights. In the end, she argued, Article 7 "came down squarely, and exclusively, in favour of an individual right to have arms for self-defence," and "though the right could be circumscribed, it had been affirmed."[33]

Despite the Bill of Right's failure unambiguously to protect the right to have arms, Malcolm wrote that within a few decades the English viewed Article 7 as an individual right for all Protestants. She noted that after the accession of William and Mary, Parliament tried—but failed—to bring the militia laws into line with the new right. However, it enacted a new game law that neglected to identify firearms as proscribed items, thus legalizing them.[34] Furthermore, English judges soon interpreted Article 7 as the right of all Protestant citizens to have private arms. Consequently, "the Whig view that armed citizens were a necessary check on tyranny

[32] Phillip Yorke, ed., *Miscellaneous State Papers from 1501 to 1726*, vol. 2 (London: W. Stahan and T. Cadell, 1778), 407, 416, 410.
[33] Malcolm, *To Keep and Bear Arms*, 117-18 (emphasis added); 120-21.
[34] Malcolm noted that under the legal interpretation of the day, omitting a previously-listed item in an updated law indicated a desire to remove the item from proscription. Malcolm, *To Keep and Bear Arms*, 126.

became orthodox opinion."[35] Malcolm concluded that Article 7 in the English Bill of Rights was the foundation of the American Second Amendment. Early commentaries on the U.S. Bill of Rights support Malcolm's conclusion.[36]

The ideology of the Whig Country Party held that for the sake of the nation's liberty the government should not infringe on the right of its citizens to keep and bear arms. This view was codified in the English Bill of Rights, an indisputable influence on American constitutional thought. When the American founders created and debated the Constitution, they brought with them a set of assumptions regarding standing armies, the role of the militia, and the importance of the armed citizen. While these assumptions took new form in the changed American situation, the core principles remained the same: standing armies were dangerous to liberty; a well armed and disciplined citizen's militia was essential to the preservation of constitutional liberty; and all citizens had a right possess and use arms to defend the nation. The founders grafted the two latter principles into the text of the Second Amendment, a process to which we now turn.

[35] Ibid., 129-30.
[36] See the section "Early Commentary on the Second Amendment" on pages 99-106.

CHAPTER 2

MILITARY ISSUES IN THE RATIFICATION OF THE CONSTITUTION

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Although the Articles of Confederation lasted ten years and survived the War of Independence, a number of problems plagued its operation and prompted many Americans to seek a revision. In the summer of 1787, fifty-five men from twelve of the thirteen American colonies met in Philadelphia, charged with revising the Articles of Confederation. In this they failed, far exceeding their mandate, because the resulting document bore almost no relation to its parent. But during that long, hot summer, a document was created that stands as the world's oldest national Constitution still in effect.[1] Before this could become true, however, supporters of the new government had to surmount a number of obstacles that threatened to derail it before it could even be tried. The Convention's radical new proposed Constitution polarized the American people, initiating fierce deliberation over its relative merits. As a result, a vibrant debate about government and constitutionalism emerged during the creation and ratification of the Constitution in 1787-1788. This debate is the crucial context for understanding the Second Amendment. This chapter explores the debate over the role of permanent, professional armies ("standing armies" in the parlance of the time) and the militia during the Constitutional Convention and the ratification debates. By studying the views of both supporters and opponents of the Constitution, it will shed light on the context—and ultimately the meaning—of the Second Amendment.

The Constitutional Convention Debates over Military Issues

"[Congress shall have the 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, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress." –Militia Clauses of the U.S. Constitution—Article 1, Section 8, Clauses 15-16

The words above, which sparked the debate leading to the Second Amendment, were forged in the Constitutional Convention during the summer of 1787. Led by nationalist-minded men who desired to radically overhaul the Articles of Confederation, the Convention proposed a much stronger national government than existed under the Articles of Confederation. However,

[1] Massachusetts' 1780 Constitution is the oldest operating constitution.

the militia proposals sparked significant opposition. Among other issues, the place of professional armies and citizen's militias took up a substantial amount of time and ink. This section details this debate because it illuminates the basic positions later taken by Federalists and Antifederalists. It is therefore crucial to understanding the context of the Second Amendment and avoiding the shortsightedness of many contemporary scholars.

Shay's Rebellion greatly contributed to the push for a new Constitution by exposing the weakness of the Confederation Congress. After the War of Independence, Massachusetts sought to repay its war debt by raising taxes and strictly controlling expenditures. In 1786-87, frustrated by taxes, debt, and foreclosures, farmers in the western part of the state assembled to shut down local courts. Led by veterans of the War of Independence, especially Daniel Shays and Eli Parsons, the so-called "Regulators" invoked the natural right of revolution to justify their actions. The uprising shocked many citizens of Massachusetts, known as "Friends of Order," who argued that in a republican government the people had no right to resist constitutional laws. The impasse forced Governor James Bowdoin to call out the state's militia to disperse the Regulators. To his chagrin, most of the militiamen either refused to march against the Regulators or actually joined forces with them, while the Continental Congress offered scant help to the Massachusetts government. Bowdoin eventually determined to raise an army funded by wealthy Bostonian businessmen. This army cornered and defeated the Regulators before they were able to seize the federal arsenal at Springfield. The incident prompted many Americans to doubt the ability of the Confederation Congress even to maintain the integrity of the union and quell unrest in the states, much less defend the nation from external attacks.

In the wake of Shay's Rebellion, the subject of military power drew considerable attention at the Convention. Two distinct positions emerged regarding standing armies and the militia: nationalist and localist.[2] Eager to infuse vigor into the new nation, nationalists, led by James Madison, Alexander Hamilton, and Charles Pinckney, advocated measures to strengthen national control of the defense system at the expense of state power. While most delegates were not prepared to go so far as Hamilton, who proposed early on that Congress have "sole and exclusive" jurisdiction over the entire militia, on August 6 a committee proposed that Congress have the authority: "To call forth the aid of the militia, in order to execute the laws of the Union,

[2] Nationalists later became known as "Federalists," while localists were termed "Antifederalists."

enforce treaties, suppress insurrection, and repel invasions."[3] This grant of power was far from total, but Congress still could control the militia temporarily to repel internal and external enemies. Furthermore, unlike the Articles, the proposed Constitution gave Congress the authority to raise and support armies without the sanction or cooperation of the states. The American experience under the Articles had convinced nationalist delegates that the new government must be able to enforce its own laws with its own military force, or else suffer the same fate. Localists, especially Oliver Ellsworth and Elbridge Gerry, argued for minimal national oversight of the militia and severe restrictions on standing armies.

On August 18, the Convention engaged in an extended debate over standing armies. George Mason officially proposed that Congress be given "a power to regulate the militia" because the states "will never concur in any one system." He wanted to make the militia better disciplined so there would be "no standing army in time of peace."[4] The ensuing debate delineated the two contrasting positions. Gerry objected that "there was no check [in the Constitution] against standing armies in time of peace." He considered an army "dangerous in time of peace" and "could never consent to a power to keep up an indefinite number," later warning that "if there be no restriction, a few states may establish a military government." Gerry, along with Luther Martin, unsuccessfully proposed to restrict Congress to raising no more than two or three thousand troops. Adverting to the core of the classical republican tradition, localists denounced standing armies as a potential source of oppression and corruption.[5] Nationalists feared that obscure threats to liberty would inhibit the nation's military preparedness. General Pinckney asked "whether no troops were ever to be raised until an attack should be made on us?" while Jonathan Dayton argued that "preparations for war are generally made in time of peace," and may "become unavoidable." Nationalists desired to give the national government powers necessary to meet *any* unforeseen emergency, however unlikely. For them, a strong government, backed by a strong army, was needed to enforce the laws and maintain the integrity of the nation.

[3] James Madison, *Notes of Debates in the Federal Convention of 1787 Reported by James Madison*, ed. Adrienne Koch (W.W. Norton, 1987), 139; ibid., 389. Any quotations from Madison's *Notes of Debates in the Federal Convention of 1787* are actually shorthand summaries that reflect Madison's perception of the speaker's actual words.
[4] Madison, *Notes*, 478.
[5] Madison, *Notes*, 481-82.

Lastly, nationalists argued that representative government negated the likelihood of Congress misusing the army.[6]

On August 18 and again on August 23, nationalists and localists debated the regulation of the militia. All sides agreed with Mason that "uniformity" was "necessary" for the proper operation of the militia. However, localists mounted a challenge to the nationalists' alleged consolidation of military power in the national government. Ellsworth argued that "the whole authority over the militia ought by no means to be taken away from the States," whose importance would "pine away to nothing after such a sacrifice of power." Localists objected to national regulation for several reasons. First, the national government would not be able to establish itself all across the country or adjust to local circumstances. Localists wanted to keep almost all power over the militia within the states; otherwise an overbearing administration would be necessary to effectively marshal the resources of a nation as large as the United States. Second, in Roger Sherman's words, "the States might want their Militia for defense [against] invasions and insurrections," and enforcing their own laws. Localists argued for concurrent national-state jurisdiction over the militia.[7] Rather than allowing Congress to "discipline" the militia (a phrase that could be potentially abused), localists believed that Congress should have authority merely "to establish an uniformity of arms, exercise & organization for the Militia, and to provide for the Government of them when called into the service of the U. States." Third, localists believed that liberty depended on the government being close and responsive to the people. They questioned whether "liberty will be as safe in the hands of eighty or a hundred men taken from the whole continent, as in the hands of two or three hundred men taken from a single state." Only if the representatives truly shared the feelings of the people would liberty be safe, a requirement that localists found lacking in the Constitution. Lastly, localists doubted that the militia would be adequately maintained if governed by the national government.[8]

Two "soft" localists, George Mason and John Dickinson, supported a compromise position. They proposed a system of "rotation" by which Congress would regulate only part of the militia at a time. Rotation would ensure that the entire militia remained disciplined, but might be more politically palatable because it would leave the bulk of the militia with the states, and because Congress would not control any of the militia permanently. Rotation failed under the

[6] Ibid., 482.
[7] Madison, *Notes*, 483-85.
[8] Madison, *Notes*, 514-15.

opposition of both nationalists and steadfast localists, such as Ellsworth, who believed a select militia was "impracticable" and, if enacted, "would be followed by a ruinous declension of the great body of the Militia."[9]

Nationalist delegates consistently maintained that the national government should control the entire militia because it was responsible for national defense. They rejected rotation because regulation of the militia "did not seem . . . to be divisible between two distinct authorities." Joint jurisdiction was "an incurable evil" and national control was necessary because "the states would not be separately impressed with the general situation, nor have the due confidence in the concurrent exertions of each other." To nationalists, increasing the powers of the national government mattered little, because the United States' representative and republican political institutions would ensure that both state and national governments remained committed to the people's welfare. Furthermore, they believed that power over the militia "could not be abused."[10] Edmund Randolph expressed astonishment at the localist suggestion that "the Militia could be brought into the field and made to commit suicide on itself. This is a power that cannot from its nature be abused, unless indeed the whole mass should be corrupted." Invoking the republican tradition to counter the localists own arguments, nationalists asserted that because the militia was composed of all citizens, it could not be used to destroy liberty.[11] Finally, they argued, reserving the appointment of militia officers to the states would prevent its misuse by Congress.

Nationalists bolstered their position by turning the localist advocacy for a strong militia against them. Although some nationalists, like Pinckney, possessed "a scanty faith in the militia," the typical nationalist position, voiced by Madison, argued that the "primary object" of the militia clauses was "to secure and effectual discipline of the militia," not to destroy it. This could be better done, they argued, by a national authority.[12] Nationalists also admitted that "armies in time of peace are allowed on all hands to be an evil," although necessary to win wars.[13] Thus, since "the greatest danger to liberty is from large standing armies, it is best to prevent them, by an effectual provision for a good militia."[14] George Washington's "Circular to the States," although penned well prior to the convention, also encapsulated this aspect of the nationalist

[9] Madison, *Notes*, 483-85. Ellsworth reiterated that universal regulation could not account for local circumstances.
[10] Ibid., at 484.
[11] Ibid., at 484,
[12] Madison, *Notes*, 484.
[13] Ibid., 639.
[14] Ibid., 516.

position. Washington supported putting the militia "upon a regular and respectable footing." Declaring the militia to be "the Palladium [safeguard] of our security, and the first effectual resort in the case of hostility," he urged that the "formation and discipline" of the militia be "absolutely uniform," as well as the types of weapons and ammunition used.[15] National oversight or governance would be required to establish uniform discipline and organization. However, Washington viewed such oversight as a way to strengthen the militia, not abolish it. During the ratification debates this stance became the typical Federalist position.

Records from August 23 reveal several clues to the nationalists' interpretation of the militia clauses. When Sherman moved to remove the phrase giving the states the "authority of training the militia according to the discipline" of Congress, Oliver Ellsworth objected, remarking that "the term discipline was of vast extent and might be so expounded as to include all power on the subject." In other words, Congress might try to prevent the states from having any active role in governing the militia by preventing them from training it. This statement sparked debate over the exact meaning of the clause's terms. Rufus King, a member of the committee that drafted the specific language, explained that the committee intended "organizing" to mean "proportioning the officers & men," "arming" to mean "specifying the kind size & caliber of arms," and "disciplining" to mean "prescribing the manual exercising evolutions &c." This was a very limited interpretation of the language, which gave Congress little more than general oversight of the militia that was not in actual service. Madison objected that according to King's explanation Congress could not supply arms itself or discipline noncompliant militia members. King then acknowledged that Congress could "regulate the modes of furnishing" the weapons—either by the militia members, the state governments, or the national government—and had full power to impose punishments for disobedience. This explanation gave Congress's powers teeth but still left the states with a crucial role in the militia system.[16]

After the Convention had completed its work, the proposed Constitution was sent to the states for ratification. Per the requirements outlined in the new document itself, nine of the thirteen states needed to sign it before it could replace the Articles. This was much easier than the unanimous consent required by the Articles, but ratification was by no means assured. Nearly all Americans believed in the importance of certain political ideas: liberty, republican government

[15] George Washington, "Circular to the States," in Sheehan and McDowell, *Friends*, 20.
[16] Madison, *Notes*, 512-13.

based on consent, limited government, written constitutions, and human sinfulness.[17] Still, many Americans balked at taking such a radical step towards centralization, and organized opposition, the so-called Antifederalists, appeared in nearly every state. Understanding the Antifederalist challenge to the Constitution, especially on the issues of federalism and military power, is a prerequisite for understanding the debate over the Second Amendment, which was designed primarily to alleviate their concerns.

Antifederalists on Republicanism, Representation, and the Rich

The next several sections examine the Antifederalists' objections to the Constitution in detail through the writings of prominent historians and the Antifederalists themselves. The diversity of Antifederal critiques bewildered Federalists, while Antifederalists, for their part, were "actually somewhat shocked" by their many commonalities.[18] Still, historians typically agree that Antifederalists shared several common opinions.[19] These included a belief that localism and small, homogenous republics are necessary for good government, that representative bodies should mirror the people at large, and that the new Constitution did not provide for adequate representation and so would foster an aristocracy. They also held that the states should exist as definitive elements in the new federal system, that the Constitution should have a bill of rights to protect the people's freedom, and that standing armies and federalized militias posed a threat to the liberty of the people and states.

Antifederalists accepted the conventional wisdom of their day that republics could exist only within small geographical boundaries. Thus, the proper system of union for the American states was a confederated republic. "Centinel" said, with confidence, "It is the opinion of the greatest writers, that a very extensive country cannot be governed on democratical principles, on any other plan, than a confederation of a number of small republics."[20] "Agrippa" believed a large republic "will degenerate to a despotism . . . the very great empires have always been

[17] Cecelia M. Kenyon, ed., *The Antifederalists* (New York: Bobbs-Merrill & Co., 1966), xxviii-xxix.
[18] Saul Cornell, *The Other Founders: Anti-Federalism and the Dissenting Tradition in America, 1788-1828* (Chapel Hill, N.C.: University of North Carolina Press, 1999), 27.
[19] Even Saul Cornell, who saw the most diversity among Antifederalists, cited nine commonalities and said that "the overall logic of the Anti-Federalist attack remained fairly consistent for the duration of ratification." Ibid., 31.
[20] Centinel, Letter I, in Storing, *Anti-Federalist*, 18. The Pennsylvania Minority used almost identical language: "The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to their Constituents," in Storing, *Anti-Federalist* (hereafter "Dissent of the Minority"), 209. Nearly all of the published materials during ratification were published under pseudonyms. Samuel Bryan, of Pennsylvania, authored all or nearly all of "Centinel's" articles, although Eleazer Oswald may have authored several.

despotick."[21] Natural differences between people of different regions and cultures could not be bridged equally. Rather, the strongest group or the group closest to the capital would "impose a crude uniform rule on American diversity."[22] Furthermore, a distant government would not possess the affection or trust of the people as well as one nearby. The importance of the small republic to Antifederalist thought was such that Cecelia Kenyon concluded: "the belief that republican government was possible only for a relatively small territory and a relatively small and homogenous population" stood at "the center of the theoretical expression of Antifederalist opposition to increased centralization of power in the national government."[23]

Antifederalists also argued that the people's representatives should closely resemble the people they represent. Whereas Federalists sought to enlarge the size of representative districts to ensure that only "natural aristocrats" won election, Antifederalists distrusted the ambition and power of the wealthy and wanted the "middling sorts" to play a part in governing the community.[24] The "Federal Farmer" described "full and equal representation" as

> that which possesses the same interests, feelings, and opinions, and views the people themselves would were they all assembled . . . [it] should be so regulated, that every order of men in the community . . . can have a share in it—in order to allow professional men, merchants, traders, farmers, mechanics, etc. to bring a just proportion of their best informed men respectively into the legislature.[25]

Pennsylvania Antifederalists declared representation under the Constitution to be inadequate because "the sense and views of 3 or 4 millions of people diffused over so extensive a territory comprising such various climates, products, habits, interests, and opinions, cannot be collected in so small a body."[26] Ordinary citizens must be able to communicate with their representatives and

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[21] Agrippa, Letter IV, in Storing, *Anti-Federalist*, 235. "Agrippa" was John Winthrop, the register of probate in Middlesex, Massachusetts.

[22] Herbert Storing, *What the Anti-Federalists Were For: The Political Thought of the Opponents of the Constitution* (Chicago: University of Chicago Press, 1981), 16.

[23] Kenyon, *Antifederalists*, xxxix.

[24] For the classic Federalist take on representation, see *The Federalist*, "No. 10," by James Madison. He argued that a large republic would secure the election of men "who possess the most attractive merit and the most diffusive and established characters," not tied to local prejudices, and with independent, unbiased minds. A large republic would also prevent a "faction" from having its way because no faction would extend over the entire country.

[25] Federal Farmer, Letter 2, 2.8.15, in Storing, *Anti-Federalist*, 39. For a similar argument, see Brutus, Letter IV, in Storing, *Anti-Federalist*, 127-28; also Federal Farmer, in Storing, *Anti-Federalist*, 41. The authorship of the Letters of the Federal Farmer is unknown. Although they are generally attributed to Richard Henry Lee, recent hisorians, such as Gordon Wood and Herbert Storing, have called this view into question. Melancton Smith has also been put forward as a possibility.

[26] "Dissent of the Minority," in Storing, *Anti-Federalist*, 214. See also Agrippa, Letter IV, in ibid., 235.

hold them responsible for their actions, and representatives must be familiar with local situations.[27]

In light of these principles, Antifederalists uniformly argued that the proposed House of Representatives had too few members—and was too removed from the people—to truly represent them. It would surely "consist of the lordly and high-minded; of men who will have no congenial feelings with the people," while the "other orders of society, such as farmers, traders, and mechanics, who all ought to have a competent number of their best informed men in the legislature, will be totally unrepresented."[28] They frequently recommended an increase in the number of representatives to give the middle classes more voting power and prevent the establishment of an aristocracy. Safeguards such as frequent elections and strict term limits also would ensure true representation of the people. Finally, they argued for strictly limiting the powers of the national government and preserving the states' power so they could resist any encroachments. Although they admitted the necessity of strengthening the national government, they mistrusted it and sought to contain it.

Because the congress would not represent the people, or be accountable to them, another common Antifederalist claim was that the Constitution would establish an aristocracy. Although Antifederalists varied in their denunciations of the Constitution as aristocratic, depending in part of their own social standing, most argued that the new government would be controlled by the wealthy. Centinal came close to inciting class resentment by declaring that the men behind the Constitution were "the wealthy and ambitious, who in every community think they have a right to lord it over their fellow creatures."[29] He continued in the same vein: "The proposed plan of government . . . is a most daring attempt to establish a despotic aristocracy among freemen, that the world has ever witnessed."[30] Antifederalists believed that the "aristorcratic character of organized civil society tends to become more severe and more selective over time, and the main efforts of constitution makers should be to directed to at least putting obstacles in its way."[31] They lamented that by creating a strong, unitary executive and an elite Senate, Federalists had

[27] See Centinel, Letter I, in Storing, *Anti-Federalist*, 16: "the form of government, which holds whose entrusted with power, in the greatest responsibility to their constituents, [is] the best calculated for freemen."
[28] "Dissent of the Minority," in Storing, *Anti-Federalist*, 219, 214.
[29] Centinal, Letter I, in Storing, *Anti-Federalist*, 14.
[30] Centinel, Letter I, in Storing, *Anti-Federalist*, 16. For a similar argument, see Federal Farmer, Letter I, in Storing, *Anti-Federalist*, 36.
[31] Storing, *What the Anti-Federalists Were For*, 48.

not only failed to establish any obstacles to aristocracy, but wanted to hasten its arrival. Further, many argued that the lack of a fair and efficient judicial system (especially trial by jury) would work to oppress the poor and middle classes by creating "infinite mazes, perplexities, and delays" that only the wealthy could afford to undergo.[32]

The Federalists also valued representative government and believed that the new national government would be just as representative as the states. James Wilson praised "the chain of communication between the people and those to whom they have committed the exercise of the powers of government" in the Constitution.[33] Noah Webster declared that "the only requisite to secure liberty, is to connect the interest of the *Governors* with that of the *governed* . . . suffer no power to exist independent of the people or their representatives . . . The only barrier against tyranny . . . is the election of *Legislators* by the yeomanry."[34] Because the people were represented by the House of Representatives, no law could pass without their consent. Roger Sherman argued that the people's "consent by representatives of their own chusing, who will participate with them in the public burthens and benefits . . . will be fully secured [in the Constitution] by a representation in proportion to their numbers in one branch of the legislature, and the rights of the particular states by their equal representation in the other branch."[35] Federalists believed the new government would operate in such a way that no harm would take place even if the people vested supreme power in the national government.

Antifederalists on Federalism and Consolidation

The issue of federalism became one of the crucial issues of the ratification debates and bore significantly on the issues surrounding the Second Amendment. Though almost wholly supportive of a union of the states, Antifederalists' convictions regarding localism, representation, and aristocracy led them to prefer a decentralized union in which the states retained most governmental powers. By radically and (in their view) dangerously extending the powers of the national government, the new Constitution threatened to weaken the states and

[32] Ibid., at 213, 216.
[33] James Wilson, Speech in the Pennsylvania Convention, November 24, 1787, in Sheehan and McDowell, *Friends*, 77.
[34] Essay by "America," *Daily Advertiser*, New York, December 31, 1787, in Sheehan and McDowell, *Friends*, 171.
[35] "A Citizen of New Haven," *New Haven Gazette*, December 25, 1788, in Sheehan and McDowell, *Friends*, 266-67. In another article, Sherman declared that "the only real security that you can have for all your important rights must be in the nature of your government. If you suffer any man to govern you who is not strongly interested in supporting your privileges, you will certainly lose them." "A Countryman," *New Haven Gazette*, November 22, 1787, in Sheehan and McDowell, *Friends*, 180-181.

create a consolidated national system. As a group, Antifederalists struggled to define what the correct version of federalism should be, but all agreed that the Convention's creation had gone too far. Herbert Storing noted that originally the Antifederalists favored a strict federal republic (what we might call today a league or confederation), in which the national government had no coercive power and relied on the states entirely for its operation. But even the Articles of Confederation did not meet that description fully, and all sides agreed that the Articles needed to be strengthened. Thus, they "followed the federalists into what we may call the 'new federalism' (i.e. a mixed national and federal system) and, despite early misgivings, became its strongest advocates."[36] They ended up charging the Federalists with abandoning federalism and advocating "consolidation" of all power toward the national government, which they predicted would establish a tyrannical government. By contrast, Antifederalists "continued to place their faith in a federal system in which the states would be the primary units of political organization and contain the bulk of political authority."[37]

Antifederalists wanted the national government to exist for limited and defined purposes that could not be accomplished by the states on their own. Furthermore, they wanted to limit the military and taxation powers of the national government to what was strictly necessary to accomplish its limited purposes. For example, the Federal Farmer favored a form of government that would "consolidate the states as to certain national objects, and leave them severally distinct independent republics, as to internal police generally."[38] This would leave the bulk of power with the states, including exclusive internal regulation and taxation, except for those objectives which the states could not accomplish on their own. In particular, Antifederalists argued, the power of taxation should remain mainly in the states, as taxation is the foundation of power, and national supremacy in taxation will lead to consolidation in other areas. "The State constitutions," said Melancton Smith, "should be the guardian of our domestic rights and interests; and should be both the support and the check of the federal government."[39]

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[36] Storing, *What the Anti-Federalists Were For*, 32-33.
[37] Saul Cornell, *The Other Founders: Anti-Federalism and the Dissenting Tradition in America, 1788-1828* (Chapel Hill, N.C., University of North Carolina Press, 1999), 11. He notes that plebeian Antifederalists' "radical localism actually threatened the power of state governments" and in some ways challenged a state-centered model of federalism (ibid., 12).
[38] Federal Farmer, Letter I, in Storing, *Anti-Federalist*, 38. For a similar argument, see Centinal, Letter 1, in ibid., 18.
[39] Melancton Smith, Speech on June 27, 1788, in Storing, *Anti-Federalist*, 352-55.

One of the Antifederalists' principle objections to the Constitution was that it would serve as a pretext for intrusion against the jurisdiction of the states, leading to centralization. Centinel said typically: "By [the Constitution] the all-prevailing power of taxation, and such extensive legislative and judicial powers are vested in the general government, as must, in their operation, necessarily absorb the state legislatures and judicatories."[40] "Brutus" objected that the supremacy clause would render the national government supreme within its areas of jurisdiction. To make matters worse, its jurisdiction would "extend to every case that is of the least importance," ruefully predicting that "the individual states must very soon be annihilated, except so far as they are barely necessary to the organization of the general government." Federalists strenuously argued that the Constitution would limit national power to certain enumerated objects, such as paying the public debt, providing for the common defense, and promoting the general welfare. Brutus countered that Congress members "are the sole judges of what is necessary to provide for the common defense, and they only are to determine what is for the general welfare; this power therefore is neither more nor less, than a power to lay and collect taxes, imposts, and excises, at their pleasure."[41] In short, "the broad grants of power, taken together with the 'supremacy' and the 'necessary and proper' clauses, amounted, the Anti-Federalists contended, to an unlimited grant of power to the general government to do whatever it might choose to do."[42] Consolidation, in the Antifederalists' minds, was practically guaranteed because they took seriously the traditional Whig axiom that rulers always grasped insatiably after power; in short, it "was inconceivable to them that men would be content to use less power than they were authorized to use."[43]

Antifederalists believed the national government's ability to tax under the new Constitution also worked to diminish state power. The unlimited power of taxation, they claimed, would dry up revenues needed for the state governments, because of either the limited ability of the people to endure taxation or simple congressional fiat. Given the supremacy of the national government, Centinal claimed that "the Congress may construe every purpose for which the state legislatures now lay taxes, to be for the *general welfare*, and thereby seize upon every object of

[40] Centinal, Letter I, in Storing, *Anti-Federalist*, 17.
[41] Brutus, Essay I, in Storing, Anti-Federalist, 109-111. The identity of "Brutus" is unknown but generally believed to be Robert Yates, a delegate to the New York ratifying convention.
[42] Storing, *What the Anti-Federalist Were For*, 28. See especially Centinal, Letter I, in Storing, *Anti-Federalist*, 17.
[43] Kenyon, *Antifederalists*, xlv.

revenue," leaving insufficient revenue for the states.[44] Antifederalists repeatedly warned that Congress would cancel or nullify state taxes on the ground that they prevented the collection of national taxes. In consequence, the state legislatures would, Brutus remarked, "find it impossible to raise monies to support their governments. Without money they must dwindle away, and, as before observed, their powers absorbed in that of the general government."[45] The Pennsylvania Minority cautioned that national taxes "may be so high as to render it impractical to levy further sums on the same articles," and the states would lose their ability to raise money altogether.[46]

In the judicial realm, Antifederalists often declared that the expansive jurisdiction of the national court would swallow up state courts. "The objects of jurisdiction [in Art. 3, Sec. 1] are so numerous," Centinel wrote, "and the shades of distinction between civil causes are oftentimes so slight, that it is more than probable that the state judicatories would be wholly superseded; for in contests about jurisdiction, the federal court, as the most powerful, would ever prevail."[47] Centinel also attacked the supremacy clause, which he stated put "the omnipotency of Congress over the state governments and judicatories out of all doubt."

Given the overwhelming advantages of the national government, Antifederalists denied that the states would be able to prevent consolidation or maintain their constitutional position. Patrick Henry contended that the Constitution "is inconsistent with the genius of republicanism: There will be no checks, no real balances, in this government."[48] Later he declared:

> To all the common purposes of Legislation it is a great consolidation of Government. You [the state governments] are not to have the right to legislate in any but trivial cases . . . what shall the States have to do? Take care of the poor—repair and make high-ways—erect bridges, and so on, and so on. Abolish the State Legislatures at once. What purposes should they be continued for?[49]

Melancton Smith noted the likelihood of conflict between the state and national governments and asked whether "the states in this contest stand any chance of success?" He urged his listeners to "consider the superior advantages of the general government: Consider their extensive, exclusive revenues; the vast sums of money they can command, and the means they thereby possess of

[44] Centinal, Letter I, in Storing, *Anti-Federalist*, 17.
[45] Brutus, Letter I, in Storing, *Anti-Federalist*, 111-12.
[46] "Dissent of the Minority," in Storing, Anti-Federalist, 210.
[47] Centinal, Letter I, in Storing, *Anti-Federalist*, 17.
[48] Patrick Henry, speech on June 5, 1788, in Storing, *Anti-Federalist*, 305.
[49] Patrick Henry, Speech on June 9, 1788, in Storing, *Anti-Federalist*, 324.

supporting a powerful standing force. The States, on the contrary, will not have the command of a shilling, or a soldier."[50]

In short, the Antifederalists defended a peculiar version of federalism which would establish a strong union but also ensure that the national government remained limited and state-based. Because representation was inadequate, they did not trust the national government's incentive to promote the common good or pursue measures beneficial to the entire nation. For them, the Constitution's substantial and ambiguous grant of power presented the possibility of the national government expanding its power far beyond its current limits. This process would almost certainly terminate in the accumulation of all power in the national government and the deterioration or extinction of the states. Consequently, they argued that fundamental powers—especially taxation and (as we shall see) military power—should remain with the states. They sought to maintain an equilibrium in which the general government could effectively deal with national concern, but where the states could also exist alone if necessary. Protecting this equilibrium, Herbert Storing noted, was "the true reason . . . for the Anti-Federalist commitment to the system of requisitions, to state military power, and to constitutional checks by the states on the general government."[51]

The Debate over Standing Armies and Militias

Concerns about centralization and the federal balance of power were the crucial context of the debate over standing armies and the militia. Although the organization of military power provoked relatively little discussion during the convention, it became a major issue in the ratification debates. Was a permanent army dangerous? Did the United States need a militia? Throughout the running debate Antifederalists consistently held to traditional Whig republican opinions: standing armies are dangerous and unnecessary instruments of tyranny, while the militia is the guarantor of popular liberty and should be the primary defense of a free nation. Federalists in contrast underscored the necessity of having a professional fighting force but found common ground with opponents by publically praising the militia and declaring that the Constitution would strengthen it. They also attempted to refute or downplay Antifederalist apprehensions by arguing that America's democratic character and explicit constitutional checks would protect the integrity of popular government.

[50] Melancton Smith, Speech on June 27, 1788, in Storing, *Anti-Federalist*, 353.
[51] Storing, *What the Anti-Federalists Were For*, 36.

Antifederalists repeatedly criticized standing armies as dangerous to liberty. Specifically, they might enforce unjust laws on an unwilling populace, "however grievous or improper they may be."[52] At best standing armies enabled a false view of the role of government that privileged the glory of war over the execution of justice. Brutus unfavorably compared a commonplace republican axiom—that government "was designed to save men[']s lives, not destroy them"—with the bloody history of European monarchs, who slaughtered thousands of innocent people to revenge private quarrels.[53] At their worst, standing armies had been used "very often to the total destruction of the government" by enslaving the people under the rule of military dictators such as Julius Caesar. To give the government power to make standing armies during peacetime, Brutus concluded, "would be in the highest degree dangerous to the liberty and happiness of the community" because "no government should be empowered to do that which if done, would tend to destroy public liberty."[54] In another essay he praised the high moral character of leaders such as George Washington, but asked: "are we to expect, that this will always be the case? Are we so much better that the people of other ages and of other countries, that the same allurements of power and greatness . . . will have no influence upon men in our country?"[55]

Antifederalists often scorned the morality and loyalty of professional soldiers. Brutus disparaged standing armies as "a body of men distinct from the body of the people" and accustomed to "blind obedience" to their officers.[56] The Impartial Examiner likewise declared that standing armies are "dangerous to a free country." The soldiers, "composed of the dregs of the people," do not fit into society because they are "exempt from the common occupations of social life." This situation, combined with their habit of submission to officers, "renders them the fit instruments of tyranny and oppression."[57] Such as force might easily be corrupted by the charisma or power of a would-be tyrant and used against the people.

Federalists, by contrast, urged the necessity of having an army to ensure robust national defense and to prevent civil war or insurrection. James Wilson argued that all nations have

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[52] Centinel, Letter I, in Storing, *Anti-Federalist*, 17.
[53] Brutus, Essay VII, in Storing, *Anti-Federalist*, 146.
[54] Brutus, Essay VIII, in Storing, *Anti-Federalist*, 151-52.
[55] Brutus, Essay X, in Storing, *Anti-Federalist*, 159. Centinel also denounced standing armies for their tendency to beget tyrants. See Centinel, Letter 2, in Document Library, http://teachingamericanhistory.org/library/index.asp?document=1939, accessed December 30, 2010.
[56] Brutus, Essay VIII, in Storing, *Anti-Federalist*, 152.
[57] Impartial Examiner, Essay 1, in Storing, *Anti-Federalist*, 284-85.

"found it necessary" to maintain a standing army during peace to "maintain the appearance of strength." Also, if a standing army was not allowed, the United States must declare war before raising any troops. Thus losing the element of secrecy and surprise, the opponent would be "informed of your intention, not only before you are equipped for an attack, but even before you are fortified for a defense."[58] Noah Webster remarked that the "states in their separate capacity, cannot provide for the *common* defence," thus leaving "no room to controvert [i.e. contradict] the propriety of constituting a power over the whole United States, adequate to these general purposes."[59] Existing fears must be cast aside, said the Federalists, in the name of self-preservation, without which the nation would fall apart.

Federalists countered objections to a standing army by arguing that this power was not revolutionary even in America. The Confederation government was authorized to raise a standing army and in fact had already done so. Wilson argued that the Confederation already had a standing army stationed along the banks of the Ohio River, thus proving that they are not necessarily incompatible with free government.[60] Timothy Pickering maintained that "Whilst we have frontiers to defend, and arsenals to secure, we must continue to have a standing army."[61] If a standing army was harmless under the Articles of Confederation, they implied, it also would be harmless under the Constitution.

Antifederalists made light of this claim. Centinel specifically rejected the bearing of Wilson's reference to the Confederation army, because that force was tiny. Also, the Articles prohibited the national government from raising its own army with its own money. Thus, the states possessed "a sufficient check on the *present* Congress" because they could withhold "the supplies necessary to keep these armies on foot."[62] Brutus wrote that the powers of Congress under the Articles and proposed Constitution "bear no analogy to each other." The Articles specifically prohibited peacetime standing armies in the states. Further, "the present Congress are restrained from an undue exercise of this power" by their dependence on the cooperation of the state legislatures to raise forces, as well as the necessity of gaining the approval of nine of the

[58] James Wilson, "State House Speech," in Sheehan and McDowell, *Friends*, 104-05.
[59] A Citizen of America, "An Examination into the Leading Principles of the Federal Constitution," in Sheehan and McDowell, *Friends*, 393.
[60] James Wilson, "State House Speech," in Sheehan and McDowell, *Friends*, 104-05.
[61] Timothy Pickering, Letter to Charles Tillinghast, December 24, 1787, in Bailyn, *Debate*, 302.
[62] Centinel, Letter II, in Document Library, http://teachingamericanhistory.org/library/index.asp?document=1939, accessed December 30, 2010.

thirteen states to pass any bill. Thus, absolute military power did not reside in either the state or national governments.[63] Responding to the claim that small garrisons would always be needed to repel sudden attacks on the frontier, Brutus argued that this concession did not justify the unlimited creation of large armies.[64] Likewise, A Democratic Federalist asserted that "we are never at peace with those inhuman butchers of their species," the Indian tribes, and noted that the troops on the Ohio were "sent for the express purpose of repelling the invasion of the savages." Thus, raising a force to fight the Indians was not equivalent to maintaining an army during peacetime.[65]

Federalists believed that the Constitution contained several checks that would prevent the misuse of a standing army. Dealing specifically with the idea that Congress would "conspire to subvert the constitution," A Foreign Spectator noted that the Constitution forbade any expenditure of money without a lawful appropriation and regular record, ensuring that Congress could not raise an army "without a pretence of war." Nor could any such appropriations be made for longer than two years, giving the representatives of the people numerous opportunities to vote for or against an army. But even after a long war the soldiers surely would not turn against their own countrymen because they would be "natives of the country, allied by friendship and blood to the other citizens, bred in principles of republican liberty . . . in all probability a great part of this army would take part with the nation."[66] Noah Webster cited the basic abhorrence of the American people towards standing armies as an effective safeguard:

> It is said there is no provision made in the new constitution against a standing army in time of peace. Why do not people object that no provision is made . . . against making the Alcoran the rule of faith and practice, instead of the Bible? . . . *no such provision is necessary* . . . the principles and habits, as well as the power of the Americans are directly opposed to standing armies; and there is as little necessity to guard against them by positive constitutions, as to prohibit the establishment of the Mahometan religion.[67]

Still, Webster echoed a common Federalist defense by noting that "the constitution provides for our safety; and while it gives Congress power to raise armies, it declares that no appropriation of

[63] Brutus, Essay IX, in Storing, *Anti-Federalist*, 156-57.
[64] Brutus, Essay X, in Storing, *Anti-Federalist*, 159-60.
[65] A Democratic Federalist, *Pennsylvania Herald*, October 17, 1787, in Bailyn, *Debate*, 75.
[66] A Foreign Spectator, XXV, in Sheehan and McDowell, *Friends*, 50-51.
[67] A Citizen of America, "An Examination in the Leading Principles of the Federal Constitution," in Sheehan and McDowell, *Friends*, 393-94.

money to their support shall be for a longer term than two years."[68] For Federalists, the strongest check on standing armies was the democratic nature of the American government.

While denouncing standing armies, Antifederalists universally praised the militia as the natural defense of a free state. Because it was composed of a cross-section of the entire population, rather than professional soldiers, it would never contravene the public good or destroy the rights of the citizens. The Impartial Examiner believed a "well regulated militia, duly trained to discipline," would sufficiently defend against a sudden attack. Militias, which he declared "the surest means of protection, which a free people can have when not actually engaged in war," had two crucial advantages over standing armies. First, they possessed the same interests as the people at large (because they were taken from the people at large). Thus they could not be perverted to oppress the nation. Second, if all the citizens were trained to arms, the nation would never lack a force to carry on the struggle, even if one or two armies meet with defeat.[69] A Democratic Federalist, in response to James Wilson, declared simply: "Is not a well regulated militia sufficient for every purpose on internal defense? And which of you, my fellow citizens, is afraid of any invasion from foreign powers, that our brave militia would not be able immediately to repel?" Also, whereas James Wilson had declared that every nation possessed a standing army, he pointed to the example of Switzerland, which raised an army only during war, despite being surrounded by powerful and ambitious nations.[70]

Notwithstanding their defense of standing armies, Federalists accepted the need for a strong militia, albeit under national control. During the Convention debates Federalists often cast national control as a means to strengthen the militia and make it an indispensable component of the nation's defense system. They repeated this argument during ratification. James Madison argued that giving control of the militia to Congress would prevent the need for a standing army. During the Virginia ratification debates he said that "the only possible way to provide against standing armies, is, to make them unnecessary. The way to do this, is to organize and discipline our militia, so as to render them capable of defending the country against external invasions, and internal insurrections."[71] Alexander Hamilton, who had served in the continental army under George Washington, said much the same thing: "If standing armies are dangerous to liberty, an

[68] Ibid., at 394.
[69] Impartial Examiner, Essay I, in Storing, *Anti-Federalist*, 284-85.
[70] A Democratic Federalist, *Pennsylvania Herald*, October 17, 1787, in Bernard Bailyn, *Debate*, 75.
[71] James Madison, June 16, 1788, quoted in Bailyn, *Debate*, 698.

efficacious power over the militia in [Congress] ought . . . to take away the inducement and pretext to such unfriendly institutions . . . to render an army unnecessary will be a more certain method of preventing its existence than a thousand prohibitions on paper."[72] However, based on his own experiences during the Revolution, he doubted that the entire citizenry could be effectively trained as soldiers, stating that "little more can reasonably be aimed at with respect to the people at large than to have them properly armed and equipped," and to assemble once or twice a year. He recommended the training and "formation of a select corps of moderate size."[73]

Federalists were quick to declare that national direction would strengthen the militia. Timothy Pickering remarked that "as the militia of the different states may serve together, the great advantages of uniformity in organization, arms & discipline must be obvious to every man." National direction also would mean fewer delays caused by states being late to summon their militia.[74] Hamilton concurred: "It requires no skill in the science of war to discern that uniformity in the organization and discipline of the militia would be attended with the most beneficial effects . . . if a well-regulated militia be the most natural defense of a free country, it ought certainly to be under the regulation and at the disposal of that body which is constituted the guardian of the national security."[75] By framing the Constitution as a friend of the militia, rather than its foe, Federalists hoped to deflect criticism and demonstrate their commitment to free government and the popular militia.

Despite their numerous differences, both Federalists and Antifederalists expected the militia to be composed of all free adult male citizens. Though usually unconsciously assumed rather than explicitly declared, only a universal, indiscriminate militia would render a standing army unnecessary and harmless. The Impartial Examiner described the militia as a "band of soldiers, whose interests are uniformly the same with those of the whole community, and in whose safety they see everything that is dear to themselves." Only a universal militia would represent and protect the interests of the "whole community." Noah Webster described the militia as "the whole yeomanry of the country," and historian Max Edling has concluded that "for white

[72] Alexander Hamilton, *The Federalist Papers*, 183.
[73] Ibid., at 185.
[74] Timothy Pickering, Letter to Charles Tillinghast, December 24, 1787, in Bailyn, *Debate*, 302.
[75] Alexander Hamilton, *The Federalist Papers*, 182-83.

men the duty to serve in the militia was more or less universal."[76] Tench Coxe similarly described the militia as "the effective part of the people at large" who "will render many troops quite unnecessary. They will form a powerful check upon the regular troops, and will generally be sufficient to overawe them."[77] The possibility of a congressionally determined "select" militia was anathema to Antifederalists and ignored or denied by Federalists.

Federalism and Military Power

The inability of the states to exist on their own was made all the worse, for Antifederalists, by the seemingly total transfer of military authority to national hands. Antifederalists vigorously demanded that control of military power, except during wars and emergencies, should remain overwhelmingly with the states. An intimate connection existed between federalism and the debate over standing armies and the militia. Antifederalists believed that if state-controlled militias were the normal defense of the nation, the states would retain sufficient power to protect their independence and jurisdiction. However, if the states gave up their military power then a corrupt, aristocratic, national government would overwhelm them and quickly consolidate all power to it. Federalists argued that the states would retain the loyalty of the militia and that either level of government could check the other to preserve constitutional liberty. This section examines how both sides argued with and responded to each other. Because the Second Amendment derived from the Antifederalists' fear of national military control, understanding this debate is crucial to determining its original meaning.

The Antifederalists argued that defects in the proposed Constitution ensured that any alleged checks would fail to prevent consolidation. While the Federal Farmer acknowledged that "a power to raise armies must be lodged somewhere," he believed that the inadequacy of representation did not "justify the lodging this power . . . in the government in which the great body of the people, in the nature of things, will be only nominally represented."[78] The inadequate representation dramatically increased the possibility that the national government would be used to benefit the few rather than the whole population. The Federal Famer also predicted that committing both unlimited taxation and unlimited military power to the national government

[76] A Citizen of America, "An Examination into the Leading Principles of the Federal Constitution," in Sheehan and McDowell, *Friends*, 393; Max M. Edling, *A Revolution in Favor of Government: Origins of the U.S. Constitution and the Making of the American State* (Oxford: Oxford University Press, 2003), 92.
[77] Tench Coxe, An American Citizen IV, October 21, 1787, quoted in Young, *Origin*, 55.
[78] Federal Farmer, Letter III, in Storing, *Anti-Federalist*, 51. National representation contrasted poorly with the states, where "the great body of the people, the yeomanry, etc. of the country, are represented."

would invite oppression. Several powers, including collecting taxes and forming the militia, were "of a very serious nature, and carry with them almost all other powers," and, if given to Congress, "will probably soon defeat the operations of the state laws and governments."[79] Furthermore, "the power in the general government to lay and collect internal taxes, will render its powers respecting armies, navies and the militia, the more exceptionable."[80] Giving complete control of military power to Congress, Brutus claimed, would endanger the public liberties. Likewise, Congress might use its unlimited powers, especially taxation and military power, "entirely to annihilate all the state governments, and reduce this country to one single government."[81]

Brutus dismantled several arguments in favor of standing armies. First, Federalists professed that prohibiting standing armies was not necessary because the habits and beliefs of Americans would not permit a standing army. Brutus replied that if a standing army is dangerous, there can be no reason to vest the government with the authority to make one; it would be safer to avoid that evil altogether. Besides, relying on the opinions of the people to protect their rights would mean no restrictions whatsoever should be placed on the government, which contradicted plain reasoning and traditional political axioms.[82] Second, some claimed that the people themselves would be in charge of the new government, and therefore the people would have nothing to fear. Brutus argued that there is always a distinction between rulers and ruled, even in representative government. Further, the interests of the two are not always the same.[83]

Antifederalists feared that a standing army could be used to enforce the unjust laws of an unrepresentative national government. Brutus linked republicanism and representation to his fear of the national government, noting two methods of enforcing the laws: a permanent military force, or "by people turning out to aid the magistrate upon his command." The traditional enforcement mechanism was the local militia spontaneously assembled into the *posse commitatus* ("the power of the country") to enforce the laws.[84] Brutus wanted to strengthen the traditional way, but "when a government is to receive its support from the aid of the citizens, it

[79] Federal Farmer, Letter III, in Storing, *Anti-Federalist*, 48-49.
[80] Ibid., at 50-51.
[81] Brutus, Essay I, in Storing, *Anti-Federalist*, 112.
[82] Brutus, Essay IX, in Storing, *Anti-Federalist*, 154-56.
[83] Brutus, Essays IX and X, in Storing, *Anti-Federalist*, 154-60.
[84] At this time, professional police forces did not yet exist in America.

must be so constructed as to have the confidence, respect, and affection of the people." These feelings depended on the people "knowing [their rulers], from their being responsible to them for their conduct, and from the power they have of displacing them when they misbehave." However, Brutus continued, the large size of the United States dictated that the people would not know their representatives or the business of the government, and therefore would lack confidence in them. Nor would the representatives be able to take local situations into account when making laws. Thus, "in so extensive a republic, the great officers of government would soon become above the controul of the people, and abuse their power to the purpose of aggrandizing themselves, and oppressing them." Under these circumstances, a standing army would be the only alternative.[85]

The "Dissent of the Minority," the public plea of Antifederalists who had failed to prevent ratification in Pennsylvania, devoted considerable time to the subject of standing armies and the militia. It specifically accused the convention of giving the new government authority over armies and the militia because they anticipated that force would be necessary to hold the nation together. Its signatories predicted that because of the issues regarding republicanism and representation, the government "will not possess the confidence of the people" and will be independent of their opinions, reducing voluntary submission to the laws and necessitating that a standing army exist to enforce them.Though "the same force that may be employed to compel obedience to good laws, might and probably would be used to wrest from the people their constitutional liberties . . . An ambitious man, who may have the army at his devotion, may step up into the throne, and seize upon absolute power." The Dissent further argued that a militia obedient to Congress was dangerous to public and private liberty because it made American citizens the slaves of Congress and created a force that could be used to destroy free government just as easily as a standing army. Citizens of one state could be marched (constitutionally) to distant states to "quell an insurrection occasioned by the most galling oppression," an experience that would harden their hearts and prepare them for further complicity with oppression.[86]

An unidentified Massachusetts Antifederalist, pen-named "John DeWitt," linked the Constitution's grant of military power with the need to impose the acts of Congress on the people. In his words, the Constitution gave the national government control of the militia to

[85] Brutus, Essay I, in Storing, *Anti-Federalist*, 115-16.
[86] "Dissent of the Minority," in Storing, *Anti-Federalist*, 219-21.

enforce their laws "if a civil aid should not prove sufficient." Further, it also gave them a standing army "through fear that they shall not be sufficiently attentive to keeping so respectable a body of men as the yeomanry of this Commonwealth, completely armed, organized and disciplined." For DeWitt, even a nationalized militia would not be suitable to oppress the people and Congress would likely neglect to use it, instead preferring the more malleable—and more dangerous—standing army.[87]

While never comfortable suggesting such an unlikely possibility, Federalists countered that even if a nationally-directed standing army did try to oppress the people, the state militias would overpower it. In fact, upholding the militias' strength became a primary defense against this fear. In Federalist No. 29 Hamilton declared: "If circumstances should at any time oblige the government to form an army of any magnitude that army can never be formidable to the liberties of the people while there is a large body of citizens, little if at all inferior to them in discipline and the use of arms, who stand ready to defend their rights."[88] A Foreign Spectator claimed that even if the unthinkable did happen, a corrupt army "could not subdue a patriotic militia ten times its number, and rendered perfectly military in the course of such war." In fact, he said, national control of the militia posed no threat because "it is evident, that a people of tolerable virtue would never become tools for enslaving themselves: would any man be ordered to kill himself by his own sword? who but an idiot or a most dastardly wretch would not plunge it in the heart of the tyrant."[89] In another article he said that "great armies" are "great evils," and although a few thousand soldiers might be necessary at all times, the usual defense of the country should be the popular militia.[90] Federalists denied that a standing army posed much danger in part because it could never overpower the numerous and incorruptible militia composed of the people themselves.

By contrast, Antifederalists denied that a nationalized militia could be an effective check on a standing army. Rather, they believed that giving control of the militia to the national government would result in its becoming neglected, impotent, and disarmed. Alternatively, it might be perverted into a "select militia"—a limited militia specially selected by the government—rather than composed indiscriminately of all free adult males. As a politically

[87] John DeWitt, *Boston American Herald*, October 27, 1787, in Ketcham, ed., Anti-Federalist Papers, 197.
[88] Alexander Hamilton, *The Federalist Papers*, 185. Rhetoric aside, it is highly questionable that Hamilton thought the people could come close to matching the discipline and firepower of a professional army.
[89] A Foreign Spectator, XXV, in Sheehan and McDowell, *Friends*, 50-51.
[90] Foreign Spectator, *Independent Gazetteer*, Philadelphia, September 21, 1787, quoted in David Young, *Origin*, 11.

chosen and largely poor set of men, a select militia would share the corruptibility of a standing army and lack the benefits of the traditional militia. A disarmed or select militia, Antifederalists reasoned, would be powerless to oppose consolidation and oppression. With money and a strong army at its back, Congress could impose its will on the states and people.

One lengthy discussion of this topic occurred in the letters of The Federal Farmer. He denounced the Federalist argument that the people could not be oppressed because they, as the universal militia, enjoyed a final negative on national laws. While acknowledging that "the yeomanry of the country possess lands, the weight of property, possess arms, and are too strong a body of men to be openly offended," yet, because of their inadequate representation in the government, "they may in twenty or thirty years be by means imperceptible to them, totally deprived of that boasted weight and strength." This could take place if Congress created a "select militia" of one-fifth or one-eighth of the population, composed of "the young and ardent part of the community, possessed of but little or no property," while putting the rest of the universal militia "upon a plan that will render them of no importance." If this happened, the select militia would "answer all the purposes of an army, while the latter will be defenceless." He noted that "the states must train the militia in such form and according to such systems and rules as congress shall prescribe," and Congress had full power to call out "the militia in general, or any select part of it . . . under military officers, instead of the sheriff [with the traditional local *posse commitatus*] to enforce an execution of federal laws . . . and thereby introduce an entire military execution of the laws." For the Federal Farmer, the Constitution threatened to destroy the traditional universal militia, leaving the states and citizens unable to preserve their rights.[91]

Patrick Henry provided a lengthy and forceful statement that the Constitution would facilitate an abusive national government and a weak militia. Henry believed that the states must be essential elements of the federal system and that Congressional oversight of the militia thwarted this ideal. Referring to the ability of the people to resist national oppression, he said:

> What resistance could be made . . . Your militia is given up to Congress . . . as arms are here to be provided by Congress, they may or may not furnish them . . . By this, Sir, you see that their controul over our last and best defense, is unlimited. If they neglect or refuse to discipline or arm, our militia, they will be useless: The States can do neither, this power being given to Congress: The power of appointing officers over men not disciplined or armed, is ridiculous: So that

[91] Federal Farmer, Letter III, in Storing, *Anti-Federalist*, 51.

> this pretended little remains of power left to the States, may, at the pleasure of Congress, be rendered nugatory.[92]

Four days later, Henry warned that the new Constitution "is a great consolidation of Government . . . you are not to have the right of having arms in your own defense."[93] For Henry, state control of the militia was an essential check on national power, one that would be compromised by giving Congress authority to "arm" and "discipline" the militia.

Other Antifederalists echoed Henry and the Federal Farmer. During the Pennsylvania ratification debates, John Smilie charged that "Congress may give us a select militia which will, in fact, be a standing army—or Congress, afraid of a general militia, may say there shall be no militia at all. When a select militia is formed, the people in general may be disarmed."[94] The Deliberator solemnly warned that "[Congress] shall have power to declare what description of persons shall compose the militia . . . Where then is that boasted security against the annihilation of the state governments, arising from 'the powerful military support' they will have from their militia?"[95] George Mason objected that Congress could, "under color of regulating," instead "disarm, or render useless the militia, the more easily to govern by a standing army."[96]

Despite assurances to the contrary, Antifederalists claimed that the constitutional arrangement would not prevent disarmament or consolidation. Furthermore, the states would not have any constitutional weapons to employ in their defense, and consolidation would deprive them of the independence and power necessary for armed resistance. Brutus declared that, because of Congress' enormous power, "there is no way, therefore, of avoiding the destruction of the state governments, whenever the Congress please to do it, unless the people rise up, and, with a strong hand, resist and prevent the execution of constitutional laws." However, Congress would soon have "a revenue, and force, at their command, which will place them above any apprehensions on that score.[97] The Constitution's grant of power meant that Congress now would have "unlimited authority and controul over all the wealth and all the force of the union . . . what kind of freedom or independency is left to the state governments, when they cannot command

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[92] Patrick Henry , Speech on June 5, 1788, in Storing, *Anti-Federalist*, 303-04.
[93] Patrick Henry, Speech on June 9, 1788, in Storing, *Anti-Federalist*, 324.
[94] John Smilie, quoted in Merrill Jensen, John P. Kaminski, and Gaspare J. Saladino, eds., *Documentary History of the Ratification of the Constitution*, 2: 508-09.
[95] Deliberator, Article in the *Freeman's Journal* (Philadelphia), February 20, 1788, quoted in Young, *Origin*, 277.
[96] Mason, quoted in John P. Kaminski and Gaspare J. Saladino, eds., *The Documentary History of the Ratification of the Constitution*, vol. 18, 79.
[97] Brutus, Essay VI, in Storing, *Anti-Federalist*, 140.

any part of the property or of the force of the country."[98] In another letter, Brutus denied that the state legislatures posed a check on national tyranny, noting that they "can, in no case, by law, resolution, or otherwise, of right, prevent or impede the general government, from enacting any law, or executing it, which this constitution authorizes them to enact or execute." All that they could do would be to organize resistance to "constitutional laws" through armed resistance, but "such kinds of checks, as these, though they sometimes correct the abuses of government, oftner destroy all government."[99] He, like other Antifederalists, preferred a check inherent in the constitutional structure to one as destructive and tenuous as armed resistance. Henry echoed these sentiments. Noting that only "downright force" could preserve liberty, he said his "great objection to this Government is, that it does not leave us the means of defending our rights; or, of waging war against tyrants." The concentration of military power in the national government, he continued, "will trample on your fallen liberty . . . have we the means of resisting disciplined armies when our only defense, the militia is put into the hands of Congress?"[100] Referring to the likelihood of conflicts between the state and national governments, Melancton Smith asked whether "the states in this contest stand any chance of success?" He urged his audience to "consider the superior advantages of the general government," including taxation and "the means they thereby possess of supporting a powerful standing force. The States, on the contrary, will not have the command of a shilling, or a soldier."[101] Rather than retaining enough military and fiscal power to exist on their own if necessary, thereby posing a powerful check on the national government, the states would exist at the mercy of the national government.

Federalists enlisted the concept of popular sovereignty to rebuff Antifederalist apprehensions about consolidation and tyranny. If all power came from the people, they asked, what difference did it make how the people allocated that power? Representative, constitutional government would ensure responsibility to the people. Regarding taxation Noah Webster asked:

> Why should such a power be more dangerous in Congress than in a legislature? . . . Why should we choose the best men in the state to represent us in Congress, and the moment they are elected arm ourselves against them as against tyrants and robbers? . . . I am willing to trust Congress with any powers that I should dare lodge in a state-legislature. I believe life, liberty, and property is as safe in the

[98] Brutus, Essay VIII, in Storing, *Anti-Federalist*, 151.
[99] Brutus, Essay X, in Storing, *Anti-Federalist*, 162.
[100] Patrick Henry, Speech on June 5, 1788, in Storing, *Anti-Federalist*, 299-300.
[101] Melancton Smith, Speech on June 27, 1788, in Storing, *Anti-Federalist*, 354.

> hands of a federal legislature, organized in the manner proposed by the convention, as in the hands of any [state] legislature.[102]

Likewise, Timothy Pickering sought to allay the fears of Congress by arguing that they, like the state governments, are "*servants* of the people . . . are not the *people* the *fountain* of all *power*? & Whether this flow in 13 distinct streams,—or in one larger stream, with thirteen branches, is not the *fountain* still the same?"[103] Thus, there was no reason to distrust the Congress any more than the state legislatures.

The Federalists' believed the liberties of the people were secure because real military power—embodied in the universal militia—lay in the people themselves rather than the state or national governments. Tench Coxe, noting that the Pennsylvania Minority believed the "power of the sword" to be "in the hands of Congress," responded

> It is not so, for THE POWERS OF THE SWORD ARE IN THE HANDS OF THE YEOMANRY OF AMERICA FROM SIXTEEN TO SIXTY. The militia of these free commonwealths, when compared with any possible army, must be *tremendous and irresistible* . . . the unlimited power of the sword is not in the hands of either the *federal or state governments*, but where I trust in God it will ever remain, *in the hands of the people*.[104]

Similarly, Noah Webster said:

> The states, by granting [to Congress the power to provide the common defense], do not throw it out of their own hands—they only throw, each its proportion, into a common stock—they merely combine the powers of the several states into one point . . . But the powers are still in their own hands; and cannot be alienated, till they create a body independent of themselves, with a force at their command, superior to the whole yeomanry of the country.[105]

Another Federalist praised the "capital circumstance in favor of liberty, that the people themselves are the military power of our country." By contrast, "in countries under arbitrary government, the people . . . neither possess arms nor know how to use them. Tyrants never feel secure, until they have disarmed the people." The fact that Americans are armed and "every citizen by law is required to be a soldier," he said, "is a circumstance which encreases the power

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[102] A Citizen of America, "An Examination into the Leading Principles of the Constitution," in Sheehan and McDowell, *Friends*, 392.
[103] Timothy Pickering, Letter to Charles Tillinghast, December 24, 1787, in Bailyn, *Debate*, 301.
[104] Tench Coxe, "A Pennsylvanian III," article in the *Pennsylvania Gazette* (Philadelphia), February 20, 1788, quoted in Young, *Origin*, 275-76.
[105] A Citizen of America, "An Examination into the Leading Principles of the Federal Constitution," in Sheehan and McDowell, *Friends*, 393.

and consequence of the people; and enables them to defend their rights and priveleges against every invader."[106] The Foreign Spectator explicitly argued that military power—which because of human sin "must be the last resort against external enemies and internal traitors"—should "be held in the brave hands of the whole federal people, and it will defy any attack from open force or secret malice."[107] As long as the militia remained strong, Federalists concluded, the nation need not fear losing its liberties to either level of government.

Federalists further highlighted that state control of the militia would ensure that its allegiance remained with their state, negating any possibility of its becoming corrupt. During the ratification debates in Virginia, James Madison explicitly acknowledged the authority of states to govern and employ any militia not in service to the national government.[108] As defined by Federalists, national control of the militia meant directing the militias of the states toward a common objective, not total control to govern them. Basic control of the militias remained with the states except when actually used in national service—a rare occurrence. Noah Webster elaborated this point:

> Congress likewise are to have power to provide for organizing, arming, and disciplining the militia, but have no other command of them, except when in actual service. Nor are they at liberty to call out the militia at pleasure—but only, to execute the laws of the union, suppress insurrections, and repel invasions. For these purposes, government must always be armed with a military force . . . otherwise laws are nugatory, and life and property insecure.[109]

"Plain Truth" also refuted the notion that the militia was under the "immediate command" of Congress by stating that only the states could "*raise* it, and they expressly reserve the right of" appointing officers and training the militia. As to compulsory service, Plain Truth asserted that the state legislatures were the only "dispensing power, or enforcing power."[110] Tench Coxe argued that because of each state's constitutional jurisdiction over appointing and training its militia, it would be "a powerful military support attached to, and even part of [the state]," and

[106] "'The Republican' to the People," *Connecticut Courant* (Hartford), January 7, 1788, quoted in Bailyn, *Debate*, 712.
[107] Foreign Spectator, *Independent Gazetteer*, Philadelphia, September 21, 1787, quoted in David Young, *Origin*, 11.
[108] James Madison, June 16, 1788, quoted in Bailyn, *Debate*, 703-05.
[109] A Citizen of America, "An Examination into the Leading Principles of the Federal Constitution," in Sheehan and McDowell, *Friends*, 394.
[110] Plain Truth, *Independent Gazetteer* (Philadephia), November 10, 1787, in Bailyn, *Debate*, 112.

therefore loyal to it.[111] State control over their militias, in other words, guaranteed that they could not be used to destroy the power of the states.

The most prominent Federalist writing, *The Federalist Papers*, offered the most sophisticated exposition of the militia's role in preserving liberty in the American federal system. Alexander Hamilton noted that although the militia was sufficient for most purposes, extreme circumstances will always necessitate the raising of professional troops. Thus, governmental oppression will remain a possibility in any state (although unlikely in a representative government). Rather than citing this possibility as a reason for rejecting the constitution, as the Antifederalists' had, Hamilton argued that the proposed Constitution uniquely protected the people from such a disaster:

> In a single state, if the persons intrusted with supreme power become usurpers, the different parcels, subdivisions, or districts of which it consists, having no distinct government in each, can take no regular measures for defense. The citizens must rush tumultuously to arms, without concert, without system, without resource . . . the usurpers, clothed with the forms of legal power, can too often crush the opposition in embryo.[112]

By contrast, in a federal system "the people, without exaggeration, may be said to be entirely the masters of their own fate" because "the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government." The people could, "by throwing themselves into either scale," ensure the triumph of their favored side. Hamilton trusted that "if their rights are invaded by either, they can make use of the other as the instrument of redress." Despite stressing that the check could work in either direction, Hamilton explicitly addressed Antifederalists' fears by declaring it "an axiom" that "the State governments will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authority." Because they will possess "all the organs of civil power" the states could "adopt a regular plan of opposition," "combine all the

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[111] A Freeman, Article in the *Pennsylvania Gazette*, January 30, 1788, quoted in http://teachingamericanhistory.org/library/index.asp?document=1704, accessed March 15, 2011.

[112] Hamilton, *The Federalist Papers*, "No. 28," 180. John Trenchard and Walter Moyle made a similar claim about the English militia. He predicted that even a small standing army could enslave the people, and that because "the Militia [could not be] raised but by the King's Command, there can be no Force levied in any part of *England*, but must be destroyed in its Infancy by a few Regiments." Later, responding to arguments that a standing army was necessary to defend against a surprise attack by a small French force, they said: "Now if so small a Force can oppose the King, the Militia, with the united Power of the Nobility, Gentry and Commons, what will an equal Power do against the People, when supported by the Royal Authority."Without the assistance of the government, in other words, the militia would be ineffective. Tranchard and Moyle, *An Argument, Shewing . . .* , 13, 15.

resources of the community," and "unite their common forces for the protection of their common liberty." In short, because of America's federal constitutional arrangement, the "body of the people . . . through the medium of their state governments" could "take measures for their own defense, with all the celerity, regularity, and system of independent nations."[113]

In Federalist No. 46, James Madison made a similar argument: if an army under the devotion of the federal government tried to oppress the states, "the state governments with the people on their side would be able to repel the danger." He assessed the greatest possible size for a standing army at four percent of the able-bodied male population. In opposition to this force would be "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 [i.e. the states] possessing their affections and confidence." In addition to "the advantage of being armed, which the Americans possess over the people of almost every other nation," Madison argued that "the existence of subordinate governments, to which the people are attached and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable that any which a simple government of any form can admit of." Madison affirmed the importance of the federal arrangement because the existence of separate state governments would "collect the national will and direct the national force," thereby rendering opposition to the national government more effective. Far from being powerless, the states had the strongest attachment to the militia, thus presenting a formidable check on any standing army. The possibility of Congress lawfully disarming the militia and destroying state oversight was unthinkable to Madison, who assumed Americans would be not only armed but organized by the states.[114]

Writers from both sides assumed every citizen's right to keep and bear arms in the militia. To contradict the perception that they were anti-militia, Federalists often found it necessary to implicitly or explicitly endorse this axiom.[115] Tench Coxe asked: "Who are these militia? *are they not ourselves* . . . Congress have no power to disarm the militia. Their swords, and every other terrible implement of the soldier, are *the birthright of an American*. What clause in the state

[113] Ibid., 180-82.
[114] Madison, *The Federalist Papers*, "No. 46," 299-300.
[115] See"'The Republican' to the People," *Connecticut Courant* (Hartford), January 7, 1788, quoted in Bailyn, *Debate*, 712. The Republican argued that the fact that "every citizen by law is required to be a soldier" was a powerful check on tyranny. Citizens of unfree nations, however, "neither possess arms nor know how to use them."

or federal constitution hath *given away* that important right."[116] Philodemos simply stated that "every free man has *a right to the use of the press*, so he has to *the use of his arms*," though either could be taken away if abused through libel or murder.[117] The Federalists publically argued that only certain defined powers were given to the national government, and disarming the people was not one of them. In fact, the entire Federalist defense implicitly recognized the right to own and use weapons, for how else could the militia be a check on a standing army? James Madison cited "the advantage of being armed" as the reason Americans could resist encroachments by an oppressive government. By contrast, in "the several kingdoms of Europe . . . the governments are afraid to trust the people with arms," and the people must suffer under absolute government.[118] For their part, Antifederalists clearly placed great value on a universally armed militia, though they contended that the Constitution's grant of power to Congress rendered it susceptible to being compromised.

Conclusion

Two positions dominated the debate about military issues during the Convention and ratification debates. Antifederalists objected to many features in the Constitution, especially its allowance of a standing armies and expansion of national control over the militia. They considered standing armies dangerous, especially in times of peace, and wanted a universal militia of citizens to serve the normal functions of national defense. Wealthy aristocrats, they believed, would dominate the new government and dilute its republican character, rendering it unable to represent or serve the people's interests. Antifederalists predicted that Congress would raise an army to enforce its unpopular laws and to subdue popular protest. "The States, on the contrary," would not have "the command of a shilling, or a soldier."[119] Furthermore, the militia of the states would be unable to prevent this nightmare because Congress' regulatory authority over it would render it disarmed, disorganized, or disloyal. Antifederalists further charged that a standing army and defanged militia threatened to distort the balance of power between the state and national governments. The Constitution's rejection of localism and state power would

[116] A Pennsylvanian, article in the *Pennsylvania Gazette* (Philadelphia), February 20, 1788, quoted in Young, *Origin*, 276.
[117] Philodemos, *Pennsylvania Gazette* (Philadelphia), March 8, 1788, quoted in *The Second Amendment Primer: A Citizen's Guidebook to the History, Sources, and Authorities for the Constitutional Guarantee of the Right to Keep and Bear Arms* (Birmingham, Alabama: Palladium Press, 1996),122-23.
[118] Madison, *The Federalist Papers*, 299.
[119] Melancton Smith, Speech on June 27, 1788, in Storing, *Anti-Federalist*, 354.

produce a consolidated and tyrannical government willing and able to destroy the states, the true guarantors of liberty. Thus, Antifederalists opposed the Constitution and sought explicitly to prohibit standing armies and protect the militia.

The Federalists' position sharply contrasted with the Antifederalists' gloomy view. Federalists accepted the existence of professional armies and asserted that in a hostile world a standing army would sometimes be necessary to project strength and prepare for war. Thus, the national government, charged with protecting the national defense, must be able to martial the entire resources of the country, including a standing army if necessary. Although admittedly inadvisable during peacetime because of their tendency to foster tyrannical government, Federalists believed the Constitution rendered standing armies technically impossible and practically harmless. The existence of representative republicanism meant that the rulers would truly represent the people, and the Constitution ensured that money could not be raised to support an army without the frequent consent of the people's representatives. Federalists also regarded the universal militia—composed of all free adult citizens—as an important component of the national defense system, in part because it was the states' counterpart to national military power. Federalists assumed that the militia would retain loyalty to the states, acting as a last-ditch check on oppression by a standing army. To them, fears that the militia would be turned against the people were groundless. In fact, according to the most sophisticated Federalist elucidations, the federal system uniquely worked to maintain free government because the military power of the two levels of government checked each other. The sovereign people could apply to either level for help against usurpation by the other. Far from disregarding federalism, they championed the superiority of the Constitution's division of power over the excessively decentralized arrangement in the Articles of Confederation.

As this chapter has shown, the debate over military issues directly involved the issue of federalism. The private use of arm—for self-defense, hunting, etc.—received almost no discussion during the Convention and ratification debates. Virtually all debate focused on the militia as an organized ("well-regulated") body directed by the government. The major question revolved around *which* government—national or state—should have primary control of the militia. The context of the Second Amendment was not a debate about self-defense or hunting but rather the role and place of arms-bearing in the United States' federal arrangement. The debate hinged on the militias' role as a check on potential tyranny from the national government.

Antifederalists balked so strongly at the militia clauses because they doubted the democratic nature of the national government and believed it would become a source of oppression. For them, maintaining the integrity of the states was paramount, and giving away the states' military power to Congress would hasten their demise. Federalists denied the danger posed by the national government, noting the strong ties between the militias and their respective states. The more pressing issue for them was giving the national government sufficient strength to protect the nation—if anything, the balance of power was tilted too strongly in favor of the states. Unless the Constitution vested sufficient military power in Congress, they said, the new nation might disintegrate or be conquered. In any case, questions of federalism dominated the debate over the militia. What was the militia's purpose? Who would control it—the national government, the states, or both? Would it be disarmed or neglected? How could the states resist national tyranny? As we will see in the next chapter, the Second Amendment was drafted to address some of these questions.

CHAPTER 3
THE CREATION OF THE SECOND AMENDMENT

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The creation of the Bill of Rights was the greatest contribution of the Antifederalists to the American founding. Defeated in almost every point, they nonetheless secured the adoption of ten amendments limiting the authority of the national government. They were successful in part because the absence of a bill of rights became a major source of opposition to the Constitution. Many states included bills of rights with their constitutions, listing such items as freedom of speech, assembly, and conscience. Already afraid of consolidation and aristocracy, Antifederalists feared that the rights of the people would be subject to abuse unless they were specifically enumerated. The Pennsylvania Minority reflected the views of many Antifederalists when it demanded a "BILL OF RIGHTS, ascertaining and fundamentally establishing those unalienable and personal rights of men, without the full, free, and secure enjoyment of which there can be no liberty, and over which it is not necessary for a good government to have controul."[1]

This chapter surveys the arguments for and against a Bill of Rights, lists the various proposals that became the Second Amendment, and outlines its drafting and adoption. While greatly prized in the twenty-first century, the Bill of Rights ignited significant controversy in 1789. An examination of the meaning of the Second Amendment requires understanding the nature, purpose, and intent of the entire Bill of Rights. During the ratification debates, Federalists set forth the doctrine of enumerated powers, while Antifederalists questioned the cogency of their conception of federal constitutionalism. The Bill of Rights reflected the specific Federalist outlook regarding the legitimate powers of the national government; namely, that they were limited to those enumerated in the Constitution. Federalists sought to assuage their opponents by conceding amendments that reinforced the notion of limited government without actually weakening any of its powers. The final form of the Second Amendment rejected radical changes to the constitutional structure created at the Convention, yet answered some of the Antifederalists' concerns about the danger of national military power. Finally, the debates in Congress over the Second Amendment, though inconclusive about its specific meaning, confirm

[1] "Dissent of the Minority," in Storing, *Anti-Federalist*, 213.

its close connection with the broader Antifederalist claim that the people needed arms to protect themselves from an overreaching government.

The relationship of federalism to the Bill of Rights is crucial for contextualizing the Second Amendment. As the chapter three demonstrated, federalism was an essential element of the Antifederalist critique. The Bill of Rights was meant to counteract widespread fear of an oppressive national government and therefore reflected federalism to a degree not recognized by many contemporary scholars. While most of the amendments dealt primarily with personal rights, this chapter argues that the framers intended the Second Amendment, along with others such as the Ninth, Tenth, and the original First and Second (both of which failed to pass), to protect the integrity of the states as distinct political units. In this way, they aimed constitutionally and structurally to protect the rights of citizens of the states from national intrusion. Federalism informs the meaning of the Second Amendment because it defines the context and intention behind the Antifederalists' proposals—to protect the states' ability to defend themselves against an oppressive national government. This chapter argues that the Second Amendment, even though drafted by a Federalist Congress, largely fulfilled this intention.

Debating the Bill of Rights

Antifederalists desired a bill of rights largely because they wanted to leave nothing to chance. Reflecting this view, the Federal Farmer said that "people, and very wisely too, like to be express and explicit about their essential rights, and not to be forced to claim them on the precarious and unascertained tenure of inferences and general principles, knowing that in any controversy between them and their rulers, concerning those rights, disputes may be endless, and nothing certain." A bill of rights would educate the people by establishing in their minds "truths and principles which they might never otherwise have thought of, or soon forgot." The experience of England confirmed this lesson: the English valued their rights largely because they were spelled out in the Magna Charta and other widely disseminated declarations. People, said the Federal Farmer, retain their rights because "by repeated negotiations and declarations, all parties are brought to realize them, and of course to believe them to be sacred."[2] John DeWitt declared that "language is so easy of explanation, and so difficult is it by words to convey exact

[2] Federal Farmer, 2.8.196, in Storing, *Anti-Federalist*, 79-80.

ideas, that the party to be governed [i.e. the citizens] cannot be too explicit. The line cannot be drawn with too much precision and accuracy."[3]

Conversely, Federalists argued that the unique American temperament and government rendered superfluous explicit protection of rights. Hamilton noted that bills of rights are "reservations of rights not surrendered to the prince," and thus "have no application to constitutions, professedly founded on the power of the people and executed by their immediate representatives and servants." Bills of rights, while they may state truths, did not restrain the government nearly so much as the people's control over it, and the best protection for popular rights was the Constitution's opening phrase "We, the people."[4] Tench Coxe argued similarly that bills of rights are often necessary in monarchies, where the people literally bargain with the ruler; however, in America, "the proposed government is to be the government of the people—all its officers are to be their officers, and to exercise no rights but such as the people commit to them." Government officials are only "agents and overseers" for the sovereign people, and are "constantly responsible" to them.[5] Federalists asserted, in Roger Sherman's words, that many rights were "much too important to depend on mere paper protection." Rather, "the only real security" for rights "must be in the nature of your government. If you suffer any man to govern you who is not strongly interested in supporting your privileges, you will certainly lose them." The main question about the new Constitution was whether it created a government that would not abuse its power; if not, Sherman said, "you must by no means adopt the constitution . . . The sole question (so far as any apprehension of tyranny and oppression is concerned) ought to be, how are Congress formed?" If it was formed to represent the interests of the people, it would not violate the people's rights; if not, then no amount of paper declaration could restrain it.[6] For Federalists, the character of the American people would supplement the nation's representative institutions to prevent an infringement of their rights. Fabius stated that trial by jury and representative government "were not obtained by a bill of rights, and have not been and cannot be preserved by them." Rather, the "*soundness of sense and honesty of heart*" of the American people gained and preserved them. It was a sad country indeed, he said, that allowed itself to be

[3] John DeWitt, Essay II, in Ketcham, *Anti-Federalist Papers*, 195.
[4] Hamilton, *Federalist Papers*, 512-13.
[5] A Citizen of New York, Address, in Sheehan and McDowell, *Friends*, 144-45.
[6] Roger Sherman, Letter II, in Sheehan and McDowell, *Friends*, 180-181.

enslaved by its own representatives.[7] In short, Federalists agreed with Antifederalists that the protection of rights depended on constitutionally limited and representative government, but strenuously asserted that the Constitution and people of the United States would guarantee such a government, thus making a bill of rights unnecessary.

The most popular of the Federalists' charges stated that a Bill of Rights actually threatened the people's rights more than its absence. Because a limited government was not authorized to violate the people's rights in the first place, it was dangerous to declare that it should not do so. "Why declare that things shall not be done which there is no power to do?" Hamilton asked. This would merely "afford a colorable pretext [by the government] to claim more [powers] than were granted." Declaring "that the liberty of the press shall not be retrained," for example, would imply that if such a prohibition had not been enacted, the government would have had the authority to regulate the press. Rather than circumscribing the government's power, a bill of rights would imply a general regulatory authority over all items not named in it. Thus, the government might claim jurisdiction over all aspects of life not prohibited by the bill of rights—even though its framers intended the Constitution to confer only specific, enumerated powers on the national government.[8] James Wilson explained that the national Constitution fundamentally differed from the state constitutions because the former's jurisdiction is carefully enumerated, while in the latter the people "invested their representatives with every right and authority which they did not in explicit terms reserve . . . every [power] which is not reserved, is given," Thus, a bill of rights in a state constitution made sense because the government had plenary jurisdiction unless otherwise stated. However, for the national government, "the reverse proposition prevails, and every thing which is not given, is reserved." For Wilson, this distinction meant that it "would have been superfluous and absurd, to have stipulated with a foederal body of our own creation, that we should enjoy those privileges, of which we are not divested either by the intention or the act that has brought that body into existence." Although novel at the time, Wilson articulated the now familiar doctrine of enumerated powers: the national government can do nothing which is not explicitly enumerated by the Constitution, or implied as "necessary and proper" to carry out an enumerated power. He concluded that a bill of rights was dangerous because "that very declaration might have been construed to imply that some degree of power

[7] Fabius, Letter IV, in Sheehan and McDowell, *Friends*, 220.
[8] Hamilton, The Federalist No. 84, Rossiter, ed., *Federalist Papers*, 513-14.

was given, since we undertook to define its extent."[9] In essence, Federalists maintained that including a bill of rights would presume an unlimited grant of power to the national government.[10]

Although a few Antifederalists conceded the theoretical validity of this argument, they still considered a Bill of Rights necessary because the Constitution's massive and ambiguous transfer of power to the national government rendered the limits of its enumerated powers unsettled. The Federal Farmer warned that the Constitution gave "many general undefined powers to congress, in the constitutional exercise of which, the rights in question may be effected." Furthermore, he noted "a studied brevity" in the Constitution which he thought resulted from the assumption that customary beliefs and practices (such as trial by jury) were obvious and needed no explanation or explicit protection. He disagreed, saying that in the future the Constitution would, and should, be interpreted by its words alone, not by reference to the state constitutions or cultural beliefs. Thus, the Constitution failed a requirement for excluding a bill of rights: namely that "the powers delegated to the government, must be precisely defined by the words that convey them, and clearly be of such extent and nature as that, by no reasonable construction, they can be made to invade the rights and prerogatives intended to be left in the people."[11] Other Antifederalists agreed. Brutus took to task James Wilson's argument that "every thing which is not given is reserved," calling it "specious" because "the powers . . . granted to the general government by this constitution, are as complete . . . as that of any state government—it reaches to every thing which concerns human happiness—Life, liberty, and property, are under its controul." Thus, a Bill of Rights benefitted the state and national governments equally.[12] The Impartial Examiner argued, contrary to Wilson, that governments are invested with every power

[9] James Wilson, Speech on October 6, 1787, in Sheehan and McDowell, *Friends*, 102-03.

[10] The Federal Farmer acknowledged the force of the Federalists' argument. He conceded that bills of rights are "useless, especially in a federal government, possessing only enumerated power—nay, dangerous, as individual rights are numerous, and not easy to be enumerated in a bill of rights, and . . . it may be inferred, that others not mentioned are surrendered." Furthermore, when making a federal republic people "often find it easier to enumerate particularly the powers to be delegated to the federal head, than to enumerate particularly the individual rights to be reserved." A well-drafted constitution would define governmental powers so precisely that any enumeration of rights would be unnecessary. Federal Famer, 2.8.196, in Storing, *Anti-Federalist*, 79-80.

[11] Federal Farmer, Letter XVI, in Storing, *Anti-Federalist*, 81-82. As an example, he noted that the Congress, because it had plenary authority to tax, could tax "all written instruments." This tax would interfere with freedom of the press because "printing, like all other business, must cease when taxed beyond its profits; and it appears to me, that a power to tax the press at discretion, is a power to destroy or restrain the freedom of it." Ibid., at 86.

[12] Brutus, Essay II, in Storing, *Anti-Federalist*, 119.

which is not explicitly reserved. Thus, "every right whatsoever will be under the power and controul of the civil jurisdiction. This is the leading characteristic of an arbitrary government . . . . Hence results the necessity of an *express stipulation* of all such rights as are intended to be exempted from the civil authority."[13]

Antifederalists pointed out that the Constitution already included a miniature Bill of Rights, proving that Federalists themselves implicitly admitted the possibility of the government exceeding its boundaries. The Federal Farmer, noting the constitutional prohibition on Congress granting titles of nobility, asked: "why then, by a negative clause, restrain congress from doing what it would have no power to do?" The only reason to include such a prohibition was the fear that Congress would justify granting titles of nobility by appealing to some other enumerated power. The convention "did not leave the point to be settled by general principles and logical inferences; but they [settled] the point in a few words, and all who read them at once understand them." He proposed just such an exact enumeration of other rights.[14] Brutus noted that the Convention "made certain reservations, while they totally omitted others of more importance." He referenced the prohibition against suspension of the writ of habeas corpus and passage of ex post facto laws, and asked: "Does this constitution anywhere grant the power of suspending the habeas corpus, to make ex post facto laws. . . . It certainly does not in express terms." Thus, these and other important powers "are implied in the general powers granted" to the national government.[15]

Antifederalists complained that the people could not appeal to their state bills of rights because the Constitution explicitly declared that national laws superseded all state laws or restrictions. Brutus believed that because of the clauses proclaiming the supremacy of the Constitution over the laws and constitutions of the states, it was "positively expressed, that the different state constitutions are entirely done away with . . . the constitution of the United States, and the laws made in pursuance thereof, is the supreme law. . . . No privilege, reserved by the bills of rights, or secured by the state government, can limit the power granted by this."[16] The Impartial Examiner pleaded that "a system, which is to supercede the present different

[13] Impartial Examiner, Essay I, February 20, 1788, in Storing, *Anti-Federalist*, 279-80.
[14] Federal Farmer, Letter XVI, in Storing, *Anti-Federalist*, 82.
[15] Brutus, Essay II, in Storing, *Anti-Federalist*, 119-21.
[16] Brutus, Essay II, in Storing, *Anti-Federalist*, 121.

governments of the states . . . must be alarming indeed! . . . How will your bill of rights avail you any thing?"[17]

Both sides of the debate argued for their ideal version of the nature of the American union. Supporters and critics of the Constitution valued union but struggled to construct a free and functional federal system. Both sides viewed the states as valuable component parts and believed that the majority of jurisdiction fell under their own control. The states, Federalists stressed, had plenary authority over matters that affected the welfare or safety of their citizens. The national government, by contrast, held finite, specifically enumerated powers over issues that concerned the nation as a whole, such as war and the regulation of commerce. While Antifederalists doubted the sincerity of the Constitution's supporters and feared that the division of power was not clear or rigid enough, they nonetheless agreed in principle that such a system would be desirable.

Another valuable conclusion is that the Antifederalists wanted a bill of rights to ensure a proper federal arrangement that would protect state sovereignty from national consolidation. A bill of rights would protect majorities from government as well as minorities from majorities—the states as well as the people. Throughout the ratification debates, Antifederalists asserted that the people were distinct from their rulers and that the interests of the two bodies often radically differed. They believed that even rights applicable to the whole population, such as the right to trial by jury, needed explicit protection because a tyrannical government might try to abrogate them. By linking their calls for a bill of rights to fears of consolidation and praise of the state governments, Antifederalists expressed their desire to limit the authority of the national government. Claiming to speak for the American people, Samuel Adams maintained that "they wish to see a line drawn" between national power and state sovereignty "upon which the private & personal Rights of the Citizens depends." "Without such Distinction," Adams continued, "there will be Danger" of a slide toward "consolidated government over all the States," which would destroy freedom altogether.[18] Richard Henry Lee likewise stated that "friends of liberty" should "guard with perfect vigilance every right that belongs to the states," which, if successful,

[17] Impartial Examiner, Essay I, *Virginia Independent Chronicle*, March 5, 1788, in Storing, *Anti-Federalist*, 288. See also Patrick Henry's Speech on June 5, 1788, in Storing, *Anti-Federalist*, 308.

[18] Samuel Adams, letter to Elbridge Gerry, quoted in Young, *Origin*, 704-05. A later letter to Richard Henry Lee (quoted in Young, *Origin*, 708) said virtually the same thing, declaring the "*sovereign* authority" of the states to be the "Palladium of the private, and personal rights of the Citizens."

would "prevent a consolidating effect from taking place by slow but sure degrees."[19] From this perspective, state rights (i.e. robust federalism) served as the foundation for individual rights by supporting the states as the guarantors of those rights.

Traditionally, scholars have assumed the Bill of Rights was meant to protect the rights of minority groups to exercise their religion, speak freely, print objectionable materials, and so forth. This viewpoint reflects much truth, but as Akhil Reed Amar has convincingly shown, an examination of the Bill of Rights also "reveals structural ideas interconnected with language of rights; states' rights and majority rights alongside individual and minority rights." An important scholar of both the Bill of Rights and the Second Amendment, he pointed out that modern scholars work under the "blinder" of nationalism, which views the national government as the protector of liberty and the state governments as threats to individual rights. By contrast, early Americans often viewed the states as checks on an abusive national government and believed that "localism and liberty can sometimes work together rather than at cross-purposes."[20] In the next chapter, this work will demonstrate that the Second Amendment falls primarily into the category of a structural or states' right amendment, designed primarily to clarify the division of power between the state and national governments.

Antecedents to the Second Amendment

Throughout the course of the ratification controversy, Antifederalists proposed a number of amendments to the Constitution. Several states even appended a list of amendments to their ratification declarations. Often, these proposals mirrored extant provisions of state constitutions. When the first Congress met it used these proposals as the base for determining what to include in the Bill of Rights. Examining these antecedents illuminates the intentions behind a Bill of Rights. This section outlines all the proposed amendments relating to standing armies, the militia, or the keeping and bearing of arms, as well as similar provisions in state constitutions. These proposals are an important element in any examination of the Second Amendment because they demonstrate the link between it and Antifederalist concerns raised during ratification: a fear of standing armies and a desire to strengthen the militia by protecting state jurisdiction and preventing disarmament.

[19] Richard Henry Lee, Letter to Patrick Henry, quoted in Young, *Origin*, 713-14.
[20] Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven: Yale University Press, 1998), xii; 3-7.

In 1789 several states contained provisions relating to standing armies and militias in their constitutions. Virginia's 1776 Declaration of Rights including the following: "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 times of peace, should be avoided, as dangerous to liberty; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power."[21] The drafters of this article chose explicitly to define the militia as "the body of the people," because they revised George Mason's original draft defining the militia as "composed of gentlemen freeholders, and other freemen."[22] This change broadened the traditional aristocratic conception of the militia and recognized the principle of equality already imbedded in the Declaration of Rights.[23] On the other hand, only full citizens, as opposed to slaves and women, were part of "the people."

Pennsylvania's Declaration of Rights likewise declared: "That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power."[24] This provision drew a distinction between the people defending "the state" and "themselves." Given its juxtaposition with prohibitions on standing armies and martial law, the phrase "for the defence of themselves" almost certainly referred to the people's right to protect themselves from governmental oppression (as a part of a militia) rather than from crimes against each other.[25] In the wake of the conflict with Great Britain, Pennsylvanians recognized the interests of the rulers and people did not always converge, and feared a standing army would facilitate the usurpation of constitutional government. In 1777, Vermont passed an identically worded declaration.[26]

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[21] "First Draft of the Declaration of Rights," *The Papers of George Mason*, Robert Rutland, ed. (Chapel Hill, N.C., 1970), I:274-76, quoted in Saul Cornell, *A Well-Regulated Militia*, 19.
[22] Cornell, *A Well-Regulated Militia*, 18-19.
[23] "That all men are by nature equally free and independent . . . That no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services; which, not being descendible, neither ought the offices of magistrate, legislator, or judge be hereditary," *Virginia Declaration of Rights*, Lillian Goldman Law Library, Yale Law School, http://avalon.law.yale.edu/18th_century/virginia.asp, accessed on February 11, 2011.
[24] Pennsylvania Declaration of Rights, quoted in Cornell, *A Well-Regulated Militia*, 23.
[25] Cornell wrote that there is "no evidence from the pre-colonial period that Pennsylvanians were concerned about threats to the common law right of individual self-defense." Cornell, *A Well-Regulate Militia*, 21.
[26] *Constitution of Vermont*, Lillian Goldman Law Library, Yale Law School, http://avalon.law.yale.edu/18th_century/vt01.asp, accessed on February 11, 2011.

The Massachusetts Constitution of 1780, still operational in 2011, included a watershed provision that protected the right to "keep" as well as "bear" arms. It read: "The People have a right to keep and bear arms for the common defence. And as in the time of peace armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military shall always be held in exact subordination to the civil authority, and be governed by it."[27] While expanding on Pennsylvania's right to bear arms, the context indicates that "keep" and "bear" are related. Saul Cornell, noting the assumption that militia members, barring poverty, would provide their own arms, argued that "a single constitutional principle emerged, linking the right to keep arms with the obligation to bear them for the common defense."[28] While certainly not meaningless or superfluous, the right to keep arms was closely connected to participation in the militia.

These early declarations of the right to bear arms shared two commonalities. First, although they did not reflect a concern with federalism, they did reflect a fear of oppression by the rulers. Second, they mandated that the militia exist as the primary defense of the state, either by explicit proclamation (as in Virginia) or by restricting standing armies. Thus, they were the natural embodiment of the Whig republican tradition. When the new constitution deposited military power in the hands of the national government, many of the states endeavored to construct similar safeguards against it. A number of amendments proposed during the creation of the Constitution and Bill of Rights closely mirrored these early statutes.

During the ratification controversy the Federal Farmer proposed several amendments. First, among a list of "unalienable or fundamental rights," he proposed the following: "The military ought to be subordinate to the civil authority, and no soldier be quartered on the citizens without their consent—the militia ought always to be armed and disciplined, and the usual defense of the country."[29] This provision would ensure that laws oppressive to the majority of the community could not be enforced. Second, he proposed that the Constitution require a supermajority of two-thirds or three-fourths of Congress—and require a larger quorum—to pass laws for raising armies or disciplining the militia, to guarantee that these laws truly represent a majority of the people. Third, as an alternative, the Constitution could mandate that any such law be affirmed by a majority of the state legislatures (or a number of state legislatures representing a

[27] Oscar Handlin and Mary Handlin, eds., *The Popular Sources of Political Authority* (Cambridge, Mass., 1966), 446.
[28] Cornell, *A Well-Regulated Militia*, 24.
[29] Federal Farmer, Letter VI, in Storing, *Anti-Federalist*, 71.

majority of the total national population) before being implemented. All of the Federal Farmer's proposals related to federalism by attempting to maintain a proper relationship between the states and the national government. Finally, in response to the Federalist argument that the state governments would prevent national overreach, the Federal Farmer stated that under the proposed federal arrangement, "the state governments . . . possess no kind of power . . . to stop in their passage, the laws of congress injurious to the people;" thus, "the members of them, in extreme cases, may resist, on the principle of self-defense—so may the people and individuals."[30] The lack of constitutional barriers to consolidation raised the awful prospect that the states would resort to a natural right of revolution.

Brutus suggested an amendment with provisions similar to those of the Federal Farmer. It stated: "As standing armies in time of peace are dangerous to liberty, and have often been the means of overturning the best constitutions of government, no standing army . . . shall be raised," except troops necessary to guard government arsenals and defend the frontier. However, in the case of an actual or threatened attack Congress could raise an army "provided that no troops whatsoever shall be raised in time of peace, without the consent of two thirds of the members, composing both houses of the legislature."[31] Like the Federal Farmer, he suggested a supermajority requirement for raising troops, and a more explicit prohibition on standing armies.

Two proposed amendments from the Pennsylvania Antifederalists merit close examination. The "Dissent of the Minority," which proposed a number of amendments, is probably the most quoted document in Second Amendment literature, at least among individual rights scholars. Among other provisions that mostly guaranteed jury trials and other criminal rights, the seventh article declared:

> That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to and be governed by the civil powers.[32]

[30] Federal Farmer, Letter XVII, in Storing, *Anti-Federalist*, 94-95.
[31] Brutus, Essay X, in Storing, *Anti-Federalist*, 61.
[32] "Dissent of the Minority," in Storing, *Anti-Federalist*, 207.

The document's authors cobbled together several different ideas in a short space. Although one certainly can read an individual right into this provision, scholars should be cautious before assuming that the founders uniformly conceived of the right to bear arms as an individual right. Protection against governmental tyranny was clearly an equal concern for the signatories, as shown by the juxtaposition of the right to bear arms next to prohibitions on standing armies and martial law. Furthermore, the eleventh article explicitly addressed oppression and its connection to federalism:

> That the power of organizing, arming and disciplining the militia (the manner of disciplining the militia to be prescribed by Congress) remain with the individual states, and that Congress shall not have authority to call or march any of the militia out of their own state, without the consent of such state, and for such length of time only as such state shall agree.
>
> That the sovereignty, freedom and independency of the several states shall be retained, and every power, jurisdiction and right which is not by this constitution expressly delegated to the United States in Congress assembled.[33]

The Second Amendment included provisions adopted, in some form, by most of the state ratifying conventions. Scholars should not assume that the "Dissent of the Minority," which reflected only the views of Antifederalists in one state, authoritatively sets forth the meaning of the Second Amendment. Given its context, the seventh article was most likely the most explicit and detailed statement of the belief that no provision of the Constitution justified disarmament by Congress.

Three states submitted similar proposals that explicate the meaning the Second Amendment. Immediately after its provision guaranteeing the right to bear arms, the Dissent stated: "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."[34] Disarmament and bearing arms in the militia were inseparable; if the people had a right to bear arms, then the national government had no power to disarm the people "or any of them" (i.e. any individual). Sam Adams introduced a list of amendments during the Massachusetts ratification convention, including one related to militias and standing armies: "that the said Constitution be never construed to authorize Congress . . . to prevent the people of the United States, who are peaceable citizens, from keeping their own arms; or to raise standing armies, unless when necessary for the defense of the

[33] Ibid., at 208.
[34] "Dissent of the Minority," in Storing, *Anti-Federalist*, 207.

United States."[35] His proposal connected the ownership of arms with the prevention of a standing army. It was later printed and distributed in the *Independent Gazetteer* in Philadelphia.[36] Although he did not use the word "militia," he had the institution in mind (without a standing army, what defense would the nation have?), and wanted to prevent Congress from disarming it. Finally, the New Hampshire Convention proposed a similar article regarding weapons: "Congress shall never disarm any citizen, unless such as are or have been in actual rebellion."[37] Given the commonality of thought among Antifederalists all over the nation, scholars should not assume that these propositions fundamentally differed from proposals securing the people's right to keep and bear arms, including the Second Amendment itself.[38] Although not worded in the form of a right, it detailed the contents of that right: Congress cannot constitutionally disarm citizens (or even a single citizen) unless they are criminals, or pose an immediate danger to the government. James Madison's original list of amendment contained different language because he drew heavily on the proposals offered by his home state of Virginia. Madison nevertheless tried to combine and consolidate the amendments to create a concise declaration of rights. Thus, the unique wording in these proposals clarifies the meaning of "keep" in the Second Amendment as well as the intentions of the Antifederalists.

The Virginia and New York Conventions included a number of proposed amendments in their ratification documents, including very similar protections of the right to keep and bear arms. The third Virginian proposal stated: "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 to the good and happiness of mankind."[39] Birthed in a revolution, the idea of resisting and overthrowing an oppressive government was the cornerstone of the American nation's political commitment. Virginia's seventeenth proposal declared:

> 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

[35] Sam Adams, Debates in the Massachusetts Convention, quoted in Young, *Origin*, 260.
[36] Letter to the Editor, *Independent Gazetteer* (Philadelphia), August 20, 1789, quoted in Young, *Origin*, 701-02.
[37] New Hampshire Convention, quoted in Halbrook, *That Every Man Be Armed*, 75.
[38] For example, Patrick Charles wrote that "it has no textual comparison to the Second Amendment and therefore should have no weight in how we interpret its contents," in *The Second Amendment*, 43.
[39] Ketcham, *Anti-Federalist Papers*, 219.

> 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.[40]

The New York convention proposed virtually the same resolution. In a list of rights that were said to be "consistent with the said Constitution," the convention declared:

> That the people have a right to keep and bear arms; that a well-regulated militia, including the body of the people *capable of bearing arms*, is the proper, natural, and safe defence of a free state. That standing armies, in time of peace, are dangerous to liberty, and ought not to be kept up, except in case of necessity; and that at all times the military should be under strict subordination to the civil power.[41]

Though the clauses in both these declarations are separated by a semi-colon or period, they are logically connected. Interpreting them piecemeal would mean misunderstanding the principle behind this proposal. Rearranging the clauses of the text above, we find the same constellation of Antifederalist ideas: military power can destroy civil power; therefore standing armies are destructive of liberty; therefore the citizens' militia should be the usual defense of the nation; therefore the people have a right to keep and bear arms.

As these proposals reveal, Antifederalists wanted meaningful restrictions on Congress' authority over the army and militia. Some of the more adamant, like Brutus and the Federal Farmer, sought institutional restrictions on the raising of a standing army by requiring a supermajority before Congress could raise an army. Others, like Virginia and New York, wanted to prohibit them altogether, although all proposals recognized the necessity of a professional army during war. A second type of restriction dealt with Congressional control over the militia. Pennsylvania sought greater state control of the militia, while all of the proposals prohibited congressional disarmament of the militia, either explicitly (i.e. "Congress shall never disarm any citizen"), or by protecting the right to keep and bear arms.

These proposals explain the motivation behind the Second Amendment. All of the proposals except New Hampshire's placed the right to keep and bear arms within the context of the fear of national oppression represented by a standing army. Thus, Antifederalists wanted to restrict Congress' ability to regulate the ownership and use of weapons to preserve the state militias as viable fighting forces capable of resisting a tyrannical government. Clearly directed at Congress and not the states, these proposals (and the Second Amendment) reflected the

[40] Ketcham, *Anti-Federalist Papers*, 221.
[41] New York Convention, quoted in Young, *Origin*, 481-83.

Antifederalist concern with federalism by attempting to preserve the military capability of the several states.[42] Scholars must interpret the Second Amendment's original meaning with the context of federalism in mind.

The Congressional Debate on the Bill of Rights

Although no state made the addition of a bill of rights or any amendment a condition of ratification, several states voted to ratify the Constitution with the expectation that amendments would be forthcoming. Large numbers of voters also expected a bill of rights would be added soon. In the spring of 1789, James Madison, now a congressman, spearheaded the House of Representative's move for a Bill of Rights. During his tightly contested election with James Monroe, Madison gained votes by pledging to sponsor and promote a bill of rights.[43] Federalists held different opinions on the necessity for amendments, and substantial debate exists over Madison's own commitment to a Bill of Rights.[44] Thomas Jefferson wrote in a letter that "even the friends of the constitution are willing to make amendments, some from a conviction they are necessary, others from a spirit of conciliation."[45] Many Federalists accepted the move for amendments in order to quell the fears of the people, and, just as importantly, to prevent the calling of a second constitutional convention, which threatened to eviscerate the national government or even disintegrate the union.

In his speech on June 8, Madison laid out his public position on amending the Constitution. He had come to realize along with other Federalists that the decision not to include a bill of rights was a tactical failure which continued to provoke strong opposition to the Constitution.[46] He wanted primarily to "satisfy the public" regarding the good faith of the government in order to "prepare the way for a favorable reception of our future measures." By

[42] In New York, this concern with federalism is clearly seen by examining a precursor to the final formulation of the proposal. Although it did not include a right to keep and bear arms, it mandated that the militia "always be kept well organized, armed and disciplined," that the militia include all "men capable of bearing arms," that no select militia be formed, and that the militia never be called out except during a war, invasion, or rebellion. It was clearly written to make it impossible for the national government to use the militia against the states or people. Young, *Origin*, 474.

[43] Richard Labunksi, *James Madison and the Struggle for the Bill of Rights* (Oxford: Oxford University Press, 2006), 159.

[44] Labunski concluded that by the commencement of the First Congress Madisone genuinely ccepted the importance of a Bill of Rights.dealt with this debate in *James Madison and Struggle for the Bill of Rights* (Oxford: Oxford University Press, 2006), 192-94,

[45] Thomas Jefferson, Letter to William Short, in Young, *Origin*, 626.

[46] Robert Allen Rutland, *The Birth of the Bill of Rights, 1776-1791* (Chapel Hill, N.C.: University of North Carolina Press, 1955), 171.

adding a Bill of Rights Federalists would prove that their commitment to "liberty and a Republican government" was just as strong as that of the Constitution's opponents. This move would minimize a damaging current of opinion undermining the strength of the new government. Secondarily, Madison stated that a Bill of Rights could serve a useful purpose: because "all power is subject to abuse . . . it is possible the abuse of the powers of the General Government may be guarded against" more securely. After his speech, he presented a list of possible amendments that closely resembled, with some additions, the eventual Bill of Rights.[47]

Like other Federalists, James Madison rejected a radical approach and sought amendments that would not substantially reduce national power. In his inaugural address (written by James Madison), President Washington cautiously supported the cause of amendments. Although he left the specifics to Congress, he charged it to "avoid every alteration that might endanger the benefits of an united and effective government," and encouraged "a reverence for the characteristic rights of freemen, and a regard for public harmony."[48] Madison himself argued for amendments "of such a nature as will not injure the constitution" while giving "satisfaction to the doubting part of our fellow-citizens." Further, he was unwilling to "see a door opened for the reconsideration of the whole structure of the Government" because such a reconsideration might damage the integrity of the government itself. Rather, he wanted protection for rights "against which I believe no serious objection has been made by any class of our constituents."[49] Therefore, many observers expected the amendments to be uncontroversial if rather ordinary.

Some Antifederalists complained about the amendments' inadequate response to their concerns, while others expressed cautious satisfaction. William Grayson wrote to Patrick Henry that the amendments "shall effect personal liberty alone, leaving the great points of the Judiciary, direct taxation &c, to stand as they are." Grayson predicted that after the failure to limit national power, many Federalists would "go on coolly in sapping the independence of the state legislatures."[50] Richard Henry Lee, also writing to Henry, declared that the "great points of free election, jury trial in criminal cases, and the unlimited right of taxation, and standing armies, remain as they were," as did the "tendency to a consolidated government" backed by a standing

[47] James Madison, Debate in the House of Representatives, quoted in Young, *Origin*, 651-53.
[48] Washington, Inaugural Speech, quoted in Young, *Origin*, 642.
[49] James Madison, Debate in the House of Representatives, quoted in Young, *Origin*, 652-53.
[50] William Grayson, letter to Patrick Henry, quoted in Young, *Origin*, 668-69.

army.[51] Underscoring the concern of most Antifederalists with federalism, Lee later seconded Henry's own statement that "right without power to protect, is of little avail."[52] An unlimited power to tax, raise standing armies, and command the militia still lay with an unrepresentative Congress. Declarations on paper could not stop flesh and blood encroachment. On the other hand, George Mason wrote that he had "received much Satisfaction" from the amendments.[53] Likewise, even the diehard Lee expressed his wish that the Virginia legislature had ratified the amendments, stating that although they did not go far enough, "by getting as much as we can at different times, we may at last obtain the greatest part of our wishes."[54] Many less extreme Antifederalists were pleased with the Bill of Rights.

Despite the disapproval of extreme Antifederalists the Bill of Rights calmed the fears of most Americans and embodied a moderate consensus among both Federalists and Antifederalists. A second convention never materialized and the new government ceased to experience significant opposition. By and large the Antifederalists worked with—rather than against—the new government. Eventually they helped form the Democratic-Republican Party led by Thomas Jefferson and (ironically) James Madison. Thus, the Bill of Rights codified widely held assumptions about the limits of governmental power under a republican constitution. Its provisions were designed to prevent the national government from assuming power that nobody acknowledged as legitimate—depriving the people of religious freedom, freedom of speech, trial by jury, the right to keep and bear arms, etc. The modest, explanatory purpose of the Bill of Rights came through clearly in the preamble to the amendments that Congress sent to the states for ratification: "The CONVENTIONS of a number of states having, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory or restrictive clauses should be added . . . ."[55] The Federalist-dominated Congress believed the amendments explained, but did not alter, the constitutional regime initiated in Philadelphia. In this sense, the Bill of Rights—rather tame and mundane—did not impinge on normal governmental operations. The expectation of national oppression simply did not materialize. Despite the involvement of the First Amendment in the quarrel over the Alien

[51] Richard Henry Lee, Letter to Patrick Henry, September 17, 1789, quoted in Young, *Origin*, 713.
[52] Richard Henry Lee, Letter to Patrick Henry, September 27, 1789, quoted in Young, *Origin*, 717.
[53] George Mason, Letter to Samuel Griffin, September 8, 1789, quoted in Young, *Origin*, 710.
[54] Richard Henry Lee, Letter to Patrick Henry, June 10, 1790, quoted in Young, *Origin*, 739.
[55] United States Congress, Proposed Amendments to Constitution, quoted in Young, *Origin*, 715.

and Sedition Acts ten years later, the Bill of Rights did not receive much treatment in American law for many decades.[56]

The Drafting and Ratification of the Second Amendment

Scholars attempting to interpret the Second Amendment often come away dissatisfied after examining the relevant debates in the First Congress. The few extant records come almost entirely from the House, and even these are scanty. An examination of the drafters' intent can inform our understanding of the Second Amendment nevertheless. This section covers the debate over the amendment in the House and Senate prior to its ratification by the states.

The debate over what became the Second Amendment began with James Madison's proposal in his June 8 speech.[57] After receiving and reviewing the proposals from the states, he rephrased them in his own words. His proposal read: "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 county; but no person religiously scrupulous of bearing arms shall be compelled to render military service in person."[58] A committee of eleven (composed of one member from each state, including Madison) modified the wording to read: "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."[59]

Despite the inadequate records, one valuable insight into the Second Amendment's meaning emerges from the House debate: it was closely connected with the prevention of governmental oppression. Elbridge Gerry stated his assumption that the amendment was intended "to secure the people against the mal-administration of their governors." This remark received no debate and we can assume that most of the other members concurred; this consensus is hardly surprising given the context of the amendment. Gerry's comment confirms the link between the Second Amendment and Antifederalist fears of national tyranny and standing armies. However, despite its obvious purpose, he worried that the amendment, in particular the last clause relating to "religiously scrupulous" people, "would give an opportunity to the people

[56] The only significant legal decisions regarding of the Bill of Rights affirmed that it applied only to the national government, not the states.
[57] It left Congress as the fourth amendment, but the first two amendments did not receive enough support to be ratified. I will refer to it as the Second Amendment throughout.
[58] James Madison, Speech on June 8, 1789, quoted in Young, *Origin*, 654-655.
[59] Young, *Origin*, 680.

in power to destroy the constitution" by defining those who are religiously scrupulous "and prevent[ing] them from bearing arms." By suggesting a comical and unlikely scenario—the government telling people their own religious beliefs—Gerry revived the fear of a select militia, a common bugbear of Antifederalists during the ratification debates. If Congress could unilaterally deprive anyone of the right to bear arms, it could pack the militia with loyal soldiers committed to advancing the government's agenda rather than protecting the people's liberties. Gerry reminded the other congressmen that such an abuse of the militia would "make a standing army necessary," and that governments intending to destroy the people's liberty "always attempt to destroy the militia" and raise a standing army. Thus, the amendment might be abused to sanction—rather than prevent—the disarmament of the people or the creation of a select militia. Roger Sherman responded to Gerry's fear by noting: "We do not live under an arbitrary government . . . and the States, respectively, will have the government of the militia, unless when called into actual service." Sherman, a strong Federalist, invoked the common Federalist claim that the states retained concurrent jurisdiction over the militia.[60] On August 20, the House again debated the conscientious objector clause of the amendment. Thomas Scott objected that unless the government could require universal military service (or payment of a monetary equivalent), "a militia can never be depended on. This would lead the violation of another article, which secures to the people the right of keeping arms, and in this case recourse must be had to a standing army." After Scott, another delegate concurred that when "forming a Militia, an effectual defense ought to be calculated" and no one with pacifist religious principles should be used in it.[61] Although the debate is hardly conclusive, supporters of the Second Amendment intended it to promote a healthy militia and prevent disarmament and dependence on standing armies.

The other debate in the House over the Second Amendment did not last long or result in many changes. Later, Gerry unsuccessfully attempted to add a clause making it the duty of the government to arm and train the militia, ensuring that Congress would not allow it to deteriorate. The amendment as it stood secured the right to keep and bear arms, but did not guarantee that the government would maintain or use the militia.[62] If the government could not disarm (or selectively arm) the people, it could still use a professional army to crush them. The remaining

[60] Debates in Congress, August 17, 1789, quoted in Young, *Origin*, 696-97.
[61] House of Representatives, Debates, August 20, 1789, quoted in Young, *Origin*, 703.
[62] Debate in the House of Representatives, August 17, 1789, quoted in Young, *Origin*, 695-96.

debate mostly related to the propriety of excluding conscientious objectors from bearing arms and has little value to the meaning of the final product, which did not include such a clause. The House rejected an amendment requiring a supermajority before raising a standing army in peacetime. The House also voted to add the words "in person" to the clause "but no person religiously scrupulous shall be compelled to bear arms," thus allowing the government to require payment of a monetary "equivalent" in lieu of physical military service.[63] In fact, despite the changes, James Madison wrote to a friend that the modified bill of rights "does not differ much from the original propositions offered on that subject."[64]

Our records from the Senate debate are even less revealing. After receiving the amendment from the House, several additions and alterations were contemplated, though no debate or reasoning was recorded. The motion to insert the words "For the common defence" next to "Bear arms" failed. The Senate then changed the amendment to read "necessary to the security of the free state" rather than "the best security of a free state." Finally, it removed the conscientious objector clause and the reference to the militia as "composed of the body of the people." The final form read: "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."[65]

Scholars should not read too much into the congressional debates presented here. The Senate's view of the amendment apparently differed little from that of the House, despite the alterations, and both versions largely reflected the sentiments encapsulated in the original proposals. Often historians have made much of the ways in which the House and Senate altered—or failed to alter—the text of the Second Amendment. For example, Saul Cornell argued that the deletion of the identification of the militia with the body of the people "gave Congress authority to determine who in the future would be included within the ranks of the militia."[66] Collective rights scholars argue similarly.[67] This argument—really nothing more than an assumption—ignores the Federalist's public identification of the militia with the whole people

[63] Debate in the House of Representatives, quoted in Young, *Origin*, 697-98, 703.
[64] James Madison, Letter to Edmund Pendleton, August 21, 1789, quoted in Young, *Origin*, 704.
[65] United States Senate, Proceedings on Amendments Proposed by the House, quoted in Young, *Origin*, 712.
[66] Cornell, *A Well-Regulated Militia*, 61. This was virtually the only time he addressed the issue of a select militia.
[67] Jack N. Rakove, "The Second Amendment: The Highest Stage of Originalism," in *The Second Amendment in Law and History*, ed. Carl T. Bogus, 86: "the effect of the Senate's editing was to leave the extent of the militia open to congressional discretion." See also David T. Konig, "The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of 'The Right of the People to Keep and Bear Arms'," *Law and History Review* 22, No. 1 (Spring 2004): 158. Konig, citing Rakove, agreed that the change "sought to allow Congress the authority to determine the nature of future militias."

and public rejection of a select militia. Further, both the Senate and House were overwhelmingly dominated by Federalists and there is no reason to assume the political opinions of the Senate radically broke with their counterparts in the House. Akhil Amar offered a more likely explanation than Cornell's for the Senate's revisions: the Senate "stylistically shortened" the amendment to avoid redundancy.[68] Stephen Halbrook likewise asserted that the shortening implied a preference for conciseness, noting that the House's wording redundantly mentioned "the people" twice.[69] Overall, the Senate reduced the number of amendments, combined several, and tightened the language throughout, implying that a revision did not signify a redefinition.[70]

For their part, individual rights scholars also foist suspect interpretations on the Senate's mundane proceedings. Halbrook's analysis is typical. From the Senate's refusal to insert the phrase "for the common defence" after "bear arms," he concluded that the Senate "meant to preclude any limitation on the individual right to have arms, for example, for self-defense or hunting."[71] By contrast, Cornell viewed the refusal as a victory for Antifederalists that ensured the militia could be used for state or local defense.[72] Rakove argued that adopting the phrase would have prevented the militia from executing the laws of the union or crushing insurrections.[73] Thus, the Senate's action could have protected any of three distinct sets of concerns—individual, state/local, or national. All are plausible, none are certain, and all depend on corroborating evidence.

Textual analysis of the phrase "keep and bear arms" also features prominently in a number of publications, though scholars often fail to address the phrase specifically. Individual rights supporter Don Kates, citing the use of the words "keep" and "bear" in contemporary legislation, argued that "keep" referred to any ownership of arms, while "bear" implied a specifically military context. Akhil Amar drew a distinction between the two words but did not

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[68] Amar, *Bill of Rights*, 51-52.
[69] Halbrook, *That Every Man Be Armed*, 81
[70] For a discussion of the Senate's changes, see Labunski, *James Madison and the Struggle for the Bill of Rights*, 237-39. He noted that Madison was very displeased by the Senate's changes, though we do not know his reaction to the Second Amendment specifically.
[71] Halbrook, *That Every Man Be Armed*, 81. Halbrook's analysis in this instance is perplexing because he asserted, contradictorily, that the inclusion of "for the common defence" in Massachusetts' similar provision "precluded any construction that arms could be used only for individual self-defense but not for common defense against governmental despotism." Ibid., 64.
[72] Cornell, *A Well-Regulated Militia*, 61-62.
[73] Rakove, "The Second Amendment: The Highest Stage of Originalism," in Bogus, ed. *The Second Amendment in Law and History*, 87.

comment on the nature of the distinction.[74] On the collective rights side, Paul Finkelman, believed that the phrase "keep and bear" was a term of art, much like "with force and arms," and referred to the arming of state militia forces, not private ownership.[75] Michael C. Dorf likened it to the phrases "cruel and unusual" and "necessary and proper."[76] Patrick Charles took an even more limited view of the word "keep," arguing that it meant merely "maintain" or "service," as opposed to "own." By contrast, he claimed, laws typically used the word "provide" or "furnish" to imply ownership.[77] Garry Wills argued that "keep and bear" indicated the militia's continual readiness—as opposed to a standing army, which gave up its arms at the conclusion of a war.[78]

The phrase "keep and bear arms" was a succinct formulation integrating two distinct but related concepts. Arguments for an expansive and individualistic interpretation of "keep" read too much into it; a single word, absent other evidence, should not alter the entire context of the Second Amendment. On the other hand, many of the examples cited by Charles actually indicate private ownership, while "provide" and "furnish" likely meant purchasing arms, a necessity because many men did not own their own weapons. One also wonders how someone could "maintain" a weapon without owning it. Instead, the nature of the militia implied private ownership as a prerequisite for bearing arms. People needed to keep arms in order to bear them.[79] Other "terms of art" included two complementary but non-synonymous concepts. "Cruel" is different but complementary to "unusual;" the whole is greater than the sum of its parts. "Keep and bear" referred to a distinct conception of the militia: a body of citizens trained in military matters, able to assemble quickly to defend the community from lawbreakers, rebels, or invaders. Thus, the phrase recognized private ownership, but placed such ownership in the context of militia service.

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[74] Akhil Amar, "Second Thoughts," *Law and Contemporary Problems* 65, no. 2 (Spring 2002): 109.
[75] Paul Finkelman, "'A Well Regulated Militia:' The Second Amendment in Historical Perspective," in Carl T. Bogus, *The Second Amendment in Law and History*, 145.
[76] Michael C. Dorf, "What Does the Second Amendment Mean Today?", in Carl T. Bogus, *The Second Amendment in Law and History*, 263.
[77] Patrick Charles, *The Second Amendment: The Intent and Its Interpretation by the States and the Supreme Court* (Jefferson, NC: McFarland and Company, 2009), 28-30.
[78] Gary Wills, "To Keep and Bear Arms," in Saul Cornell, ed., *Whose Right to Bear Arms Did the Second Amendment Protect?* (Boston: Bedford/St. Martin's, 2000), 74-75.
[79] Non-individualist scholars have recognized close connection between militia service and private ownership of arms. See Saul Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* (Oxford: Oxford University Press, 2006), 2, 23-24; H. Richard Uviller and William G. Merkel, "Muting the Second Amendment: The Disappearance of the Constitutional Militia," in Carl T. Bogus, *The Second Amendment in Law and History*, 148.

Ultimately, what Congress wrote into the Second Amendment is far more important than what it left out. Its formulation corresponded closely to the proposals offered by the states, especially Virginia's.[80] While rejecting more radical amendments, such as those restricting a standing army or limiting Congress' power to manage and coordinate the state militias, they adopted the more limited proposal to give the people the right to keep and bear arms without much comment. This wording, and similar formulations, appeared in many of the proposed amendments, and reflected deeply felt fears that Congress would disarm the militia under the pretense of "regulating" it, or create a select militia by giving only some citizens the right to privately own and publically bear arms. Thus, a close connection existed between the Second Amendment, the debate over standing armies and the militia during ratification, and the proposals submitted to Congress.

Conclusion

The context of the drafting and ratification the Second Amendment confirms the central argument of this study: the Second Amendment was intended to preserve the viability of state-operated militias by preventing the national government from disarming the people or forming a select militia. Fearful of resigning unlimited military power to Congress, many states proposed to restrict congressional control over the militia or protect the right to keep and bear arms as a precondition for a well-regulated militia. Just as the Bill of Rights as a whole was meant to satisfy a large section of the American population without reducing national power, the Second Amendment, understood as a significant compromise between Federalists and Antifederalists, did not shift radically the original division of power over the militia between the states and Congress. Rather, it affirmed the Federalist claim that states could operate their militias independently of national direction and codified the widely held assumptions that the militia should be composed of "the people" and that Congress had no power to disarm them or organize a select militia. Hereafter, states could safely organize and arm their militias free from national control, ready to deploy them in defense of their sovereignty against an overreaching national government. This interpretation, explained and unpacked in the next chapter, is the constitutional legacy of the Second Amendment.

[80] Richard Labunski noted that Madison "drew heavily on the amendments suggested by his state's ratifying convention and those listed in the Virginia Declaration of Rights." Labunski, *James Madison and the Struggle for the Bill of Rights*, 199.

CHAPTER 4
THE ORIGINAL MEANING OF THE SECOND AMENDMENT

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The previous chapters outlined the context and meaning of the Second Amendment. Chapter one dealt with the widespread current of thought praising militias as the best defense of a free state. In contrast to a standing army, recruited from the dregs of society and dependent on the government for their livelihood, the militia was drawn from the whole people. Therefore, it would never endanger the people's liberties because their own liberties would be at stake. By contrast, eighteenth century thinkers, especially members of the English Country Party, blamed standing armies for enslaving the people of Europe under absolute monarchs. They supported universal militias and the right to bear arms in them. The English Bill of Rights of 1688 confirmed the right of Protestant citizens to "have arms for their defense," albeit under extensive regulation by Parliament. These ideas took root in the American colonies as they sought to secure republican governments.

As the second chapter showed, the Constitutional Convention produced a controversial document that, among other things, gave the national government primary control over the military power of the new nation. The Antifederalists opposed the Constitution because they feared the consolidation of all power into a national government which might oppress the people. Praising states as the guardians of the people's liberty, they sought to protect the states' authority in all realms, especially that of military power. They predicted that Congress would disarm the militia and raise a standing army to enforce its unpopular policies. Federalists countered that the Constitution gave Congress no power to disarm the people and that the states would have primary control over their militias. Moreover, in the unlikely event that the national government attempted oppression, the state militias could prevent it from taking place. Thus, federalism, in particular control over the militia, was the crucial context of the Second Amendment.

Chapter three examined the ratification and drafting of the Bill of Rights and Second Amendment. Antifederalists desired a bill of rights to reverse centralization and prevent the abuse of power by the national government. Federalists believed that in a democratic nation, a bill of rights was unnecessary and potentially dangerous because the powers of the government were already enumerated. In the end, a Federalist-dominated Congress proposed a set of amendments intended explicitly to endorse common assumptions regarding the limited nature of

the government's powers, while also carefully leaving them intact. In particular, the Second Amendment was intended to assuage Antifederalist concerns while leaving untouched Congress's ability to control the militia and raise a standing army. Thus, the arguments made about the militia during the ratification debates clarify the meaning of the Second Amendment.

The "Federalist" Interpretation of the Second Amendment

With this context in mind, this chapter advocates a new interpretation of the Second Amendment that does not fall under either the collective or individual rights models. It would best be described as "federalist" or "jurisdictional," for two reasons: (1) the amendment clarified the limits of the national government's jurisdiction, and (2) the attempt to balance power between the federal and state governments—i.e. federalism—fundamentally shaped the Second's original meaning.[1] The Second Amendment addressed concerns of federalism and jurisdiction by codifying which powers were (and, more importantly, were not) given to the national government in the Constitution.[2] Antifederalists feared that some indistinct clauses would be stretched to make room for violations of the people's rights, including the right to keep and bear arms. Federalists denied the validity of this fear, and drafted the Bill of Rights to assuage those fears by specifically proscribing certain types of legislation.[3]

The federalist interpretation advances four primary claims:

1. *The right to keep and bear arms in the Second Amendment was an "auxiliary right" intended to enable the people to protect their other constitutional rights and freedoms*. By having arms, the people could resist unconstitutional laws and policies.
2. *The framers intended the Second Amendment to uphold the ability of the states to oppose national tyranny by preserving the integrity of both the universal militia and the division of military power between the state and national governments*. Federalists envisioned America's federal constitutional arrangement—including state control over competent and

[1] The adjective "federalist" is unsatisfactory because it connotes the Federalists or the Federalist Party, whereas the Second Amendment reflected a consensus between all sides. The title "States' Right Interpretation" would fit my argument well; unfortunately, the collective rights interpretation is sometimes (mistakenly) called by that name. "Jurisdictional" is correct but uninspired.

[2] The First Amendment, the repository of Americans' most cherished personal rights, stated that "Congress shall make no law . . ." Likewise, the Second did not confer the right to keep and bear arms on anyone; it merely declared that it "shall not be infringed" (by Congress). This was jurisdictional language.

[3] Recall Tench Coxe's declaration that "Congress have no power to disarm the militia. Their swords, and every other terrible implement of the soldier, are *the birthright of an American*. What clause in the state or federal constitution hath *given away* that important right?" A Pennsylvanian, article in the *Pennsylvania Gazette* (Philadelphia), February 20, 1788, quoted in Young, *Origin*, 276.

loyal militias—as a balancing mechanism ensuring that the citizens possessed the capacity to resist constitutional usurpation from either level of government.

3. *The Second Amendment restricted the jurisdiction of the national government, preventing it from exploiting its control over the militia to disarm American citizens or create a select militia*. It clarified that Congress' powers under the militia clauses did not authorize laws restricting citizens' right to own weapons or bear them in the militia.
4. *Because of the Second Amendment's close connection with federalism, it did not restrict the jurisdiction of the state governments*. While the original Constitution restricted the states' autonomy in military issues, the Second Amendment controlled the actions of the national government only.

The first two arguments describe the amendment's intent, the third its content, and the fourth its extent. One must understand all of them to interpret the Second Amendment adequately and apply its restrictions in today's society. All four arguments diverge from competing interpretations. The following sections develop these arguments in greater detail and demonstrate their superiority vis-à-vis competing interpretations.

Keeping and Bearing Arms: An Auxiliary Right

The federalist interpretation argues that the right to keep and bear arms is not an individual, collective, or civic right, but a political or "auxiliary" right, designed primarily as a bulwark to protect the people's other, more fundamental rights. The concept of auxiliary rights originated with William Blackstone, the most prominent attorney of his time and the author of the widely influential *Commentaries on the Laws of England*. He wrote that

> In vain would [the rights of Englishmen] be declared, ascertained, and protected by the dead letter of the laws, if the constitution had provided no other method to secure their enjoyment. It has therefore established certain other auxiliary subordinate rights of the subject, which serve principally as outworks or barriers, to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property.[4]

These auxiliary rights included the rights of Parliament, limitations on the king's prerogative, the right of applying to the courts to correct a grievance, the right of appealing to the king, and, fifthly, the right of "having arms." The fifth auxiliary right was "a public allowance, under due restrictions, of the natural right of self-preservation, when the sanctions of society and laws are

[4] William Blackstone, *Commentaries on the Laws of England*, vol. 1 (New York: W.E. Dean, 1838), 102. The *Commentaries* were originally published between 1765-69.

found insufficient to restrain the violence of oppression."[5] The auxiliary right to keep and bear arms existed to enable the people to protect their liberties from an oppressive government. Still, as the last right mentioned, it was a last resort, permissible only after the ordinary restraints of the constitution and judicial system failed to secure justice.[6]

Although an auxiliary right to keep and bear arms shared similarities with both individual and collective rights, it was distinct from both. Like a collective right, the founders considered the auxiliary right to arms to be realized most fully in the context of a collective body, the militia. Their conception of rights reflected classically republican ideals of a unitary "public good" for a virtuous "commonwealth," and they would have objected to the individualistic pursuit of private self-interest championed by modern gun-rights supporters. Statements that the Second Amendment protected personal, individual aims, such as hunting or self-defense, do not exist.[7] On the other hand, akin to an individual right but unlike a collective right, individual citizens possessed an auxiliary right, which was immune from governmental infringement. The fact that the auxiliary right to bear arms existed to check the government meant that it could not prohibit the private ownership of weapons under any pretext. To enable the people to oppose repressive rulers, the Second Amendment forbade the government from disarming them. Lastly, contrary to an individual right, an auxiliary right was not considered intrinsically good. Rather, it was instrumentally valuable only because it prevented the infringement of other, more fundamental rights. The similarities between an auxiliary right and other types of rights may explain the failure of historians to identify the right to keep and bear arm as an auxiliary right.

The federalist interpretation also resembled but diverged from the "civic conception" of the right to bear arms. Saul Cornell's reminder that bearing arms was both a right and duty is valuable but limited. Americans viewed rights differently in the 1790s, a point often lost in the individualist, libertarian interpretation of rights in the twenty-first century. The crucial point to understand, however, is not what the founders believed the right to keep and bear arms entailed

[5] Ibid., 102-04.

[6] In addition to the Constitution itself, which restrained government, the First Amendment listed two other auxiliary rights: assembly and petition.

[7] According to the Antifederalists own conception of federalism, the national government did not have jurisdiction over criminal law and other local matters. The Second Amendment could only have been a response to the Constitution's grant of power in the militia clauses. As Saul Cornell aptly noted: "It would have been anathema to Anti-Federalists to demand an amendment to protect a private right of self defense since doing so would have meant conceding that the federal government had general police powers." Cornell, "*Heller*, New Originalism, and Law Office History: 'Meet the New Boss, Same as the Old Boss,'" *UCLA Law Review* 56 (2009): 1114.

but why they thought it necessary to say it "shall not be infringed." The context of the amendment crucially defines its meaning, both then and now. Cornell acknowledged that the Second Amendment "emerged out of" the ratification debates, but still believed "the language . . . was closer in spirit to the civic model embodied in the first state constitutions." Although he acknowledged that the "states' rights" (i.e. "federalist") interpretation predated the adoption of the Bill of Rights—Antifederalists believed the Second Amendment assigned to the state militias "the awesome power to resist federal authority by force of arms,"—he believed this viewpoint did not reflect the true meaning of the amendment.[8] However, Cornell ignored the fact that the civic and auxiliary/federalist conceptions of the right to keep and bear arms worked in tandem. The civic conception merely extended the concept of an auxiliary right by making militia service a duty as well as a right. The Second Amendment institutionalized the civic conception *by placing restrictions on Congress' authority over the militia*, thus preserving universal military service in a locally directed militia. In this sense, Cornell and the federalist interpretation are both right. Antifederalists were the prime motivation for the Second Amendment's adoption, and the issue at stake was prevention of national tyranny and disarmament—no one questioned the government's authority to compel militia service.

Americans, as we have seen, eagerly incorporated the idea of the auxiliary right to keep and bear arms, viewing the popular militia as the "palladium" or safeguard of liberty. The ratification debates reveal the conception of the militia as a protector of liberty and the intent to prevent the national government from destroying this shield. Antifederalists and Federalists alike viewed the universal militia as an institution crucial to the maintenance of free government in America, because it could aid in resisting tyranny. The debate in Congress revealed that the Second Amendment was intended "to secure the people against the mal-administration of their governors."[9] Likewise, the most influential constitutional commentator prior to 1820, George Tucker, explicitly equated the Second with Blackstone's fifth auxiliary right, while other commentators less directly viewed it as the people's protection against abusive government.[10] Overall, nearly all early commentary on the militia and the right to keep and bear arms, both

[8] Cornell, *A Well-Regulated Militia*, 5.
[9] Elbridge Gerry, Debates in Congress, August 17, 1789, quoted in Young, *Origin*, 696-97.
[10] Tucker, *Blackstone's Commentaries*, vol. 1, 143. See the section "Early Commentary on the Second Amendment" later in this chapter.

before and after the adoption of the Second Amendment, confirms that the right to keep and bear arms was an auxiliary right.

Insurrection and the Second Amendment

The individual rights position has received a lot of bad press because of its association with "insurrectionist" thinking. Scholars often object to arguments that the Second Amendment legalizes rebellion, charging that such a view paves the way to anarchy and renders the government unable to carry out its legitimate functions. Gary Wills' scathing critique of the individual rights position exuded incredulity at the prospect of rebels invoking the Constitution to overthrow the government: "Only a madman, one would think, can suppose that militias have a *constitutional* right to levy war against the United States, which is treason by constitutional definition."[11] In the hands of radical individualists and cranks, this criticism strikes home. Pointing to Timothy McVeigh, Michael C. Dorf declared that "placing a right to rebel against tyranny in the hands of individuals risks violence by every would-be Spartacus."[12] Despite the example of the rebellion against England, Saul Cornell wrote that the right of revolution "was not a constitutional check, but a natural right that one could not exercise under a functional constitutional government."[13] In his interpretation, governments retained constitutional power to control access to weapons.

The complex historical record seems to support such a position. Patrick Charles cited the confiscation of loyalists' firearms, undertaken by various colonies during the War of Independence, to buttress his position that owning weapons "was neither a constitutional nor a natural right" but rather "a conditional right in support of just government."[14] Charles also pointed to the existence of state-level restrictions on using weapons to argue for the collective rights interpretation: in particular, the Massachusetts government's action to temporarily deprive Daniel Shays and his followers of their civil rights, including voting and running for office, serving as jurors, and owning weapons.[15] If the right to keep and bear arms in state constitutions did not conflict with the states' ability to regulate weapons in a variety of ways, he reasoned, why

[11] Gary Wills, "To Keep and Bear Arms," in Saul Cornell, ed., *Whose Right to Bear Arms Did the Second Amendment Protect?* (Boston: Bedford/St. Martin's, 2000), 78.
[12] Michael C. Dorf, "What Does the Second Amendment Mean Today," in Bogus, *The Second Amendment*, 265.
[13] Saul Cornell, "Commonplace or Anachronism: The Standard Model, The Second Amendment, and the Problem of History in Contemporary Constitutional Theory," *Constitutional Commentary* (1999), 238.
[14] Charles, *The Second Amendment*, 82.
[15] Ibid., 83-86.

should the Second Amendment restrict the national government? By implication, the national government can similarly define the scope of the right to keep and bear arms. For example, it could do so by limiting that scope to participation in a nationally organized military force (i.e. the National Guard).

The evidence clearly shows that by affirming the right to keep and bear arms, state and national governments did not surrender their ability to suppress insurrections or enforce compliance with the law. Without such a power no government would be possible. Noah Webster stated the truism that to enforce the laws and keep the peace "government must always be armed with a military force . . . otherwise laws are nugatory, and life and property insecure."[16] Even the most explicit proposals to proscribe disarmament (Pennsylvania, New Hampshire, and Sam Adams) recognized that rebellious or violent people could be disarmed. Further, the American commitment to republican government entailed that the will of the majority governed society, and that the government legitimately could coerce individuals to submit to the decrees of the people's representatives.

However, Charles' and other critics of the "insurrectionist" position ignore the relationship of the Second Amendment to majority rule and federalism, betraying an attachment to the overly individualistic conception of rights that has dominated the twentieth century. They see rights as important primarily because they protect minorities. Rather, most founders viewed rights—especially jury trial, voting, bearing arms, and states' rights—as safeguards of majoritarian government against usurpation by minorities, public or private. At the state level a robust militia would prevent a law that offended a predominant majority of the population from being enforced, thereby protecting majority rule from self-serving government. The Second Amendment applied the same logic to the federal arrangement: the state militias would prevent the enforcement of a law offensive to most of the people or states. Without their militias, the states and people would be at the mercy of a standing army. Antifederalists closely linked personal rights with states' rights because they believed that the national government would succumb to unrepresentative and aristocratic interests.[17] They intended the Second Amendment to protect the federal arrangement in addition to majority rule. While a combination of

[16] A Citizen of America, "An Examination into the Leading Principles of the Federal Constitution," in Sheehan and McDowell, *Friends*, 394.
[17] See for example, Cornell, *The Other Founders*, 33.

treasonous individuals had no right to bear arms against the state, the founders believed that military power still should reside in the population as a whole.

The Federalists insisted that the popular militia provided a vital function in the federal arrangement by maintaining the balance of power between the two levels of government. Chapter two recounted in detail how the Federalists conceived of the militia as a "military check" on usurpation, and a brief summary will suffice here.[18] Although during ordinary circumstances legal and political checks (intellectual debate, voting, the court system, etc.) would maintain the constitutional balance, the existence of state governments commanding loyal militias posed an ultimate check against a truly undemocratic coup by the national government. If any state-level person or institution attempted to establish a military dictatorship, the national government could marshal the resources of the entire nation to oppose the attempt. Likewise, if any person or set of people—the President, Congress, or a powerful general—tried to overthrow the nation's republican Constitution to rule by force, the states and their militias could join forces and collectively resist. However, "the 'military check of federalism' built into the original constitution," despite the vigorous defense of it during ratification, "did not quiet Antifederalist fears," and Federalists were obliged to adopt the Second Amendment.[19]

Rather than enshrine a debilitating *constitutional* right to revolution articulated by some radical Antifederalists, the Second Amendment tacitly acknowledged the validity of the widely accepted *natural* right of revolution. This theory, derived from John Locke and invoked to justify the Americans' own rebellion against the British crown, asserted that "whenever the legislators endeavor to take away and destroy the property of the people, or to reduce them to slavery under arbitrary power," the people are "absolved from any further obedience" and "may resume their original liberty" by defending themselves and violently resisting the oppressor.[20] Although wide consensus existed that only extreme situations could justify armed revolution, only an armed population could defend its rights when such a situation did arise. The Antifederalists hoped to achieve preemptive prevention of tyranny by restricting the creation of a standing army and

[18] See the section "Federalism and Military Power" on pages 47-58.
[19] Amar, "The Bill of Rights as a Constitution," 1165. In another article, Amar supports my analysis of federalism, military power, and the nature of revolution, stating that "the various state militias could serve as organized and independent pockets of military resistance" if the national government tried to "suspend the Constitution and forcibly subjugate the people." Amar, "Of Sovereignty and Federalism," *Yale Law Journal* 96, No. 7 (June 1987): 1496.
[20] David Wotton, ed., *The Political Writings of John Locke* (New York: Penguin Books, 1993), 374.

limiting national control over the militia. What they got instead was preemptive prevention of federal disarmament, ensuring that the people of the states could successfully resist any future oppression.[21] Thus, while the federalist interpretation supports a version of the "insurrectionist" position, the nature of this position has been misunderstood by all sides. The right of resistance enshrined in the amendment cannot be invoked by all people against all government, which would truly invite anarchy. Needless to say, the Second Amendment did not forbid the states from regulating firearms or establish a universal right to revolt against them. Rather, by sanctioning the orderly resistance of the state governments to a coup by the national government, the Second Amendment can best be described as the "auxiliary right of federalism." As such, it preserved the viability of the state militias—and the military check they represented—by confirming the states' right to keep their (universal) militias armed. By indirectly acknowledging the natural right of rebellion and affirming the role of the militia in the federal system, the Second Amendment took a middle position regarding insurrection.

The experience of Shays Rebellion clarifies the views of the founders regarding the limits of the right to revolution. The Shaysites appealed to the natural right of revolution to justify their actions, not the right to bear arms in the Massachusetts constitution.[22] According to them, the government was no longer fulfilling the reason for its existence—promoting the welfare of the citizens. By oppressing them with high taxes and foreclosures, it had broken its contract with the people and prompted them to alter or, if necessary, abolish it. Rather than acting as lawless rebels, the Regulators carefully portrayed themselves as representatives of the sovereign people, adopting the form of a popular militia. By contrast, the Friends of Order—including Samuel Adams, who would later become a virulent Antifederalist—denounced the Shaysites as the enemies of government and "the mob." In their view, the will of the sovereign people, enacted by the Massachusetts legislature, was binding on the whole state.

Were Antifederalists like Sam Adams being inconsistent when they supported the possibility of states resisting the national government during ratification, considering that just a couple years ago they had condemned the "rebellion" of the Regulators? Properly understood, they were not. Many drew a distinction between revolution in a monarchy and revolution in a

[21] The right to own weapons followed logically from the right to rebel. John Locke wrote: "He that shall oppose an assault only with a shield to receive the blows . . . without a sword in his hand to abate the confidence of his assailant, will quickly be at an end of his resistance." Ibid., 381.
[22] Cornell, *A Well-Regulated Militia*, 32.

representative republic. Samuel Adams said that "in monarchies the crime of treason and rebellion may admit of being pardoned or lightly punished, but the man who dares rebel against the laws of a republic ought to suffer death."[23] Under a monarchy, he and others noted, the people have no voice and cannot change their lot peacefully. By forming a civil society, in other words, the people of each state had pledged to obey the laws, because "all authority is from the people." Government was authoritative when it spoke for the people, whose voice was mediated through a popularly ratified constitution. For Adams, "to say the majority shall not govern, is saying, either that we will reduce ourselves to a State of Nature, or reject the ideas of civil liberty."[24] However, if the rulers overstepped the bounds of the constitution, the people were not obligated to obey the laws and could resort to the natural right of revolution. As one congregational minister argued, in Massachusetts "publick oppressions may be soon removed without force, either by remonstrance against the measures of rulers, or by a change of the rulers themselves." The people legitimately could take up arms, he continued, only when "rulers usurp a power oppressive to the people, and continue to support it by military force in contempt of every respectful remonstrance."[25] When Antifederalists such as Samuel Adams raised the specter of an oppressive Congress, they clearly had in mind the unconstitutional annihilation of representative government.[26] Thus, they plausibly could criticize the Regulators for resisting constitutional (if unpleasant) laws, and later argue that the states should be equipped to resist unconstitutional tyranny.

The Second Amendment definitively established concurrent jurisdiction over the militia. It established the authority of the states to organize it so long as such regulation did not conflict with national regulation. Further, the Second specifically forbade Congress from disarming the universal militia and confirmed the right of the states to provide arms to their citizens. Neither the Constitution nor the Second Amendment required that the militia be organized, armed, or employed, and the Second Amendment did not curtail the national government's authority to call

[23] William V. Wells, *The Life and Public Service of Samuel Adams*, vol. 3. (Freeport, NY: Book For Libraries Press, 1969), 246, quoted in William Pencak, "Samuel Adams and Shays's Rebellion," *The New England Quarterly* 62, no. 1 (1989), 64. In a letter to Noah Webster, Adams wrote that because "we now have constitutional and regular governments," extra-constitutional conventions or assembles "are become useless." Pencak, "Samuel Adams and Shays's Rebellion," 66.
[24] Samuel Adams, "Circular Letter," 1786, quoted in Pencak, "Samuel Adams and Shays's Rebellion," 69-70.
[25] "A Congregational Pastor Counsels Moderation," in Richard Brown, ed., *Major Problems in the Era of the American Revolution, 1760-1791*, 1st ed. (Lexington, Mass., 1992), quoted in Cornell, *A Well-Regulated Militia*, 34.
[26] However, some Antifederalists feared that the Constitution's grant of power was so vague and all-encompassing that if the people wanted to break their yoke, they would have to resist technically constitutional laws.

out the militia.[27] However, by supporting the Second Amendment, which affirmed the states' concurrent authority to define, arm, and train the militia, Federalists hoped to persuade doubters that the states possessed the necessary tools to resist any future attack on their liberties.

Defining "The Right of the People"

The federalist interpretation argues that the Second Amendment restricted the jurisdiction of the national government by preventing it from disarming American citizens or creating a select militia. To sustain this claim, it is necessary to define the terms of the Second Amendment, especially "the people" and "militia." Here the federalist interpretation diverges from all competing interpretations. Individual rights scholars point out that the Second refers to "the people," not "the states" or "the militia." Thus, they argue, "the people" cannot mean the militia or the state government; rather, every individual person holds a right to keep and bear arms. Collective rights scholars argue that "the people" refers to the collective people, and that the collective people can be regulated by the collective government (i.e. Congress). In essence, the "right of the people" merely refers to organized state militias under national control. For them, as long as Washington makes some provision for state militias, the collective people's right is secure.[28]

The federalist interpretation, by contrast, argues that both "the people" and the "militia" encompassed all full citizens. Federalists and Antifederalists alike closely identified "the people" with the "well-regulated militia;" for them, the terms were virtually synonymous.[29] They wanted the whole free male population to keep and bear arms, not a select few. The Second affirms the concept of the universal militia by protecting the rights of the whole citizen population. However, the right to keep and bear arms applied only to citizens. In the parlance of the times, it

[27] Both omissions provoked criticism from Antifederalists, who often worried that the national government would oppress the people by using the militia *too much*. After noting that the "personal liberty" of "every man probably from sixteen to sixty years of age, may be destroyed" by the Constitution's grant of power to Congress, the "Dissent of the Minority" declared typically: "The absolute command of Congress over the militia may be destructive of public liberty; for under the guidance of an arbitrary government they may be made the unwilling instruments of tyranny. The militia of Pennsylvania may be marched to New England or Virginia to quell an insurrection occasioned by the most galling oppression . . . . This power can be exercised not only without violating the constitution, but in strict conformity with it." "Dissent of the Minority," in Storing, *Anti-Federalist*, 220-21.

[28] Cornell seems to concur in this interpretation. Cornell, *A Well-Regulated Militia*, 61.

[29] In the 1790s, slaves, (often) free blacks, women, children, criminals, and recent immigrants were not full citizens. Since then, constitutional developments have abolished slavery and established racial and sexual equality.

was a political right rather than a civil right.[30] Akhil Amar explained the difference thusly: "Alien men and single white women circa 1800 typically could enter into contracts, hold property in their own name, sue and be sued, and exercise sundry other civil rights, but typically could not vote, hold public office, or serve on juries . . . So too, the right to bear arms had long been viewed as a political right, a right of Citizens."[31] Thus, slaves, children, women, immigrants, criminals, and other people who were not full citizens did not have the right to keep and bear arms. Those who argue that the Second Amendment confers a personal right to keep and bear arms must confront the clear fact that not all persons enjoyed that right in 1790. Collective rights proponents, in their turn, must take into account that the Second Amendment refers to "the people," and that bearing arms was widely believed to be a right of all citizens. The restriction of this right to citizens, like the restriction of other civil rights such as serving on juries and running for political office, does not prove that the founding generation believed these rights could be taken away from citizens at the discretion of the government.

Another major area of debate among current scholars involves whether the national government may determine the composition of the militia. The individual rights interpretation, which ahistorically disconnects the right to keep and bear arms from its militia/federalism context, does not address this issue. For them, reference to the militia in the Second Amendment only implies that the founders believed an armed population would promote a "well-regulated" militia; the Second itself has no relation to the militia clauses of the Constitution. By contrast, perhaps the most crucial difference between the federalist and collective rights interpretations is that the former leaves the composition of the militia to the states, while the latter asserts it belongs to Congress.[32] If Congress enjoys leeway, under the militia clauses, to organize the militia in any way it wants, it has substantially more power to regulate the ownership and use of firearms.

The available evidence strongly suggests that the national government does not have constitutional authorization to restrict membership in the militia, except on the basis of citizenship. The entire context of the debate over the militia, meticulously recounted in chapter two, confirms that Antifederalists feared a select militia as much as a standing army and that

[30] As an "auxiliary right" intended to protect constitutional liberties, it would naturally apply only to citizens who fell under the jurisdiction of the constitution in question.
[31] Akhil Amar, "The Bill of Rights as a Constitution," *The Yale Law Journal* 100, No. 5 (March 1991): 1164.
[32] Saul Cornell also aligns with the collective rights scholars on this point.

Federalists denied that the un-amended constitution permitted Congress to create one. Furthermore, even if the original Constitution could be construed to authorize congressional determination of the militia (which it cannot), the Second Amendment clearly placed this interpretation out of bounds. The amendments proposed by the states reflected a desire to protect the viability of the (universal) militia. Similarly, the debate in the House of Representatives shows that members approved the authority of the government to compel military service but rejected its authority to prevent citizens from being in the militia.[33] Keeping and bearing arms was both a right and a duty; the ability to compel militia service did not imply the ability to restrict it.

If the collective rights scholars are correct, the Second Amendment did not restrict the national government from creating a select militia and disarming those outside of it. In this conception the Second Amendment was basically meaningless as a practical restriction on the national government. Its only value would lay as a declaration of principles that would dispel objections to the Constitution. Jack Rakove took this stance. To him, the Second "served as a principled reminder to the federal government (or, more particularly, to Congress) to act to ensure that the militia would indeed remain well organized, armed, and disciplined." The Federalists, he continued, declined to make the text more explicit, refusing to make an "alteration of any kind in the delegation and allocation of legislative authority" in the militia clauses of Article I. The ideal embedded in the Second Amendment (a robust militia) did not provide adequate remedies for its infringement, because the Federalists simply did not want to impose "a meaningful restriction on the ability of Congress to develop whatever form of militia the consideration of national security" might require.[34] Elsewhere, after noting the specific interpretive challenges revealed in the debate over abortion rights and the Second Amendment, he asked "whether it is linguistically possible to cabin any conception of a right within terse textual formulas," rendering the entire process of interpretation fundamentally flawed.[35]

[33] See pages 78-79. The only possible exception to compulsory service was conscientious objection, which was viewed as a voluntary concession by the government. Most House members believed objectors could be subject to a fine.

[34] Rakove, "Highest Stage of Originalism," in Bogus, *The Second Amendment in Law and History*, 110-11.

[35] Rakove, "The Dilemma of Declaring Rights," in Barry Alan Shain, ed., *The Nature of Rights at the American Founding and Beyond* (Charlottesville, VA: University of Virginia Press, 2007), 185.

Several observations refute the position that the Bill of Rights was merely a statement of general principles devoid of specific content.[36] First, the Bill of Rights succeeded because "most Antifederalists were pleased with the Bill of Rights."[37] Individuals who expressed displeasure approved of the amendments as far as they went and merely wanted to extend their restrictions to realms such as the judiciary and taxation. Given the deep and widespread dismay at the prospect of a select militia, the complete lack of negative commentary on the Second Amendment implies that contemporaries did not believe the Second Amendment authorized the creation of a select militia, although many feared—and publically wrote—that the original Constitution had. Second, while the first clause of the Second Amendment seems to be declaratory and purposive, one cannot assume the same about the second clause. Contemporaries viewed the Bill of Rights as explanatory amendments that declared certain types of legislation off limits; the Second was intended to shape the boundaries of national authority.[38] This purpose explains the inclusion of the Tenth Amendment as well as phrases such as "Congress shall make no law" and "shall not be infringed." Third, Rakove's interpretation privileges the private views of the members of Congress above the public understanding of the voting population. When attempting to divine the original understanding of a constitutional text, the opinion of the people—whose votes enacted the Constitution and Bill of Rights—should trump other considerations. History, context, and the understanding of individuals play an important part in originalist constitutional interpretation, but only to the extent that they disclose the predominant views of the whole population. Based on the public debate, there is no evidence to suggest that the majority of Americans—or even a majority of Federalists—adopted the view that Congress could create a select militia.

Regardless of whether the Bill of Rights reflected the Federalist or Antifederalist viewpoint, the result is the same. If one assumes the Bill of Rights embodied Antifederalist concerns, it rules out a select militia: opposition to disarmament indisputably featured strongly in their critique. Sensing this, collective rights scholars often privilege Federalists' voices over

[36] The viability of correct "originalist" interpretations is another matter, beyond the scope of this work. In short, I hold to the opinion that, while there will never be a consensus regarding the meaning of a law, even among the people at the time, some originalist interpretations are better than others. The context and purpose of a law help determine both its meaning and applicability in new contexts.

[37] Stuart Leibiger, "James Madison and Amendments to the Constitution: 1787-1789: 'Parchment Barriers'," *The Journal of Southern History* 59, No. 3 (August 1993): 467.

[38] Leibiger noted that "by using the words 'shall not' instead of 'ought not,' Madison phrased his proposals as imperatives rather than suggestions." Leibiger, "James Madison and Amendments," 461.

those of the Antifederalists (they were, after all, the winners) to argue that the Second Amendment does not rule out national regulation of firearms.[39] However, Federalists' frequent assertions of the communal militias' value as a check on tyranny (not to mention the assumption that the people would have arms) came in direct response to the Antifederalists' claim that the Constitution would authorize a select militia and disarmed population. These public arguments would presumably take precedence even if the Second Amendment did not exist; its ratification only further enshrined the Federalist conception of the militia and federalism.[40]

The context of the Second Amendment also does not imply that "the people" would be congressionally determined militia members. Collective rights scholars invalidly cite the Second Amendment's military context to argue that the right to keep and bear arms was a collective right subject to extensive governmental regulation. On the contrary, the debate revolved around the militia clauses because Antifederalists could not conceive of any other section of the Constitution authorizing disarmament, absent blatant misinterpretation. As the ratification debates show, they believed the power "to provide for organizing, arming, and disciplining, the militia" would become the pretext for an aristocratic Congress to destroy the military power of the states. While some Federalists may have privately entertained the notion that the government could disarm the people under the "general welfare" or "commerce" clauses, these opinions are entirely absent from public arguments regarding the Constitution. Rather, Federalists consistently emphasized the limited nature of national power and asserted that all powers not granted to the national government were reserved to states (the Tenth Amendment later explicitly codified this argument). Thus, because the militia clauses were the only realistic avenue for disarmament, they became the target of Antifederalists concerns.[41]

The Second Amendment and State Jurisdiction

The fourth pillar of the federalist interpretation states that while the Second Amendment restricted the national government, the states retained plenary authority to make regulations consistent with their own constitutions. Americans believed that the states, closer to the people and consequently charged with a greater range of concerns, should possess more expansive regulatory authority than the national government. This authority included regulation of firearms,

[39] See, for example, Paul Finkelman, "'A Well Regulated Militia:' The Second Amendment in Historical Perspective, in Bogus, *The Second Amendment*, 131-133.
[40] See the section "Federalism and Military Power" in chapter two, pages 47-58.
[41] The founding generation generally did not ascribe police powers to the national government; thus, they did not see a need to guard against misuse of the police powers by the national government. See epilogue.

which fell under the states' "police power."[42] Whereas the Constitution strictly spelled out the authority of the national government, dealing almost exclusively with larger national concerns, state authority extended to the preservation of the safety and morality of the community. State laws regulating the use of firearms and storage of gunpowder were widespread and uncontroversial in 1792. In the antebellum era, the Supreme Court left untouched antebellum state laws banning concealed weapons, and consistently declined to apply the Bill of Rights to the states despite a small body of contrary opinion.[43]

The Second Amendment's orientation toward federalism meant that different sets of rules applied to the state and national governments. The Second Amendment determined who could regulate arms, not what regulations were permissible. In this sense, the declaration that the right to keep and bear arms "shall not be infringed" was similar to the First Amendment's declaration that "Congress shall make no law." The framers intended the Bill of Rights to prohibit the national government from enacting certain types of legislation altogether, an intention confirmed by several Supreme Court cases in the nineteenth century.[44] As a concession to the Antifederalists, the Bill of Rights acknowledged their characterization of the national government as particularly susceptible to abusing its powers and restricted in accordingly. Congress could organize, arm, and discipline the militia, but could not limit citizens' ownership of weapons or their participation in the universal militia. While states could circumscribe the right to keep and bear arms in a variety of ways, Congress could not "regulate" the militia so as to weaken the state's concurrent jurisdiction over it.

Early Commentary on the Second Amendment

Post-adoption commentary supports the federalist interpretation of the Second Amendment more comprehensively than its competitors. Consistent with the amendment's context, commentators regarded the right to keep and bear arms as an auxiliary right, agreed that

[42] Police power is "the inherent power of a government to exercise reasonable control over persons and property within its jurisdiction in the interest of the general security, health, safety, morals, and welfare except where legally prohibited," quoted in "Police Power," *Merriam-Webster*, http://www.merriam-webster.com/, accessed February 20, 2011. For more on the expansion of congressional jurisdiction, see *United States V. Darby Lumber Co.* 312 U.S. 100 (1941).

[43] For a rejection of "incorporation," see *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833). For a contrary opinion by a state court, see *Hawkins H Nunn v The State of Georgia*, 1 Ga. 243, 251 (1846), the first court decision to overturn a gun control law with the Second Amendment..

[44] See *Barron V. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833); *United States V. Cruikshank*, 92 U.S. 542 (1875). Note that Madison's attempt to include an amendment limiting state power failed to receive even the approval of Congress.

the Second served as a limitation on congressional jurisdiction, and linked it with federalism—especially the maintenance of concurrent state jurisdiction over universal militias. This evidence, often written by prominent and authoritative figures, may be the closest historians can come to the intent of the framers of the Second Amendment.

The amendment received surprisingly sparse commentary at the time of its adoption, given the ruckus of the ratification debates. However, several newspaper articles addressed it. In an early article supporting the Bill of Rights, Tench Coxe, a well-known Federalist, included a short paragraph about the Second Amendment:

> As civil rulers, not having their duty to the people, duly before them, may attempt to tyrannize, and as the military forces which shall be occasionally raised to defend the country, might pervert their power to the injury of their fellow-citizens, the people are confirmed by the next article in their right to keep and bear their private arms.[45]

Coxe clearly viewed the right as an auxiliary right and assumed that militiamen could own their own weapons. Coxe forwarded his commentary to Madison, who thanked him for his "explanatory strictures" that would aid the process of ratification. Madison's praise indicates, but does not prove, that he did not object to Coxe's language regarding the Second Amendment. In September, Centinel took up his pen to assail the weakness of the amendments. Regarding the Second Amendment, he complained that it did not "constitutionally provide for" the establishment of a militia, which still could be misused by being "subjected to martial law," punished severely, and forced to crush "the last efforts of expiring liberty" in another state. By not addressing the possibility of disarmament, Centinel implicitly conceded that the militia could not be disarmed. If Congress could not neglect the militia, its "absolute command" over it still rendered it susceptible to corruption.[46] A third article wrote that the "right of the people to keep and bear arms has been recognized by the General Government, but the best security of that right after all is, that military spirit, that taste for martial exercises . . . ." This interpretation separated the right to keep and bear arms from participation in the militia, contrary to the collective rights interpretation. If the right only existed via participation in a disciplined military force, why would there need to be "martial exercises" to secure it? Yet, the article also implied (contrary to some manifestations of the individual rights view) that the right was meant to secure a powerful

[45] A Pennsylvanian, Article in the *Federal Gazette* (Philadelphia), June 18, 1789, quoted in Young, *Origin*, 671. Coxe was commenting on an earlier version of the Amendment, before it was revised by the Senate.
[46] Centinel, Revived, *Independent Gazetteer* (Philadelphia), September 9, 1789, quoted in Young, *Origin*, 710.

militia. Finally, it stated that well disciplined militiamen "form the best barrier to the Liberties of America," thus linking both the Second Amendment and the militia to the preservation of constitutional freedom (i.e. an auxiliary right).[47]

By far the most important commentator on the Second Amendment was St. George Tucker, a district court judge and professor of law at the College of William and Mary. His views are especially relevant to constitutional scholars because he was very conversant with the congressional debates on the Bill of Rights and because he reflected the moderate Federalist viewpoint that was responsible for ratifying the Constitution. In addition, he was "the most influential legal scholar of the early nineteenth century." His edition of Blackstone "continues to be held in the highest regard by legal and constitutional historians as an indispensible source for understanding American law and the Constitution in their formative era."[48] Originally an Antifederalist, he switched sides as ratification became imminent, supported a Bill of Rights, and, despite some Antifederalist misgivings, expressed optimism about the final outcome.[49] Several of Tucker's writings, including unpublished law lecture notes, dealt with the Second Amendment. Taken as a whole they offer strong support for the federalist interpretation.

In his lecture notes, Tucker clearly connected the Second Amendment's prohibition of national disarmament to federalism. His statements, written just after the adoption of the amendment, are so valuable they warrant extended quotation:

> If a State chooses to incur the expence of putting arms into the Hands of its own Citizens for their defense, it would require no small ingenuity to prove that they have no right to do it, or that it could by any means contravene the Authority of the federal Govt. It may be alledged indeed that this might be done for the purpose of resisting the Laws of the federal Government, or of shaking off the Union: to which the plainest Answer seems to be, that whenever the States think proper to adopt either of these measures, they will not be with-held by the fear of infringing any of the powers of the federal Government. But to contend that such a power would be dangerous for the reasons above-mentioned would be subversive of every principle of Freedom in our Government; of which the first Congress appears to have been sensible by proposing [the Second Amendment].[50]

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[47] *Gazette of the United State*s (New York), October 14, 1789, quoted in Young, *Origin*, 719.
[48] Davison M. Douglas, "Foreward: The Legacy of St. George Tucker," *William and Mary Law Review* 47, No. 4 (2006), 1112; David Thomas Konig, "St. George Tucker and the Limits of States' Rights Constitutionalism: Understanding the Federal Compact in the Early Republic," *William and Mary Law Review* 47, No. 4 (2006), 1247.
[49] Cornell, "St. George Tucker and the Second Amendment: Original Understandings and Modern Misunderstandings," *William and Mary Law Review* 47, No. 4 (2006): 1124, 1127-1128.
[50] St. George Tucker, Ten Notebooks of William and Mary Law Lectures (*W & M Digital Archive*, http://digitalarchive.wm.edu/handle/10288/13361, accessed February 20, 2011), 127-28.

Writing in the heat of the original context of the ratification debates, Tucker boldly claimed that the Second Amendment secured the states' ability to resist oppression from the national government with force. Congress could not disarm the states' militias even if it suspected them of planning a revolution. A less ambiguous identification of the Second Amendment as the "auxiliary right of federalism" is scarcely possible. To further buttress his point he noted that the "power of arming the militia, is not one of those prohibited to the States by the Constitution, and, consequently, is reserved to them under the twelfth Article of the ratified Aments."[51] By linking the Second Amendment to the Tenth, Tucker further emphasized its relation to federalism.

Although his lecture notes were never published, his *View of the Constitution of the United States* contained several sections that support the federalist interpretation by connecting the Second Amendment to the preservation of popular liberty against governmental oppression. In his treatment of the Second Amendment itself, he said:

> This may be considered as the true palladium of liberty . . . The right of self defense is the first law of nature: in most governments it has been the study of rulers to confine this right within the narrowest limits possible. Whenever standing armies are kept up, and the right of the people to keep and bear arms is under any color or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.[52]

Tucker then cited the disarmament of most English citizens under laws designed to prevent plebeians from hunting game animals traditionally reserved for the wealthy. The English Bill of Rights had failed to prevent disarmament, Tucker noted, because it contained language limiting the right to have arms based on religion and social standing. As a result "not one man in five hundred can keep a gun in his house without being subjected to a penalty." Tucker also asserted that such laws—purportedly to protect game—were "calculated for very different purposes."[53] This is doubtless a reference to William Blackstone, who wrote that "the prevention of popular insurrection and resistance to the government by disarming the bulk of the people, is a reason oftener meant than avowed for the making of game laws."[54] In a later comment on the game laws Tucker wrote that disarmament had rendered the English "at the mercy of the government,"

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[51] Ibid. The "twelfth article" was today's Tenth Amendment.
[52] Tucker, *View of the Constitution of the United States: With Selected Writings* (Indianapolis, Liberty Fund, 1999), 238-39.
[53] Ibid.
[54] St. George Tucker, *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia*, vol. 1 (Union, New Jersey: The Lawbook Exchange LTD., 1996), 143.

while "in America we may reasonably hope that the people will never cease to regard the right of keeping and bearing arms as the surest pledge of their liberty."[55] Tucker defined disarmament as restrictions on the private ownership of weapons. To him, the right to keep and bear arms should extend to all citizens and encompass the ability to own weapons apart from state sanction.[56] Tucker indentified the right to keep and bear arms as an auxiliary right that enabled the people to resist unjust government. In his commentary on Blackstone, Tucker explicitly equated the Second Amendment with Blackstone's fifth auxiliary right, but noted that in America it was "without any qualification as to [the people's] condition or degree, as is the case in the British government."[57] While Parliament had prohibited arms to most of its citizens under the pretext of protecting aristocratic privileges, nothing could justify laws disarming American citizens.[58]

Though the above passages did not articulate the Second Amendment's relationship to federalism, possibly because of their distance from the amendment's immediate context, other passages in *View of the Constitution* corroborate Tucker's earlier statement from his lecture notes. In his discussion of the militia clauses, he recognized that, although founded on the principle of the universal militia expressed in Virginia's bill of rights, they "were thought to be dangerous to the state governments." Tucker assured his readers that "all room for doubt, or uneasiness" regarding the states' authority to organize, arm, and discipline their own militias "seems to be completely removed" by the Second Amendment. He further pointed out that because the Constitution did not prohibit the states from arming the militia, they retained concurrent jurisdiction in that respect. Tucker clearly considered the possibility of Congress creating a select militia by preventing the states from organizing and arming their own militias (which he explicitly identified with "the body of the people") to be unconstitutional. To illustrate his point he complained about the actions of the Fifth Congress, which had authorized the President to enlist "select corps of militia, whose officers HE was authorized to appoint," and who were exempt from normal state and national militia duty. "It seems impossible to view them in any other light," Tucker continued, "than as a part of the militia of the states, separated by an

[55] Ibid., vol. 2, 413.
[56] England already had a militia, whose members possessed the right to bear arms while serving in it.
[57] Tucker, *Blackstone's Commentaries*, vol. 1, 143.
[58] Tucker's son, Henry, also a lawyer and author of constitutional law, echoed his father's interpretation, linking the Second to the fifth auxiliary right (though "not limited and restrained" as in England), and declaring that it "furnishes the means of resisting . . . the inroads of usurpation." Henry St. George Tucker, *Commentaries on the Laws of Virginia* (1831), vol. 1, 43, quoted in Halbrook, *That Every Man Be Armed*, 91-92.

unconstitutional act of congress, from the rest, for the purpose of giving the president powers, which the constitution expressly denied him, and an influence the most dangerous that can be conceived, to the peace, liberty, and happiness of the United States." For Tucker, the creation of a separate, select militia, enlisted by the President and neither available to nor governed by the states, was unconstitutional because the constitutional militia must be the universal militia under concurrent national/state jurisdiction. It was dangerous because it placed too much power in the hands of the national government.[59]

In another passage Tucker argued that America's federal constitutional arrangement uniquely discouraged the disarmament of the people. In England—where the bill of rights restricted only the king—omnipotent power was placed in the hands of Parliament. However, in "the United States," Tucker said, "the great and essential rights of the people are secured against legislative as well as executive ambition." One of the five protectors of liberty was the federal distribution of power between the state and national governments, "by which each is in some degree made a check upon the excesses of the other." In particular, the states are "duty bound" to resist attempts by the national government to exceed its limited and enumerated constitutional powers. Tucker then illustrated how federalism prevented infringement of the people's rights:

> In England . . . the greatest political object may be attained, by laws, apparently of little importance, or amounting only to a slight domestic regulation: the game-laws, as was before observed, have been converted into the means of disarming the body of the people . . . the acts directing the mode of petitioning parliament, &c. and those for prohibiting riots . . . are so many ways for preventing public meetings of the people to deliberate upon their public, or national concerns. The congress of the United States possess no power to regulate, or interfere with the domestic concerns, or police of any state: it belongs not to them to establish any rules respecting the rights of property, not will the constitution permit any prohibition of arms to the people, or of peaceable assemblies by them, for any purposes whatsoever.[60]

By linking the right to keep and bear arms with the rights of assembly and petition, other "auxiliary rights," Tucker endorsed Blackstone's view that the right to keep and bear arms was a political/auxiliary right that protected constitutional freedom. Further, the decentralized constitutional arrangement helped to maintain this structural framework by limiting the national government's regulatory and police powers: the states would have exclusive regulation over local concerns, including firearm regulation. After the adoption of the Second Amendment, Tucker

[59] Tucker, *View of the Constitution*, 214-16.
[60] Tucker, *View of the Constitution*, 252-53.

implied, there could be no pretext for disarming the people through either the militia clauses or non-existent police powers. If such a law was passed the courts could declare it unconstitutional.[61]

Two other constitutional commentators provided explanations of the Second Amendment. Joseph Story, although further removed from the amendment's immediate context, affirmed that the "right of the citizens to keep and bear arms" was "the palladium of the liberties of the republic" because "it offers a strong check against usurpation and arbitrary power of the rulers; and will generally . . . enable the people to resist and triumph over them." Story also declared that the militia should be the "natural defense of a free country" because standing armies were expensive and because of the "facile means, which they afford to ambitious and unprincipled rulers, to subvert the government, or trample upon the rights of the people."[62] William Rawle, writing in 1829, also noted the connection between the Second Amendment and the militia, arguing that "few" would dissent from the proposition that a militia is "necessary to security of a free state," although during an actual war professional troops "are confessedly more valuable." Because a "disorderly militia is disgraceful to itself" and dangerous to its own state, the "duty of the state government is, to adopt such regulations as well tend to make good soldiers." The right to keep and bear arms, he continued, was a "corollary" to the first clause:

> The prohibition is general. No clause in the Constitution could by any rule of construction be conceived to give to congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretence by a state legislature. But if in any blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both.[63]

These commentaries corroborate the basic claims of the federalist interpretation. They identified the right to keep and bear arms as primarily a tool to oppose governmental oppression with armed resistance (i.e. an auxiliary right), and viewed the militia as the safeguard of popular liberty. Rawle, expressing a jurisdictional viewpoint, saw the Second Amendment as a limitation

[61] Tucker, *View of the Constitution*, 293. Tucker viewed the independence of the judiciary as another check on misgovernment; see ibid., 253.
[62] Joseph Story, *Commentaries on the Constitution*, vol. 3 (Boston: Hilliard, Gray, and Company, 1833), 746, quoted in Halbrook, *That Every Man Be Armed*, 93.
[63] William Rawle, *A View of the Constitution*, 2nd ed. (Philadelphia: Philip H. Nicklin, 1829), 125-26, quoted in Halbrook, *That Every Man Be Armed*, 90-91.

on governmental power.[64] The testimony is even more striking given that Rawle was a Federalist and Story an arch-nationalist.

[64] However, Rawle also believed that the Bill of Right applied to the states, a view that contradicted mainstream judicial opinion, including that of Story, who voted in the unanimous Supreme Court decision not to apply the Bill of Rights to the states (*Barron V. Baltimore* 32 U.S. 243, 1833).

EPILOGUE

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The ratification of the Constitution, the creation of the Second Amendment, and post-adoption commentary all support the primary arguments of the federalist interpretation. At the time of its adoption, the Second Amendment protected an auxiliary right to keep and bear arms intended to protect constitutional liberty from oppressive government. Specifically, the Second was intended to protect state control over universal militias so that they could successfully resist the national government if need be. It restricted Congress from creating a select militia or disarming the people under any pretext. Finally, the Second Amendment reflected the Antifederalists concern with federalism, and thus applied exclusively to the national rather than the state governments. However, while the federalist interpretation embodies the original meaning of the Second Amendment, several important constitutional developments have taken place since 1791 that impinge greatly on its applicability in the twenty-first century.

The Second Amendment Today

Following its adoption, the Second Amendment remained largely irrelevant until the twenty-first century. Until *District of Columbia V. Heller* (2008), only a handful of Supreme Court cases mentioned it and none set forth a comprehensive interpretation. Some Americans have expressed astonishment over this phenomenon, but, given the amendment's context, it is hardly surprising. National regulation of firearm ownership or use was never a political possibility, much less a goal, for the Federalists. Thus, the adoption of the Second Amendment gave them no great headaches. They had already decisively won the debate over whether the national government should control the militia or raise standing armies during peacetime. Congress briefly contemplated organizing the militia in a way that would have resembled a select militia. However, the Militia Act of 1792 eventually defined the militia as "each and every free able-bodied white male citizen of the respective states" aged 18-45, thus creating a universal militia and obviating any resistance on constitutional grounds.[1]

Subsequent political and constitutional developments have given the Second Amendment a new relevance. Over the course of the twentieth century a series of Supreme Court decisions enlarged Congress's regulatory jurisdiction, particularly its power "to regulate commerce . . .

[1] Militia Act of 1792, http://www.constitution.org/mil/mil_act_1792.htm, accessed February 28, 2011.

among the several states."[2] Although even now the national government possesses police power only over federally owned lands and the military, Congress frequently passes laws on a wide variety of subjects which traditionally had fallen under the police power of the states.[3] National disarmament, a nightmare scenario for Antifederalists and Federalists alike, is now a political possibility. Because the Second Amendment was a direct response to Congress's military oversight granted in the militia clauses, applying it to this new source of regulatory authority requires difficult interpretive decisions.

The Second Amendment originally prohibited any national firearm regulation and an originalist interpretation could apply the same prohibition today. The national government still does not possess police power, and the Second Amendment clearly prevents the national government from regulating weapons via clauses such as the "necessary and proper" clause. This prohibition includes any attempt to limit access to arms by imposing restrictions on interstate buying and selling of arms as well as any law restricting a citizens' right to own or use a weapon. St. George Tucker wrote that if "Congress were to pass a law prohibiting any person from bearing arms, as a means of preventing insurrections," the courts should pronounce it unconstitutional. The necessary and proper clause could not authorize congressional regulation of arms because "if congress may use any means, which they choose to adopt, the provision in the constitution which secures to the people the right of bearing arms, is a mere nullity."[4] In other words, Congress cannot legitimately use its other constitutional powers to justify regulating arms. For the founders, a bill of rights established "those unalienable and personal rights of men, without the full, free, and secure enjoyment of which there can be no liberty, and over which it is not necessary for a good government to have controul."[5] Thomas Jefferson wrote 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."[6] In other words, because government was ordained to protect people's rights, it could never legitimately violate those rights. The founders believed

[2] U.S. Constitution, Article 1, Section 8, Clause 3.
[3] For an example of a commentator who explicitly argued that the lack of national police power prevented national disarmament, see George Tucker, *View of the Constitution*, 252-53.
[4] Tucker, *View of the Constitution*, 228-229.
[5] "Dissent of the Minority," in Storing, *Anti-Federalist*, 213.
[6] Thomas Jefferson to Uriah Forrest, December 31, 1787, quoted in Neil H. Cogan, ed., *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins* (Oxford: Oxford University Press, 1997), 593.

the government must accomplish its enumerated purposes without intruding on rights, including the right to keep and bear arms, despite any inconveniences this limitation might cause.

While directly applying the Second Amendment's original meaning is a possibility, an awkward modification of the federalist interpretation may prove more viable in light of the gradual expansion of national regulatory authority. Under this construction any congressional regulations, though ordinarily permissible under modern interpretations of the commerce or general welfare clause, could be negated or "nullified" by state laws. This view was contemplated by Glenn Harland Reynolds and Don B. Kates, though both were proponents of the individual rights interpretation. Proposing to engage in a "thought experiment" about the consequences of adopting a states' rights (i.e. collective rights) interpretation, Reynolds and Kates concluded that "a states' right interpretation of the Second Amendment must mean—if it is to mean anything at all—that a federal action that invades a state's protected interests can be challenged in court" and struck down.[7] According to the states' rights supporters' own arguments, they noted, the Second Amendment addressed the Antifederalists' concerns that the militia clauses of the Constitution destroyed the independent military power of the states. "It is inescapable, then, that the states' right interpretation . . . implies the repeal or modification of other language in the Constitution."[8] However, states' rightists seldom specify how the amendment limits congressional jurisdiction over the militia, preferring instead to employ their viewpoint like "a chain of garlic against a vampire, pulled out, and brandished at need but then hastily tossed back into the cellar lest its odor offend."[9] In reality, the implications of such an approach, they argued, are radical: the Second Amendment entails a "repeal of certain limitations on state military power found in the Constitution proper, renders the National Guard unconstitutional, at least as currently constituted, and creates a power on the part of state legislatures to nullify federal gun-control laws, if such laws are inconsistent with that state's scheme for organizing its militia."[10] The revised federalist interpretation closely resembles such an expansive notion of a "states' right" Second Amendment. If Congress banned concealed weapons a state could pass a law permitting any member of its militia (i.e. citizen population) to carry concealed weapons. State regulation of its militia would supersede national regulation

[7] Glenn Harland Reynolds and Don B. Kates, "The Second Amendment and States' Rights: A Thought Experiment," *William and Mary Law Review* 36 (1995): 1741.
[8] Ibid., 1749.
[9] Ibid., 1742.
[10] Ibid., 1743.

except during the rare times when Congress places the militia under the direct command of the president. This construction would acknowledge the Second Amendment as a "states' right" or federalism provision by protecting state jurisdiction over the militia. Although Reynolds and Kates conceived of this scenario as a kind of *reductio ad absurdum* refutation of the collective rights viewpoint, there is no reason to believe it would be incompatible with either individual liberty or safe and efficient gun regulations.

The Second Amendment and Incorporation

Though originally the Supreme Court's role in interpreting the Second Amendment was easy, the Fourteenth Amendment and the ensuing doctrine of incorporation have rendered the Court's interpretive task much more difficult. Since the Second Amendment merely clarified governmental jurisdiction, amplifications and elucidations of the right to keep and bear arms were unnecessary. The amendment did not create a broad, individual right; it simply recognized that all restrictions on arms were forbidden to the national government whereas the states retained full power to regulate them. The Supreme Court did not need to juggle complex calculations of reasonableness or create a hierarchy of values (as it has since done with almost all of the amendments, including the Second) nor did it need to settle minute disputes over the applicability of the right to bear arms to issues such as concealed carry laws, assault weapon bans, and gun permits. Individual rights scholars often concede the constitutionality of these and other regulations, but insist that some types of regulation are off limits. As with other provisions of the Bill of Rights, however, determining which regulations are acceptable has proven quite difficult. Given the modern expansive and individualistic conception of rights, applying either an individual or collective interpretation of the Second Amendment in today's context is inevitably problematic.

The federalist interpretation offers a solution to this bothersome and insoluble problem by undermining support for "incorporation" of the Second Amendment. Any interpretation of the Fourteenth Amendment must recognize that some elements in the Bill of Rights are individual rights—and some are not. The Bill of Rights was structurally-oriented as well as rights-oriented. The Second Amendment protects a specific federal arrangement as much as it declares personal liberties. In this sense it resembles the establishment clause of the First Amendment.[11] Vincent Phillip Muñoz has convincingly argued that the establishment clause "did not "constitutionalize a

[11] "Congress shall make no law respecting an establishment of religion," U.S. Constitution, Amend. 1.

personal right of 'non-establishment.'" Rather, "the framers adopted the precise wording 'respecting an establishment' to convey their intention of leaving the question of religious establishments to the states . . . . [the establishment clause] protects state establishments (or lack thereof) while also acknowledging the lack of federal power over religion." In short: "Because the original meaning only recognizes a jurisdictional boundary that protects state authority, it cannot logically be incorporated to apply against state governments."[12] The same could be said of the Second Amendment. It was a federalism provision intended to prevent Congress from interfering with concurrent state control of the militia, namely by disarming it or replacing it with a nationally-controlled select militia. Thus, it makes little sense to incorporate the Second Amendment against the states because it was meant to preserve, not limit, state jurisdiction.

To incorporate the Second Amendment would actually contravene its original meaning. Every right has limitations, as all but the most extreme interpreters of the Bill of Rights admit. Allowing the Supreme Court to determine which limitations apply to the Second Amendment gives it enormous discretionary power over the nature and extent the right to keep and bear arms. Under the original meaning, Congress possessed no authority whatsoever to regulate firearms. Under incorporation, however, the national government could regulate keeping and bearing weapons so long as such regulations conformed to some (rather arbitrary) standard such as reasonableness. This discretionary power would allow for significant congressional regulation that necessarily would impinge on existing state regulation. Incorporating the Second Amendment—versus adhering to its original meaning—would compromise the very idea of the universal militia the Second Amendment was meant to preserve. In any case it would gut the states' jurisdiction over their militias, perverting the amendment's original relationship with federalism.

Incorporation might be supported on other grounds, such as pragmatic considerations or the view that the ratifiers of the Fourteenth Amendment intended to incorporate the Second Amendment. Though such justifications are far beyond the scope of this paper, substantial

[12] Vincent Phillip Munoz, "The Original Meaning of the Establishment Clause and the Impossibility of its Incorporation," *University of Pennsylvania Journal of Constitutional Law* 8, no. 4 (August 2006): 631. Although the Supreme Court is largely mired in the historically inaccurate "separation of church and state" doctrine, Justice Clarence Thomas has adopted a jurisdictional reading: "The text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments. Thus, unlike the Free Exercise Clause, which does protect an individual right, it makes little sense to incorporate the Establishment Clause." *Elk Grove Unified School District et al. v. Newdow et al.*, 542 U.S. 1 (2004), 49 (Thomas J., concurring).

evidence seems to support the conclusion that the drafters of the Fourteenth Amendment wanted to protect the freed slaves' right to own and use firearms.[13] However, in such cases the views of the founders about the right to keep and bear arms and the Second Amendment are irrelevant because incorporation effectively nullifies the Second Amendment's original meaning. In short, an "originalist" interpretation becomes impossible.

The Supreme Court twice rejected attempts to incorporate the right to bear arms during the nineteenth century. In the first, *United States V. Cruikshank* (1875), several white men were charged with conspiring to hinder two black men in the exercise of their constitutional rights of assembly, bearing arms, and voting. The decision hinged in part on whether carrying a weapon was protected under the Fourteenth Amendment. The majority rejected this line of reasoning and supported a jurisdictional interpretation of the Bill of Rights. They began by stating that the United States is a federal system of many governments—state and national—and "each is distinct from the others."[14] Further, each government conferred different sets of rights on its citizens. The Bill of Rights, they continued, did not confer positively any rights on the citizens of the states. Rather, it negatively protected those (presumed to be pre-existing) rights against government interference. According to the Court, the Fourteenth Amendment did not alter this balance of power because

> it adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society. The duty of protecting all its citizens in the enjoyment of an equality of rights was originally assumed by the States, and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the Amendment guarantees, but no more. The power of the National Government is limited to the enforcement of this guaranty.[15]

In other words, if the constitution of Louisiana conferred a right to keep and bear arms, the Fourteenth Amendment would allow Congress to ensure that Louisiana applied this right equally to all of its citizens. However, it did not establish an independent right to bear arms contrary to the laws of Louisiana. About the Second Amendment, the majority ruled: "The right to bear arms is not granted by the Constitution; neither is it in any manner dependent upon that instrument for

[13] For example, see generally Stephen Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866-1876* (Westport, Conn.: Praeger, 1998).
[14] *United States V. Cruikshank* 92 U.S. 542 (1875). http://supreme.justia.com/us/92/542/case.html. Accessed March 28, 2011.
[15] Ibid.

its existence. The Second Amendment means no more than that it shall not be infringed by Congress, and has no other effect than to restrict the powers of the National Government."[16] Rather than empowering the national government to enforce the people's right to bear arms, the amendment simply prohibited infringement of that right.

The second case, *Presser V. Illinois* (1886), confirmed the *Cruikshank* decision. The circumstances of the case were very different. Herman Presser, a member of a group of ethnic German workers in Chicago, was charged with drilling and parading with an unlawful group of armed men. They did not meet Illinois' qualifications for a militia unit because they did not have a license from the Governor, nor were they recognized by national militia law. Presser claimed protection under the Second Amendment. The Court ruled against him and upheld Illinois' ability to regulate its own citizens' use of arms. The majority ruled that the Second Amendment "is a limitation only upon the power of Congress and the national government, and not upon that of the state." However, because "it is undoubtedly true that 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 amendment did restrict the power of the states in one crucial respect:

> [I]n view of this prerogative of the general government, as well as of its general powers, the states cannot, even laying the constitutional provision in question out of view, 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. But as already stated, we think it clear that the sections under consideration do not have this effect.[17]

Because Congress is charged with regulating the militia, the states cannot disarm their citizens to the extent that no militia force remains, nor can it interfere with anyone's participation in the militia in accordance with national laws. However, Presser's band of armed men did not conform to national militia laws and thus could be regulated by state law. In response to Presser's assertion that the Fourteenth Amendment protected his "privilege and immunity" to associate and exercise with a military unit, the majority ruled that "we have not been referred to any statute of the United States which confers upon the plaintiff in error the privilege which he asserts." Such a right "is not an attribute of national citizenship."[18]

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[16] Ibid.
[17] *Presser V. Illinois* 116 U.S. 252 (1886). http://supreme.justia.com/us/116/252/case.html. Accessed March 28, 2011.
[18] Ibid.

Given the Supreme Court's refusal to incorporate an individual right to keep and bear arms in the nineteenth century, the roots of the 2008 *District of Columbia V. Heller* ruling lie in legal developments that occurred well after the adoption of the Fourteenth Amendment. Incorporation has generated protracted debate over whether—and how—the amendment's ratifiers meant incorporation to take place. It is quite likely that total incorporation of the Bill of Rights was not intended, considering the first true decision incorporating a provision of the Bill of Rights, *Gitlow V. New York* (1925), occurred nearly sixty years after the adoption of the Fourteenth Amendment. By the time Washington contemplated regulating firearms in the late twentieth century, federalism was all but dead as a tool for opposing centralization, tarnished by its association with secession and segregation. Furthermore, the universal militia of the Second Amendment, though still on the books, was a virtual nullity. In such a climate supporters of gun rights naturally invoked the protection of an individual right located in the Second Amendment and applicable against the states. This transition was aided by the lack of a definitive Second Amendment jurisprudence, the imprecision of the sources surrounding its origin, and the gradual development of a deeply individualistic conception of rights.

This study provides only partial guidance to citizens and judges in the 21st century. Determining the applicability of history to judicial decision-making is daunting and lies beyond the scope of this work. Certainly, several historical developments—the increasing identification of arms-bearing with individuals rather than communities, the presence of the Fourteenth Amendment, and the decline of federalism as a means of constitutional resistance—counteract the application of the Second Amendment's original meaning. On the other hand, incorporation is recent, politically explosive, weakly supported by the historical evidence, and destructive of the amendment's initial purpose. Furthermore, this work demonstrates the possibility of constructing a historically nuanced account of the context and original meaning of the right to keep and bear arms. In light of these facts, adopting an originalist approach may be feasible today. Doing so would foster local self-government and individual liberty without empowering judicial activism.

BIBLIOGRAPHY

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Primary Sources

Adams, Les. *The Second Amendment Primer: A Citizen's Guidebook to the History Sources, and Authorities for the Constitutional Guarantee of the Right to Keep and Bear Arms*. Birmingham, Alabama: Palladium Press, 1996.

Blackstone, William. *Commentaries on the Laws of England*, 2 vols. New York: W.E. Dean, 1838.

Burgh, James. *Political Disquisitions, or An ENQUIRY into public Errors, Defects, and Abuses*. 3 vols. Philadelphia: Robert Bell and William Woodhouse, 1775.

Bailyn, Bernard, ed. *The Debate on the Constitution: Federalist and Antifederalist Speeches, Articles, and Letters During the Stuggle Over Ratification*. 2 vols. New York: Literary Classics of the United States, 1993.

Machiavelli, Niccolo. *Discourses on Livy*. Trans. Julia Conaway Bondanella and Peter Bondanella. Oxford: Oxfored University Press, 2009.

—. *The Prince and The Art of War*. London: CRW Publishing, 2004.

—. *The Prince*. Trans. Luigi Ricci. London: Grant Richards, 1903.

Aristotle. *The Politics*. Trans. J.E.C. Welldon. London: MacMillan & Co., 1883.

Cogan, Neil H., ed. *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins*. Oxford: Oxford University Press, 1997.

Fletcher, Andrew. *Andrew Fletcher: Political Works*. Ed. John Robertson. Cambridge: Cambridge University Press, 1997.

Jacobson, David L. *The English Libertarian Heritage From the Writings of John Trenchard and Thomas Gordon in The Independent Whig and Cato's Letters*. Indianapolis: The Bobbs-Merrill Company, 1965.

Handlin, Oscar, and Mary F. Handlin, eds. *The Popular Sources of Political Authority: Documents on the Massachusetts Constitution of 1780*. Cambridge, MA: Belknap Press, 1966.

Harrington, James. *The Political Works of James Harrington*. Ed. J.G.A. Pocock. Cambridge: Cambridge University Press, 1977.

Kaminski, John P., Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber, and Margaret Hogan, eds. *The Documentary History of the Ratification of the Constitution*. 23 vols to date. Madison, Wicsonsin: State Historical Society of Wisconsin, 1976-.

Mason, George. *The Papers of George Mason, 1725--1792*. Ed. Robert A. Rutland. 3 vols. Chapel Hill: University of North Carolina Press, 1970.

Madison, James. *Notes of Debates in the Federal Convention of 1787 Reported by James Madison*. Ed. Adrienne Koch. New York: W.W. Norton, 1987.

—, Alexander Hamilton, and John Jay. *The Federalist*. Ed. J.R. Pole. Indianapolis: Hackett Publishing Company, 2005.

Price, Richard. *Observations on the Importance of the American Revolution, and the Means of Making It a Benefit to the World*. London, 1784.

Rawle, William. *A View of the Constitution of the United States*. 2nd ed. Philadelphia: Philip H. Nicklin, 1829.

Sheehan, Colleen, and Gary L. McDowell, eds. *Friends of the Constitution: Writings of the "Other" Federalists, 1787-1788*. Indianapolis: Liberty Fund, 1998.

Sidney, Algernon. *Discourses Concerning Government.* 2 vols. Edinburgh: G. Hamilton and J. Balfour, 1750.

State Tracts: Being a Collection of Several Treatises Relating to the Government. Privately Printed in the Reign of K. Charles II. London, n.p., 1689.

Storing, Herbert, ed. *The Anti-Federalist: An Abridgement of the Complete Anti-Federalist*. Abridgement by Murray Dray. Chicago: University of Chicago Press, 1985.

—, ed. *The Complete Anti-Federalist*. 3 vols. Chicago: University of Chicago Press, 2007.

Story, Joseph. *Commentaries on the Constitution of the United States; With a Preliminary Review of the Constitutional History of the Colonies and States, Before the Adoption of the Constitution*. 3 vols. Boston: Hilliard, Gray, and Company, 1833.

Trenchard, John, and Thomas Moyle. *An Argument Shewing, That a Standing Army Is Inconsistent with a Free Government, and Absolutely Destructive to the Constitution of the English Monarchy*. London: n.p., 1697.

Tucker, St. George. *Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States, and of the Commonwealth of Virginia*. 5 Vols. Union, New Jersey: The Lawbook Exchange Ltd., 1996.

—. Ten Notebooks of William and Mary Law Lectures. *W & M Digital Archive*. http://digitalarchive.wm.edu/handle/10288/13361. Accessed February 20, 2011.

—. *View of the Constitution of the United States: With Selected Writings*. Indianapolis: Liberty Fund, 1999.

Tucker, Henry St. George. *Commentaries on the Laws of Virginia*. 1831.

Wotton, David, ed. *The Political Writings of John Locke*. New York: Penguin Books, 1993.

Yorke, Phillip, ed. *Miscellaneous State Papers from 1501 to 1726*. 2 vols. London: W. Stahan and T. Cadell,1778.

Young, David E.. ed. *The Origin of the Second Amendment: A Documentary History of the Bill of Rights 1787-1792*. Second Edition. Ontonagon, MI: Golden Oak Books, 1995.

Secondary Sources

Alstyne, William Van. "The Second Amendment and the Personal Right to Arms." *Duke Law Journal* 43, no. 6 (April 1994): 1236-1255.

Amar, Akhil Reed. "The Bill of Rights and the Fourteenth Amendment." *Yale Law Journal* 101, no. 6 (April 1992): 1193-1284.

—. "The Bill of Rights as a Constitution." *Yale Law Journal* 100, No. 5 (March 1991): 1131-1210.

—. *The Bill of Rights: Creation and Reconstruction*. New Haven: Yale University Press, 1998.

—. "Of Sovereignty and Federalism," *Yale Law Journal* 96, No. 7 (June 1987): 1425-1520.

—. "Second Thoughts." *Law and Contemporary Problems* 65, no. 2 (Spring 2002): 103-111.

Bailyn, Bernard. *The Ideological Origins of the American Revolution*. Enlarged edition. Cambridge, Massachusetts: Harvard University Press, 1992.

Bogus, Carl T., ed. *The Second Amendment in Law and History: Historians and Constitutional Scholars on the Right to Bear Arms.* New York: The New Press, 2000.

Brown, Richard, ed. *Major Problems in the Era of the American Revolution, 1760-1791*. 1st ed. Lexington, Mass., 1992.

Charles, Patrick J. *The Second Amendment: The Intent and Its Interpretation by the States and the Supreme Court*. Jefferson, NC: McFarland, 2009.

Cornell, Saul. "Commonplace or Anachronism: The Standard Model, The Second Amendment, and the Problem of History in Contemporary Constitutional Theory." *Constitutional Commentary* (1999): 221-246.

—. "Heller, New Originalism, and Law Office History: 'Meet the New Boss, Same as the Old Boss.'" *UCLA Law Journal* 56 (2009): 1095 -1125.

—. "A New Paradigm for the Second Amendment." *Law and History Review* 22, no. 1 (Spring 2004): 161-167.

—. *The Other Founders: Anti-Federalism and the Dissenting Tradition in America, 1788-1828*. Chapel Hill, University of North Carolina Press, 1999.

—. "St. George Tucker and the Second Amendment: Original Understandings and Modern Misunderstandings." *William and Mary Law Review* 47, No. 4 (2006):1123-1155.

—. *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America*. Oxford: Oxford University Press, 2008.

—. *Whose Right to Bear Arms Did the Second Amendment Protect?*, 1st ed. Boston: Bedford/St. Martin's, 2000.

Cress, Lawrence Delbert. "An Armed Community: The Origins and Meaning of the Right to Bear Arms." *Journal of American History* 71, no. 1 (June 1984): 22-42.

Dickinson, H.T. *Liberty and Property: Political Ideology in Eighteenth-Century Britain*. New York: Holmes and Meier, 1977.

Douglas, Davison M. "Foreword: The Legacy of St. George Tucker," *William and Mary Law Review* 47, No. 4 (2006): 1111-1121.

Edling, Max M. *A Revolution in Favor of Government: Origins of the U.S. Constitution and the Making of the American State*. Oxford: Oxford University Press, 2003.

Finkelman, Paul. "A Well Regulated Militia: The Second Amendment in Historical Perspective," In *The Second Amendment in Law and History: Historians and Constitutional Scholars on the Right to Bear Arms*, 117-147. New York: The Free Press, 2000.

Gibson, Alan. *Interpreting the Founding: Guide to the Debates Over the Origins and Founding of the American Republic*. Lawrence, Kansas: University Press of Kansas, 2006.

Halbrook, Stephen P. *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866-1876*. Westport, Conn.: Praeger, 1998.

—. *That Every Man Be Armed: The Evolution of a Constitutional Right*. 2nd ed. Oakland, CA: Independent Institute, 1994.

Higginbotham, Don. “The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship.” *The William and Mary Quarterly* 55, no. 1, Third Series (January 1998): 39-58.

Hutson, James H. “Country, Court, and Constitution: Antifederalism and the Historians.” *William and Mary Quarterly* 38, no. 3 (1981): 337-368.

Kates Jr., Don B. “Handgun Prohibition and the Original Meaning of the Second Amendment.” *Michigan Law Review* 82, no. 2 (Nov. 1983): 204-273.

Kenyon, Cecelia M., ed. *The Antifederalists*. New York: Bobbs-Merrill & Co., 1966.

Konig, David Thomas. “The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of "The Right of the People to Keep and Bear Arms".” *Law and History Review* 22, no. 1 (Spring 2004): 119-159.

—. “St. George Tucker and the Limits of States’ Rights Constitutionalism: Understanding the Federal Compact in the Early Republic.” *William and Mary Law Review* 47, No. 4 (2006): 1245-1278.

Labunski, Richard. *James Madison and the Struggle for the Bill of Rights*. Oxford: Oxford University Press, 2006.

Leibiger, Stuart. “James Madison and Amendments to the Constitution: 1787-1789: ‘Parchment Barriers.’” *The Journal of Southern History* 59, No. 3 (August 1993): 441-68.

Levinson, Sanford. “The Embarrassing Second Amendment.” *Yale Law Journal* 99, no. 3 (December 1989): 637-659.

Lund, Nelson. “Federalism and the Constitutional Right to Keep and Bear Arms.” *Publius* 33, no. 3 (Summer 2003): 63-81.

Malcolm, Joyce Lee. *To Keep and Bear Arms: The Origins of an Anglo-American Right*. Cambridge, MA: Harvard University Press, 1994.

Martin, James Kirby, and Mark Edward Lender. *A Respectable Army: The Military Origins of the Republic, 1763-1789*. Arlington Height: Harland Division, 1982.

Morgan, Edmund S. *Inventing the People: The Rise of Popular Sovereignty in England and America*. New York: W.W. Norton & Company, 1988.

Muñoz, Vincent Phillip. “The Original Meaning of the Establishment Clause and the Impossibility of its Incorporation.” *University of Pennsylvania Journal of Constitutional Law* 8, no. 4 (August 2006): 585-639.

Pencak, William. “Samuel Adams and Shays’s Rebellion.” *The New England Quarterly* 62, no. 1 (1989): 63-74.

Pocock, J.G.A. *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition*. Revised edition. Princeton: Princeton University Press, 2003.

Reynolds, Glenn Harland, and Don B. Kates. "The Second Amendment and States' Rights: A Thought Experiment." *William and Mary Law Review* 36 (1995): 1737-1768.

Rodgers, Daniel T. "Republicanism: The Career of a Concept." *Journal of American History* 79, No. 1 (June 1992): 11-38.

Rutland, Robert Allen. *The Birth of the Bill of Rights, 1776-1791*. Chapel Hill, N.C.: University of North Carolina Press, 1955.

Shain, Barry Alan, ed. *The Nature of Rights at the American Founding and Beyond*. Charlottesville, VA: University of Virginia Press, 2007.

Shalhope, Robert E. "The Ideological Origins of the Second Amendment." *Journal of American History* 69, no. 3 (December 1982): 599-614.

Storing, Herbert. *What the Anti-Federalists Were For: The Political Thought of the Opponents of the Constitution*. Chicago: University of Chicago Press, 1981.

Wells, William V. *The Life and Public Service of Samuel Adams*. 3 vols. Freeport, NY: Book For Libraries Press, 1969.