

# The "Assault Weapon" Panic

By David B. Kopel

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Persons who claim that the Second Amendment protects only "sporting guns" implicitly assert that protection of recreational hunting and target shooting was seen by the authors of the Bill of Rights as some particularly important activity to a free society. The framers, as the "sporting gun" theory goes, apparently intended to exalt sports equipment used in recreational hunting to a level of protection not enjoyed by equipment for any other sport. It is true that the framers did see sport hunting as an activity better suited for building good character than other sports. <sup>1</sup> Nevertheless, it is difficult to believe that the Framers would follow an amendment guaranteeing speech, assembly, and the free exercise of religion with an amendment protecting sporting goods.

Moreover, to the extent that there is a real conflict between public safety and sports equipment, public safety should win. Except for shooting in Department of Civilian Marksmanship programs, which have been created to enhance civil preparedness, recreational use of "assault weapons" does not directly enhance public safety. <sup>2</sup> Hence, if "assault weapons" posed a substantial threat to public safety, control would be in order because protecting many people from death is more important than enjoying sports.

One reason that "assault weapon" bans are improper is that government statistics prove that "assault weapons" are no more threat to public safety than any other gun; the "safety vs. sports" conflict is non-existent.

Reflecting a sports-based theory of gun ownership, "assault weapon" prohibitionists claim that these guns have no purpose except to kill. As a factual matter, the claims are incorrect. The guns, as detailed in this section, are frequently used for sports. And ironically, the guns have the distinction of being the only firearms ever designed to wound rather than to kill. But even if the gun prohibitions' claim were correct, it would do nothing to militate for a ban on the guns.

Only if all killing were wrong would a gun made for killing be illegitimate. <sup>3</sup> American law clearly guarantees the natural right to self-defense, including the right to take an aggressors' life if necessary. Semiautomatics do not deserve Constitutional protection because they are sometimes used for hunting. Rather, they deserve protection because they are militia guns \_ because they are made for personal and national defense, as the next section elaborates.

The Second Amendment of the United States Constitution states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." <sup>4</sup>

Supports of "assault weapon" prohibition argue that the Second Amendment only grants to states a right to maintain a militia. Under this theory, the "right of the people to keep and bear arms" is infringed by laws which disarm states, but not laws which disarm people. The "right of the people" is said to be a "collective right," which (like "collective property" in Communist nations) can never be possessed by any individual

because it belongs to everyone at once.

In contrast, the theory which has been accepted six times by the Supreme Court, 5 is compelled by the text of the Second Amendment itself, 6 is held by approximately 89% of the American people, 7 is supported by the large majority of scholarship, 8 and which comports with original intent 9 is the individual rights theory. Under this theory, the "right of the people" to bear arms recognizes a right of individual people to own guns. 10 The discussion below attempts to show how the framers' objection of protecting the states' "well-regulated militias" was carried out by the recognition of "the right of the people to keep and bear arms."

This Issue Paper has thus far presented two contrasting views of semiautomatic "assault weapons." This Paper has argued that so-called "assault weapons" are no more deadly or dangerous than other semiautomatics and other guns. If this Paper's contention is correct, then an "assault weapon" ban would violate the right to bear arms because it would ban certain guns which are not logically different from other guns. The ban would also violate the equal protection clause of the Fourteenth Amendment, which requires that legislative classifications be rational, and based on real differences, rather than on hysteria or misinformation.

In contrast, gun prohibition advocates suggest that the semiautomatics which they call "assault weapons" are true "weapons of war" and not "sporting weapons." If the prohibitionists' theory is correct, then "assault weapon" prohibition is again unconstitutional, for the historical and judicial record shows that the core aim of the Second Amendment was to ensure that weapons of war would be in the hands of ordinary American citizens. The history and evolution of the Second Amendment clearly shows that weapons of war \_ and not sports equipment \_ are at the heart of the right to bear arms.

In 1982, the Senate Subcommittee on the Constitution evaluated the historical record, and unanimously concluded that the Second Amendment recognizes an individual right to bear arms. The Subcommittee noted that when James Madison drafted the second amendment, he "did not write upon a blank tablet." 11 The British history that predated the Bill of Rights affirmed not only an individual right, but also a duty, to own firearms. 12 Britain's great expositor of the common laws, Sir William Blackstone, called the right to bear arms the "fifth auxiliary right of the subject," which would allow citizens to vindicate all the other rights. 13 He explained the right as an instrument to permit violent revolution: "in cases of national oppression, the nation has very justifiably risen as one man, to vindicate the original contract subsisting between the king and his people." 14 The duties for which the British right to bear arms was intended \_ national defense against unjust rulers, national defense against foreign governments, and local defense against crime \_ obviously required the use of anti-personal weapons, and not sports equipment.

The English colonies in America quickly established an individual right and duty to bear arms that paralleled the developments in England. 15 In 1658, the Virginia House of Burgesses required every householder to have a functioning firearms. 16 The legislatures in Virginia and the other colonies did not require persons to have guns so that those persons could enjoy a right sporting life. Instead, the purpose was to have a citizenry which could be called to militia duty to fight in numerous Indian wars. 17 Additionally, in both Great Britain and America, citizens were required to participate in anti-crime patrols such as night watch and to obey the commands of sheriffs to pursue fleeing felons. Lastly, as a practical matter, citizens had to possess arms for their own personal protection from Indians or criminals, since public safety agencies were few and far between.

The weapons that were most useful for these colonial purposes were weapons of war, and not guns designed for sports (although in practice there was no distinction, and almost all guns served multiple purposes).

Colonial recognition of the right and duty to bear arms helped precipitate the break with England. When the number of British soldiers increased in the colonies, colonists asserted their right to own firearms in order to defend their liberties. As the New York Journal Supplement proclaimed in 1769, "It is a national

right which the people have reserved for themselves, confirmed by their Bill of Rights, to keep arms for their own defense.

The outbreak of hostilities came at Lexington and Concord, when the British commander from Boston was informed that the Americans owned cannons, and the British marched on Concord to seize the American armory there. 18 (It was also a dispute over weapons of war \_ and not sporting guns \_ that sparked the Texan Revolution against Mexico. When Mexican dictator Santa Ana's forces attempted to confiscate a small cannon from settlers in Gonzales, the settlers raised a flag that said "Come and Take It," and the Texas Revolution began. 19)

The Revolutionary War strengthened the colonists' beliefs about the importance of an individual right to bear arms. 20 The militia arose wherever the British deployed. Thus, the American side developed a tactical mobility to match the British mobility at sea. As historian Daniel Boorstin put it, "The American center was everywhere and nowhere \_ in each man himself." 21 With every American a militiaman, the British could triumph only by occupying the entire United States, and that task was far beyond their manpower resources. The Americans never really defeated the British; the war could have continued long past Yorktown. After seven years of winning most of the battles but getting no closer to winning the war, the British simply gave up.

The guns with which the American militia helped win the American Revolution were weapons of war. Particularly effective was the long-range Kentucky Rifle, which enabled American sharpshooters to snipe at British officers.

After the successful revolution the maintenance of a citizen militia was a primary concern of the framers of the Constitution. 22 General Washington's Inspector General, Baron Von Steuben, proposed a "select militia" of 21,000 that would be given government issue arms and special government training. 23 When the proposed Constitution was presented for debate, anti-Federalists complained that it would allow for the withering of the citizen militia in favor of the virtual standing army of a "select militia." 24 Richard Henry Lee, in his widely-read Letters from the Federal Farmer to the Republican, warned ratifiers that a select militia had the same potential to deprive civil liberties as a standing army, for if "one fifth or one eighth part of the people capable of bearing arms should be made into a select militia," the select militia would rule over the "defenseless" rest of the population. Therefore, wrote Lee, "the Constitution ought to secure a genuine, and guard against a select militia... to preserve liberty, it is essential that the whole body of the people always possess arms and be taught alike, especially when young, how to use them. 25

Federalists promoting the new Constitution allayed fears of select militias and Congress' broad powers to "raise armies" under Article I, section 8. They reasoned that Americans would have nothing to fear from federal power since American citizens were universally armed. 26 Noah Webster, in the first major Federalist pamphlet, attempted to calm Pennsylvania anti-Federalists:

Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom in Europe. The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any bands of regular troops that can be, on any pretense, raised in the United States. 27

The Federalist Papers looked to the state militias, comprised of the armed populace, as the ultimate check on government. As James Madison put it, "the ultimate authority... resides in the same people alone." Madison predicted that no federal government could become tyrannical, because if it did, there would be "plans of resistance" and an "appeal to trial by force." A federal standing army would surely lose that appeal, because it "would be opposed by a militia amounting to near half a million citizens with arms in their hands." Exalting "the advantage of being armed, which the Americans possess over almost every other nation," Madison contrasted the American government with the European dictatorships, which "are afraid to trust the people with arms. 28

Alexander Hamilton explained that "If the representatives of the people betray their constituents, there is

then no recourse left but in the exertion of that original right of self-defense which is paramount to all positive forms of government..." 29 Hamilton reassured skeptical anti-Federalists that no standing army, however large, could oppress the people, for the federal soldiers would be opposed by state militias consisting of "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 and those of their fellow citizens." 30

Many delegates to the state conventions that ratified the Constitution expressed discontent over the Federalists' assurances about existing protection of the right to possess arms. 31 New Hampshire provided the key ninth vote that ratified the Constitution only after receiving assurance that a Bill of Rights would be drafted with a protection for the right of individuals to own firearms. 32 The New Hampshire delegates suggested that the new Bill of Rights provision be worded as follows: "Congress shall never disarm any citizen unless such as are or have been in Actual Rebellion. 33

At the Virginia convention, Patrick Henry had stated, "Guard with jealous attention the public liberty. Suspect everyone who approaches that jewel. Unfortunately, nothing will preserve it but downright force. Whenever you give up that force, you are ruined... The great object is that every man be armed... Everyone who is able may have a gun." 34 During the ratification process five state conventions demanded protection of the right of citizens to bear arms, more than demanded protection of free speech. 35 The sentiment of Patrick Henry and the other state convention delegates was not fear that the federal government might regulate sports equipment too severely.

The first Congress delegated the duty of writing a Bill of Rights to James Madison. Madison obtained copies of state proposals and attempted to combine them in a succinct passage that all state delegates would accept. 36 The original intent of the second amendment remained consistent with the intentions of the states that demanded it.

Madison's use of the phrase "well-regulated militia" was not a code word for the National Guard (which did not even exist). The phrase was not esoteric, but had a commonly-accepted meaning. Before independence was even declared, Massachusetts patriot Josiah Quincy had referred to "a well-regulated militia composed of the freeholder, citizen and husbandman, who take up their arms to preserve their property as individuals, and their rights as freemen." 37 "Who are the Militia?" asked George Mason of Virginia. He answered his own question: "They consist now of the whole people." 38 The same Congress that passed the bill of Rights, including the Second Amendment and its militia language, also passed the Militia Act of 1792. That act enrolled all able-bodied white males in the militia and required them to own arms.

Although the requirement to arm no longer exists, the definition of the militia has stayed the same; section 311(a) of title 10 of the United States Code declares, "The militia of the United States consists of all able-bodied males at least 17 years of age and... under 45 years of age." The next section of the code distinguishes the organized militia (the National Guard) from the "unorganized militia." The modern federal National Guard was specifically raised under Congress's power to "raise and support armies," not its power to "Provide or organizing, arming and disciplining the militia." 39

James Madison wrote the Second Amendment in order to prevent the right to bear arms from vesting only in "select militias" like state national guard units. The Second Amendment was written to secure an individual right to bear arms that provided an ultimate check on government and any of its "select" militias. 40

The core of the Second Amendment therefore was that state militias \_ comprised of individual citizens bringing their own guns to duty \_ would have the power to overthrow a tyrannical federal government and its standing army. The weapons that would be most suited to overthrow a dictatorial federal government would, of course, be weapons of war, and not sports equipment.

To persons accustomed to think of the "right to bear arms" as a privilege to own sporting goods, it must

seem incredible that the authors of the Second Amendment meant to ensure that the American people would always own weapons of war. But that is precisely what the historical record demonstrates. The only commentary available to Congress when it ratified the Second Amendment was written by Trench Coxe, one of James Madison's friends. Coxe explained:

The powers of the sword are in the hands of the yeomanry of America from sixteen to sixty. The militia of these free commonwealths, entitled and accustomed to their arms, when compared with any possible army, must be tremendous and irresistible. Who are the 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 birth-right of an American... [T]he 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. 41

This original intent of the Second Amendment has nothing to do with sports, and only a little to do with personal defense against criminals. The text of the Second Amendment itself highlights the implausibility of the claim that the Amendment refers to sporting equipment rather than to devices made for injuring or killing other persons. "Arms," says Webster's Dictionary are "a means (as a weapon) of offense or defense; esp. FIREARM." 42 Sporting equipment that is not a means of offense or defense is not within the category of "arms," and hence cannot be what the "right to bear arms" refers to. The Second Amendment guarantees a popular militia in order to provide for "the security of a free state." \_ ensuring that there will always be a force capable of overthrowing a domestic tyrant, or of resisting an invasion by a foreign one. The weapons best suited for this purpose are not weapons particularly suited for duck hunting; the weapons at the heart of the Second Amendment are weapons of war.

Under some theories of Constitutional interpretation, the language, common understanding, and intent of Constitutional provisions may be ignored by courts based on a judge's personal determinations of appropriate social policy. For example, when a lower federal court upheld Morton Grove's handgun prohibition, the court declared that the intent of the Second Amendment was "irrelevant." 43

The United States Supreme Court, however, has never claimed that original intent is "irrelevant," and the thrust of the most recent Supreme Court jurisprudence is to place the greatest emphasis upon the people's intent and the text of the Constitution. The leading (and only) Supreme Court case dealing with which weapons are protected by the Second Amendment falls squarely within the tradition of textual analysis and original intent.

In the 1939, case *United States v. Miller*, 44 Jack Miller was charged under section 11 of the 1934 "National Firearms Act" with the unlawful transportation of an unregistered "sawed-off" shotgun in interstate commerce. 45 The federal district court quashed the indictment on the grounds that section 11 of the National Firearms Act violated the Second Amendment. 46 The prosecutor appealed directly to the Supreme Court, and the Court produced its most thorough analysis of the meaning of the Second Amendment. 47 Instead of defining the militia as a select group such as the national guard, the Court unanimously defined "militia" as "all males physically able of acting in concert for the common defense." 48 The Court went on to note that these militiamen were expected "to appear bearing arms supplied by themselves." 49

Even though the Court recognized an individual right to bear arms, the justices still had to decide what types of "arms" individuals had a right to bear. The Court suggested that militia arms would consist of "the kind in common use at the time." 50 that had "some reasonable relationship to the preservation of efficiency of a well-regulated militia." 51 Since the defendant had not briefed this issue (he had disappeared while free pending appeal), the Court was presented with no evidence that a sawed-off shotgun had any value to the militia. The Court wrote:

In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the second amendment guarantees the right to

keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense. 52

Although the Court held that this particular case did not present a violation of the Second Amendment, the unanimous opinion recognized an individual right to bear arms which were "part of the ordinary military equipment" or which "could contribute to the common defense" \_ weapons of war. For the anti-gun lobbies to mouth their epithet "weapons of war" to concede that semiautomatics are protected arms under the Supreme Court's Miller test.

Concluding that the Second Amendment protects the right of American people to own arms which have a reasonable relationship to the maintenance of a well-regulated militia \_ that is, weapons of war \_ does not prove that all "assault weapon" prohibitions are necessarily unconstitutional. The Second Amendment, like the rest of the Bill of Rights, was historically seen as only a limit on federal power, and not a restraint on state or local governments. Thus, the Second Amendment, standing alone, would only prevent federal "assault weapon" prohibitions or other infringement.

The individual rights recognized in the Bill of Rights have only become enforceable against state and local governments through the 14th Amendment, which forbids states (and localities, which are subdivisions of states) to violate fundamental human rights.

In the 1876 case *United States v. Cruikshank*, the Supreme Court ruled the right peaceably to assemble and the right to bear arms were not protected against state interference by the Fourteenth Amendment's requirement that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." 53 The court reasoned that the clause only applied to "privileges or immunities" that arose from citizenship in the United States (such as the right to interstate travel). The Court said the peaceable assembly and bearing arms were not rights which arose as a result of American citizenship; rather, they were fundamental human rights which were found "wherever civilization exists." The First and Second Amendments, the Court said, had not granted a right to assemble or a right to bear arms, but had merely recognized the existence of those rights. 54

When California's "assault weapon" prohibition was challenged as violating the Second Amendment, the federal trial court, relying on *Cruikshank*, ruled that the Second Amendment could not be violated by state-level gun control, since the Second Amendment only restricts the federal government. 55

While *Cruikshank* has never been formally overruled, the federal trial court's reliance on it was dubious. *Cruikshank* dates from an era when the Supreme Court refused to hold any of the freedoms recognized in the Bill of Rights enforceable against the states. In the 20th century, the Supreme Court, while never overruling the 19th century "privileges and immunities" decisions, has relied on another provision of the 14th Amendment to make the Bill of Rights enforceable against the states.

The 14th Amendment forbids any state to deprive a person of "life, liberty, or property without due process of law." The Court has interpreted this phrase to mean that there can be no state deprivations of life, liberty, or property which violate certain rights recognized by the Bill of Rights. Thus, in *DeJonge v. Oregon*, the Court held that the First Amendment right to peaceably assemble was made applicable against the states by the Fourteenth Amendment's "due process" clause. In *Moore v. East Cleveland*, the Court stated, in dicta, that the right to bear arms was also enforceable against the states via the 14th Amendment's due process clause. 56 *Moore v. East Cleveland* more closely followed the intent of the framers of the 14th Amendment than did the *Cruikshank* case, since the historical record shows that the right to bear arms was one of the rights which the framers were most intent on making applicable against state government. 57

A distinct Constitutional provision, not discussed by the Fresno court, provides an additional reason to doubt the Constitutionality of state (or local) gun prohibitions. Article I, section 8 of the Constitution grants the Congress the authority to call forth the militia into national service. Hence, state gun prohibitions deprive the federal government of its ability to summon a militia. In *Presser v. Illinois*, 58 the

Supreme Court stated:

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, and in view of this prerogative of the general government, as well as of its general powers, the States cannot, even laying the constitutional provisions in question [the Second Amendment] out of view, prohibit the people from keeping and bearing arms... 59

Because the Fresno court ignored the clear language of Presser, and did not follow the modern Supreme Court's approach to the 14th Amendment, the case does not appear to be particularly well-reasoned. Regardless of whether the Fresno decision is eventually upheld on appeal, the case is relevant only in the handful of states, including California, which do not have a right to bear arms in their own state Constitution, and which must rely solely on the Second Amendment for protection of citizens' right to bear arms.

To the extent that state Supreme Courts have confronted the issue of what types of arms are protected by the state Constitutional right to bear arms, the decisions militate against the Constitutionality of "assault weapon" prohibition.

In 1846, the Georgia" Supreme Court found that, even in the absence of an explicit right to bear arms in the state Constitution, the Georgia legislature had no power to interfere with the right of Georgia citizens to "keep and bear arms of every description." 60

After the Civil War, courts addressed the implications of a developing weapons technology. The decades immediately after the Civil War are particularly significant for evaluating the "assault weapon" issue, because it was in these decades that courts confronted rapid-fire, high-capacity weapons capable of causing mass destruction.

The Civil War was by far American's bloodiest war; no war in American history remotely approaches the mass destruction and widespread death of that terrible conflict. The war witnessed the widespread use of the first type of repeating firearm (the revolver, invented several years before by Col. Samuel Colt) and the Gatling Gun, a hand-cranked ancestor of the machine guns. In the two decades following the war, the high-capacity, rapid-fire rifle (such as the Sharps, Winchester, and Henry models) became ubiquitous. The courts in the post-war years were more personally aware of the killing potential of rapid-fire, high-capacity weapons than any American courts have been before or since.

In the 1871 case *Andrews v. State*, 61 the Tennessee Supreme Court held that, although the Tennessee Constitution did not protect "every thing that may be useful for offense or defense," the Constitution did protect "the rifle of all descriptions, the shotgun, the musket, and repeater." 62 In 1876, the Arkansas Supreme Court stated that protected "arms" included "the unusual arms of the citizen of the country." 63 The court agreed with the Tennessee court's listing of these arms and noted the addition of the "army and navy repeaters, which, in recent warfare, have very generally superseded the old-fashioned holster, used a weapon in the battles of our forefathers." 64 These early courts \_ which were cited by the U.S. Supreme Court in *Miller*\_ found that personal sidearms, including new repeating firearms, fell within the reach of constitutional provisions drafted in times of more simplistic weapons technology.

In 1980, the Oregon Supreme Court approached more modern weapons developments in a similar manner. The court noted that since the era of the Civil War, "The development of powerful explosives, ... combined with the development of mass produced metal parts, made possible the automatic weapons, explosives, and chemicals of modern warfare." 65 The Oregon Court explained that "the term 'arms' as used by the drafters of the constitution probably was intended to include those weapons used by settlers for both personal and military defense... The term 'arms' would not have included cannon or other heavy ordnance not kept by militiamen or private citizens." 66 The court concluded that such modern heavy ordnance, used exclusively by the military, would not be considered individual "arms" deserving of constitutional protection. 67 The Attorney General of Oregon has stated that so-called "assault weapons" fall within the

scope of arms protected under the Oregon Supreme Court's test. 68

Some proponents of "assault weapons" legislation have argued that even if one recognizes an individual right to bear arms, such guns are not the type of arms that individuals have a right to bear. Although the framers might have intended that citizens have a right to possess the single-shot rifles, shotguns, and pistols of their day, the gun prohibitionists assert that the Second Amendment never intended to give citizens the right to own modern small arms such as military-style semiautomatics. 69

It is true that the Second Amendment never intended to protect the right to own semiautomatics (since such guns did not exist), just as they never intended to protect the right to talk privately on a telephone or to broadcast news on a television (since telephones and televisions did not exist either). To assert that Constitutional protections only extend to the technology in existence in 1791 would be to claim that the First Amendment only protects the right to write with quill pens and not with computers, and that the Fourth Amendment only protects the right to freedom from unreasonable searches in log cabins and not in homes made from high-tech synthetics.

The Constitution does not protect particular physical objects, such as quill pens, muskets, or log cabins. Instead, the Constitution defines a relationship between individuals and the government that is applied to every new technology. For example, in *United States v. Katz*, the Court applied the privacy principle underlying the Fourth Amendment to prohibit warrantless eavesdropping on telephone calls made from a public phone booth \_ even though telephones had not been invented at the time of the Fourth Amendment. 70 Likewise, the principle underlying freedom of the press \_ that an unfettered press is an important check on secretive and abusive governments \_ remains the same whether the press uses a Franklin press to produce a hundred copies of a pamphlet, or laser printed to produce a hundred thousand.

It is true that an individual who misuses a semiautomatic today can shoot more people than could an individual misusing a musket 150 years ago. 71 Yet if greater harm were sufficient cause to invalidate a right, there would be little left to the Bill of Rights.

Virtually every freedom guaranteed in the Bill of Rights causes some damage to society, such as reputations ruined by libelous newspapers, or criminals freed by procedural requirements. The authors of the Constitution knew that legislatures were inclined to focus too narrowly on short term harms: to think only about society's loss of security from criminals not caught because of search restrictions; and to forget the security gained by privacy and freedom from arbitrary searches. That is precisely why the framers created a Bill of Rights \_ to put a check on the tendency of legislatures to erode essential rights for short-term gains.

Since the Constitution was adopted, virtually all of the harms that flow from Constitutional rights have grown more severe:

\* Today, if an irresponsible reporter betrays vital national secrets, the information may be in the enemy's headquarters in a new minutes, and may be used to kill American soldiers and allies a few minutes later. Such harm was not possible in an age when information traveled from America to Europe by sailing ship.

\* Similarly, an inappropriate leak of information in a superpower crisis could harden negotiating positions, leading at the worst to nuclear war. Previously, a leak might precipitate a war, but could not destroy the planet.

\* As Gary Hart learned the hard way, a single act of gutter journalism can wipe out in a week a decades-long career of public service. In the early years of the Constitution, journalists also printed stories of sex and politics, but the slower movement of information kept one tale of indiscretion from growing to such destructive proportions.

\* Correspondingly, a show like "60 Minutes" can wrongfully ruin a person's reputation throughout the nation, a feat no single newspaper could have accomplished before.

\* In earlier times, strong community ties and traditional values made young people less susceptible to religious charlatans. But today, freedom of religion can kill people, as we learned at Jonestown.

\* Criminal enterprises have always existed, but the proliferation of communications and transportation technologies such as telephones and automobiles makes possible the existence of criminal organizations of vastly greater scale \_ and harm \_ than before.

The principle underlying the Second Amendment is resistance to federal tyranny. The method of achieving the Second Amendment's goal is for individual citizens to possess arms equal to those possessed by the federal standing army. If the federal standing army possesses muskets, then citizens may own muskets. If the federal standing army own M16 assault rifles, then citizens may own M16 assault rifles.

Persons who find the argument above to be unpersuasive are not without a remedy. If the Constitutional right to bear arms has become inappropriate for modern society, because the people are so dangerous and government so trustworthy, then a Constitutional amendment to abolish or limit the right may be proposed. (Although given the fact that only two states have enacted "assault weapon" legislation, it is doubtful that a proposed amendment would be ratified by many states.) But it is not permissible for legislators or courts to flout an existing Constitutional guarantee, even if they personally think it unimportant. 72

So-called "assault weapons," particularly the politically incorrect semiautomatic rifles, are well-suited for personal defense against criminals. 73 More significantly, from a Second Amendment viewpoint, they are well-suited for community defense against dangers both internal and external.

Americans watched in horror when television showed the Cambodian school children killed by a deranged criminal with a Kalshnikov rifle, in a Stockton, California, schoolyard in January 1989. America's "Drug Czar" William Bennett informed the American people the Kalashnikovs were guns made only for drug traffickers, like the Crips and Bloods gangs in Los Angeles. Through Bennett and the television networks, America heard one story about semiautomatic rifles. Another, equally dramatic story, never was heard outside Los Angeles. In May 1988, the Bloods attacked a Los Angeles housing project containing Cambodians. The Cambodians fought back with M1s and Kalashnikovs and drove away the Bloods. 74

To defend a neighborhood from Bloods on Piru Street, Los Angeles, "some block clubs had to resort to armed guerrilla warfare," reports The Washington Times. One block club leader met with Mayor Bradley, the Police Chief Daryl Gates, and with the city attorney (all vocal gun prohibitionists) and achieved nothing. Drug dealers continued to shoot at block club members, but now the block club fired back. After club leader Norris Turner shot and wounded two gang members who had tried to ambush and kill him on the street, Turner threatened to call the media. Police presence increased, and the neighborhood was cleaned up. 75

The War on Drugs took on a new meaning in September 1989 in Tacoma, Washington, where angry citizens gathered for an anti-crime rally. Spurred by the rally, an off-duty sergeant organized a dozen off-duty Army Rangers and went into free-fire combat with neighborhood crack dealers. Up to 300 rounds of handgun, shotgun, and semiautomatic rifle fire were exchanged. No fatalities resulted, and Washington Governor Booth Gardner praised the gunmen: "They were very good shots. They weren't shooting to harm. They were shooting to make a point, I think." The police mediated a truce, whereby the drug dealers agreed to stop dealing in the streets, and the neighborhood agreed to put away its guns. 76

Citizens of the United States have often used personal sidearms to aid law enforcement officials in restoring public order. 77 In 1977, a blizzard in Buffalo, New York, and a flood in Johnstown, Pennsylvania, both prompted local officials to call for citizens to arm themselves and restore the public order. 78 In other situations, as in the aftermath of an earthquake or hurricane, there may not even be any public officials around to urge citizens to protect themselves. In the chaotic frontier circumstances of an area after a natural disaster \_ or the modern inner city under day-to-day conditions \_ a reliable, rugged,

easy to operate firearms is the type of arm which is most necessary for the protection of life.

The most recent instance in which people of the United States mobilized "bearing arms supplied by themselves and of the kind in common use at the time" to defend their nation was during the World War II.

After Pearl Harbor the citizen militia was called to duty. Nazi submarines were constantly in action off of the East Coast. On the West Coast, the Japanese seized several Alaskan islands, and strategists wondered in the Japanese might follow up on their dramatic victories in the Pacific with an invasion of the Alaskan mainland, Hawaii, or California. Hawaii's governor summoned armed citizens to man checkpoints and patrol remote beach areas. 79 Maryland's governor called on "the Maryland Minute Men," consisting mainly of "members of Rod and Gun Clubs, of Trap Shooting Clubs and similar organizations," for "repelling invasion forays, parachute raids, and sabotage uprisings," as well as for patrolling beaches, water supplies, and railroads. Over 15,000 volunteers brought their own weapons to duty. 80 Gun owners in Virginia were also summoned into home service. 81 Americans everywhere armed themselves in case of invasion. 82

After the National Guard was federalized for overseas duty, "the unorganized militia proved a successful substitute for the National Guard," according to a Defense Department study. Militiamen, providing their own guns, were trained in patrolling, roadblock techniques, and guerrilla warfare. 83 The War Department distributed a manual recommending that citizens keep guerrilla weapons on hand.84

Certainly the militia could not defend against intercontinental ballistic missiles, but it could keep order at home after a limited attack. In case of conventional war, the militia could guard against foreign invasion after the army and the National Guard were sent into overseas combat. Especially given the absence of widespread military service, individual Americans familiar with using their private weapons provide an important defense resource. 85 Canada already has an Eskimo militia to protect its northern territories. 86

It has been more than 40 years since the last invading troops left American soil. No invasion is plausible in the foreseeable future. Is it now possible to state with certainty that America is so omnipotent, and the nuclear umbrella so perfect that America will never again need the militia, and that Americans should jettison their tradition of learning how to use arms that would be useful for civil defense?

In the unlikely event that the United States were ever subjugated by a foreign or domestic tyrant, could citizens actually resist? Recent history suggests that the answer is "yes".

Of course, ordinary citizens are not going to grab their "Saturday night specials" (or even their "assault weapons") and charge into oncoming columns of tanks. Resistance to tyranny or invasion would be a guerrilla war. In the early years of such a war, before guerrillas would be strong enough to attack the occupying army head on, heavy weapons would be a detriment, impeding the guerrillas' mobility. As a war progresses, Mao Zedong explained, the guerrillas use ordinary firearms to capture better small arms and eventually heavy equipment. 87

The Afghan mujahedeen were greatly helped by the belated arrival of Stinger antiaircraft missiles, but they had already fought the Soviets to draw using a locally made version of the outdated Lee-Enfield rifle. 88 One clear lesson of this century is that a determined guerrilla army can wear down an occupying force until the occupiers lose spirit and depart \_ just what happened in Ireland in 1920 and Palestine in 1948 (and American in 1783). As one author put it: "Anyone who claims that popular struggles are inevitably doomed to defeat by the military technologies of our century must find it literally incredible that France and the United States suffered defeat in Vietnam... that Portugal was expelled from Angola; and France from Algeria." 89

If guns were not useful in a popular revolution, it would be hard to explain why dictators as diverse as Ferdinand Marcos, Fidel Castro, Idi Amin, and the Bulgarian communists have ordered firearms confiscation upon taking power. 90

In sum, American citizens can and do use "assault weapons" successfully to protect themselves against domestic chaos when local police forces cannot or will not protect them. In the unlikely event that Americans were threatened by hostile foreign or domestic governments, "assault weapons" would be useful, and citizen resistance might well prove successful.

If "military" arms, such as the assault rifles carried by the federal standing army, are precisely what the Constitution protects, it may be asked where the upper boundary lies \_ at grenade launchers, anti-aircraft rockets, tanks, battleships, or nuclear weapons.

To begin with, the phrase "keep and bear" limits the type of arm to an arm that an individual can carry. Things which an individual cannot bear and fire (like crew-served weapons) would not be within the scope of the Second Amendment. Nor would things which bear the individual, instead of being borne by him or her. Thus, tanks, ships, and the like would be excluded.

In addition, if a hand-carried weapon is not "part of the ordinary military equipment" (as the Supreme Court put it in *Miller*), then the weapon might not have a reasonable relationship to the preservation of a well-regulated militia; hence its ownership would not be protected. Since American soldiers do not carry nuclear weapons, such weapons would not be within the scope of the Second Amendment. Perhaps the Supreme Court will one day further elaborate the boundaries of the *Miller* test.

Soldiers do carry real assault rifles (namely M16s), and it would therefore seem that such weapons would fit with the *Miller* test. In early 1991, the Supreme Court declined to hear a case involving the prohibition of machine-guns produced after 1986. *Handgun Control, Inc.* immediately announced that the Supreme Court had validated the ban, although the Court had done so such thing. As the Supreme Court itself has stated, however, a denial of review has no presidential effect and is not a decision on the merits. <sup>92</sup>

As this Issue Paper is written, the Constitutionality of the 1986 federal ban is unclear. In the case that the Supreme Court declined to hear, the federal trial court had interpreted the relevant statute as not being a ban, but only a licensing requirement. The trial court had said that if the statute were to be read as a ban, it would be unconstitutional. <sup>93</sup> The 11th Circuit Court of Appeals reversed on the statutory interpretation issue, and did not address the Constitutional question.

In the meantime, a federal district court in Illinois found the ban unconstitutional on the grounds that Congress' enumerated powers did not include the banning of firearms. <sup>94</sup>

Even if the machine gun issue remains in a Constitutional limbo, the semiautomatic issue need not. The bias on which machine guns may be considered distinguishable from other guns is their capability of rapid, automatic fire. All semiautomatic firearms lack this capability, and according to the Bureau of Alcohol, Tobacco and Firearms, it is quite difficult to convert semiautomatics to automatic. <sup>95</sup> In fact, semiautomatic rifles may fire less rapidly than traditional pump action shotguns, <sup>96</sup> and there is no dispute that traditional pump action shotguns fall within the scope of the right to bear arms.

The "assault weapon" controversy wears the mask of a crime control issue, but it is in reality a moral issue. Regardless of whether "assault weapons" are a serious crime problem, and regardless of whether prohibitions will reduce criminal use of the guns, such weapons have no legitimate place in a civilized society \_ or so many gun prohibitionists feel. These prohibitionists do not trust their fellow citizens to possess "assault weapons"; but astonishingly, they do trust the government to possess such guns.

"Government is the great teacher," said the late Justice Brandeis. What lesson does government teach when police chiefs insist that "assault weapons" have no reasonable defensive use, and are evil machines for killing many innocent people quickly \_ but that prohibitions on these killing machines should not apply to the police? Are massacres acceptable if perpetrated by the public sector? <sup>97</sup>

The exemption cannot be logically defended. If "assault weapons" can legitimately be used for police

protection of self and others, then a ban on those guns cannot be Constitutionally applied to ordinary citizens, because ordinary citizens have a right to bear arms for personal defense, and like police, face a risk of being attacked by criminals. (And unlike police, ordinary citizens cannot make a radio call for backup that will bring a swarm of police cars in seconds.)

Conversely, are "assault weapons," as some police administrator insist, only made for slaughtering the innocent? If so, such killing machines have no place in the hands of domestic law enforcement. Unlike in less free countries, police in this country do not need highly destructive weapons designed for murdering innocent people.

The arrogance of power manifested by police chiefs such as Daryl Gates in their drive to outlaw semiautomatics for everyone but themselves is reason enough for a free society to reject gun prohibition. 98

In Maryland, the police staged an illegal warrantless raid on gun rights group's office the night before a gun control referendum. 99 The pro-Second Amendment protesters picketed at the state capitol, Governor Donald Schaefer's police photographed them. 100 The police-state tactics in Maryland led one newspaper (which favors gun control as a substantive matter), to note "Just because you're paranoid doesn't mean they're not out to get you." The paper labeled the tactics of Governor Schaefer and his police (including the illegal warrantless raid, the photographing of protesters, and a late night surprise visits to a critic's home) a validation of the paranoid world-view allegedly held by proponents of the rightt bear arms. 101 Is the Maryland police hierarchy the kind of government agency that should be trusted to disarm citizens, while it keeps "assault weapons" for itself?

After the Tiananmen Square massacre, the response of the National Rifle Association was to purchase print advertisements suggesting the core purpose of the Second Amendment is resistance to tyranny. The response of Chicago police chief LeRoy Martin \_ a vociferous advocate of gun prohibition \_ was to accept a paid trip to China from the Communist government. Upon returning, Chief Martin pronounced his admiration for the Chinese system of criminal justice, and suggested that in the United States zones should be created where the Constitution would be suspended. Is LeRoy Martin the kind of police chief who should be trusted to enforce an "assault weapon" ban, while he keeps such weapons for himself?

Of course even despite the excesses of the drug war, most of the Bill of Rights remains intact. Elections will take place as scheduled in 1992, and there is no plausible claim that it would be appropriate to take up arms against the federal government. Can the gun prohibition movement guarantee that this happy state will persist forever?

In 1900, Germany was a democratic, progressive nation. Jews living there enjoyed fuller acceptance in society then they did in Britain, France, or the United States. Thirty-five years later, circumstances had changed. The Holocaust was preceded by the Nazi government's enactment of the strictest gun controls of any industrial nation. 102

The prospect of a dictatorial American government thirty-five years from now seems almost impossible. What about a hundred years from today? Two hundred? The Bill of Rights attempted to enshrine for all time the principle that the government should not be able to overpower the people. On the 200th anniversary of the Bill of Rights, should that principle be discarded forever? Do government officials like Daryl Gates, Donald Schaefer, and LeRoy Martin inspire confidence that the government may always be trusted?

Before rejecting the United States Constitution's bedrock principle that the people are more trustworthy than the government, it would be wise to consider the words of the late Vice President Hubert Humphrey: "The right of citizens to bear arm is just one more guarantee against arbitrary government, one more safeguard against the tyranny which now appears remote in America, but which historically has proved to be always possible. 103

The asserted major concern of legislators passing "assault weapon" legislation is the criminal misuse of these firearms. Proposed legislation, to be effective must directly target this misuse. Legislators should consider the following proposals:

A. Fund the appointment of at least one Assistant U.S. Attorney in each District to prosecute felon-in-possession cases involving violent offenses under 18 U.S.C. 924 and relevant sections of the Firearms Owners' Protection Act, Public Law 99-308. More consistent enforcement of existing statutes would directly target criminal misuse of all firearms. States and localities could also assign prosecutors to felons using firearms to perpetrate violent crimes.

B. Fund the creation of new prison facilities dedicated to violent repeat felony offenders. Reallocate existing prison capacity to that same end. Prison facilities must be adequate to insure that those convicted of the criminal misuse of firearms actually serve the sentences.

C. Reform and streamline probation revocation. If a person already eligible for probation revocation commits a violent armed felony, probation should be revoked immediately. This reform would have prevented a career criminal named Eugene Thompson from perpetrating a murder spree in the suburbs south of Denver in March 1989. 104

D. Create a task force that will exert informal pressure on the entertainment industry to encourage industry officials to reduce the portrayal of criminal misuse of firearms. Beginning in 1983, prime-time television shows such as *The A Team*, *Wise Guy*, *Hardcastle & McCormack*, *Riptide*, *21 Jump Street*, and *Miami Vice* have filled American homes with the depiction of criminal misuse of "assault weapons." 105 While direct links between these portrayals and criminal violence may be difficult to establish, at least one study has linked television and movie depictions of "assault weapons" to increased sales of those weapons. 106 Dr. Park Dietz, the specialist in violent behavior who conducted this recent study, called NBC's *Miami Vice* "the major determinant of assault gun fashion for the 1980's." 107 Research by the University of Washington's Brandon Centerwall has found a cause and effect relation between television violence and homicide. 108

A task force could draft voluntary guidelines limiting the depiction of the misuse of military-style semiautomatics, and the task force, along with interested citizens' groups, could exert informal pressure on industry officials to conform to these guidelines.

And at the very least, the film/television industry exemption from existing state and local "assault weapon" bans should be removed. Film-makers who glorify mindless violence encourage far more gun misuse than do ordinary citizens who quietly own a firearm for sports or self-defense. 109

The solutions suggested above will not cure the problem of armed crime. But they will make the problem better, whereas, "assault weapon" prohibition will make the problem worse.

## CONCLUSION

"Assault weapon" legislation appears to offer several political advantages. This legislation allows its proponents to appear "tough on crime and drugs," to garner to the applause of the establishment media, and to exploit the political potential latent in the emotion surrounding tragic events such as the Stockton shootings. At the same time, "assault weapon" legislation requires no fiscal outlay.

Unfortunately, "assault weapon" legislation is unconstitutional. Second Amendment jurisprudence establishes an individual right to bear arms that protects the possession of military-style semiautomatics. While "assault weapon" legislation may not unduly impinge the privilege to hunt ducks, it strikes at the heart of the right to defend home, person and property against criminal individuals and criminal governments.

The "assault weapon" controversy poses a litmus test for continued adherence to the principles on which

the United States was founded. Shall citizens retain the power claimed in the Declaration of Independence to "alter or abolish" a despotic government?

The claims that certain politically incorrect semiautomatic firearms are machine-guns, are the weapon of choice of criminals, have a uniquely high ammunition capacity, or cause uniquely destructive wounds are a hoax. Although the gun prohibition lobby managed to generate a few months of national panic in early 1989, only two state legislatures decided to adopt "assault weapon" legislation. In one state (California), the Attorney General has found that most of the law is so ineptly drafted as to be unenforceable. The more that legislatures examine the facts, the more apparent the gun prohibition lobby's fraud becomes. The Great "Assault Weapon" Panic of 1989 deserves a place alongside Senator Joseph McCarthy's list of State Department Communists and the Tawana Brawley kidnapping as one of America's greatest political hoaxes. When hysteria is replaced by analysis, the gun prohibition lobby's fraud becomes apparent.

Despite their "evil" appearance, so-called "assault weapons" are no more dangerous than many non-semiautomatics. According to empirical evidence and police experience, the guns are not the weapons of choice of drug dealers or other criminals. Even if these guns played a significant role in violent crime, sociological evidence suggests that "assault weapon" legislation would not reduce the criminal misuse.

To limit the criminal misuse of firearms, legislators must take the more difficult and costly steps of providing sufficient funding to the prosecutors and prisons that directly confront the problems of firearms misuse. While these measures may not seem as simple as passing a severe "assault weapon" prohibition, an effective firearms policy \_ one that preserves basic Constitutional rights \_ will be logical, legal, and moral, and well worth the effort.

#### Footnotes

1. Thomas Jefferson advised his nephew: "Games played with a bat and ball are too violent, and stamp no character on the mind... [A]s to the species of exercise, I advise the gun." J. Foley, THE JEFFERSON ENCYCLOPEDIA (1967), at 318. Were Jefferson to visit a high school shooting competition, and then a high school football game where student cheered as a player was slammed to the ground, Jefferson might think his earlier view confirmed.

2. Because of budget constraints, the DCM program will lose its federal subsidy. That the program must become financially self-sufficient does not prove that it is no longer important. Many important federal programs, such as aviation safety and airport construction, are financed by user fees.

3. It might be interesting to ask the anti-gun lobby why a gun designed to kill an innocent game animal is more legitimate than a gun designated to protect an innocent human being against a criminal attack.

4. U.S. CONST. amend. II.

5. Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 417 (1857) (If free Blacks were citizens, they would have the right "to carry arms wherever they went."); United States v. Cruikshank, 92 U.S. 542, 551-53 (1876) (The Second Amendment right to bear arms, like the First Amendment right to assemble, was not granted by the Constitution, but was merely recognized by that document, since arms bearing and assembly are both fundamental human rights that are "found wherever civilization exists."); Robertson v. Baldwin, 165 U.S. 275, 281-82 (1896) (In this case, the Court wrote "The right of the people to keep and bear arms is not infringed by laws prohibiting the carrying of concealed weapons." The obvious implication is that laws prohibiting the carrying of unconcealed weapons would violate the Second Amendment, a fact that could only be true if the Amendment recognized an individual right); United States v. Miller, 307 U.S. 174 (1938 (discussed extensively below); Moore v. East Cleveland, 431 U.S. 494, 502 (1976) ("the freedom of speech, press, and the religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures" are part of the "full scope of liberty" guaranteed by the Constitution and made applicable against the states by the due process clause of the 14th amendment); United States v. Verdugo-Urquidez, 110 S. Ct. 1056, 1061 (1990) ("[T]he 'people' protected by the Fourth Amendment, and by the First and

Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of the national community or who have otherwise developed sufficient connection with this country to be considered part of the community.")

6. As the Senate Subcommittee on the Constitution noted in 1982, "The Framers of the Bill of Rights consistently used the words 'right of the people' to reflect individual rights \_ as when these words were used to recognize the 'right to the people to peaceably assemble'" in the first amendment.

7. Eighty-nine percent of Americans believe that as citizens they have a right to own a gun, and 87 percent believe the Constitution guarantees them a right to keep and bear arms. J. Wright, P. Rossi, and K. Daly, UNDER THE GUN: WEAPONS, CRIME AND VIOLENCE IN AMERICAN 229 (1983), quoting survey conducted by Decision-Making Information Inc.

8. The most recent endorsements of the individual right position appear in Amar, The Bill of Rights as a Constitution, 100 YALE L. J. 1131, 1164ff (1991) and Scarry, War and the Social Contract: Nuclear Policy, Distribution, and The Right to Bear Arms, 139 U. PENN. L. REV. 1257 (1991).

Similar conclusions were reached in the overwhelming majority of scholarly writing in the 1980s, of which the following is only a partial list: Levinson, The Embarrassing Second Amendment, 99 YALE L. J. 637 (1989); S. Halbrook, A Right To Bear Arms: State and Federal Bills Of Rights And Constitutional Guarantees (1989); L. Levy, Original Intent and the Framers' Constitution 341 (1988); Hardy, The Second Amendment and the Historiography of the Bill of Rights, 4 J. L. & POL'Y 1 (1987); Lund, The Second Amendment, Political Liberty and the Right to Self-Preservation, 39 ALA. L. REV. 103 (1987); Shalhope, The Armed Citizen in the Early Republic, 49 LAW & CONTEMP. PROBS. 125 (1986); Kates, A Dialogue on the Right to Keep and Bear Arms 49 LAW & CONTEMP. PROBS. 143 (1986); 4 Encyclopedia of the American Constitution 1639-40 (Karst & Levi eds. 1986); Hardy, Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment, 9 HARV. J. L. & PUB. POL'Y 559 (1986); Marina, "Weapons, Technology and Legitimacy: The Second Amendment in Global Perspective" in Firearms and Violence: Issues of Public Policy (D. Kates, ed. 1984); Dowlut, The Current Relevancy of Keeping and Bearing Arms, 15 U. BALT. L. REV. 32 (1984); Kates, Handgun Prohibition and the Original Meaning of the Second Amendment, 82 MICH L. REV. 204, 244-52 (1983); Malcolm, The Right of the People to Keep and Bear Arms: The Common Law Perspective, 10 HAST. CONST. L. Q. 285 (1983); Dowlut, The Right to Arms, 36 OKLA. L. REV. 65 (1983); Senate Subcomm. on the Constitution of the Comm. on the Judiciary, 97th Cong., 2d Sess., The Right To Keep and Bear Arms (1982); Caplan, The Right of the Individual to Bear Arms, 1982 DET. COLL. L. REV. 789 (1982); Gardiner, To Preserve Liberty \_ A Look at the Right to Keep and Bear Arms, 10 N. KY. L. REV. 63 (1982); Note, Gun Control: Is It A Legal and Effective Means of Controlling Firearms in the United States?, 21 WASHBURN L.J. 244 (1982); Shalhope, The Ideological Origins of the Second Amendment, 69 J. AM HIST. 599 (1982); Cantrell, The Right to Bear Arms, 53 WIS. BAR B. 21 (1980).

It appears that only five articles from the last decade which approximate support of the prohibitionist, anti-individual position. Significantly, even one of these rejects the states' right view. Beschle, Reconsidering the Second Amendment: Constitutional Protection for a Right of Security, 9 HAMLIN L. REV. 69 (1986) concedes that the Amendment does guarantee a right of personal security, but argues that the right can constitutionally be implemented by banning and confiscating all guns. The others are Fields, Guns, Crime and the Negligent Gun Owner, 10 N. KY. L. REV. (1982) (article by a non-lawyer spokesperson for the National Coalition to Ban Handguns); Spannaus, State Firearms Regulation and the Second Amendment, 6 HAMLIN L. REV. 383, (1983); Cress, An Armed Community: The Origins and Meaning of the right to Bear Arms, 71 J. AM. HIS. 22 (1983); Ehrman & Henigan, The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately? 15 DAYLTON L. REV. 5 (1990) (employee of Handgun Control, Inc.).

9. Madison's original structure of the Bill of Rights did not place the amendments together at the end of the text of the Constitution (the way they were ultimately organized); rather, he proposed interpolating

each amendment into the main text of the Constitution, following the provision to which it pertained. If he had intended the Second Amendment to be mainly a limit on the power of the federal government to interfere with state government militias, he would have put it after Article 1, section 8, which granted Congress the power to call for the militia to repel invasion, suppress insurrection, and enforce the laws; and to provide for organizing, arming, and disciplining the militia. Instead, Madison put the right to bear arms amendment (along with the freedom of speech amendment) in Article I, section 9 \_ the section that guaranteed individual rights such as habeas corpus. Donald B. Kates, "Second Amendment," in *Encyclopedia of the American Constitution*, ed. Leonard Levy (New York: MacMillan, 1986), p. 1639. See also Robert Shalhope, "The Ideological Origins of the Second Amendment," 69 *Journal of American History* (December 1982): 599-614; Joyce Malcolm, "The Right of the People to Keep and Bear Arms: The Common Law Tradition," *Hastings Constitutional Law Quarterly* 10 (Winter 1983): 285-314. See also discussion below, and legal scholarship cited in previous note.

10. See, e.g., Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 *HARV. J. L. & PUB. POL'Y* 559, 560 (1986). This article provides a summary of contemporary interpretations of the Second Amendment and a thorough discussion of the intent of its framers.

11. SENATE SUBCOMM. ON THE CONSTITUTION OF THE COMM. ON THE JUDICIARY, 97th Cong., 2d Sess., *THE RIGHT TO KEEP AND BEAR ARMS* 6 (Comm. Print 1982) [hereinafter *SUMCOMM. ON THE CONSTITUTION*].

12. *Id.* The English background of the individual right to possess weapons dates back to the reign of King Alfred the Great in 690 A.D. Hardy *supra* note 10, at 562. Under King Alfred, every free male was required by law to possess the weapons of an infantryman and serve in the citizen militia (although the word "militia" itself was not used until the late 16th century). In 1181, King Henry II's Statute of Assize of Arms ordered all freemen to bear arms for national defense. The Assize required every freeman to "bear these arms in his [Henry II's] service according to his order and in allegiance to the lord King and his realm." The Assize was based on the old Saxon tradition of the fyrd, in which every male aged 16 to 60 bore arms to defend the nation. Statute of Assize of Arms, Henry II, art. 3 (1181); Robert W. Coakley and Stetson Conn, *The War of the American Revolution* (Washington: Center of Military History United States Army, 1975), at 2. Complaining about an increase in crime, Edward I enacted the Statute of Winchester, which required "every man," not just freemen, to have arms. The types of arms required to be owned by the poorest people were Gisarnes (a type of pole-ax), knives, and bows. Another anti-crime measure in the statute ordered local citizens to apprehend fleeing criminals, and established night watches. 13 Edward I chapter 6 (1285). By the late 16th century, gun ownership had become mandatory for all adult males \_ for anti-crime purposes, and for the defense of the realm. Arms were necessary so that all citizens could join in the *hutesium et clamor* (hue and cry) to pursue fleeing criminals; indeed, citizens were legally required to join in. Any person who witnessed a felony could raise the hue and cry. Frederick Pollock and Frederic W. Maitland, *The History of English Law before the Time of Edward I* (Cambridge: Cambridge University Press, 1911, 2d ed., 1st pub. Cambridge, 1895), II, chapter IX, paragraph 3, pp. 578-80; Blackstone, IV, pp. \*293-94; Statute of Winchester, 13 Edward I, chapter 1 & 4; Bradley Chaplin, *Criminal Justice, in Colonial America, 1606-1660* (Athens: University of Georgia Press, 1983), p.31, citing Michael Dalton, *The Country Justice, Containing the Practice of Justices of the Peace out of the Their Sessions* (London: 1619), p. 65, and Ferdinando Pulton, *De Pace Regis Regni Viz A Treatis declaring which be the great and generall offences of The Realme, and the chiefe impediments of the pace of The King and The Kindom* (London: 1609), pp. 152-56. The English Bill of Rights of 1689 recognized a right to bear arms, albeit one subject to limitation. "The subjects which are Protestants may have arms for their defence suitable to their conditions as and allowed by law." Bill of Rights of 1689, 1 William & Mary, sess. 2 chapter 2.

13. "The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence, suitable to their condition and degree, and such as are allowed by law. Which is also declared by the same statute 1 W. & M. st. 2 c. 2. and is indeed a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found

insufficient to restrain the violence of oppression." William Blackstone, *Commentaries on the Laws of England*, I (Chicago: University of Chicago Press, 1979) (facsimile of First Edition of 1765-1769), p. 139.

14. Blackstone, IV, p. \*82.

15. Hardy, *supra* note 10, at 588.

16. *Id.*

17. Between 1620 and 1775, "almost the entire male population of New England actively participated in the militia." Marie Ahearn, *The Rhetoric of War: Training Day, the Militia, and the Military Sermon* (Westport, Connecticut, Greenwood Press, 1989), p. 2.

18. *Essex Gazette*, April 25, 1775, p. 3, col. 3; Coakley and Conn, pp. 25-26.

19. Halbrook, *The Right to Bear Arms in Texas: The Intent of the Framers of the Bill of Rights*, 41 *BAYLOR L. REV.* 629, 636 (1989).

20. "The experience of the Revolution thus strengthened the colonial perception of a link between individual armament and individual freedom. The colonists, who perceived themselves as staunch Whigs, continued to see free individual armament as Whig dogma." Hardy, 10, at 593.

21. Daniel Boorstin, *The Americans: The Colonial Experience* 370 (1965). See also William Marina and Diane Cuervo, "The Dutch-American Guerrillas of the American Revolution," in ed. Gary North, *The Theology of Christian Resistance: A Symposium*, vol. 2 of *Christianity and Civilization* (Tyler, Texas: Geneva Divinity School Press, 1982): 242-65.

22. Hardy, *supra* note 10, at 600-15.

23. *Id.* at 600.

24. *Id.* at 600-15.

25. W. Bennett, ed., *Letters from the Federal Farmer to the Republican* 21, 22, 124 (1975). Lee sat in the Senate that ratified the Second Amendment. *SUBCOMMITTEE*, *supra* note 11, at 5.

26. Hardy, *supra* note 10, at 599.

27. N. Webster, "An Examination into the Leading Principles of the Federal Constitution," in P. Ford, ed., *Pamphlets on the Constitution of the United States* 56 (1888).

28. *The Federalist*, No. 46 (J. Madison). At the time Madison wrote, "half a million citizens" amounted to almost the entire adult white male population.

29. *The Federalist*, no. 28 (A. Hamilton).

30. *The Federalist*, no. 29 (A. Hamilton).

31. Hardy, *supra* note 10, at 604.

32. H. R. DOC. NO. 398, 69th Cong., 1st Sess. 1026 (1927).

33. *Id.*

34. Quoted in ed. Morton Borden, *The Antifederalist Papers*, vol. 3 (East Lansing: Michigan State University Press), p. 386.

35. "State conventions had made no fewer than five appeals for such a right; such accepted rights as freedom of speech, of confrontation, and against self-incrimination could boast but three endorsements." Hardy, *supra* note 10, at 604.

36. SUBCOMM. ON THE CONSTITUTION, *supra* note 11, at 6.

37. Quoted in Clinton Rossiter, *The Political Thought of the American Revolution* (New York: Harcourt, Brace and World, 1953), pp. 126-27.

38. Quoted in Borden. 425.

39. House Report No. 141, 73d Cong., 1st sess. (1933), pp. 2-5. Congress did so in order that the National Guard could be sent into overseas combat. The National Guard's weapons cannot be the arms protected by the Second Amendment, since Guard weapons are owned by the federal government. 32 U.S.C. paragraph 105[a][1].

40. Subcommittee on the Constitution, at 11. "There can be little doubt... that when the Congress and the people spoke of a 'militia,' they had reference to the... entire populace capable of bearing arms, and not to any formal group such as what is today called the National Guard... When the framers referred to the equivalent of our National Guard, they uniformly used the term 'select militia' and distinguished this from 'militia'. Indeed, the debates over the Constitution constantly referred to organized militia units as a threat to freedom comparable to that of a standing army, and stressed that such organized units did not constitute, and indeed were philosophically opposed to, the concept of a militia."

Several states included a similar right to bear arms guarantee in their own constitutions. If the Second Amendment protected only the state uniformed militias against federal interference, a comparable article would be ridiculous in a state constitution.

41. Coxe, *Pennsylvania Gazette*, Feb. 20, 1788, quoted in Halbrook, *To Keep and Bear Their Private Arms: The Adoption of the Second Amendment, 1787-1791*, 10 N. KY. L. REV. at 17 (1982).

42. Webster's Ninth New Collegiate Dictionary 103 (1984).

43. *Quilici v. Village of Morton Grove*, 532 F. Supp. 1169 (N.D. Ill.), *affd.* 695 F.2d 261 (7th Cir., 1982), *cert. denied* 464 U.S. 863 (1983).

44. 307 U.S. 174 (1938).

45. *Id.* at 175.

46. *Id.* at 177.

47. A federal statute at the time allowed appeals directly to the Supreme Court when a federal district court found a federal statute unconstitutional.

48. *Miller*, 307 U.S. at 179.

49. *Id.*

50. *Id.*

51. *Id.* at 178.

52. *Id.* (quoting *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 158 (1840)).

53. United States v. Cruikshank, 92 U.S. 542, 551-53 (1976).

54. The Court's decision failed to consider Dred Scott, where the Court had stated the right to carry arms was included within the "Privileges and Immunities" clause of Article IV, section one of the Constitution.

55. Fresno Rifle and Pistol Club v. Van de Kamp, 746 F. Supp. 1415 (E.D. Calif. 1990).

56. Moore v. East Cleveland, 431 U.S. 494, 502 (1976) ("the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures" are part of the "full scope of liberty" guaranteed by the Constitution and made applicable against the states by the due process clause of the 14th amendment).

57. Said Rep. Sidney Clarke of Kansas, during the debate on the Fourteenth Amendment, "I find in the Constitution of the United States an article which declared that 'the right of the people to keep and bear arms shall not be infringed.' For myself, I shall insist that the reconstructed rebels of Mississippi respect the Constitution in their local laws." Quoted in David Hardy, "The Constitution as a Restraint on State and Federal Firearm Restrictions," in D. Kates, ed. Restricting Handguns: The Liberal Skeptics Speak Out 181 (1979). For more on the history of the 14th Amendment, see S. Halbrook, THAT EVERY MAN BE ARMED, supra note 144; Kates, Handgun Prohibition and the Original Meaning of the Second Amendment, 82 MICH. L. REV. 204 (1983).

58. 116 U.S. 252 (1886).

59. Id. at 265.

60. 196. Nunn v. State, 1 Ga. (1 Kel.) 243, 251 (1846)

61. 50 Tenn. (3 Heisk.) 165 (1871).

62. Id. at 179.

63. Fife v. State, 31 Ark. 455, 461 (1876).

64. Id. at 460-61.

65. Oregon v. Kessler, 289 Or. at 369, 614 P. 2d at 99.

66. Kessler, 289 Or. at 368, 614 P. 2d at 98.

67. Id. The Texas Constitution has also been interpreted to deny a right to possess machine-guns.

68. 204. Oregon Attorney General, Opinion 82-15, Apr. 20, 1990. An Oregon trial court has disagreed, under the rationale that semiautomatics are essentially machine-guns. Oregon State Shooting Association v. Multnomah County, no. 9008-04628 (Circuit Court, August 22, 1991). The case is being appealed. The trial court labeled as "dicta" the Oregon Supreme Court's methodology for evaluation of technological advances in arms in relation to the right to bear arms. The trial court reasoned that the Supreme Court's methodology had been outlined in a case involving knives, and thus was not binding to a case involving guns.

69. Hearings on H.R. 1154 before the Subcomm. on Trade of the House Comm on Ways and Means, 101st Congress, 1st Sess. 10, at 104. [Herein after called Hearings.] Hon. Charles B. Rangel, National Council For a Responsible Firearms Policy, Inc., stated:

I understand the second amendment and the right to bear arms. I understand the right to protection and all of those issues. I am well aware of the fact that just because a gun is powerful and has lots of fancy features, it does not mean that each and every person who purchases it does so with the intent of taking

human lives.

But I also understand the fact that we cannot continue to allow human beings, and not animals, to be hunted down with these weapons. People are being stalked through the street and the neighborhoods and pumped fill of bullets like prey on "Wild Kingdom."

70. 389 U.S. 347.

71. It should be noted that the Stockton murders were not made worse because Patrick Purdy owned a semiautomatic. He fired approximately 10 rounds in six minutes. Anyone who was willing \_ as Purdy apparently was \_ to spend some time practicing with guns, could have speedily reloaded even a simple bolt-action rifle, and fired as many shots in the same time period.

Moreover, the medical technology has greatly outstripped firearms in the past two centuries. Because gunshot wounds are much less likely to result in fatality today, a criminal firing a semiautomatic gun for a long period (such as six minutes) today would kill fewer people today than a criminal firing a more primitive gun two hundred years ago.

72 . One clearly obsolete provision of the Constitution is the guarantee of federal jury trials when the amount in controversy exceeds \$20. Due to inflation, a \$20 case today is immensely less significant than a \$20 case from 200 years ago. Today, the \$20 rule impedes judicial efficiency by guaranteeing a jury trial for even the pettiest of cases. Yet no-one suggests that a legislature could simply ignore the 7th amendment because of obsolescence. The only remedy is to propose an amendment.

73. That the guns to be prohibited may sometimes be the best form of self defense does not matter to some advocates of prohibition. As New York City Mayor responded to self defense arguments: "I'm telling you this nonsense that the Constitution entitles us to a weapon to defend ourselves is not an appropriate response to [gun prohibition] legislation. "Council Panel OKs Ban on Assault Weapons," New York Post, July 25, 1991.

74. Los Angeles Times, May 13, 1988, at II, 3.

75. "Block Clubs Wage the Battle," Washington Times, November 25, 1988, p. C6.

76. "Drug Battle Truce," Rocky Mountain News, September 29, 1989, p. 4; "Anti-Drug Gun Battle Spurs Demand for Firearms," Gun Week, November 3, 1989, p. 9, citing Spokane Chronicle.

77. 135 CONG. REC. S 1869-70 (daily ed. Feb. 28, 1989).

78. Hearing, *supra* note 69, at 77.

79. Alan Gottlieb, "Gun Ownership: A Constitutional Right," Northern Kentucky Law Review 10 (1982): 138.

78 . Governor O'Conor of Maryland delivered a radio address on March 10, 1942, at which he called for volunteers to defend the state: "[T]he volunteers, for the most part, will be expected to furnish their own weapons. For this reason, gunners (of whom there are sixty thousand licensed in Maryland), members of Rod and Gun Clubs, of Trap Shooting and similar organizations will be expected to constitute a part of this new military organization." State Papers and Addresses of Governor O'Conor, vol III, p. 618, quoted in Bob Dowlut, "The Right to Bear Arms: Does the Constitution or the Predilection of Judges Reign?" Oklahoma Law Review 36 (1985): 76-77, n. 52. See also D. Kates, Why Handgun Bans Can't Work 74 (1982), citing Baker, "I Remember 'The Army' with Men from 16 to 79," Baltimore Sun Magazine, November 16, 1975, p. 46.

81. M. Schlegel, Virginia On Guard \_ Civilian Defense and the State Militia in the Second World War

(Richmond: Virginia State Library, 1949), pp. 45, 129, 131. According to Schlegel, the Virginia militia "leaned heavily on sportsmen," because they could provide their own weapons. *Ibid.*, p. 129; quoted in Bob Dowlut, "State Constitutions and the Right to Keep and Bear Arms," *Oklahoma City University Law Review* 2 (1982): 198.

82. "To Arms," *TIME*, March 30, 1942, p. 1.

83. Office of the Assistant Secretary of Defense, U.S. Home Defense Study (March 1981), pp. 32, 34, 58-63, quoted in Dowlut, "State Constitutions," p. 197.

84. *Id.*

85. A study by the Arthur Little firm found that men who participated in the DCM shooting program before joining the military learned military shooting more speedily than did other recruits. DCM participants who do not join the military are still a national defense resource, since they will be able to use their skills in the event of an emergency of the type detailed in this section.

86. "Far North Has Militia of Eskimos," *New York Times*, April 1, 1986, p. A14.

87. Mao Zedong, *Mao-Tse Tung on Guerrilla Warfare*, translated by S. Griffith (New York: Praeger, 1961), cited in Raymond Kessler, "Gun Control and Political Power," *Law and Policy Quarterly* 5 (1983): 395.

88. "One Year Later, Analysts Groping for Answers to Afghanistan," *Kansas City Times*, December 26, 1980, p. B-3, cited in Kessler, p. 395.

89. Gottlieb, p. 139.

90. For the Philippines, see R. Sherrill, *THE SATURDAY NIGHT SPECIAL* 272 (1973). For Uganda, "Uganda Curbs Firearms," *New York Times*, December 22, 1969, p. 36. For Cuba, see Kessler, p. 382; Crum, "Gun Control Paved Castro's Way," *Conservative Digest*, April 1976, p. 33 (use of Batista's registration lists to facilitate confiscation); Williams, "The Rise of Castro: 'If only we hadn't given up our guns!'", *Medina County Gazette*, October 15, 1978, p. 5. For Bulgaria, see *GUN CONTROL LAWS IN FOREIGN COUNTRIES*, rev. ed. (Washington: Library of Congress, 1976), p. 33. (Upon coming to power Bulgarian communists immediately confiscated all firearms.)

91. *Farmer v. Higgins*, 907 F.2d 1041 (11th Cir. 1990), cert. denied, 111 S. Ct. 753 (1991).

92. *Hopfman v. Connolly*, 471 U.S. 459 (1985).

93. The statute prohibits manufacture of machine-guns for sale to civilians except "under the authority of the United States." The federal district court, noting repeated Congressional statements of intent not to outlaw any firearms, found the phrase to require the Bureau of Alcohol, Tobacco and Firearms to issue manufacturing licenses to persons who were not otherwise prohibited from manufacture.

94. *United States v. Rock Island Armory* (C. D. Ill. May 2, 1991).

95. In this issue paper, the term "assault rifle" is generally used without quotation marks, since it has a precise and commonly accepted definition. The term "assault weapon" is always used in quotation marks, since there is no definition other than "an amorphous subset of guns which are incorrectly considered to be military firearms."

96. Legislating against semiautomatic firearms that happen to look like military weapons does not draw any meaningful distinctions between those firearms that are banned as "assault weapons" and those that are not.

97. Massacres do not have to be planned. An inexperienced police officer, under stress and armed with a deadly "assault weapon" could do at least as much damage as an ordinary citizen who went berserk. Of course it would be wrong to deprive all police officers of useful firearms to guard against the unlikely possibility that an officer with no prior record of illegal violence would suddenly lose his bearings and start killing people. The same may be said of ordinary citizens.

98. In the spring of 1989, Philip McGuire testified before the U.S. Senate Subcommittee on the Constitution in favor of Senator Metzenbaum's S.386. The bill would have given the Bureau of Alcohol, Tobacco and Firearms the discretionary authority to outlaw almost every semiautomatic. Mr. McGuire, a former administrative official with the BATF, assured the Senators that BATF would not abuse its discretionary authority. The assurance was ironic, considering its source.

When Mr. McGuire was Chief of Investigations for BATF, the United States Senate made the finding that "[E]nforcement tactics made possible by current firearms laws [which were later reformed over Mr. McGuire's strong opposition] are constitutionally, legally, and practically reprehensible... [A]pproximately 75 percent of BATF gun prosecutions were aimed at ordinary citizens who had neither criminal intent nor knowledge, but were enticed by agents into unknowingly technical violations." Senate Committee on the Judiciary, Subcommittee on the Constitution, THE RIGHT TO BEAR ARMS, 97th Cong., 2d. Sess., S. Doc. No. 2807 (February 1982), at 20-23 (unanimous report).

In 1982, Mr. McGuire was promoted to Associate Director, Law Enforcement, a position which he held until his retirement in 1988. In 1986, Congress enacted the Firearm Owners Protection Act, which narrowed the definition of offenses under the Gun Control Act of 1968, and sharply curtailed the search and seizure authority of BATF. The preamble to the law reining in the enforcement activities under Mr. McGuire's supervision states;

The Congress finds that (1) the rights of citizens (A) to keep and bear arms under the second amendment to the United States Constitution (B) to security against illegal and unreasonable searches and seizures under the fourth amendment (C) against uncompensated taking of property, double jeopardy, and assurance of due process of law under the fifth amendment and (D) against unconstitutional exercise of authority under the ninth and tenth amendments; require additional legislation to correct existing statutes and enforcement policies...

18 U.S.C.S. paragraph 921 (1990 Supp.), at 149. The only fact that gave Mr. McGuire's promises on non-abusive enforcement by BATF any credibility was that he was no longer with the Bureau.

99. "Gun-control foes' Lawsuit Alleges Warrantless Search," Wash. Times, July 17, 1990, at B5; "Pro-gun Groups for Access to Papers Related to '88 Search," The (Baltimore) Sun, July 17, 1990.

100. The act which the police said justified the taking of photos was unfurling a banner comparing Governor Schaefer to Hitler, but no photograph shows such a banner. None of the photos showed persons engaging or seeming ready to engage in violent conduct. The photographs were mostly of speakers and persons quietly listening to them. The rally was the only 1991 State House demonstration where police photographed the demonstrators. "Police Photos Taken at State House Rally Irk Gun-Control Foes," Wash. Times, Mar. 28, 1991, at B4; "Police Photos and Gun Rally Blasted," The (Baltimore) Evening Sun, Mar. 27, 1991, at A1; "Gun Advocates Charge Intimidation," Montgomery J., Mar. 28, 1991, at A1.

101. "Smile! You're on State Police Camera," Montgomery J., Apr. 1, 1991, at A4 (editorial).

102. The Nazi controls were based on a foundation of strict controls enacted by the Weimar government.

103. Quoted in David Hardy, "The Second Amendment as a Restraint on State and Federal Firearm Restrictions," in Restricting Handguns, pp. 184-85.

At "assault weapon" hearings in 1989, Representative William Hughes told witness Neal Knox (the

lobbyist for the Firearms Coalition), that it was outrageous that Knox and his supporters did not trust the government. Knox shot back that it was outrageous that Hughes did not trust the people.

104. Thompson used a stolen, fully-automatic firearm. The gun prohibition lobby's low regard for truth is evidenced by their advertising assertions that the gun was a semiautomatic.

105. Austin Amer. Statesman, Sept. 17, 1989, at A19 col. 2.

106. Id. at A19, col. 3. In fact, the study showed that after one episode of Miami Vice featured the Bren 10, gun stores were flooded with demands for the unusual weapon and the price has now reached \$1200 per gun. Id.

107. Id.

108. Homicide rates in the United States, Canada, and South Africa all rose steeply after the introduction of television. Centerwall noted that after television was introduced in Canada, the homicide nearly doubled, even though per capita firearms ownership remained stable. In the United States, the rise in firearms homicide was paralleled by an equally large rise in homicide with the hands and feet. The data therefore implies that the underlying cause of the homicide increase was not a sudden surge in availability of firearms, since there was no surge in availability of hands and feet, and hand and foot homicide rose as sharply as firearms homicide. Centerwall suggested that one mechanism by which television causes homicide, and perhaps other violent crime as well, is simple imitation. He pointed to an ABC news poll of prisoners which asked "have you ever committed a crime you saw on television?" Over one quarter of prisoners remembered a specific crime episode they had imitated. Brandon Centerwall, "Exposure to Television as a Risk Factor for Violence," 129 American Journal of Epidemiology 643-652 (April 1989).

109. There is no First Amendment violation in subjecting the entertainment industry to the same criminal laws that apply to the rest of the population.

# **The Second Amendment and the Historiography of the Bill of Rights**

**by David T. Hardy**

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Mr. Hardys' paper is based in large part on an article of the same name that appeared in The Journal of Law and Politics, Vol. IV, No.1, published by the University of Virginia.

The second amendment to the Constitution of the United States recognized that "[a] well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed."<sup>1</sup> That there is controversy surrounding the interpretation of the second amendment, or any provision of the Bill of Rights, is hardly surprising. While the disputes relating to the first, fourth and remaining amendments focus up on their detailed application, the conflict over the second amendment concerns the question of its very subject matter. One school of thought contends that the second amendment protects a collective right, a narrow guarantee of a state right to maintain organized reserve military units.<sup>2</sup> This interpretation emphasized the phrase "A well regulated militia being necessary to a free state," and maintains that the subsequent recognition of the people's right to bear arms is a mere restatement of this collective (i.e., state) right. The other school of thought contends that the amendment recognizes an individual right to possess and use arms.<sup>3</sup> This interpretation emphasizes the phrase "the right of the people to keep and bear arms shall not be infringed," and maintains that the preceding description of the militia (i.e., all individuals capable of arms bearing) is a mere explanation of one objective of this guarantee.<sup>4</sup>

The works of neither school entertain the possibility that an "either/or" test may be a gross oversimplification of what are in fact two different sets of constitutional priorities. Yet the fact that prior to 1788 the Framers who proposed protections for individuals' arms did not propose to protect the militia, and those desirous of protecting the militia did not propose safeguards of individual arms, suggests the quixotic nature of previous attempts to demonstrate that the Framers, as a whole, had a single intent. Is it reasonable to assume that John Adams, obsessed with the risk of mob rule, and Thomas Jefferson, who so lightly praised the virtues of frequent revolutions, were of a single mind when it came to popular armaments? When Virginia constitutionalized the principle that a well-regulated militia was necessary to the proper defense of a free state, and Pennsylvania instead guaranteed that the people had a right to bear arms for defense of themselves and the state, was there in fact an identical understanding which motivated each statement? Both existing formulations of the second amendment require us to assume precisely that. As a consequence, no existing analysis of that amendment has attempted a critical examination of the proposals for the second amendment against the varied backgrounds and philosophies of their authors, and none has taken account of recent research demonstrating that the different state conventions were dominated by radically differing political philosophies.

It is the purpose of this article to suggest that in fact neither the collective nor individual school of thought is correct insofar as it claims to entirely explain the second amendment, and both are correct, insofar as they purport to offer partial explanations. The second amendment was not intended to recognize only a single principle; rather, like the first, fourth, fifth, and sixth amendments, it was intended as a composite of constitutional provisions. Its militia component and its right to bear arms recognitions have in fact

different origins and theoretical underpinnings. One is a legacy of the Renaissance, brought to fruition by the "Classical Republicans;" the other is the creation of seventeenth century English experience, brought to fruition in the Enlightenment. At the time of the framing of our Constitution, the militia statement found its primary constituency among the gentry, particularly that of Virginia. The individual right to bear arms provision was primarily advanced by the Radical movement, particularly in Pennsylvania and Massachusetts. Only after the Constitution had received its crucial ninth ratification were the two precepts joined into a single sentence, thereby creating a constitutional "package" which addressed the demands of both schools of thought. Thus neither the militia nor the right to bear arms provision can be taken in isolation as a sufficient explanation of the second amendment, a fact made obvious by the first Congress' retention of both clauses during its extensive paring of Madison's proposals.<sup>5</sup> The second amendment therefore has historical interest which extends beyond militia and arms issues. It is, metaphorically speaking a fault line in the bedrock of the Constitution; the one place where a rough joiner of related idea enables us today to discern a turning point between two entirely different American approaches to statecraft.

To be sure, militia systems and individual armament have always been related concerns with a practical interaction. An armed citizenry was the basis of the militia the Framers sought, and the functioning of such a militia was the most obvious political purpose of the citizen armament. Such an interaction is hardly unique; the first amendment guarantees freedom of expression and the right to petition the legislature. At the same time, neither of the interrelated rights can fully express the purposes of the Framers. Indeed, the overlap between the militia concept and the right to arms concept has not prevented a certain rivalry between the two, a rivalry especially pronounced during the formative years of our own nation. Supporters of one view may not have disputed the principle of the other, but they certainly disputed whether it deserved high political-constitutional priority.

One group, influenced by the Classical Republicans, saw the establishment of a stable republic that could survive in a hostile environment as the highest priority. For this group, to emphasize citizens' rights against such a republic was to place the cart before the horse. The other group, influenced by Enlightenment thought, are the establishment of the rights of man, around which a free republic or democracy might be construed, as the main priority. A statement, rather than a command, regarding the value of the militia "to a free state" appealed to the first group; a command that the right "of the people" to bear arms shall not be infringed appealed to the second.

In order to fully understand both purposes of the second amendment it will be necessary to examine first the origins of the militia concept, second, the origins of an individual right to bear arms, and third, the eventual merger of the two concepts which lead to the present second amendment.

## I. The Militia as Essential to a Free Republic

A Digression: Modern Historiography,

the Classical Republicans and the Radicals

Only a few decades ago, the ideology of the American Revolution could have been neatly summarized as a commentary on John Locke's First Treatise on Civil Government. While acknowledging that more state-centered Republicans emerged during the seventeenth century (largely as a result of the English Civil War the Protectorate of Oliver Cromwell which followed), this view assumes that their ideas had been discredited in the late seventeenth century and were disregarded in the eighteenth.<sup>6</sup> Thus before Locke there was nothing, so far as the theoretics of the Framers were concerned.

Recent search has forced reevaluation of this view, suggesting both that Locke's role was overstated<sup>7</sup> and that eighteenth century American thought was heavily influenced by pre-Lockean republican views.<sup>8</sup> These "Classical Republican" (largely identified with the Whig Party) contributed greatly to late eighteenth century American Political thought. Although largely forgotten today, the names of eminent Republican such as Sidney, Harrington and Fletcher were commonplace to the Framers and their

contemporaries.<sup>9</sup> Indeed, modern students of this movement maintain that the Framers were immersed in Classical Republican thought:

No man's thought is altogether free. Men are born into an intellectual universe where some ideas are native and others are difficult to conceive. Sometimes this intellectual universe is so well structured and has so strong a hold that it can virtually determine not only the ways in which a society will express its hopes and discontents but also the central problems with which it will be concerned. In 1789 Americans lived in such a world. The heritage of classical republicanism and English opposition thought, shaped and hardened in the furnace of great Revolution, left few men free.<sup>10</sup>

Yet the rediscoveries of Classical Republican thought did not have the last word in the effort to discern the political thought of the Framers. The seventeenth century had its Populists and Democrats (the Diggers and the Levelers) and one of the effects of the Classical Republican emphasis has been the study of their counterparts (albeit not direct descendants), the Radical thinkers of revolutionary America.<sup>11</sup> However unappealing such radicalism may have been to the gentry, its values and thoughts explain the stance of Sam Adams, Thomas Paine, and the urban patriots of Boston and Philadelphia to a far greater degree than the Classical Republicans' emphasis on agrarian, freeholding society. Moreover, since one of the Radical legacies was an emphasis on individual rights, as distinguished from the Classical Republicans' emphasis on a well-ordered society, their thought is of special relevance to our Bill of Rights, not to mention the Jeffersonian/Jacksonian democracy of the early republic.

To be sure, when we speak of Republicans and Democrats, Conservatives and Radicals, we do so in a quite subjective manner. Few, if any, statesmen of 1787-1791 would have admitted to being anything but a "Republican" today were among the most ardent supporters of "Republicanism." Few would have cared to be called "Radical." These terms of art thus have little relation to how the labelled individuals described themselves at the time. Moreover, to categorize so varied a band of thinkers is to understate the diversity of their thought and impose upon that group a particular perspective. The views of Jefferson, the agrarian Radical, differed subtly from those of Sam Adams, the urban Radical; neither man would have cared for too close an association with the views of Sam's aristocratic cousin, John Adams. Richard Henry Lee and Elbridge Gerry, both ardent Republicans, are to our eyes hardly compatriots of Carter Braxton, the reluctant revolutionary and Monarchist. Yet all these otherwise disparate individuals put their names to the Declaration of Independence, and all (whether Monarchist or Democrat, Conservative or Radical) would have been similarly Radical to a Tory of the time. Recognizing these limitations, it is still plausible to distinguish between "Conservative Revolutionaries" such as George Mason, and their Radical brethren such as Sam Adams, and between those who gave priority to establishing a stable republic and those who gave priority to defining and guaranteeing rights against even such a government.

### The Free State and Well Regulated Militia

The existence of an English militia, comprised not of specialized units but of essentially the entire male population, far antedates even the Norman Conquest.<sup>12</sup> By 1181, every English freeman was required annually to prove ownership of arms proportionate to his landholdings.<sup>13</sup> In 1253, even serfs were required to prove annually that they owned a spear and dagger.<sup>14</sup> Subsequent enactments ordered all healthy Englishmen to own longbows, to train their sons in archery from age seven, and to abstain from a variety of outdoor sports that diverted commoners from the archery ranges.<sup>15</sup> By the fifteenth century, Englishmen already regarded universal armament for national defense as a critical element of their development of "government under law".<sup>16</sup> This perception of citizen armament as a peculiarly English virtue was thereafter reinforced by the rise of royal absolutism on the Continent,<sup>17</sup> with consequent limitation on firearm possession in France and the Empire. Long after her continental counterparts had banned or severely restricted firearms ownership,<sup>18</sup> Elizabeth still struggled to stop her subjects from drawing pistols in church, or firing them in the churchyard.<sup>19</sup>

While the results of citizen armament may thus have been annoying to sundry clerics, they did much to restrain excessive royal power. An English king had to remember that his "'gentleman pensioners' and his

yeoman of the guard were but a handful, and bills or bows were in every farm and cottage."<sup>20</sup> Conversely, a popular monarch could count upon a massive reserve army, maintained at little or not cost to the state: in the 1580s, Elizabeth could maintain 120,000 men on duty throughout the summary.<sup>21</sup> Such a force was almost entirely for defensive use because, since the twelfth century, English kings had relied upon mercenaries for foreign military service.<sup>22</sup> Mercenaries were not tied to a home district; they were better trained and, while on the offensive, could be compensated by plunder. But after the loss of British holdings in France during the mid-fifteenth century, England stood mainly on the defensive, and mercenary forces swindled to a handful of bodyguards and coastal garrisons.

This decline paralleled an expansion and perfection of the militia system under the late Tudors.<sup>23</sup> The system all but collapsed under the reign of the pacifistic James I, who acquiesced in the repeal of the militia statutes. The civil war which came during the reign of his son, Charles I, saw both sides dependent upon standing armies (sometimes equipped by disarming local militias). The end result of the war was a military dictatorship.<sup>24</sup> The dictatorship ended in turn with the restoration of Charles II, who restored only a limited royalist militia backed by standing forces. This turmoil predictably inspired various theoreticians to suggest various ideal political systems. Unlike many thinkers from that period in history, the Classical Republicans, who drew inspiration largely from the Greek and Roman republics, left an enduring legacy.

To the early Classical Republicans, the militia concept was more than simple tradition. The belief that such a militia was "necessary to the security of a free State" soon became central to their political thought. They drew inspiration from Nicolo Machiavelli, who had both explained and attempted to implement a national militia centuries before. Writing to an Italy which had seen its city-states and their mercenary armies crushed in detail by French and Spanish professionals, Machiavelli advocated an Italian nation, led by a popular prince and based on a national militia. Such a prince, he explained, would found his state upon: "good laws and good arms. And as there cannot be good laws where there are not good arms, and where there are good arms there must be good laws, I will not now discuss the laws, but will speak of the arms."<sup>25</sup> Mercenaries were to be categorically condemned, they were "disunited, ambitious, without discipline, faithless, bold amongst friends, cowardly amongst enemies, they have no fear of God, and keep no faith with men."<sup>26</sup> These faults were inherent in all mercenaries, their lack of patriotism left no motivation beyond wages, which were not enough to motivate men to die.<sup>27</sup> More fundamentally, any mercenary army powerful enough to defend a state must be more than powerful enough to subjugate it.<sup>28</sup> According to Machiavelli, only a nation defended by a militia can escape this dilemma: "Rome and Sparta were for many centuries well armed and free. The Swiss are well armed and enjoy great freedom."<sup>29</sup>

The great Florentine expanded these themes in his Art of War. A prince who relies upon mercenaries must either remain embroiled in war, or risk overthrow when mercenaries become unemployed with the advent of peace.

A prince, therefore, who would reign in security, ought to select only such men for his infantry as will cheerfully serve him in war when it is necessary, and be as glad to return home when it is over. This will always be the case with those who have other occupations and employments by which to live.<sup>30</sup>

Such a militia stabilizes the state, whatever its form:

it is certain that no subjects or citizens, when legally armed and kept in due order by their masters, ever did the least mischief to any state. . . Rome remained free for four hundred years and Sparta eight hundred, although their citizens were armed all that time, but many other states that have been disarmed have lost their liberties in less than forty years.<sup>31</sup>

Knowledge of Machiavelli's writings spread rapidly. An English translation of his Art of War went through no fewer than three printings by 1588,<sup>32</sup> yet long before the translations his writings were common currency among the English statesmen.<sup>33</sup> Machiavelli's greatest impact upon English thought came, however, through the writings of James Harrington. Harrington applied Machiavelli's realpolitik to seventeenth century England, substituting a republic of freeholders for rule by a popular prince. The

outcome was a stable republic populated, ruled and defended by a militia of its freeholders.<sup>34</sup> Ownership of land gives independence; unlike a feudal landholder, the modern freeholder owns in fee simple, is not obliged as a condition of tenure to fight for a superior, and thus can defend his own rights and interests.

[T]he power whose distributics in society [Harrington] was trying to chart was essentially the possession of land that gave a man independence, this independence being in the last analysis measured by his ability to bear arms and use them in his own quarrels. Harrington's democracy was a republic of freeholders owning their own lands and weapons...<sup>35</sup>

Indeed, Harrington's rejection on monarchy is intertwined with his belief that land, political power and military force must be in the same hands:

Harrington's entire theory of monarchy can be reduced to two propositions: First, that the King's agents and servants must be supported either upon the land as a feudal aristocracy, or about this person, as praetorians or janissaries; second, that whichever of these methods is adopted, relations between the military class and the King will be so prone to tensions that monarchy can never be a stable form of government.<sup>36</sup>

This, Harrington argued, could be contrasted to his stable republic where property, political power, and arms were all in the same hands. Such a republic faced few internal threats, since those with arms also had the greatest economic and political interest in maintaining the state. Nor were external threats to be feared:

inasmuch as, the commonwealth being equal, [an invader] must needs to find them united, but in regard that such citizens, being all soldiers or trained up unto their arms, which they use not for the defense of slavery but of liberty (a condition not in this world to be bettered), they have more especially upon this occasion the highest soul of courage and (if their territory be of any extent) the vastest body of well disciplined militia that is possible in nature. Wherefore an example of such an one overcome by the arms of a monarch, is not to be found in the world... [F]or the reasons why a government of citizens ... is the hardest to be held, there needs no more than that men accustomed unto their arms and their liberties will never endure the yoke.<sup>37</sup>

Harrington wrote during the Protectorate, when efforts to maintain a standing army were indeed destabilizing the nation. After 1660, the army played a different role, that of maintaining royal power. Harrington's postulate that an army could not be adequately financed and subordinated was compromised. Harrington's followers, particularly Henry Neville, modified this critique. Whereas Harrington has assumed a standing army could not stabilize a government, good or bad, Neville and other post-1675 Harringtonians saw it as all too capable of stabilizing and autocratic one.<sup>38</sup> Conversely, by arming the people at large democracies could obtain an incomparable advantage: "democracy is much more powerful than aristocracy, because the latter cannot arm the people for fear they could seize upon the government."<sup>39</sup> Harrington's followers also recast his utopia in a conservative light, by arguing that traditional English practices had in fact been republican. "The arming and training of all the freeholders of England, as it is our undoubted ancient Constitution, and consequently our Right," argued Robert Moesworth, "so it is the Opinion of most Whigs, that it ought to be out in Practice."<sup>40</sup> Thus the Classical Republicans ultimately cast the militia not only as part of the republican utopia but also an underpinning of the existing English constitution.

### The Standing Army Controversy

Yet as Harrington's successors refined the argument for the militia vis-a-vis the standing army, they were being overtaken by events. In 1688 James II relied upon his army, which was financed out of his own personal funds rather than Parliamentary appropriations, and staffed by handpicked officers. Too late, James discovered his mistake. England was "invaded" by William of Orange, supported by some 12,000 troops. Although James mustered more than twice that number, dissension (particularly among the officers) prevented James from offering battle, and he fled into exile.<sup>41</sup>

This "Glorious Revolution" and William and Mary's acceptance of the throne offered by Parliament did nothing to reduce the support for the standing army. For England to accept William also meant being drawn into the ongoing struggle between Holland and France and facing the risk of James' return with a French army. The need for the projection of force on the continent had returned and, as always, the militia was totally unsuited to this task.

English policy makers had to face several other realities, none of which favored reliance on the militia. An invasion, if it came, would be spearheaded by well-trained French troops, at a time when such training was of increasing importance. Technical improvements over the course of the seventeenth century had immensely complicated the role of the average infantryman. At the beginning of the century, the customary infantry weapons of musket or pike (an eighteen-foot spear held by men formed in a dense mass) had required a moderate amount of training; an army of that time maneuvered slowly in "tercios" or "battles" of about 3,000 men. During the first third of the seventeenth century, armies were constructed around a "battalion" of about 500 men trained to execute a multitude of orders: "Officers became not merely leaders, but trainers of men; diligent practice in peace-time, and in winter, became essential; and drill, for the first time in modern history became the precondition for the military success..."<sup>42</sup> Conversely, the financial revolution of the 1690's, which saw the creation of a national bank and acceptance of a national debt, made it possible to fund a large enough standing force.<sup>43</sup> Increasing tactical and economic sophistication were paralleled by the realization of political means to guarantee legislative control of the army. Parliament could keep a tight rein on the standing army by limiting appropriations and enacting "Mutiny Acts" of intentionally short duration.<sup>44</sup>

The increased viability of a true standing army suddenly forced the post-1688 Whigs to face the prospect of becoming members of the establishment they had formerly opposed.<sup>45</sup> Some, like Molesworth, hedged:

A Whig is against the raising or keeping up a Standing Army in Time of Peace; but with this Distinction, that if at any time an Army (though even in Time of Peace) should be necessary to the Support of the very Maxim, a Whig is not for being too hasty to destroy that which is to be the Defender of his Liberty.<sup>46</sup>

Others continued to defend the renaissance ideal of the citizen-freeholder-soldier, and argued that military skills as a specialization would lead inevitably to tyranny and corruption. While their views, as will be shown, gained great currency in America, in England they became simply the "Opposition."<sup>47</sup>

In the years after 1688, a standing army thus became more acceptable to Englishmen, if not to their American counterparts. Macaulay sums up the experience:

What had been at first tolerated as an exception began to be considered as the rule. Not a session passed without a mutiny bill, regarded merely as an occasion on which hopeful young orators fresh from Christchurch were to deliver maiden speeches, setting forth how the guards of Pisistratus seized the citadel of Athens, and how the Praetorian cohorts sold the Roman empire to Didius. At length these declamations became too ridiculous to be repeated. The most old-fashioned, the most eccentric, politician could hardly, in the reign of George the Third, contend that there ought to be no regular soldiers...<sup>48</sup>

The acceptance of a standing army was paralleled by the atrophy of the militia system in England. Indeed, the rural disorders of the 1760 inspired fear in the gentry of the militia-trained portion of the populace. Lord Barrington, for instance, feared that "a few soldiers, commanded by a weak, ignorant subaltern, might be defeated by a very large mob, full of men largely used to arms in the army and militia."<sup>49</sup> The general militia in England was steadily supplanted by a select militia which achieved efficiency by a sacrifice of almost every traditional attribute. The 1761 Militia Act, for instance, authorized mustering of only a few hundred men from each county. Those chosen were, if wealthy, able to hire another to serve as a substitute; those actually serving were issued government arms, stored by the officers under lock and key. The Lieutenant of the county (or his deputies) was authorized "to employ such Person or Persons as he or they shall think fit, to seize and remove the arms, clothes and accoutrements belonging to the militia, whenever [they] shall adjudge it necessary to the peace of the kingdom...<sup>50</sup> It thus is no surprise that a few

years later the Whig mayor of London would inform Parliament that the militia "could no longer be deemed a constitutional defence, under the immediate controul and direction of the people, for by that bill they were rendered a standing army to all intents and purposes whatever...51

## II. The People's Right to Keep and Bear Arms

As noted above, Classical Republicanism strongly influenced American revolutionary ideology. Nevertheless, while the views of Harrington and Neville may go far toward explaining the outlook of John Adams and George Mason, but they are less illuminating in explaining the views of Sam Adams, Thomas Paine, Thomas Jefferson, and their fellows.

Alongside the Machiavellian conception of citizenship, order and liberty, there grew up another paradigm. . . Classical theory asserted the predominance of politics over all other aspects of social life. In exactly the way Pocock has described the creation of all matrices of language, [18th century] writers decomposed old meanings about civil order and recomposed the elements of time, citizenship, and the distribution of authority. Outside the polity, they constructed a model of economic life that borrowed its order from nature \_ the newly conceptualized nature of predictable regularity. As the economy absorbed more and more of the attention of men and women it supplied a new identity for them. By the end of the eighteenth century the individual with wide-ranging needs and abstract rights appeared to challenge the citizen with concrete obligations and prescribed privileges.

In the 1790's, when the Jeffersonian Republicans and Federalists confronted each other, the battle lines had been drawn around opposing conceptions of civil society.<sup>52</sup>

Although Anglo-Saxon society had long placed particular emphasis on the individual, especially toward property,<sup>53</sup> the concept of individual political rights was of relatively late birth. To print a work on politics or religion required a royal permit as late as 1695.<sup>54</sup> Most colonies retained the permit requirement into the 1730's,<sup>55</sup> even after these measures lapsed, it was illegal to print a work reflecting on an action of Parliament or the person of a member without prior authorization.<sup>56</sup> The 1661 Act Against Tumultuous Petitioning prohibited petitioning the King or Parliament for changes in the established law, absent a permit from a justice of the peace.<sup>57</sup> The 1673 Test Act, which generally barred non-Anglicans from civil or military office, remained on the books until 1829,<sup>58</sup> searches based on general warrants, issued by the executive, were universally accepted until the 1760s.<sup>59</sup> Most of our Bill of Rights are, in short, of quite recent vintage. It should therefore come as no surprise that the concept of a right to keep and bear arms has a later point of origin than that of the militia. Conversely, a specifically individual right to arms, separate and apart from the militia system, was one of the earliest of the individual civil rights to gain acceptance.

In fact, the origins of the concept of an individual right to arms lies not in the eighteenth century Enlightenment, but in the turmoil of the seventeenth century. As Joyce Malcolm has demonstrated,<sup>60</sup> Englishmen of all classes and loyalties were shocked when, hard pressed for arms at the outset of the English Civil War, both Royal and Parliamentary forces disarmed suspected opponents and even supporters.<sup>61</sup> The end of the fighting brought no end to the risk. In 1659, the Protectorate for the first time gave formal statutory authorization to disarm Englishmen en masse: officials were authorized to search for and seize all arms possessed by veterans of the Royal armies or by "any other person whom the Commissioners shall judge dangerous to the peace of the Commonwealth."<sup>62</sup> Nor were supporters of the Commonwealth safe for long. The following year, the Commonwealth fell and Charles II was restored to the throne. One of his first acts was to order the Lords Lieutenant of the militia to disarm all likely opponents. The Calendar of State Papers summary of his order ends: "officers to be numerous, disaffected persons watched and not allowed to assemble, and their arms seized."<sup>63</sup>

The order was executed to zealously as to antagonize even Charles' supporters. The failure of his attempts to secure a comprehensive militia bill in 1661 is primarily attributable to resentments aroused among members of the royalist Restoration Parliament.<sup>64</sup> Only after strenuous effort was Charles able in 1662 to

secure passage of suitable Militia Act. The 1662 Act broadly authorized actions which Charles had previously undertaken by prerogative. Rather than draw its membership from the entire body of the people, the militia was to be a limited, organized group of Royalists,<sup>65</sup> most critically for the purposes of this article, the Lieutenants and their deputies were to "search for And seize all Arms in the custody or possession of any person or persons whom the said Lieutenants or any two or more of their deputies shall judge dangerous to the peace of the Kingdom..."<sup>66</sup>

In support of these provisions, gunsmiths and carriers were ordered by proclamation to file weekly reports on firearms sold and transported.<sup>67</sup> Furthermore, in 1671, the Hunting Act was amended to restrict arms possession by all but the land gentry. The Hunting Acts had long barred all but the relatively wealthy from ownership of hunting implements, such as traps, net and hunting dogs. The 1671 Act added all firearms to the list of contraband, and extended the ban to all persons not owning lands with an annual rental value exceeding 100 pounds sterling.<sup>68</sup> Anyone possessing property with greater value was authorized to search residences for weapons on his own initiative.<sup>69</sup> Both Charles and his successor, James II, vigorously implemented these firearms proscriptions.<sup>70</sup> In December 1686, James issued duplicate orders to six Lords Lieutenant of the militia, stating that he was informed "that a great many persons not qualified by law under pretense of shooting matches keep muskets or other guns in their houses" and that they should instruct their deputies "to cause strict search to be made for such muskets or guns and to seize and safely keep them till further order."<sup>71</sup> The searches were intended to keep the Anti-Royalists under control and on the defensive.<sup>72</sup> The reconstituted Royalist militia was used for enforcement, and sometimes engaged in mass searches.<sup>73</sup>

As noted above, neither such disarmaments nor James' personally-financed standing army were sufficient to sustain him in power. James lost his throne but retained his head, for the 1688 Glorious Revolution<sup>74</sup> was accomplished without a single fatality. Parliament, meeting on its own initiative as a "convention," formulated a "Declaration of Rights" which William and Mary, its nominees, were required to accept prior to taking the throne.<sup>75</sup> The Declaration was intended to reflect the very core of traditional English rights which must be observed in the future; it embodied only the most indisputable and critical rights.<sup>76</sup> A century later, an American Congress would use much of the Declaration as a basis for an American bill of rights.<sup>77</sup>

The Parliamentary debates over the Declaration mark the first acceptance of an indisputably individual right to keep and bear arms. The debates in the House of Commons<sup>78</sup> show that arms confiscations under the Militia Act were a widespread grievance. Sir Richard Temple, for example, criticized the militia bill as containing the power to disarm all England.<sup>79</sup> Mr. Boscawen's crucial speech focused upon the oppressive acts of Parliament as well as those of the King.<sup>80</sup> Sergeant Maynard<sup>81</sup> complained that "an Act of Parliament was made to disarm all Englishmen, whom the lieutenant should suspect, by day or by night, by force or otherwise."<sup>82</sup> Others seconded his complaints of oppressive enactments before Maynard returned to the floor:

Some particulars well propounded \_ Some gross grievances for which we are beholden to a Parliament, who care not what was done, so their pensions were paid. \_ Militia Act \_ an abominable thing to disarm the nation, to set up a standing army \_ Corporation Act carried into execution with a high hand.<sup>83</sup>

The House of Commons voted out a Declaration, in the form of a list grievances and parallel rights. The list of grievances included to the subjects." Although this would clearly focus upon the rights of the individual, or "subject," Commons clouded the issue in the rights of recognitions of its draft: "[T]he Subjects which are Protestants, should provide and keep arms for the common defense; and that the arms which have been sized and taken from them be restored."<sup>84</sup> The House of Lords found this combination of individual right and remedy with a collective purpose unacceptable. The grievance section of Commons' draft was altered into a general indictment of James' policies. He had endeavored "to subvert and extirpate" the "laws and liberties of this kingdom" by, inter alai, "causing several good subject, being protestants, to be disarmed, at the same time when papists were both armed and employed contrary to law."<sup>85</sup> The second passage was even more profoundly altered. The "common defense" proviso was

replaced with recognition that individuals might possess arms "for their defense." The Lords declared: "For the vindicating and asserting their ancient rights and liberties... [t]hat the subject, which are protestants, may have arms for their defense suitable to their conditions and as allowed by law."<sup>86</sup> Lest there be confusion over the "as allowed by law" proviso, Parliament promptly amended the Hunting Acts to delete firearms from the list of contraband.<sup>87</sup> The House of Commons paralleled this with an amendment to the Militia Act which repealed all power to seize firearms; unfortunately, the bill was lost in the House of Lords when William dissolved Parliament.<sup>88</sup> Nevertheless, its provisions were soon incorporated into colonial militia statutes.<sup>89</sup>

The Lords' changes, which prevailed in conference, thus emphasized the individual character of the right to arms. The final form of the Declaration does not so much as mention the militia. Standing armies are mentioned, but the object is only that they were maintained "without consent of Parliament," a purely royal army is contrary to law, one created by Parliament is quite consistent with the Constitution.

The Declaration in turn formed the core of the following century's conception of individual rights. In his famed Commentaries, Blackstone discussed the absolute rights of life, liberty and property, and the auxiliary rights which protect them. After discussing such auxiliary rights as those to petition and to legal process he concluded, in words which would have been read and re-read by Jefferson, Madison and almost any colonist with a claim to constitutional insight:

The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defense, suitable to their condition and degree and as allowed by law. Which is also declared by the same Statute 1 W&M s. 2 c. 2 and is indeed a public allowance under due restrictions, of the natural right of resistance and self preservation, when the sanctions of society and the laws are found insufficient to restrain the violence of oppression.<sup>90</sup>

In brief, it is apparent that the common law recognized an individual right to keep and bear arms, and that this was separate and apart from the related concept (whether or not it be considered a "collective" or an "individual right") that a militia was an especially appropriate way of defending a free republic. The "collective/individual" distinction was not unknown at this point, but Englishmen approached it by stressing that their system endorsed both concepts. As the Recorder of London noted, when called upon to determine the legality of privately-established military reserve units:

The right of his majesty's Protestant subjects, to have arms for their own defense, and to use them for lawful purposes, is most clear and undeniable. It seems, indeed, to be considered, by the ancient laws of this kingdom, not only as a right, but as a duty... And that this right, which every protestant most unquestionably possesses individually, may, and in many cases must, be exercised collectively, is likewise a point which I conceive to be most clearly established by the authority of judicial decisions and ancient acts of Parliament, as well as by reason and common sense.<sup>91</sup>

### III. The Militia and the Rights to Arms in

#### Pre-Revolutionary America

#### Decline of Militia System

While the militia as an institution declined in Britain during the eighteenth century, <sup>92</sup> it retained vitality in the colonies. Unlike the mother country, the colonies lacked both the need to project military force beyond their borders, and an economy which could support a significant standing force. The colonists quickly adapted the militia system to Indian conflicts, instituting rapid response units and long-range patrols.<sup>93</sup> They also assimilated the views of the English Whigs and Classical Republicans,<sup>94</sup> with their stress upon the militia's role in a free republic.<sup>95</sup> To Harrington, an army was too unstable to support any government; to Neville, it was so stable as to support a tyrannical one; to many colonists, it was capable of corrupting a republican government into a tyranny. Had not James Burgh, their favorite Whig,<sup>96</sup> laid their troubles with the mother country at the feet of the English standing army?<sup>97</sup> The Revolution's origins

reinforced these views. The most critical preparation for the conflict came in 1774, when revolutionaries took over virtually every colony's militia organization. The British attempts to raid militia arsenals at Concord and Williamsburg ensured the alliance of Massachusetts and Virginia and converted local grievances into a continental war.<sup>98</sup>

The conclusion of the American Revolution left Americans in a position similar to that of post-1689 English Whigs: the former opponents were now in control. Many now found a limited standing army acceptable. Hamilton later observed that exclusive dependence on the militia: "had like to have cost us our independence...The steady operations of war against a regular and disciplined army can only be successfully conducted by a force of the same kind."<sup>99</sup> These views prevailed in the early republic: a small professional army was kept afoot, and it was expanded as needed to meet sundry emergencies.<sup>100</sup> As in post-1689 England, the standing army was denounced, derided, and retained.

The parallel Whig view, which stressed the desirability of a true militia, had a longer lease on life. Pre-1789 American political thought had stressed the need to enroll all citizens, or at least all free holders, for militia duty, and had rejected any idea of a "select militia" in which only a portion of the population was enrolled.<sup>101</sup> Provisions authorizing Congress to provide for the arming and organizing of the national militia were seen as allowing it to require that all citizens possess arms of uniform caliber and conform to a standard of drill.<sup>102</sup> In practice, while various administrations prepared detailed plans along these lines, Congress refused to enact them.<sup>103</sup> Washington's first annual address acknowledged: "[a] free people ought not only be armed, but disciplined; to which end a uniform and well-digested plan is requisite."<sup>104</sup> His second address courteously hinted that the "establishment of a militia" was among the "subject which I presume you will resume of course, and which are abundantly urged by their own importance."<sup>105</sup> One year later, Washington again listed militia legislation as "a matter of primary importance whether viewed in reference to the national security to the satisfaction of the community or the preservation of order."<sup>106</sup> In 1792, Congress voted out the first (and, until 1903, the last ) national Militia Act.<sup>107</sup> While this Act required all white males of military age to possess a rifle or musket (or, if enrolled in cavalry or artillery units, pistols and a sword), it did nothing to guarantee uniformity of calibers, fixed no standard of national drill, and failed even to provide a penalty for noncompliance. The subsequent presidential calls for detailed organization of a national citizen army<sup>108</sup> went unheeded. The original ideal of the militia thus ultimately went the way of the standing army controversy: "The ideological assumptions of revolutionary republicanism would no longer play an important role in the debate over the republic's military requirements."<sup>109</sup>

### The Dominance of the Right to Arms

Conversely, even as the republican militia concept weakened throughout the eighteenth century, the concept of an individual right to arms became more firmly entrenched in American thought. To a great extent, this was a part of a larger intellectual movement. The primary legacy of the 1689 settlement in England had been the supremacy of Parliament. Bodin's maxim that every government there must be a single, ultimate repository of sovereignty was accepted,<sup>110</sup> and that repository was fixed as Parliament. While Parliament must heed the "Constitution", the Constitution was (with apologies to a later Chief Justice) what Parliament said it was.<sup>111</sup> The colonists, whose initial conflict was with Parliament and not the King,<sup>112</sup> necessarily had to take issue. One counter was to amplify the concept of rights which existed somehow beyond the scope of any governmental interference.

The most historical approach involved deriving such right from common law. This involved accepting Coke's position that the common law was immemorial and superhuman, the product not of any one legislator or legislative act, but of the collective intelligence and experience of Englishmen over a millennium or more.<sup>113</sup> Few dicta have had as great an impact on legal history as the equivocal passage Coke slid into *Dr. Bonham's Case*:

And it appears in our books, that in many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void: for when an act of Parliament is against common right an

reason, or repugnant, or impossible to be performed, the common law control it, and such Act to be void...114

Coke's language led to his removal as Chief Justice,115 and his holding was overruled by proclamation, 116 but his world became sacred writ to the Americans.117

Derivation of a common law right to arms took little effort. Even the earliest common law jurists had recognized a right to self-defense and to the possession of arms for that purpose.118 The recognition of an individual right to arms in the 1689 Declaration made the matter all but indisputable. The colonists took to hear Blackthorn's derivation of an individual right to arms from both these sources. When, during the Stamp Act crisis, objection was raised to a call for all citizens to procure arms, newspaper articles published throughout the colonies119 proclaimed:

It is a natural right which the people have reserved to themselves, confirmed by the Bill of Rights, to keep arms for their own defense; and as Mr. Blackstone observes, it is to be made use of when the actions of society and law are found insufficient to restrain the violence of oppression.120

In similar vein, members of the Continental Congress exhorted the Committees of Safety that "[i]t is the Right of every English subject to be prepared with Weapons for this Defense."121

But the common law was not the only source of rights theory, particularly when, after 1776, the conflict became one with the entire British system and not merely Parliament.122 Some Americans reconciled their views with tradition by claiming that American views were purified common law which lacked later British corruptions.123 Others went behind the common law, claiming it only declared some natural rights.124 The major American thinkers were even bolder. Washington wrote with pride that "the foundation of our empire was laid in the gloomy age of ignorance and superstition," and Madison calmly explained that our Constitution declined to incorporate the common law because many of its principles were anti-republican.125 One source of the new rights theory lay in the various "compact" theories of government, which sought the origins of the state in implicit agreements rather than in divine commands. The civilian jurist Hotman had initially argued for such a view in his 1572 work *France Gallia*126 which became available in English through Molesworth's 1711 translation 127 To Hotman, the compact theory represented liberation from autocracy founded upon "divine right" or supposed tradition: his research sought to trace government among what became the French people to democratic tribal arrangements, which in turn were suppressed by usurping monarchs.128

A more abstract (and less democratic view) was taken by Thomas Hobbes in his 1651 *Leviathan*.129 To him, government was founded upon a compact of mutual protection. The fundamental rule of nature was "to seek peace and follow it" and, conversely, "the second, the sum of the right of nature" was "by all means we can, to defend ourselves."130 This right was so fundamental that it could not be included in the compact: "A Covenant not to defend my selfe from force, by force, is alwayes void. For (as I have shewd before) no man can transfere, or lay down his Right to save himselfe from Death..."131 While Hobbes is often seen as laying the foundations for absolute monarchy,132 he in fact admits one circumstance under which the monarch may justly be replaced by his subjects:

The Obligation of Subject to the Sovereign is understood to last as long, and no longer, than the power lasteth, by which he is able to protect them. For the right men have by Nature to protect themselves, when none else can protect them, can by no Covenant be relinquished.133

A different rationalist basis for colonial derivations of rights encompassed supernatural origins, whether seen as God or nature. The Anglican church, hamstrung by its acceptance of non-resistance,134 was unable to make much contribution here, but the slack was more than taken up by the Congregationalist, Baptist and Presbyterian divines who played so major a role in promoting the patriot cause.135 Joel Barlow, a chaplain in Washington's army, thus derived a right to arms:

Only admit the original, unalterable truth, that all men are equal in their rights, and the foundation of every

thing is laid; to build the superstructure requires no effort but that of natural deduction. The first necessary deduction will be, that the people will form an equal representative government... Another deduction follows, That the people will be universally armed: they will assume those weapons for security, which the art of war has invented for destruction.<sup>136</sup>

Many colonists also consulted European natural law theorists in hopes of defining the rights of men.<sup>137</sup> These thinkers commonly stressed an individual right or duty to self defense as the very core of individuality. Pufendorf, deriving natural law from man's instincts toward society, concluded that (at least for a person with dependents) a failure to use necessary deadly force to defend himself is a violation of natural law and a sin:

Nor indeed should it be thought that the law of nature, instituted as it was for the safety of man, favors such a peace as would cause his immediate destruction, and bring about anything but a social life... Now there are some who would carry this command so far that it could not be abrogated even by civil law, maintaining that the man who allows himself to be killed when he could have defended himself, can be condemned on the same score as if he had killed himself... To us it seems necessary to consider first of all, whether it is of any great concern to others that the person who is attacked survive, or whether, as a matter of fact, he apparently lives only to himself. We hold that in the former case the man is obligated to secure his own protection by every means possible, but, in the latter case we maintain that is only permissible...<sup>138</sup>

Burlamaqui went farther, maintaining the natural law of self-preservation might be deduced from reason as well as social instincts. "Let us suppose man in solitude; he would still have several duties to discharge, such as to love and honor God, to preserve himself, to cultivate his faculties..."<sup>139</sup>

Thus, the intellectual bases for an individual right to bear arms expanded at the same time that the practical bases for the militia system declined. Both principles, however, are immortalized in the second amendment to the Constitution. We might suspect that this is the remnant of a period in which the decline of the republican militia ideal overlapped the origin of the Enlightenment and Jeffersonian/Jacksonian democracy. To test this hypothesis will require a detailed examination of both the militia and the right to arms concepts during the formation of the American republic.

#### IV. The American Right to Arms

The Prototypes: Virginia, Pennsylvania

and Massachusetts

In the summer of 1776, the Continental Congress recommended that the former colonies "adopt such governments as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents, and Americans in general."<sup>140</sup> While not every state responded with a bill of rights (or, for that matter, a new constitution), a significant number did so as to enable us to trace the process whereby certain rights became codified in declarations of rights. Since drafters of each declaration were conversant with the work of their predecessors and duplicated or differed as they saw fit, it also became possible to compare how different factions phrased particular rights.

The ancestry of the second amendment can be found in the declarations of rights adopted by Virginia, Pennsylvania and Massachusetts. The different approaches taken by each state give insight into the differences of opinion over which component, militia or right to arms, was most deserving of recognition.

#### Virginia and the Well-Regulated Militia

Virginia's Constitution and Bill of Rights were the first adopted after the Declaration of Independence. While records of the actual deliberations are limited, it is known that Thomas Jefferson drafted a document worthy of the Enlightenment. Jefferson's draft would have extended the franchise to any

taxpayer, divided state lands among the landless citizens, ended importation of slaves, and banned the establishment of religion. His proposal did not mention the militia or its role in a republic, but did include a clearly individual right to arms: "No freeman shall ever be debarred the use of arms."<sup>141</sup>

Virginia's legislature chose instead a constitution and bill of rights drafted by committee, and taken predominantly from the proposals of the more conservative George Mason.<sup>142</sup> The prevailing version omitted any mention of individual arms and substituted a recognition 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."<sup>143</sup>

It is unlikely that the choice was dictated in the case by a conflict of values. Jefferson, who had served on the committee to organize the Virginia militia,<sup>144</sup> was an unlikely opponent of the militia concept. Mason, who was a firearms collector and George Washington's hunting partner,<sup>145</sup> was an improbable supporter of individual disarmament. The difference is more one of emphasis. The Constitution as adopted looks predominantly to the maintenance of the status quo. This was predictable since the members of the committee charged with the initial drafting were predominantly large landowners.<sup>146</sup> Mason's original draft contained a substantial property requirement for legislators \_ only citizens owning 1,000 pounds worth of real estate could run for the lower house, while only those with twice that freehold could run for the upper.<sup>147</sup>

In more general terms, the primary concern of the 1776 constitution is (as it was with Harrington and his followers) the establishment of a stable republic. Indeed, the original draft did not recognize a "right" to a freedom of religion, but rather a "toleration of the exercise of religion,"<sup>148</sup> along the lines of the British Toleration Act, which for practical grounds exempted certain faiths from the ban on non-establishment churches.<sup>149</sup> Only the intervention of the novice legislator James Madison<sup>150</sup> enabled an American president to later boast: "It is now no more than toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights."<sup>151</sup> The Virginia Declaration thus looks backward to the classical republic and concern for the state; Jefferson's unsuccessful draft, in contrast, looked forward to the form of democracy which would take his name. The gap between the Harringtonian republic and Jeffersonian democracy was clearly demonstrated in Jefferson's explanation of his draft:

I was extending the right of suffrage (or in other words the right of a citizen) to all who had a permanent intention of living in the country. Take what circumstance you please as evidence of this, either the having resided a certain time, or having a family, or having property, any or all of them. Whoever intends to live in a country must wish that country well, and has a natural right of assisting in the preservation of it.<sup>152</sup>

The contrast between Mason's and Jefferson's proposals highlights a correlation which will be found in later efforts by other states. Those constitutions which maintained the Classical Republican link between land ownership and electoral participation also stressed its ideal of militia institutions. Those constitutions which accepted the Radical foundation of near-universal manhood suffrage largely ignored the militia ideal by stressed individual rights to arms.

### Pennsylvania and the Individual Right to Arms.

Pennsylvania adopted a bill of rights only a few months after Virginia, yet its political situation was nearly opposite that present in Mason's state. While Virginia's establishment became the leadership of its revolutionary movement, the Pennsylvania establishment lagged behind and was overthrown by the Quaker State's revolutionary movement. The pre-1776 legislature was dominated by the wealthier families; unlike Virginia's ruling gentry, their wealth was primarily based on shipping and commerce. The threat to trade posed by the split with Britain understandably made such men wary of independence.<sup>153</sup> The revolutionary movement, in contrast, had its primary strongholds in the more sparsely populated, agrarian West, as well as a secondary base among the apprentices and "mechanics" (in modern terms, the labor movement) of Philadelphia.<sup>154</sup> As one writer of the last century, himself sympathetic to the aristocracy,

phrased it:

At the beginning of the contest with Great Britain the control of affairs in Pennsylvania was still in the hands of the aristocratic element of the province, which centered in Philadelphia and the richer and more thickly settled counties adjacent thereto, and whose power politically was supported by the requirement of a 50 pound property qualification for the franchise.. [T]he assembly lent but a lukewarm support to the patriot cause, and many measures earnestly desired by the patriot leaders failed in the body because of the innate caution and conservatism of its members.

There was, however, another element well suited by temper and circumstances to apply the part desired by the radical leaders, if only power in proportion to its number could be given. This was the democracy, the party of the country, as the other was the party of the city. Its strength lay chiefly in the back counties, where the independent life of the settler and farmer, and the practical uniformity of material conditions, naturally stimulated the democratic instinct.<sup>155</sup>

The Radical forces launched a successful assault on the opposition. Following the Continental Congress' call for new state constitutions, the Committees of Safety arranged extralegal elections for representatives to a constitutional convention. Each county would elect an equal number of delegates (thus weighting the convention against the more populous eastern counties) and the property requirement was waived for the militia,<sup>156</sup> who comprised much of those counties' revolutionary element.<sup>157</sup> In the meantime, Radical members of the assembly absented themselves; their departure deprived that body of a quorum and paralyzed any possible counterattack. The aristocratic elements were nearly trapped; to run for the constitutional convention would be to endorse its legitimacy without gaining any reasonable chance of winning its control. Many instead sat out the election, leading to a convention as commented by the Radicals as Virginia's had been by the gentry.

The convention's product has been described as the "most democratic form of government ever tried by an American State."<sup>158</sup> The fifty pound franchise requirement was replaced with one that enfranchised any taxpayer over the age of twenty-one.<sup>159</sup> It was probably Benjamin Rush, one of the losing aristocrats, who complained of the power placed in the hands of the citizenry: "They call it a democracy \_ a monarchy in my opinion would be more proper. All our laws breathe the spirit of town meetings and porter shops."<sup>160</sup>

Pennsylvania became the second state to adopt a bill of rights; a comparison with Virginia's product is all the more instructive since the Pennsylvania convention obtained copies of the Virginia Bill of Rights and were able to use it as a model.<sup>161</sup> Indeed, John Adams later noted that their "bill of rights is almost verbatim from that of Virginia."<sup>162</sup> "Almost" is, however, a word that bears emphasis. Individual rights are given greater scope in the Pennsylvania declaration than in that of Virginia.<sup>163</sup>

Pennsylvania clearly departed from the Virginia approach when it deleted the Virginia reference to well regulated militias and added a new recognition: "That the people have a right to bear arms for the defense of themselves and the State..."<sup>164</sup> The "themselves and the State" proviso seems superfluous, but it reinforces the distinction between the Radicals' recognition of an individual right (against, it should be noted, even the government they now dominated) and the Virginia gentry's simple praise of a militia system as necessary to their "republic." The Radicals of the Pennsylvania convention thus repudiated Mason's Harringtonian model (which linked land ownership, political rights, and militia duty) in favor of the Jeffersonian formula of universal suffrage and an individual right to arms.

The future federal second amendment was thus the direct descendant, not of any one model, but of two distinct products of two different political outlooks. The militia component is ultimately derived from the work of the Virginia convention, which made no effort to define a right to arms. The second amendment's right to arms component is a direct descendant of the work of the Pennsylvania Radicals, who sought an unquestionably individual right and considered a militia statement superfluous.

North Carolina, Massachusetts and

## the Unsuccessful Compromise

A third approach deserves mention, but because it was a progenitor of the second amendment, but because it was available as a model 1791 and was specifically rejected by the first Congress. This approach was taken, only a few months after the Pennsylvania convention, by North Carolina. The state's convention was split between Republican and Democratic elements, and its product reflected the need for compromise.<sup>165</sup> Under the constitution they voted out, all taxpayers could vote for the lower house, while those with fifty acres or more of land could vote for the upper as well. On the other hand, the actual candidates were subject to stricter requirements; the governor must own 1,000 pounds worth of land, members of the upper and lower houses 300 and 100 acres, respectively.<sup>166</sup> The franchise was thus quite broad, while the privilege of seeking office was considerably narrowed. The convention took a similarly eclectic approach to a bill of rights.

North Carolina took its Declaration of Rights primarily from Virginia. However, it replaced Mason's paean to the militia with a variant of the Pennsylvania approach "[T]he people have a right to bear arms, for the defense of the state..."<sup>167</sup> The omission of the militia statement on the one hand, and the recognition of an individual right \_ but only for defense of the State \_ seems an uneasy balance between Virginia and Pennsylvania models. Massachusetts' 1780 Constitution expanded upon this third approach. Its chief author was John Adams, probably the colonies' most devout Harringtonian<sup>168</sup> whose fears that excessive democracy would lead to anarchy<sup>169</sup> gave force to Jefferson's accusations that Adams was a closet Monarchist.<sup>170</sup>

The Massachusetts Constitution and Bill of Rights drew heavily upon those of Virginia. Members of the lower house were required to have freehold estates of 100 pounds, and those of the upper house were required to own 300 pounds.<sup>171</sup> The Bill of Rights largely focused upon the nature of the government, occasionally going so far as to codify its powers rather than restrain them.<sup>172</sup>

Adams chose an unusual mode of coping with the question of arms and militia provisions. He took the language of the Pennsylvania convention, expanded it somewhat by recognizing for the first time a right to "keep" as well as to "bear" arms, but then qualified the entire provision by recognizing the resulting right only with regard to the common defense.<sup>173</sup> Given Adams' outstandingly Harrington viewpoint, the qualifier is hardly a surprise, although how it can be reconciled with his original proposal to recognize a right to "keep" arms is unclear. Possible, to Adams, the proviso was meant simply as an explanation along the lines of the statements of social duty mentioned above, and not as an operative qualifier. Perhaps Adams simply felt a need to reconcile his creation with his philosophy and this added a clause tying a radically-conceived right into a Harringtonian set of political values. The most likely explanation lies, however, in Adams' legal background and in his general suspicion of the people and of mobs. To "keep" arms was, after all, a more precise rendition of the 1689 English Declaration than the "to bear" language used in the other state conventions. The 1670 English Hunting Act, prohibiting arms to the poor, had used the phrase "have or keep," and the phrase "keep arms" recurs in post-1692 English case law interpreting the Act as modified after the Declaration of Rights.<sup>174</sup> To this extent, Adams' work was what we would expect from one of the premier attorneys of the colonies. The qualifier "for the common defense" may share similar roots. If Adams was going to recognize, in precise legal terms, a right to own or carry firearms as a citizen pleased, he was going to reserve the power to suppress armed riots. Some seven years later, in his *Defense of the Constitution*, Adams would write:

To suppose arms in the hands of citizens, to be used at individual discretion, except in private self-defense, or by partial orders of towns, countries or districts of a state, is to demolish every constitution, and lay the laws prostrate, so that liberty can be enjoyed by no man; it is a dissolution of the government. The fundamental law of the militia is, that it be created, directed and commanded by the laws, and ever for the support of the laws.<sup>175</sup>

Adams was thus mindful of the uses of arms (i.e., legitimate self-defense and militia duty) and concerned

about misuse for mob action or anarchy. With far greater precision than is typical in constitutional processes, he sought both to ensure the breadth of the right he desired and to fix its boundaries.

The popular reaction to his proposal illustrates forcefully that many ordinary citizens did not share his fears of the people, and on the contrary feared the exercise of government power that might be allowed under his "common defense" proviso. A meeting of the citizens of Williamsburg objected to the language, noting that "we deem it an essential privilege to keep Arms in our Houses for Our Own Defense" and that the qualifier might be read to allow government to "Confine all the fire Arms to some public Magazine."<sup>176</sup> In Northampton, an objection was raised that the right to keep and bear arms "is not expressed with that ample and manly openness and latitude which the importance of the right merits" and should be changed to "The People have a right to keep and bear arms, as well, for their Own as the Common defence. . ." <sup>177</sup>

In sum, by 1780 there were three major state models for dealing with the question of popular armaments: The Virginia or Harrington/Gentry model, stressing a well-regulated militia; the Pennsylvania or Jeffersonian/Radical model, stressing an individual right to bear arms; and the Massachusetts development of the North Carolina model, stressing a right both to keep and bear arms, but only for the common defense. It is worth noting that at the state level, only the Pennsylvania model withstood the test of time. After 1780, both the Virginia and the Massachusetts models fell into complete disuse,<sup>178</sup> while the Pennsylvania model thrived in the age of Jeffersonian democracy.<sup>179</sup>

## Militia and Individual Armament

### in the American Bill of Rights

In 1787, the Continental Congress summoned a convention to propose amendments to the Articles of Confederation. The decision by the delegates to the Constitutional Convention to instead draft a replacement compact offered Americans a rare and unique opportunity to dictate, consciously and in some detail, the terms by which they would be governed. With the exception of the Article I section 9 limitations on ex post facto laws, bill so attainder and peacetime suspensions of habeus corpus, the convention's proposal did little to recognize individual rights. Conversely, it did expressly grant Congress the power to raise and support armies, with no restriction save a two-year limit on any appropriations for that purpose, and also gave the power to provide for the organizing, arming and disciplining of the militia.<sup>180</sup> The contrast between the breadth of these powers and the traditional views of standing armies and militia organization predictably led to conflicts in the ratifying conventions which were called in each state. It is out of these conflicts that our Bill of Rights arose.

## Ratification Conventions

### Demand a Federal Bill of Rights

The omission of a bill of rights was a weak point of the proposed Constitution, and soon became the focus of opposition. The early conflicts critical to the gestation of the Bill of Rights came in Pennsylvania, Massachusetts and New Hampshire. These were soon followed by a series of similar demands from Virginia, New York, and North Carolina. Each of these proposals therefore merits consideration.

The Pennsylvania convention was the first to consider major criticism of the absence of a federal bill of rights. The criticism did not prevail, and the state ratified the Constitution without reservation. This action seems inconsistent with the same state's 1776 enumeration of rights and stress upon protections of the individual,<sup>181</sup> The explanation is simple: by 1787, the Philadelphia commercial "empire" had struck back; the ratifying convention was heavily dominated by the eastern counties and their commercial aristocracy which, some three years later, would replace the 1776 Constitution.<sup>182</sup> In the 1790 state convention, the defending minority would include several of the men who in 1787 pressed unsuccessfully for a federal bill of rights \_ Robert Whitehill, John Smilie and William Findley.<sup>183</sup>

In any event, the leaders of the aristocracy who dominated the 1787 convention has little reason to sympathize with an individual right to arms. Benjamin Rush's complaint that the 1776 Pennsylvania Constitution institutionalize "monocracy" has already been mentioned. James Wilson, leader of the pro-ratification forces, had recently been on the receiving end of the "Fort Wilson Incident," in which a firefright broke out between his supporters, barricaded in his house, and a body of Radical militiamen marching past in protest over the lack of price controls.<sup>184</sup> His opponents, as noted previously, were largely supporters of the 1776 Radical-Democratic Constitution.<sup>185</sup>

Available records of the Pennsylvania convention<sup>186</sup> indicate that the lack of a federal bill of rights was an important issue, and perhaps the most important issue from the outset.<sup>187</sup> The dispute came to a head when Whitehill, seconded by Smilie, moved for a federal bill of rights.<sup>188</sup> The motion failed, 46-23, and the Federalist majority refused even to permit it or the vote to be entered in the convention's journal.<sup>189</sup> Whitehill and Smilie, joined by Findley and other delegates, published a pamphlet setting out their amendments and rationale; the pamphlet was in turn reprinted in Pennsylvania newspapers.<sup>190</sup>

The minority's argument was hardly Harringtonian. The limited number of representatives under the new Constitution would, they argued, present the danger than "men of the most elevated rank will be chosen. The other orders in society, such as farmers, traders and mechanics... shall be totally unrepresented."<sup>191</sup> This was not a criticism that would have moved John Adams, or likely George Mason, but Whitehill was a small farmer and Jeffersonian<sup>192</sup> and Findley had declined appointment to the federal Constitutional Convention out of poverty.<sup>193</sup>

While they considered a standing army objectionable,<sup>194</sup> the Pennsylvania minority had scarcely a good word for the militia. Indeed, to them the danger was not that the Congress would fail to adequately discipline the militia and thereby allow the republican tradition to lapse, but that Congress might endanger individual liberties by too forcefully using its powers. Militia discipline to them posed a danger to the individual:

[T]he personal liberty of every man, probably from sixteen to sixty years of age, may be destroyed by the power Congress have in organizing and governing of the militia. As militia they may be subjected to fines of any amount, levied in a military manner; they may be subjected to corporal punishments of the most disgraceful and humiliating nature; and to death itself, by the sentence of a court-martial.<sup>195</sup>

We are here a long way from the worries of the later, more conservative Virginia convention; to them, the predominant danger was that Congress would neglect the militia, or use it to supplant state governments.<sup>196</sup> To the Pennsylvanians, these were secondary concerns; the primary danger was to the individual as such. It is not surprising that, while the Pennsylvania proposals mirror almost every provision of the later federal bill of rights,<sup>197</sup> any recognition of the necessity of a militia, or other analog to the militia component of the second amendment, is pointedly omitted. The militia is mentioned only in the eleventh proposal, which would simply provide that its organization, armament and training would remain a state responsibility, and that no militiamen may be forced to serve outside their state of residence.<sup>198</sup>

The Pennsylvania minority did not similarly neglect the right to arms. Indeed, consistent with their emphasis on individual rights, their seventh proposal sought recognition:

That the people have a right to bear arms for the defense of themselves and their own State, or of 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.<sup>199</sup>

The Pennsylvania proposals did not prevail in that state's convention, but the publicity accorded them ensured that they were considered by members of later conventions.<sup>200</sup> When, two years later, James Madison sat down to draft the federal bill of rights, he considered Pennsylvania's minority proposals along with those of other states.<sup>201</sup>

Samuel Adams and the Massachusetts Minority

The Massachusetts convention saw the next proposal for a bill of rights. In that state, however, Federalist leaders faced an extremely close fight. Anxious for every vote, they accepted a limited proposal for a bill of rights, which was successfully introduced by John Hancock.<sup>202</sup> The rights recognized by Hancock's draft were primarily economic (limited direct taxes and federally-created monopolies) or aimed at protecting states' rights. The only individual rights guaranteed were those to indictment by grand jury and jury trial in civil cases.<sup>203</sup>

Samuel Adams, the famed Radical leader, unsuccessfully proposed the addition of a paragraph containing a multitude of individual rights:

[T]hat the said Constitution be never construed to authorize Congress to infringe the just liberty of the press, or the rights of conscience; or to prevent the people of the United States, who are peaceable citizens, from keeping their own arms; or to raise standing armies, except when necessary for the defense of the United States, or of some one or more of them; or to prevent the people from petitioning, in a peaceable and orderly manner, the federal legislature for a redress of grievances; or to subject the people to unreasonable searches and seizures of their persons, papers or possessions.<sup>204</sup>

Adams' motion was unsuccessful,<sup>205</sup> but it is noteworthy that this Radical, whose constituency was the urban "mechanics" and small tradesmen,<sup>206</sup> did not consider the militia worthy of mention, while a clearly individual right to arms merited a detailed guarantee. Even his limitation on standing armies was no more than a statement of the obvious \_ that they should not be maintained where not necessary to defense. Although Sam Adams had a model in his state constitution, written by his aristocratic cousin John, he preferred an unlimited individual right to bear arms to John's citation of arms being "for the common defense."<sup>207</sup>

#### New Hampshire: the Bill of Rights Carries a Majority

The Pennsylvania minority's position and that of Sam Adams were ultimately absorbed into the New Hampshire proposals, attached to that states' crucial ratification.<sup>208</sup> We know that the vote in New Hampshire was expected to be close \_ so close that the Federalists had to obtain a temporary adjournment to muster the votes needed to avoid defeat.<sup>209</sup> Unfortunately, we know almost nothing of that state's deliberations.<sup>210</sup> It is apparent that New Hampshire borrowed "almost verbatim" most of its proposals from those advanced by Hancock in Massachusetts.<sup>211</sup> However, the New Hampshire delegates added three proposals of their own, perhaps taken from Samuel Adams' proposed supplement. The first would have barred standing armies, or their quartering in private homes during peacetime, except with consent of three-fourths of the Congress. New Hampshire's second addition prohibited federal laws affecting religion or infringing rights of conscience. The third provided that: "Congress shall never disarm any Citizen except such as are or have been in Actual Rebellion."<sup>212</sup> Like the concepts advanced by Same Adams and by the Pennsylvania minority, the New Hampshire proposals made no mention of a well-regulated militia.

Thus, at the time of the ninth ratification, three major proposals for a bill of rights had surfaced.<sup>213</sup> All sought a clearly individual right to bear arms, and none lauded the necessity of a militia. The Radical-Republican division visible in the state bills of rights is apparent here as well; the two demands whose origins can be traced were advanced by the Radical leadership in each state.

#### Virginia, New York, North Carolina: the Merger of Republicans and Radicals

New Hampshire's ratification did not end the battle, although by giving the Constitution its ninth ratification, it bound the states which had already signed the Constitution. Among the several states which had not ratified were the major commercial states of Virginia and New York. Few states boasted the intellect arrayed in Virginia, and in few was ratification as much in doubt.

The Federalists' task was complicated by Virginia's unusual, perhaps unique, political alignment on the federal constitutional issues. Leaders in the call for a bill of rights, and in opposition to the unamended

Constitution, came from varied backgrounds. Conservative George Mason and Democrat Thomas Jefferson joined forces to promote a bill of rights,<sup>214</sup> despite their earlier differences as to what such a bill ought to contain.<sup>215</sup> They were joined by the firebrand Patrick Henry and the more staid Richard Henry Lee, both of whom defy simple classification.<sup>216</sup>

Mason's position is perhaps the most imply stated. To him, the priority was protection of the militia, and the restriction of a standing army. Yet preserving the militia required a delicate balance: A government bent upon destroying it might do so either by too lax a regime, by "neglect[ing] to provide for arming and disciplining the Militia," or by too strict a one, "subjecting them to unnecessary severity of discipline in time of peace, confining them under martial law, and disgusting them so much as to make them cry out, 'give us an army.'"<sup>217</sup> Patrick Henry shared similar fears. The "militia is our ultimate safety,<sup>218</sup> he wrote, yet it might be undermined if either the national government made no provision for the militia or if its provisions added too much to the citizens' burdens. To Henry, the militia ideal involved a good deal of personal freedom to obtain arms. Excessive requirements (e.g., requirement of special firearms for federal duty) might hinder rather than aid the goal. "The grate object is that every man be armed," he argued, asking on the other hand,"but can the people afford to pay for double sets of arms?"<sup>219</sup> To Lee, the danger was more one-sided. Congress might well create a select militia, "distinct bodies of military men, not having permanent interests and attachments in the community."<sup>220</sup> Having done this, it would naturally neglect the militia proper, so that "the yeomanry of the country [who] possess the lands, the weight of the property, possess arms, and are too strong a body of men to be openly offended... may in twenty or thirty years be by means imperceptible to them, totally deprived of that boasted weight and strength."<sup>221</sup>

Yet an analysis of only the militia question does an injustice to all three advocates. Even those who would normally be considered conservative or Harringtonian placed new emphasis on individual rights. This may have been a result of their alliance with the Radicals (Jefferson was no longer a young delegate justifying a radical constitution, but a former governor charged with the most delicate diplomatic affairs) or due to the emphasis on individual rights in past conventions or simply because the political climate of 1788 was different from that of twelve years before. To Mason, loss of the militia system was no longer the ultimate risk, but merely an evil means to a worse end:

Forty years ago, when the resolution of enslaving America was formed in Great Britain, the British parliament was advised by an artful man, who was governor of Pennsylvania, to disarm the people \_ that was the best and most effectual way to enslave them \_ but that they should not do it openly; but to weaken them and let them sink gradually, by totally disusing and neglecting the militia.<sup>222</sup>

Henry shared these feelings. On the one hand, "the militia, sir, is our ultimate safety," on the other, "[t]he great object is that every man be armed... every one who is able may have a gun."<sup>223</sup> Richard Henry Lee concluded his republican paeon to the militia with a passage no Jeffersonian Democrat could have bettered. "[T]o preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them."<sup>224</sup> Perhaps to Lee "the young and ardent part of the community, possessed of but little or no property" could not be relied upon as the militia<sup>225</sup>, but they certainly should have been armed.

Virginia's ratification was secured, albeit by a close vote 88-80, and only at the price of simultaneous proposals for a bill of rights.<sup>226</sup> The proposals were drafted by a committee that included Anti-imperialists Lee and Mason, as well as Federalists James Madison, John Marshall, and John Wythe.<sup>227</sup> Madison had always tended to emphasize individual rights in general and individual armament in particular. At the outset of the Revolution, he had noted his skill with the rifle;<sup>228</sup> in Federalist No. 46 he would praise the "advantage of being armed, which the Americans posses over the people of almost every other nation" and note that European governments "are afraid to trust their people with arms;<sup>229</sup> nearly half a century later, the former President, legislator and "Father of the Constitution" would attack aristocracy on the ground it could never be safe "without a standing army, an enslaved press and a disarmed populace."<sup>230</sup>

The committee took an unusual approach to the militia arms concept. Previous proposals had emphasize either the importance of the militia or recognized in individual right to arms. The Virginia committee chose to do both, and slice together wide ranging provisions from earlier proposals. From Virginia's Bill of Rights came the militia component; while Mason's presence on the committee made this expected, it is noteworthy because this was the first time a federal ratifying convention has so stressed the need for a militia. The right to arms may have been drawn almost verbatim from the Massachusetts Declaration of Rights, employing its broad reference to rights to keep as well as to bear arms, while deleting its qualifier "for the common defense," or it may have been assembled from the Pennsylvania minority's recognition of a people's right to bear arms, joined to Sam Adams' proposal of a federal right of "keeping their own arms."<sup>231</sup> Whatever the origin, it is apparent that Virginia meant to extend broad protections both to militia needs and individual rights when it called for recognition "that the people have the right to keep and bear arms; that a well regulated militia, composed of the body of the people trained to arms, is the proper, natural and safe defence of a free state..."<sup>232</sup>

The Virginia approach of combining a militia recognition with a statement of individual rights could have been expected to have a broader appeal than either provision taken alone. It is thus hardly surprising that it supplanted the previous models, and was employed almost verbatim in the ratifying conventions in New York and North Carolina.<sup>233</sup>

## V. Drafting of the Federal Bill of Rights

When James Madison found himself cast in the unlikely role of father of the national bill of rights,<sup>234</sup> he was not forced to write upon a clean slate. His first step was to obtain a pamphlet which conveniently listed all state proposals, from the Pennsylvania minority onward.<sup>235</sup> The problem became one of editing; out of hundreds of proposals, many redundant and some questionable, a hard core of usable proposals had to be selected. The barriers to be surmounted required discarding all controversial proposals. As he informed Jefferson, "every thing of controvertible nature that might endanger the concurrence of two-thirds of each House and three quarters of the States was studiously avoided."<sup>236</sup> After excluding the controversial propositions, Madison still have to single out the most desirable proposal, and then (where several different proposals had been made to a single end) select the specific terms of the guarantee. Finally, he had to decide how to assemble and group the rights into a number of amendments.

With any fortune at all, the delegates would view Madison's language as incorporating their ideas.<sup>237</sup> The working of the militia clause was, after all, a combination of the broadest terms employed in the state bills of rights. From Pennsylvania had come the recognition a popular right to bear arms;<sup>238</sup> from Massachusetts had come the right to keep them; yet the controversial Massachusetts limitation to keeping and bearing "for the common defense"<sup>239</sup> was conspicuously omitted.<sup>240</sup> Merging the militia declaration with an individual arms clause would thus have been expected to please George Mason and Samuel Adams alike, nicely reconciling Harringtonians and Jeffersonians, Conservatives and Radicals.

The related issues were dealt with more quickly. Subjection of the militia to martial law was restricted in what became the fifth amendment by guaranteeing jury trial to militiamen not in actual service during time of war or public danger.<sup>241</sup> Conscientious objection would be taken care of in an addendum to the the militia statement, although that addendum was removed by the Senate.<sup>242</sup> Thus four arms and military related concerns raised by the ratifying conventions could be resolved entirely.

Significantly, the one military concern not addressed by Madison was the call for limitations on a standing army. As discussed above, Americans by 1789 had crossed the line the English Whigs had passed a century before: a standing army might be a nuisance, but now it was an American Nuisance. Statesmen would still condemn it, but also continue to authorize it. Moreover, unlike the right to arms and need for a militia, the details of limiting the army were eminently "controvertible." Federalists in the conventions had strongly opposed any limitations<sup>243</sup> and no consensus had developed among the supports of such limitations.<sup>244</sup> Madison wisely avoided inserting such limitation in his draft; when others proposed them in the Senate their motions were uniformly defeated.<sup>245</sup> The one objective the future second amendment

would not seek was a barrier to a standing army.

Having structured these proposals, Madison faced one last choice. While the Constitution provided for the amendment process, it said nothing regarding the form of amendments. Madison planned to offer nine amendments, each containing several paragraphs. Each amendment would be designated for insertion at a different, specific point in the text of the Constitution. The first amendment would add a prefix to the constitution, recognizing that all power is derived from the people. The second and third (which were ultimately rejected by the states) would expand membership of the House and fix their compensation, and would be added to Article I in sections 2 and 6. The third amendment would have grouped together ten paragraphs and inserted them in Article I, section 9, immediately following the constitution's existing guarantees of individual rights (viz., restriction on suspension of habeas corpus, bill of attainder and ex post facto laws).<sup>246</sup> Interestingly, Madison intended the future second amendment, also containing individual rights, as a general limitation of legislative power, rather than as a modification to Congress' militia powers under Article I, section 8. While insertion of militia language might have pleased George Mason, there is little doubt that the individual right component predominated in Madison's mind.

Madison's handiwork underwent substantial editing in both House and Senate. The effect was to pare the guarantees to a minimum. Madison's expansive guarantee of freedom of expression, "the people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the breath bulwarks of liberty, shall be inviolable,"<sup>247</sup> became simply "Congress shall make no law... abridging the freedom of speech, or of the press."<sup>248</sup> Madison's militia and arms provisions fared better. His proposal that "the right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country..."<sup>249</sup> became "[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," as ultimately passed by the House.<sup>250</sup> Although the first casualties of the House's editorial process were Madison's preambles and explanations,<sup>251</sup> the militia statement and the right to arms guarantee were both retained. The first House apparently did not feel that either portion of the ultimate second amendment was redundant. The Senate did not either, for it emphasized the differing natures of each provision. On the one hand, it refused to add "for the common defense" to the right to arms guarantee,<sup>252</sup> which would have suggested that the guarantee's purpose was linked solely to the militia; on the other, it replaced the House's statement that the militia was "the best security" of a free state with a stronger statement that it was "necessary" to that security.<sup>253</sup>

## VI. Conclusion

The second amendment to the Constitution had two objectives. The first purpose was to recognize in general terms the importance of a militia to a free state. This recognition derives from the very core of Classical Republican thought; its "constituency" among the Framers was found primarily among conservatives, particularly Virginia's landed gentry. Indeed, prior to Virginia's proposal, no federal ratifying convention had called for such recognition. The second purpose was to guarantee an individual right to own and carry arms. This right stemmed both from the English Declaration of Rights and from Enlightenment sources. Its primary supporters came from the Radical-Democratic movement, whether based among the small farmers of western Pennsylvania or the urban mechanics of western Pennsylvania or the urban mechanics of Massachusetts. Only by incorporating both provisions could the first congress reconcile the priorities of Sam Adams with those of George Mason, and lessen the "disquietude" both of the Pennsylvania and Massachusetts minorities and those of the Virginia and New York majorities. The dual purpose of the second amendment was recognized by all early constitutional commentators;<sup>254</sup> the assumption that the second amendment had but a single objective is in fact an innovation born of historical ignorance.

The distinction between the second amendment's purposes enables us to avoid the pitfalls of the collective rights view, which would hold that the entire amendment was meant solely to protect a "collective right" to have a militia.<sup>255</sup> The militia component of the second amendment was not meant as a "right",

collective or individual, except in the sense that structural provisions (e.g., requirements that money bills originate in the House, or military appropriations not exceed two years) are considered collective "rights." Indeed, the militia component was meant to invoke the exertion of governmental power over the citizen, to inspire it to require citizens to assume the burdens of militia duty. In this respect it differs radically from any other provision of the Bill of Rights. To ready what was recognition of an individual right, the right to arms, as subsumed within the militia recognition is thus not only permitting the tail to wag the dog, but to annihilate what was intended as a right.<sup>256</sup> As the one provision of the Bill of Rights which encourages rather than restricts governmental action, the militia component's terms were necessarily vague and its phrasing a reminder rather than a command.<sup>257</sup>

The right to arms portion of the second amendment, in contrast, was meant to be a prohibition, as fully binding as those in the remainder of the Bill of Rights. Madison intended that the second amendment be read as incorporating the individual rights proposals put forward by the Pennsylvania minority and by Sam Adams and the New Hampshire convention. Judging from contemporary discussion in Massachusetts and Pennsylvania, he succeeded.<sup>258</sup> If either clause can be accorded primacy, it is the right to arms clause; only in Virginia, at the eleventh hour of the ratification proposal.

Reading the entirety of the second amendment as militia-related, based upon some contemporary references to the need for constitution recognition of the militia concept, confuses the purpose of one provision with the text of another. The second amendment, in short, cannot be explained simply as a last avowal of the classical ideal, as "the last act of the Renaissance."<sup>259</sup> Rather, it is a bridge tween the decline of that ideal and the rise of the liberal democracy. Part of the second amendment looks backward to the worlds of Polybus and Machiavelli; but part looks forward, to the worlds of Jefferson and Jackson. Only a recognition of the dual nature of the second amendment will enable us to give meaning to the aspirations of Thomas Jefferson and Samuel Adams as well of those of George Mason.<sup>260</sup>

#### Footnotes

1. The second amendment's capitalization and punctuation is not uniformly reported; another version has four commas, after "militia", "state", and "arms". Since documents were at that time copied by hand, variations in punctuation and capitalization are common, and the copy retained by the first Congress, the copies transmitted by it to the state legislatures, and the ratifications returned by them show wide variations in such details. Letter from Marlene McGuirl, Chief, British-American Low Division, Library of Congress (Oct. 29, 1976).

2. See, e.g., Beschle, *Reconsidering the Second Amendment: Constitution Protection For Right of Security*, 9 *Hamline L. Rev.* 69 (1986); Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 *J. Am. Hist.* 22 (1984); Levin, *The Right to Bear Arms*, 19 *S.C.L. Rev.* 402 (1967).

3. This approach fell into disfavor in the early twentieth century, but its resurgence in recent years has altered constitutional interpretation. While advocates of collective right approaches have for a decade failed to produce much in the way of original thought or research, the last five years have seen an explosion of original research supporting the individual rights approach. See, e.g., Caplan, *The Right of the Individual to Bear Arms; A Recent Judicial Trend*, 1982 *Det. C.L. Rev.* 789; Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 *Okla. L. Rev.* 65 (1983); Dowlut & Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 *Okla. City U.L. Rev.* 177 (1982); S. Halbrook, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* (1984); Subcomm. on the Constitution of the Sen. Judiciary Comm., *The Right to Keep and Bear Arms*, 97th Con., 2d Sess. (Comm. Print 1982); Halbrook, *The Right to Bear Arms in the First State Bills of Rights: Pennsylvania, North Carolina, Vermont, and Massachusetts*, 10 *Vt. L. Rev.* 255 (1985) [hereinafter *The Right to Bear Arms*]; Halbrook, *To Keep and Bear Their Private Arms: The Adoption of the Second Amendment 1787-1791*, 10 *N. Ky. L. Rev.* 13 (1982); Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 *Harv. J.L. & Pub. Pol'y* 559 (1986); Kates, *Handgun*

Prohibition and the Original Meaning of the Second Amendment, 82 Mich. L. Rev. 204 (1983); Malcolm, The Right of the People to Keep and Bear Arms: The Common Law Tradition, 10 Hastings Const. L.Q. 285 (1983); Shalhope, The Ideological Origins of the Second Amendment, 69 J. Am. Hist. 599 (1982). The author is also informed that Joyce Malcolm, a historian specializing in early modern British history, is in the final drafting of a treatise on the common law right to arms, which alone is likely to double the available original research on the history of that right.

4. The author has suggested a third school of thought, advocating a "hybrid" right, in which the right is individual but its source is collective. In this view, individuals are seen as having a right to possess arms suitable for organized military reserve duty. See Hardy, *Armed Citizens* supra note 3, at 615-622.

5. Madison's original proposal took no fewer than 46 words to describe the rights involved: "The right of the people to keep and bear arms shall not be infringed; a well-armed, and well-regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person." 12 *The Papers of James Madison* 201 (R. Rutland & C. Hobson eds. 1979). The version finally voted out by the Congress uses only 24 words. Madison's original version also illustrates his approach of grouping several rights into a single amendment, since it incorporated not only a militia and a right to arms component, but would have added a constitutional right to conscientious objection.

6. Shalhope cites, as typical, a 1940 conclusion that "Americans in 1776 had little if any knowledge of past republics and that consideration of these was clearly irrelevant to the discussion of the origins of republican institutions in America." Shalhope, *Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism in American Historiography*, 29 *Wm. & Mary Q.* (3d Ser.) 49, 50 (1972).

7. See generally J. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (1970).

8. The works most crucial to this recognition were: Pamphlets of the American Revolution (B. Bailyn ed. 1965); H. Colbourn, *The Lamp of Experience: Whig History and the Intellectual Origins of the American Revolution* (1965); C. Robbins, *The Eighteenth Century Commonwealthman: Studies in the Transmission, Development and Circumstance of English Liberal Thought from the Restoration of Charles II until the War with the Thirteen Colonies* (1959); and G. Wood, *The Creation of the American Republic 1776-1787* (1969). The best historiographical works include Banning, *Republican Ideology and the Triumph of the Constitution, 1789 to 1793*, 31 *Wm. & Mary Q.* (3d Ser.) 167 (1974); Pocock, *Machiavelli, Harrington and English Political Ideologies in the Eighteenth Century*, 22 *Wm. & Mary Q.* (3d Ser.) 334 (1982); and Shalhope, supra note 6.

9. See B. Bailyn, *The Ideological Origins of the American Revolution* 85 (1967); H. Colbourn, supra note 8, at 60, 78, 127.

10. Id.

11. Id.

12. A duty of all freeman to serve in the fyrd, or militia, is traceable at least to the seventh century, and may well antedate even the Saxon invasions. See J. Bagley & P. Rowley, *A Documentary History of England 1066-1540*, at 152 (1965).

13. J. Bagley & P. Rowley, supra note 12, at 154-56.

14. Id. at 155-156.

15. See generally Hardy, *Armed Citizens*, supra note 3, at 564-66.

16. Many may think these concepts are recent creations. In fact, Sir John Fortescue, who fought in the War of the Roses, distinguished in the 1470s between France's "jus regale" and England's "jus regale et polliticum." "Jus Regale" can be rendered "royal law" or "law of the king", "polliticum" can be rendered as "of the State," "national," or even "of the republic" (Latin translation of Plato's Republic rendered the title as "Politia"). Fortescue argued that the French peasants were starved and impoverished so that they were "crokyd" and "feble," and unable to defend the realm: "not thai have wepen, nor money to bie them wepen withall." Thus the French king, unable to use his unreliable nobility or his weak and unarmed peasants, was forced to rly on mercenaries: "Lo, this is the frute of his Jus regale. Yf the reume of Englonde, wich is an Ile, and therfor mey not lyghtly geyte soucore of other landes, were ruid vnder such a lawe and vnder such a prince, it wolde be a pray to all oper nacions pat wolde conqwer, robbe or deuour it." Fortunately, Englishmen were healthy, wealthy and armed to the teeth, "whefore thai ben myghty, and able to resiste the adversaries of this realme, and to beete oper reaumes that do, or woldee do them wronge. Lo,, this is the fruty of Jus polliticum et regale, under wich we live." J. Fortescue, *The Governance of England, Otherwise Called The Difference Between an Absolute and a Limited Monarchy* 114-15 (C. Plumjmer rev. ed. 1885).

17. See generally M. Beloff, *The Age of Absolutism 1660-1815* (1962).

18. For example, the Holy Roman Emperor banned wheellock firearms throughout the Empire in 1518, while unauthorized manufacture of firearms or gunpowder in France soon became a capital offense. Blair, *Further Notes on the Origin of the Wheelock*, in *Arms and Armor Annual* 29, 35-36 (1973); L. Kennett & A. Anderson, *The Fun in American* 12, 15 (1975); N. Perrin, *Giving Up the Gun* 58 (1975).

19. *Proclamation Enforcing Peace in Churches and Churchyards* (Oct., 30, 1561), 2 *Tudor Royal Proclamations 177-78* (P. Hughes & J. Larkin eds. 1969).

For avoiding of divers outrageous and unseemly behaviors... and for the better and speedy reducing of the same churches to the godly uses for Thee which the same were builded,... Her Majesty's please is that if any person shall make any fray or quarrel, or dray, or put out his hand to any weapon for that purpose, or shoot any handgun or dag within the cathedral church of St. Paul... or within any other church or churchyard, [he]... shall suffer imprisonment by the space of two months without bail or mainprize...

Id. Henry VIII had briefly experimented with prohibiting firearms shooting by all but the wealthy, but soon abandoned the attempt in the face of both massive noncompliance and of new military needs. See Hardy, *Armed Citizens* supra note 3, at 566-69.

20. C. Oman, *A History of the Art of War in the Sixteenth Century* 288 (1937).

21. L. Boynton, *The Elizabethan Militia* 8-9 (1967).

22. B. Lyon, *A Constitutional and Legal History of Medieval Britain 271-73* (2d ed. 1980). See L. Boynton, supra note 21.

23. See L. Boynton, supra note 21.

24. See generally Hardy, *Armed Citizens*, supra note 3, at 572-575.

25. N. Machiavelli, *The Prince and the Discourses* 44 (Mod. Library ed. 1950) (1513).

26. See id. at 44-45.

27. See id. at 45.

28. "Mercenary captains are either very capable men or not; if they are, you cannot rely upon them, for they will always aspire to their own greatness, either by oppressing you, their master, or by oppressing

others against your intentions; but if the captain is not an able man, he will generally ruin you." Id.

29. Id. at 46.

30. N. Machiavelli, *The Art of War* 21 (rev. ed. 1965) (1521).

31. Id. at 30.

32. Id. at xxx.

33. See Federally F. Rabb, *The English Face of Machiavelli* 48-51 (1964). Rabb cites, for example, quotations and paraphrases in English diplomatic dispatches dating from as early as 1537.

34. Harrington's major works were *Ocean* published in 1656 and *The Perogative of Popular Government* published in 1658. The best current collection is *The Political Works of James Harrington* 210, 389 (J.G.A.Pocock ed. 1977). Harrington has proven to be a bit of a political visionary. He predicted the independence of British and Spanish colonies, the French Revolution, and advocated universal free education, voting by secret ballot, and tax exemptions for dependents. C. Hill, *The Century of Revolution 1603-1714*, 310 (1962).

35. Pocock, *supra* note 34 at 553-554.

36. Id. at 559.

37. Id. at 442-443.

38. Neville's great work, *Plato Redivus, Or a Dialogue Concerning Government*, may be conveniently found in *Two English Republican Tracts* (C. Robbins ed. 1969). See generally C. Hill, *supra* note 34, at 223.

39. C. Hill, *Some Intellectual Origins of the English Revolution* 27 (1980) (citing Neville, *supra* note 38).

40. Molesworth, *Forward to F. Hotman, Franco Gallia* at xxvi (R. Molesworth trans., London 1711).

41. See generally G. Trevelyan, *The English Revolution 1688-1689*, at 63 (1939). Crucial to the army's failure was an officers' conspiracy led by none other than John Churchill. James' commander-in-chief, who defected to William during the confrontation.

42. M. Roberts, *The Military Revolution 1560-1660, Inaugural Lecture delivered before the Queen's University of Belfast* 9-11 (copy possession of author). The earlier use of the pike had led to no improvements in organization. Fifteenth century pikemen were generally launched en masse at the enemy.

43. See generally Pocock, *supra* note 7, at 64-65.

44. The Mutiny Acts authorized the imposition of martial law on persons enlisted in the military. Absent their sanctions, a deserting soldier could be punished by a civil suit for breach of contract, or at most, prosecution as a runaway apprentice; one who struck an officer might face misdemeanor assault charges in the civilian courts. C. Barnett, *Britain's Army 1503-1970*, at 124 (1970). The post 1688 Mutiny Acts were generally of one year's duration, ensuring that without annual parliamentary reauthorization army discipline would be almost unattainable.

45. To be sure, the events of 1688 cannot be represented as an unqualified Whig victory. William's policies favored neither party, and those of his successor Ann strongly favored Tories. Only with the accession of George I in 1714 did the Whigs attain a dominant hand. See generally B. Williams, *The Whig Supremacy 1714-1760* (2nd ed. 1962). At the same time, for Whigs after 1688 the destruction of the government would likely mean replacement of a generally unsympathetic Tory establishment with an

oppressive and vengeful Jacobite one, and the loss of their gains made during the Glorious Revolution.

46. Molesworth, *supra* note 40, at xxv.

47. Even under William, who relied heavily upon Whig ministers, "[t]he honeymoon did not last . . . [A] flood of publications reminded Englishmen of the ancient system they were supposedly reviving, including a Saxon-style militia. Yet William believed that military common sense dictated a standing army." H. Colbourn, *supra* note 8, at 48. Under the Tory administrations which followed, these views became truly the "opposition theory [which] provided a model for an American version." Banning, *supra* note 8 at 183.

48. 3 T. Macaulay, *The History of England from the Accession of James the Second* 47 (1856).

49. T. Hayter, *The Army and the Crowd in Mid-Georgian England* 117 (1978).

50. "An Act to explain, amend, and reduce into one act of Parliament the Several Laws, now in being, Relating to the Raising and Training of the Militia Within that part of Great Britain called England," 20 Geo. 3, ch. 20 paragraph 105 (1761).

51. *The North British Intelligencer* 20 (Edinburgh 1776) (reporting speech by Lord Mayor of London, attacking the Scottish Militia Bill) (Lib. of Congress Rare Books Collection).

52. Appleby, *Republicanism in Old and New Contexts*, 43 *Wm. & Mary Q.* (3d Ser.) 20, 31-32 (1986).

53. See generally A. Macfarlane, *The Origins of English Individualism* (1978); C. Morris, *The Discovery of the Individual 1050-1200* (1972).

54. C. Hill, *supra* note 34, at 248-49. When the Licensing Act briefly lapsed in 1679, the royal courts asserted a common law basis for the prohibition against most political publications, the Chief Justice stating that it extended to "all Persons that do Write or Print or Sell any Pamphlet that is either Scandalous to Public or Private Persons." G. Sensenbaugh, *That Grand Whig Milton* 56 (1952). Judge Allybone's jury instructions in the Seven Bishop's Case are instructive. "In the first place, . . . no man can take upon him to write against the actual exercise of the government, unless he have leave from the government. If he does, he makes a libel, be what he says true or false; if we once come to impeach the Government by way of argument, it is argument that makes government or not government. . . My next position is, that no private man can take upon him to write concerning the government at all, for what has any private man to do with the government. It is the business of the Government to manage matters relating to the government; it is the business of subjects to manager only their private affairs. . . when I intrude myself into matters which do not concern my particular interest, I am a libeler." 2 Lord Campbell, *Lives of the Lord Chief Justices* 362 (7th ed. 1878).

55. From 1686 to 1732, the standard royal command authorizing colonial governors to assume their post ordered them to ban not only printing, but also possession of a printing press, without a license. "You are to provide by all necessary orders that no person keep any press for printing, nor that any book, pamphlet or other matters whatsoever be printed without your especial leave and license first obtained." C. Rossier, *Seedtime of the Republic* 29 (1953).

56. In 1762, the author of a legal treatise was threatened with prosecution for including in his work passages criticizing rulings of the House of Lords, without having obtained the Lords' consent; a century later, a biographer obtained statutory authorization to publish a history of judges, some of whom had sat in Parliament. 5 Lord Campbell, *Lives of the Lord Chancellors and Keepers of the Great Seal of England* 26 (7th ed. 1878).

57. J.R. Jones, *Country and Court* 143 (1978). Even authorized petitioners ran a risk; the "Seven Bishops" were prosecuted for seditious libel based upon a petition handed directly to the king. In 1701, the "Kentish

Petitioners," who presented a mild petition requesting passage of spending bill, were imprisoned on the spot for contempt of Parliament. E.N. Williams, *The Eighteenth Century Constitution* 410-11 (1960).

58.G. Trevelyan, *The English Revolution 1688-1689*, at 27-28 (1939). While the Toleration Acts relieved certain non-Anglican protestant religions from the risk of criminal prosecution for non-adherence, those acts did not permit their communicants to hold office.

59.6 Lord Campbell, *Lives of the Lords Chancellor and Keepers of the Great Seal of England* 305-09 (7th ed. 1878).

60.Malcolm, *supra* note 3. Dr. Malcolm's work has also appeared in a paper. J. Malcolm, "Disarmed: The Loss of the Right to Bear Arms in Restoration England" (Mary Ingraham Bunting Institute of Radcliffe College 1980), and is now being prepared in treatise form.

61.J. Malcolm, *supra* note 3, at 294-96. See also Hardy, *Armed Citizens*, *supra* note 3, at 572.

62.*Ordinances and Acts of the Commonwealth and Protectorate 1317-1319* (London 1911).

63.8 *Calendar of State Papers (Domestic)* 150, Charles II, No 188 (July 1660). Using the militia for such tasks was not unusual; in addition to being a military force, it was used for domestic law enforcement. However, the same order makes it clear that the Lords Lieutenants were to "stack" the militia, relying not upon a general muster of the populace but upon volunteers "who offer assistance," who were to be "formed in troops apart and trained."

64.J.R. Western, *The English Militia in the Eighteen Century* 12-14 (1965).

65. *Statutes at Large*, 14 Car. 2, ch. 3 paragraph 2 (1662). Apart from numerical limitations, members were required to swear that "it is not lawful upon any pretence what soever to take arms against the King." *Id.* at paragraph 19.

66. *Id.* at paragraph 14. The search was to be between dawn and sunset, unless the warrant issued by the Lieutenant or his deputies indicated otherwise. Force could be used in the event of resistance.

67.Malcolm *supra* note 3, at 285, 299-300.

68.*Statutes at Large*, 22 & 23 Car. 2, ch. 25, paragraph paragraph 2-3 (1670). This was fifty times the property requirement for voting, and marked a 250% increase over the previous hunting requirement. Hardy, *Armed Citizens*, *supra* note 3, at 576. Well into the next century, barely 3% of Englishmen could boast lands of this value. C. Hill, *Some Intellectual Consequences of the English Revolution* 9 (1980).

69.The 1671 Acts in fact marked a major act of self-assertion by the gentry. Not only the poor were disarmed, but the wealthy tradesman and others who failed to invest in land. The gentry, not the king, now controlled game and hunting and enforced the law. See P.B. Munsche, *Gentlemen and Poachers: The English Game Laws 1671-1831*, at 12-18 (1981).

70.See generally Hardy, *Armed Citizens*, *supra* note 3, at 578-79.

71.2 *Calendar of State Papers (Domestic)* 314, James II, No 1212 (Dec 6, 1686).

72.See J.R. Western, *supra* note 64 at 31.

73.One contemporary Londoner reports, "The militia for the city [sic] of London went from house to house to search for arms, and 'tis said at some places quantities were seized." 1 N. Lutterell, *A Brief Historical Relation of State Affairs from September 1678 to April 1714*, at 263 (Oxford 1857).

74.If "revolution" seems a strange term to apply to the actions of predominantly conservative, thoroughly

"establishment" Englishman, it must be remembered that the term was invented to describe this particular event and (being taken from the mechanical arts) was meant to describe a return to the constitutional point of origin. James, the term implied, had reversed constitutional norms: The "revolutionaries" sought to restore them through further action. See J.R. Western, *supra* note 64, at 1.

75. Following their acceptance, they summoned a proper Parliament which, being thus empowered to enact legislation, enacted the Declaration of Rights as a bill of rights. 1 W. & M., ch. 1, paragraph 2 (1688). See generally G. Trevelyan, *supra* note 58, at 149-151.

76. The concentration upon fundamentals, and matters of consensus, had a practical basis. Until the Declaration could be drafted, the throne could not be offered to William and Mary. James might at any point return, either through negotiation or through invasion. William began to hint that, absent a prompt offer, he was prepared to return to the Continent. Accordingly, a statement of the most vital rights had to be quickly prepared and had to be limited to such as all factions would agree upon. G. Trevelyan, *supra* note 58, at 149-151.

77. Guarantees of rights to petition, prohibitions on excessive bail or fines and protections against cruel and unusual punishments are obvious examples of safeguards embodied in the Bill of Rights. Other guarantees of the Declaration were written into our Constitution itself. Bans on levying of taxes without legislative consent, guarantees that "parliaments ought to be held frequently," and that freedom of debate in Parliament "ought not be impeached or questioned in any court or place out of parliament" all reflect concepts written into our 1787 Constitution.

78. These debates were fortuitously preserved in penciled outlines of speeches. See 2 P. Yorke, Lord of Hardwicke, *Miscellaneous State Papers from 1501 to 1726*, at 399 (London 1778). The notes were made by Lord Somers, who headed the committee charged with drafting the Lords' version of the Declaration. They survived a 1752 fire at Lincoln Inn which destroyed most of the remainder of Somers' papers.

79. *Id.* at 416.

80. Boscawen also added a personal element to Temple's complaints of disarmament: "Acts of the Long Parliament \_ Corporation Act \_ That the same with the resolution \_ The most loyal or deserving, turned out. \_ Militia \_ Imprisoning without reason; disarming \_ Himself disarmed." *Id.* The reference to the Long Parliament is ambiguous; that would normally identify the Parliament which sat from 1640-1649, during the Civil War, and was dissolved by Cromwell. By adding in the various "rump" Parliaments under the Protectorate, it can be extended to 1660. Might Boscawen have been referring to Charles II's first Parliament, the "Cavalier" or "Pensioner" Parliament? Since it met intermittently from 1661 to 1679, it certainly was a long Parliament, if not the "Long Parliament," and it enacted the Corporation Act (which turned non-royalists out of all city governments) as well as the Militia Act, both of which Boscawen names as grievances.

81. Maynard would later successfully argue that Parliament ought to proceed both to fill the throne and secure their rights. *Id.* at 417, Sergeant was then, incidentally, a very high legal rank; in court, a Sergeant-at-law was entitled to speak first, before even the Attorney or Solicitor General, and was entitled to be addressed as "brother" by the bench; while all others uncovered their heads in the Royal presence, the Sergeant retained his coif, lest it be thought that the law must humble itself before a monarch. C. Bowen, *The Lion and the Throne* 278 (1957).

82. 2 P. Yorke, *supra* note 78, at 407.

83. *Id.* at 414, 415, 417. Some of the listed complaints were, "fundamentals too may be destroyed, by corrupting Parliaments," "In the year 1660, there were many hard laws made, grievous to the people . . . Militia Act . . . Corporation Act was arbitrary." *Id.*

84. *Journal of the House of Commons from December 26, 1688 to October 26, 1693*, at 21-2 (London

1742) (Lib. of congress Rare Books Collection).

85. The proviso regarding armament of Catholics was inserted, the Lords explained in conference, because "[t]his is a further aggravation fit to be added to the clause." *Id.* at 25.

86. 1 W. & M. ch. 2 (1689).

87. 4 W. & M., ch. 2 (1692). See generally Hardy, *Armed Citizens*, *supra* note 3 at 581. As Dr. Malcolm notes, "The provision in the Declaration of Rights that Protestant subjects had a right to have arms suitable to their conditions and as allowed by law was interpreted to mean that all Protestants, whatever their condition, were permitted to have arms." Malcolm, *supra* note 3 at 16. The extension of rights such as these to all Protestants was a legacy of the Protestant dissenters' contribution to the Glorious Revolution. Previously, non-Anglican Protestants had been viewed as a public danger; the Presbyterians and Independents had, after all, been the mainstay of Cromwell's Protectorate and were often lumped in with Catholics as persons who believed monarchs might be overthrown for religious reasons. Over seventeenth century sermon indeed charged that Jesuits and Calvinists were "sworn brothers in Iniquity, to plot and conspire the death and ruin of Princes." G. Sensenbaugh, *supra* note 54, at 75. It would be interesting to have the reactions of Jean Calvin and Ignatius Loyal to the accusation.

88. Malcolm, *supra* note 3, at 309 & n. 139.

89. Mayland's colonial militia code of 1692 paralleled the 1662 Militia Act, but added a proviso that "no pressmaster or any persons whatsoever shall presume at any time to seize, press or carry away from the inhabitant resident in this province any arms or ammunition of any kind whatsoever

. . . any law, statute or usage to the contrary notwithstanding." 13 *Archives of Maryland: Proceedings and Acts of the General Assembly of Maryland, April 1684 - June 1692*, at 557 (W. Browne ed. 1894).

90. 1 W. Blackstone, *Commentaries* \*144.

91. W. Blizard, *Desultory Reflection on Police* 59-60 (London 1785) (copy in possession of author). See also Malcolm, *supra* note 3, at 313; Hardy, *Armed Citizens*, *supra* note 3, at 587.

92. See generally *supra* notes 41-48 and accompanying text.

93. See generally J. Gavin, *The Minute Men* 1-46 (1967).

94. See C. Rossiter, *The Political Thought of the American Revolution* 55 (1963). See generally B. Bailyn, *supra* note 9; H. Colbourn, *supra* note 8.

95. See generally *supra* notes 36-39 and accompanying text.

96. Burgh's most popular work, *Political-Disquisitions*, *infra* note 97, was quickly reprinted in the colonies by Benjamin Franklin. Major printed works at that time were sold by pre-publication subscription; the signatories to Burgh's subscription list read like those to the Declaration of Independence: George Washington, Thomas Jefferson, John Adams, John Hancock and John Dickinson, L. Cress, *Citizens in Arms: The Army and the Militia in American Society to the War of 1812*, at 35 (1982).

97. "Had we at this time no standing army, we should not think of forcing money out of the pockets of three million of our subjects. We should not think of punishing with military execution, unconvicted and unheard, our brave American children, our surest friends and best customers. We should not \_ but there is no end to observations on the difference between the measures likely to be pursued by a minister backed by a standing army, and those of a Court awed by the fear of an armed people." 2J. Burgh, *Political-Disquisitions: An Enquiry into Public Errors, Defects and Abuses* 475-476 (reprint 1971) (London 1774).

98. In 1774, the British government banned export of arms ammunition to the colonies, and instructed General Gage to disarm rebellious areas. After several attempts to raid militia arsenals in the Boston area, some successful and some unsuccessful, an intended raid on the Concord arsenal brought about the outbreak of war at Lexington and Concord. At almost the same time, British authorities in Virginia secretly emptied the powder magazine at Williamsburg, but were discovered as they made off. The Virginians responded by mustering militia units, confronting British officials, and seizing 200 muskets from the governor's mansion. The unusually bad timing of the two raids thus brought Massachusetts and Virginia (which otherwise had little in common) into an alliance in revolution, thus uniting the leadership of New England and the South. See generally Hardy, *Armed Citizens*, supra note 3, at 591-593.

99. The Federalist No. 25, at 166 (A. Hamilton) (C. Rossier ed. 1961).

100. Initially, one regiment was maintained, a second was added in 1791. During the 1798 quasi-war with France, this was expanded to four regiments. W. Millis, *Arms and Men* 46, 50-53 (1956). A decade later, Jefferson's administration began with 4,000-5,000 men on duty and eventually doubled this authorized strength. R. Weigley, *Towards an American Army: Military Thought from Washington to Marshall* 27-28 (1962). The 1820 report by Secretary of War Calhoun, a dedicated Jeffersonian, called for reducing the importance of the militia, which were capable "of meeting in the open field the regular troops of Europe" and instead creating an expansible army. *Id.* at 31-33.

101. A few examples: Richard Henry Lee charged that a select militia would "answer all the purposes of an army" and that therefore the "Constitution ought to secure a genuine and guard against a select militia." *Letters from the Federal Farmer to the Republican* 21-22, 124 (W. Bennett ed. 1978). In the Pennsylvania federal ratifying convention, John Smilie expressed concern that "Congress may give us a select militia which will in fact, be a standing army." 2 *The Documentary History of the Ratification of the Constitution* 509 (M. Jensen ed. 1976). When Baron von Steuben, the Prussian expatriate who became Washington's Inspector General, proposed a select militia, one Connecticut newspaper was able to complain that the congressional power over the militia "looks too much like Baron Steuben's militia, by which a standing army was meant and intended." 3 *Id.* at 378. A Pennsylvania newspaper complained that the Federalists sought: "1. The liberty of the press abolished, 2. A standing army. 3. A Prussian militia." J. McMaster & F. Stone, *Pennsylvania and the Federal Constitution 1787-1788*, at 141 (1888).

102. At the Constitutional Convention, a delegate explained that "by organizing, the Committee meant proportioning the officers and men \_ by arming, specifying the kind, and calibre of arms \_ and by disciplining, prescribing the manual exercise, evolutions..." 5 J. Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 344 (1966) (2d ed. 1836). In the Pennsylvania convention, James Wilson explained: "If a soldier drops his musket, and his companion, unfurnished with one, takes it up, it is of no service, because his cartridges do not fit it. By means of this system, a uniformity of arms and discipline will prevail throughout the United States." 2 *id.* at 521.

103. Major plans included Steuben's of 1784; Knox's of 1786; and Washington's of 1790. The last, submitted to Congress in January 1790, was drafted, redrafted, debated and, after a year and a half of work, enacted in emasculated form as the Militia Act of 1792. J. Palmer, *Washington, Lincoln, Wilson: Three War Statesmen* 87-89, 104-105, 107-123 (1930). See also L. Cress, supra note 96, at 78-93, 116-129.

104. 1 *Messages and Papers of the Presidents* 57 (1897) [hereinafter *Messages*].

105. *Id.* at 75.

106. *Id.* at 99.

107. Act of May 8, 1792, 1 Stat. 271.

108. 1 *Messages*, supra note 104, at 132 (Washington, 1793): suggests examination of the Militia Act is

"an inquiry which cannot be too solemnly pursued"); *id.* at 176 (Washington, 1795); *id.* at 317 (Jefferson, 1801: Congress should "at every session continue to amend the defects which from time to time shew themselves in the laws from regulating the militia"); *id.* at 333 (Jefferson, 1802: considering the importance of the militia, "you will doubtless think this institution worthy of a review, and give it those improvements of which you find it susceptible"); *id.* at 360 (Jefferson, 1804: "Should any improvement occur in the militia system, what will be always seasonable"). After all these efforts, Congress still failed to attempt any significant improvements. By 1805, even Jefferson was reduced to asking for a select militia, which had been anathema even to conservatives a few years before: "I can not, then, but earnestly recommend to your early consideration the expediency of so modifying our militia system as, be a separation of the more active part from that which is less so, we may draw from it when necessary an efficient corps fit for real and active service, and to be called to it in regular rotation." *Id.* at 373.

109. L. Cress, *supra* note 96, at 176.

110. B. Bailyn, *supra* note 9, at 200-05.

111. As a modern British writer put it:

It follows from all this that there is nothing rigid or static about the English Constitution. Not being set out or declared in any sacrosanct document nor hedged in by some special procedure of amendment, it can be changed or modified in any or every particular by the ordinary process of legislation. It can be reformed in any part by ordinary Act of Parliament assented to in the ordinary way.

S. B. Crimes, *English Constitutional History* 9 (2d ed. 1953). Madison's attack on the Alien and Sedition Acts still stands as an impeccable sketch of the difference between the English and American understandings:

In the British Government the danger of encroachment on the rights of the people is understood to be confined to the executive magistrate. The representatives of the people in the Legislature are not only exempt themselves from distrust, but are considered as sufficient guardians of the rights of their constituents against the danger from the Executive. Hence it is a principle, that the Parliament is unlimited in its power, or, in their own language, is omnipotent. Hence too, all the ramparts for protecting the rights of the people \_ such as the Magna Carta, their Bill of Rights, [etc.] \_ are not reared against the Parliament, but against the royal prerogative... In the United States, the case is altogether different. The People, not the Government, possess the absolute sovereignty. The Legislature, no less than the Executive, is under limitations of power.

R. Buel, *Securing the Revolution: Ideology in American Politics 1789-1815*, at 249 (1972).

112. See generally, H. Colbourn, *supra* note 8, at 166-67. As Franklin wrote in 1770, "The sovereignty of the Crown I understand the sovereignty of Britain I do not understand... We have the same King, but not the same legislature." Namier, *King George III: A study of Personality, in Causes and Consequences of the American Revolution* 193, 197 (E. Wright ed. 1966). The notion that the colonists' fight was with Parliament and its ministers and not with George III was hard dying. Even after the fighting at Concord, Washington would write of "the Ministerial Troops (for we do not, nor cannot yet prevail upon ourselves to call them the King's troops)." 3 *Writings of George Washington* 291 (J. Fitzpatrick ed. 1931).

113. J.G.A. Pocock, *The Ancient Constitution and the Feudal Law* 36-55 (1967). See generally C. Bowen, *The Lion and the Throne* (1957).

114. *Dr. Bonham's Case*, 77 Eng. 646, 652 (1610).

115. C. Bowen, *supra* note 113, at 381-83.

116. J. Baker, *An Introduction to English Legal History* 92-93 (1979).

117. In the Stamp Act crisis alone, the passage was cited by James Otis, John Adams, and Patrick Henry. C. Bowen, *supra* note 113, at 315-16.

118. Blackstone, for instance, noted: "Both the life and limbs of a man are such high value, in the estimation of the law of England, that it pardons even homicide committed *se defend* (in self defense) or in order to preserve them." 1 W. Blackstone, *Commentaries* \*310. See generally Caplan, *The Right of the Individual to Bear Arms: A Recent Judicial Trend*, 4 *Det. C.L. Rev.* 789, 804-06 (1982).

119. The article was one of the "Journal of the Times," which was written anonymously in Boston, published there and in New York and Philadelphia, and thereafter reprinted widely throughout the colonies. B. Bailyn, *supra* note 9, at 115 n.21.

120. O. Dickerson, *Boston Under Military Rule* 79 (1936).

121. Halbrook, *supra* note 3, at 280 (citing *North Carolina Gazette* (Newburn), July 7, 1775 at 2, col. 3).

122. H. Colbourn, *supra* note 8, at 190.

123. *Id.* at 126, 190.

124. C. Rossiter, *supra* note 94, at 352.

125. *Id.* at 377; 1 B. Schwartz, *infra* note 142, at 448.

126. J.G.A. Pocock, *supra* note 113, at 20.

127. F. Hotman, *Franco Gallia* (R. Molesworth trans., London 1711).

128. The compact theorists were not burdened with the data generated by modern archaeology, which suggest that the choice of tribal leaders occurred among Cro-Magnons, some tens of millennia ago. See Pfeiffer, *Cro-Magnon Hunters Were Really Us, Working Out Strategies for Survival*, 17 *Smithsonian* 74, 82 (1986).

129. Hobbes' appeal to power and consent as the basis of dominion upset the royalists, while his assertion that popular consent once given could never be modified or revoked (absent failure of the sovereign to perform the sole duty of protection) alienated their opposition. Hobbes was concerned, after the Restoration, that Royalists might have him burned for heresy; as it was, they settled for burning his books at Oxford. C. Hill, *supra* note 34, at 249,. During our own colonial period, he was "denounced as frequently by loyalists as by patriots." B. Bailyn, *supra* note 9, at 28-29.

130. T. Hobbes, *Leviathan* ch. 14 at 107 (reprint 1950) (1651).

131. *Id.* at 116.

132. This view is not completely fair: Hobbes in fact admits that his sovereign can be a democratic government: "The legislator in all Common-wealths, is only the Sovereign, be he one Man, as in a Monarchy, Or one Assembly of men, as in a Democracy, or Aristocracy." *Id.*, ch 26. at 226. Hobbes also seems to accept that a government might be one of limited powers although he clearly regards this as a mistake: "Amongst the Infirmities therefore of a Common-wealth . . . this is one, That a man to obtain a Kingdom is sometimes content with lesse power, than to the Peace, and defence of the Common-wealth is necessarily required. From whence it commeth to passe that when the exercise of the Power layd by, is for the publique safety to be resumed, it hath the resemblance of an unjust act . . ." *Id.*, ch.29 at 276.

133. *Id.*, ch. 21 at 117.

134. The doctrine of nonresistance (which was derived from the Pauline epistles and early Christian martyrology) maintained that Christians were required to submit to a ruler, no matter how unjust; indeed, the reliance upon the submission of early Christians to martyrdom indicated that submission was required even to a pagan ruler bent upon extirpating Christianity. See generally G. Senssbaugh, *That Grand Whig Milton* (1952). The seriousness with which this was taken can be seen in the aftermath of the Seven Bishops' Case, in which James II prosecuted seven Anglican bishops for seditious libel. After James was overthrown in the Glorious Revolution, a majority of the seven were forced to resign by the new government because they were "nonjurors," unable in conscience to take an oath recognizing William and Mary as sovereigns. Whatever his actions toward them, their nation or their church, James was still their monarch, to whom submission was due. C. Hill, *supra* note 34, at 238.

135. See generally Morgan, *The American Revolution Considered as an Intellectual Movement*, in *Causes and Consequences of the American Revolution* 172, 182,-86 (E. Wright ed. 1966).

136. J. Barlow, *Advice to the Privileged Orders in the Several States of Europe, Resulting from the Necessity and Propriety of a General Revolution in the Principle of Government* 46 (reprint 1956) (London 1792).

137. See generally B. Bailyn, *supra* note 9, at 27. See also C. Rossiter, *supra* note 94. "In pamphlet after pamphlet, American writers cited . . . Beccaria on the reform of the criminal law, Grotius, Pufendorf, Burlamaqui and Vattel on the laws of nature and of nations, and on the principles of civil government. The pervasiveness of such citations at times astonishing." *Id.* at 359.

138. Pufendorf, *De Jury Nature et Gentium: Libri Octo* (C. & W. Oldfather trans.) in *The Classics of International Law* 265-266 (J. Scott ed. 1934).

139. J. J. Burlamaqui, *The Principles of Natural and Politic Law* (Nugent trans. 5th ed. Cambridge 1807). The jurist goes on to note that "To kill a man, for instance, is a bad action in a robber, but is lawful or good. . . in a citizen or soldier, who defends his life or country. . ." *Id.* at 121.

140. *4 Journals of the Continental Congress* 342 (W. Ford et. 1906).

141. *1 Papers of Thomas Jefferson* 344 (J. Boyd ed. 1950). Jefferson's draft indicated he toyed with adding the words "within his own lands" at the end of this guarantee. See *id.* at 353. Like many Virginia landowners, Jefferson had probably had troubles with trespass and poaching. Washington, for example, had to post notices, publish handbills, and write letters to his neighbors in vain efforts to stop such poaching. See *37 Writing of George Washington* 194 (J. Fitzpatrick ed. 1940). Jefferson's proposals also would have divided State lands among persons owning no lands, or less than fifty acres apiece, would have provided that they would be held in fee simple (a reflection of his opposition to fee tail, which was still permitted in Virginia), and would have barred transfer of State lands "until purchased of the Indian native proprietors". *1 Papers of Thomas Jefferson, supra*, at 362.

142. Traditionally, the Bill of Rights is ascribed to Mason. This attribution is based in large part on the Edmund Randolph's recollection that Mason's proposals "swallowed up all the rest." 1 B. Schwartz, *The Bill of Rights: A Documentary History* 247 (1971). Recent evidence suggests, however, that the relevant portion was added by the committee, albeit taken almost verbatim from Mason's Fairfax Resolves. See H. Miller, *George Mason: Gentleman Revolutionary* 148 (1975). On the other hand, there also is evidence that the Fairfax Resolves were more of a committee effort than has previously been supposed. See Sweig, *A New-Found Washington letter of 1774 and the Fairfax Resolves*, 40 *Wm. & Mary Q.* (3d Ser.) 283 (1983). It is clear in any event that the body of the Virginia Constitution was in fact a committee effort, based on submission of a number of plans. See *1 Papers of Thomas Jefferson, supra* note 141, at 337.

143. *7 F. Thorpe, The Federal and State Constitutions* 3814 (1909).

144. D. Malone, *Jefferson the Virginian* 195 (1948).

145. K. Rowland, *Life of George Mason* 104 (1892); 83 *The Diaries of George Washington* 71 (D. Jackson ed. 1978) ("[November] 27. [1771.] Set off before sunrise with John Curtis for Colo. Masons and went a driving [deer] in his Neck after breakfast \_ two deer killed. [November] 28. Went a driving again with Colo. Mason \_ killed nothing.").

146. J. Main, *The Sovereign States 1775-1783*, at 156. (1973).

147. *Id.* at 157; 1 *Papers of Thomas Jefferson*, *supra* note 141, at 366.

148. Hunt, *James Madison and Religious Liberty*, *Proceedings of the 17th Annual Meeting of the American Historical Society* 165, 166-67 (1901). Madison later recollected that Mason had "inadvertently adopted" the word "toleration." 1 *Papers of Thomas Jefferson*, *supra* note 141, at 250. This is consistent with the hypothesis that Mason differed from Jefferson and the Radicals not so much in values as in perspective. To Mason, the object was to establish a stable republic, which would naturally respect individual rights, while to Jefferson the object was to reserve the rights and let the republic form within those reservations.

149. *Toleration Act*, 1 W. & M. 18 (1689). The Act begins: "Forasmuch as some ease to scrupulous consciences in the exercise of religion may be an effectual means to unite their Majesties' protestant subjects in interest and affection . . ."

150. See generally Hunt, *supra* note 148.

151. 31 *Writings of George Washington* 93 (J. Fitzpatrick ed. 1939).

152. 1 *Papers of Thomas Jefferson*, *supra* note 141, at 504.

153. See generally Doerflinger, *Philadelphia Merchants and the Logic of Moderation 1760-1775*, 40 *Wm. & Mary Q.* (3d Ser.) 197 (1983).

154. See generally J. Selsam, *The Pennsylvania Constitution of 1776: A Study in Revolutionary Democracy* (1936); Gough, *Notes on the Pennsylvania Revolutionaries of 1776*, 96 *Pa. Mag.* 89 (1972).

155. Harding, *Party Struggles Over the First Pennsylvania Constitution*, *Annual Report of the American Historical Association* 371-72 (1895).

156. *Id.* at 374.

157. One historian noted in a recent work:

Aristocratic Whigs described the militia private as "in general damn'd riff raff \_ dirty, mutinous and disaffected." The militia described themselves as "composed of tradesman and others, who earn their living by the industry..." [A] check of one militia company roster against the published tax lists for Philadelphia reveals that of sixty-seven names, almost half (twenty-nine) appeared on no tax list between 1769 and 1781... For such men, participation in the militia was the first step in the transition from crowd activity to organized politics. Like the New Model Army of the English Civil War, the militia was a "school of political democracy."

E. Foner, *Tom Paine and Revolutionary America* 63-64 (1976).

158. Harding, *supra* note 155, at 376.

159. *Pa. Const.* paragraph 6 (1776), reprinted in 5 *F. Thorpe*, *supra* note 143, at 3084.

160. Harding, *supra* note 155, at 386. Harding himself complains that the supporters of the 1776 document

were men of obscure birth, of little education or property, and of the narrowest views, "the party of the democracy \_ suspicious, bigoted, easily swayed by demagogues . . ." Id. at 383-84.

161. 1 B. Schwartz, *supra* note 142, at 262.

162. J. Adams, *Diary and Autobiography* 391 (L. H. Butterfield ed. 1964).

163. Most noticeably, Pennsylvania added rights to freedom of speech (Virginia recognized, probably through oversight, only that of the press) and assembly. See 1 B. Schwartz, *supra* note 142, at 262-263.

164. Pa. Declaration of Rights, paragraph 12 (1776), reprinted in 5 F. Thorpe, *supra* note 143, at 3083. The constitution itself did provide for the militia \_ but with businesslike statements that all "freeman" shall be "trained and armed" under legislative direction. Pa. Const. paragraph 5 (1776), reprinted in 5 F. Thorpe, *supra* note 143, at 3084. There is no statement of the militia's necessity or role in a republic, but simply a practical provision for its organization.

165. J. Main, *supra* note 146, at 166-69. Main points out that some counties sent delegates with a mandate to "oppose everything that leans to aristocracy" while other delegates noted that their main concern was "how to establish a check on the representatives of the people."

166. N. C. Const. paragraph paragraph 5, 6, 15 (1776, amended 1835), reprinted in 5 F. Thorpe, *supra* note 143, at 2790-2791.

167. N. C. Declaration of Rights paragraph 17 (1776), reprinted in 5 F. Thorpe, *supra* note 143, at 2788.

168. See Z. Haraszti, *John Adams and The Prophets of Progress* 34-35 (1952).

169. Id. at 35-37.

170. Id. at 37-40. It is difficult to find a sharper contrast than that between Jefferson's defense of the near-universal suffrage \_ "my observations do not enable me to say I think integrity the characteristic of wealth. In general I believe the decisions of the people, in a body, will be more honest and more disinterested than those of wealthy men. . ." 1 *Papers of Thomas Jefferson*, *supra* note 141, at 504, and Adams' argument that "the men in general, who are wholly destitute of property, are also too little acquainted with public affairs to form a right judgment..." Z. Haraszti, *supra* note 168, at 36.

171. Mass. Const. art. V, paragraph 2 and art. III, paragraph 3 (1780, amended 1840), reprinted in 3 F. Thorpe, *supra* note 143, at 1897-98.

172. For example, provisions were included which authorized support of "public Protestant teachers of piety, religion and morality"; they also noted that "Each individual of the society . . . is obliged, consequently, to contribute his share to the expense of this protection . . ." Mass. Const. arts. III, X (1780, amended 1911), reprinted in 3 F. Thorpe, *supra* note 143, at 1890-91.

173. "The people have a right to keep and to bear arms for the common defence." Mass. Const. pt. I, art. XVII, reprinted in 3 F. Thorpe, *supra* note 143, at 1892.

174. See J. Smith, *Constitutional Right to Bear Arms* 16-26 (1959) (unpublished manuscript).

175. 6 *Works of John Adams, Second President of the U.S.* 197 (C. Adams ed. 1851). Adams, however, was not a defender of the select militia concept. See Halbrock, *The Right to Bear Arms*, *supra* note 3, at 314 (citing Adams 1823: "The American states have owed their existence to the militia for more than two hundred years. A select militia will soon become a standing army . . .").

176. *The Popular Sources of Political Authority: Documents on the Massachusetts Convention of 1780*, at

624 (O. & M. Handlin eds. 1966).

177. Clune, Joseph Hawley's Criticism of the Constitution of Massachusetts, 3 *Smith C. Stud. Hist.* 15 (1917).

178. Virginia's approach prevailed only in Maryland, whose 1776 constitution recognizes that "a well-regulated militia is the proper and natural defence of a free government." Maryland Declaration of Rights paragraph 25 (1776), reprinted in 3 F. Thorpe, *supra* note 143, at 1688. Maryland's 1776 Constitution also imposed varying property requirements for voting and candidacy, ranging from 50 acres of land to vote for the lower house to 1000 acres for a state senator or any representative to the Continental Congress. *Id.* at 1691, 1695, 1696. "The property requirements contained in the Maryland constitution excluded almost 90 percent of Maryland's male taxpaying population from holding provincial office. Because of these restrictions, only ten percent could qualify for the lower house and seven percent for the upper. The elite's dominance of the constitution accurately reflected the class structure of the society." Hoffman, "The 'Disaffecte' in the Revolutionary South", reprinted in *The American Revolution: Explorations in the History of American Radicalism* 280 (A. Yound ed. 1976). Today, the Massachusetts "common defense" model is followed in only 4 states of the 39 that have "right to arms" constitutional provisions: Maine, Massachusetts, Arkansas, and Tennessee. Dowlut & Knoop, *supra* note 3, at 177, 203.

179. It was adopted, for example, in Kentucky in 1792, in Indiana in 1816, in Connecticut in 1818, and in Missouri in 1820. Hardy, *Armed Citizens*, *supra* note 3, at 597 n. 188.

180. U.S. Const. art. I, sec. 8.

181. See *supra* notes 154-163 and accompanying text.

182. See generally Harding, *supra* note 155.

183. See *id.* at 383; 1 & 2 J. McMaster & F. Stone, *supra* note 101, at 419, 421, 482.

184. See generally Alexander, *The Fort William Incident of 1779: A Case Study of the Revolutionary Crowd*, 31 *Wm. & Mary Q.* (3d Ser.) 589 (1974). The militia/citizen group was marching in support of price controls, which they argued were necessitated by merchant speculation. In anticipation of the march, Wilson's home (nicknamed due to the sturdiness of its construction, "Fort Wilson") was occupied by thirty or so of his supporters. During the march, a firefought broke out between the occupants of the house and the militia; one occupant and several militiamen were killed. Although this may seem a comparatively tame affair by our standards, it was seen at the time as quite stunning; contemporaries wrote of "a convulsion among the people" and "[m]any flying the city for fear of [v]engeance." *Id.* at 589.

185. See J. McMaster & F. Stone, *supra* note 101.

186. The following discussions are based heavily upon J. McMaster and F. Stone, *supra* note 101. For most ratifying conventions, the standard reference is *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (reprint 1966). (J. Elliot 2d ed. 1836). This work reports but little of the Pennsylvania convention, since Elliot relied upon reports published by a reporter apparently bribed by the Federalists to publish only the speeches of the two leaders of their group. J. McMaster & F. Stone, *supra* note 101, at v, 14-15. The relevant portions of the Pennsylvania proceedings are also reproduced at 1 B. Schwartz, *supra* note 142, at 627-62.

187. See e.g., J. McMaster & F. Stone, *supra* note 101, at 116, 190, 314, 419, 421, 482.

188. *Id.* at 420, 425. The exact nature of Whitehill's motion is unclear. He is stated to have moved the articles "which might either be taken collectively, as a bill of rights, or separately, as amendments to the general form of government proposed." *Id.* at 421. Presumably, he sought ratification of an amended version of the proposed Constitution, which might well have raised problems in itself.

189. *Id.* at vi.

190. *Id.* at 454.

191. *Id.* at 472.

192. *Id.* at 756.

193. William Findley of Westmoreland, Pa., 5 *Pennsylvania Magazine* 444 (1881).

194. J. McMaster & F. Stone, *supra* note 101, at 480.

195. *Id.*

196. See *infra* notes 222, 225.

197. The later fifth and eighth amendments are taken almost verbatim from the Pennsylvania wording; the Pennsylvania proposals also called for recognition of freedom of conscience, speech, press, and the establishment of protection against warrants unsupported by evidence or not particularly describing the property to be seized. J. McMaster & F. Stone, *supra* note 101, at 461-63.

198. *Id.* at 462-63.

199. *Id.* at 462. Their proposals also, remarkably, added a guarantee that "the inhabitants of the several States shall have liberty to fowl and hunt in seasonable time on the lands they hold, and on all other lands in the United States not inclosed, and in like manner to fish in all navigable waters . . ." *Id.* This provision was adapted from a similar guarantee in the 1776 State constitution, which was defended at the time as barring British-style Hunting Acts which could be used to disarm the populace. See Hardy, *Armed Citizens*, *supra* note 3, at 596-97, n. 218.

200. See E. Dumbauld, *The Bill of Rights and What It Means Today II* (1957).

201. See I. Brant, *James Madison: Father of the Constitution* 264 (1950). Madison's amendments were drawn almost entirely from forty Virginia propositions. *Id.* at 265.

202. 2 B. Schwartz, *supra* note 142, at 674.

203. *Debates and Proceedings in the Convention of the Commonwealth of Massachusetts Held in the Year 1788*, at 79-81 (Boston 1856).

204. *Id.* at 86-87.

205. The journal of the convention shows Adams' motion as losing on a voice vote. *Id.* at 87. The record of the debated indicates he withdrew his motion. *Id.* at 266. The former version is not only more authoritative, but more logical; the motion came at the very end of the convention, when Adams had nothing to lose by pushing the matter to a vote. Moreover, the report of the debates bore a caveat: "The printers who took the minutes of the proceeding Debates, are conscious that there are some inaccuracies, and many omissions made in them. It could not be otherwise, as they were inexperienced in the business, and had not a very eligible situation to hear in the Convention." *Id.* at "Note to the First Edition of the Debates" (unpaginated).

206. Daniel Webster later recollected that Adams' statement that this position on the Constitution was changed by the resolution of a large meeting of Boston's "mechanics," Adams' primary constituency. P. Lewis, *The Grand Incendiary* 359-60 (1973).

207. See *supra* note 173 and accompanying text.

208. New Hampshire gave the Constitution its ninth ratification and thus made it binding upon the states already signatories. See *The Federal Convention and the Formation of the Union of the American States* 375 (W. Solberg ed. 1958).

209. 1 B. Schwartz, *supra* note 142, at 758.

210. A fragment of one speech is all that survives of the record of its debates. *Id.*

211. *Id.*

212. *Id.* at 761.

213. There was also an unsuccessful committee report, and a minority report, from Maryland: neither, however, proposed either a militia or a right to arms clause. *Id.* at 729-35.

214. Jefferson, then an ambassador to France, had suggested that it would be best if the Constitution were ratified by the requisite nine States, and the remainder then held out for a bill of rights. See D. Malone, *Jefferson and the Rights of Man* 168-169, 171 (1951).

215. See generally *supra* notes 141-147, 152 and accompanying text.

216. A modern historian classifies Henry as "firmly attached to the world of the gentry." Issuance, *Preachers and Patriots: Popular Culture and the Revolution in Virginia*, reprinted in *The American Revolution* 128, 153 (A. Young ed. 1876). Jefferson, who knew him, would have differed. "Whenever the courts were closed for the winter session, he would make up a party of poor hunters of his neighborhood, would go off with them in the piny woods of Fluvanna, and pass weeks in hunting deer . . . wearing the same shirt the whole time, and covering all the dirt of his dress with a hunting shirt." M. Tyler, *Patrick Henry* 29-30 (reprint 1980) (1898). Richard Henry Lee's background would mark him as a member of the innermost circles of planter aristocracy. Yet this can hardly explain his great objection to the proposed constitution that the lower and middle classes of people would have no share [in taxation decision]", nor his contemplated move to New England: "The hasty, unpreserving, aristocratic genius of the south suits not my disposition, and is inconsistent with my ideas of what must constitute social happiness." See *Letters from the Federal Farmer*, *supra* note 101, at 20; E. Morgan, *The Challenge of the American Revolution* 119 (1976).

217. D. Robertson, *Debates and Other Proceedings of the Convention of Virginia* 270-271 (2d ed. Richmond 1805).

218. *Id.* at 274.

219. *Id.* at 275.

220. *Letters from the Federal Farmer to the Republican*, *supra* note 101, at 124.

221. *Id.* at 21.

222. D. Robertson, *supra* note 217, at 270.

223. *Id.* at 274-275.

224. *Letters from the Federal Farmer to the Republican*, *supra* note 101, at 142.

225. *Id.* at 22.

226. See C. Bowen, *Miracle at Philadelphia* 304 (1986).

227. 2 B. Schwartz, *supra* note 142, at 765.

228. Madison wrote that he could hit a small target from 100 yards, but that he was far from the best marksman. James Madison: *A Biography in His Own Words* 38 (M. Peterson ed. 1974).

229. *The Federalist* No. 46, at 310-311 (J. Madison) (Modern Library ed. 1974).

230. R. Ketcham, *James Madison: A Biography* 640 (1970).

231. See *supra* note 204 and accompanying text.

232. 1 B. Schwartz, *supra* note 142, at 842.

233. See *id.* at 912, 968. Yet of the two, only New York ratified. North Carolina is best described as declining to ratify, since that State's convention simply refused, pending a bill of rights, either to ratify or to repudiate the proposed Constitution. *Id.* at 966.

234. Madison had argued against a bill of rights in his contributions to *The Federalist Papers*. See *The Federalist Papers*, *supra* note 229, at 238. At the Virginia convention, he argued that "A bill of rights would be a poor protection for liberty." 1 B. Schwartz, *supra* note 142, at 764. Even after introducing his bill of rights, he informed Jefferson, "My own opinion has always been in favor of a bill of rights . . . At the same time I have never thought the omission of a material defect, nor been anxious to supply it even by subsequent amendment for any other reason than that it is anxiously desired by others." *11 Papers of James Madison* 297 (R. Rutland & C. Hobson eds. 1977). Yet this and later tendencies to downplay the Bill of Rights as an improvement on the Constitution may have been an attempt to avoid accusations of inconsistency. No one could complain if Madison, who had expressed his personal beliefs that a bill of rights was unnecessary, was later to advocate one simply because his constituents demanded it.

235. *12 Papers of James Madison*, *supra* note 234 at 58.

236. *Id.* at 272.

237. This in fact happened. For example, a Massachusetts newspaper described Madison's draft as incorporating Adams' proposals, including that for a right to arms. The Massachusetts articles were reprinted in the *Philadelphia Independent Gazetteer*, Aug. 20, 1789, at 2, col. 2. See generally Hardy, *Origins and Development of the Second Amendment*, *supra* note 3, at 250; Halbrook, *Right to Bear Arms*, *supra* note 3, at 309-10. A Pennsylvania newspaper explained that in Madison's draft "the people are confirmed by the next article in the right to keep and bear their private arms." *The Federal Gazette & Philadelphia Evening Post*, June 18, 1789, at 2, col. 1. The article was written by Tenche Coxe, a friend of Madison. Coxe mailed a copy to Madison on the day of publication; Madison took time from the debates to reply with appreciation and note that it had already appeared "in the *Gazettes* here." Hardy, *Armed Citizens*, *supra* note 3, at 610.

238. See *supra* note 164.

239. See *supra* note 173.

240. The absence was not inadvertent; the Senate rejected, by voice vote, a proposal to add "for the common defense" to the right to arms clause. *Journal of the First Session of the Senate of the United States of America* 77 (Washington 1820) ("On motion to amend article the fifth, by inserting these words, 'for the common defense,' next to the words 'bear arms': It passed in the negative.").

241. Madison's original proposals would have included the following: "The trial of all crimes (except in

cases of impeachments, and cases arising in the land or naval forces, or the militia when on actual service, in time of war or public danger) shall be by an impartial jury of freeholders of the vicinage, with the requisite unanimity... and in all crimes punishable with loss of life or member, presentment or indictment by a grand jury shall be an essential preliminary..." 1 Journal of Congress 452 (J. Gales ed. 1789). This proposal was ultimately divided into the fifth and sixth amendments, the first of which applies his armed forces and active militia exception to the requirement of indictment by grand jury.

242. Journal of the First Session of the Senate of the United States of America 71 (Washington 1820).

243. See, e.g., 1 B. Schwartz, *supra* note 142, at 455-56; J. McMaster & F. Stone, *supra* note 101, at 409 (James Wilson, in the Pennsylvania convention: "It may be frequently necessary to keep up standing armies in time of peace. The present Congress have... [gone] farther and raise[d] an army without communicating to the public the purpose... When the commotions existed in Massachusetts, they gave order for enlisting an additional body of two thousand men... [O]ught Congress to be deprived of power of prepare for the defense and safety of our county?").

244. Virginia's Bill of Rights, for instance, merely provided that standing armies in time of peace "should be avoided." Maryland's provided that standing armies (presumably in war as in peace) out not to be keep up "without the consent of the legislature." Massachusetts provided that standing armies in time of peace ought not to be kept up without the consent of the legislature. See 3 F. Thorpe, *supra* note 143, at 3814, 1688, 1892. The Pennsylvania minority desired to ban all standing armies in peacetime, while Sam Adams desired to bar them only when not "necessary." See J. McMaster & F. Stone, *supra* note 101, at 462.

245. A proposal to add to what became the second amendment a recognition that such armies are "dangerous to liberty," should be avoided as far as possible, and would be authorized in peace only upon a two-thirds vote of each house of Congress was lost six to nine. Four days later, an amendment stating more concisely that a two-thirds majority was necessary was lost on a voice vote. Journal of First Session of the Senate of the United States 71.75 (Washington 1820).

246. 1 Journal of Congress 451-53 (J. Gales ed. 1789). The remaining amendments were dealt with as follows: a provision forbidding state interference with rights of conscience or press, or to jury trial, would be inserted in article I, paragraph 10, following the existing restrictions on state powers; a right to civil jury trial and limitation on federal appeal would be inserted in article III, paragraph 2, following the existing definition of federal judicial power; a detailed guarantee of criminal jury trail and grand jury indictment would be substituted for the existing jury guarantees in that same section; and a new article VII would be added, expressly codifying the separation of powers.

247. *Id.* at 451.

248. U.S. Const. amend. I.

249. Journal of Congress, *supra* note 256, at 451.

250. Journal of the First Session of the Senate of the United States 63, 64 (Washington 1820) (citing bill as passed by the House).

251. Lost, for example, were Madison's proposed preamble to the Constitution, stating that "Government is instituted and ought to be exercised for the good of the people; which consists in the enjoyment of life and liberty..."; his explanation that freedom of the press is "one of the great bulwarks of liberty"; and the explanation that the express guarantees ought not be read to rule out other rights retained by the people, since they were inserted "either as actual limitations of such powers, or as inserted merely for greater caution." 1 Annals of Congress 451 (J. Gales ed. 1789). The House was apparently more interested in stating concisely the limitations upon federal power than in explaining why the limitations were created.

252. Journal of the First Session of the Senate of the United States 77 (Washington 1820) ("On motion to

amend article the fifth, by inserting these words: 'for the common defense' next to the words 'to bear arms'; it passed in the negative.").

253. *Id.* at 77. In the House, Elbridge Gerry had unsuccessfully argued that the "best security" language was inadequate since it admitted that other measures, e.g., a standing army, would be acceptable as secondary securities. 1 *Annals of Congress* 751 (J. Gales ed. 1789).

254. For example, St. George Tucker, a Revolutionary War veteran who went on to an extraordinary legal and scholarly career, began his discussion of the second amendment with the note that "The right of self defense is the first law of nature," went on to discuss the dangers of standing armies, and closed with a note that the British government had disarmed its citizens under the Hunting Acts. See *Blackstone's Commentaries, with Notes of Reference to the Constitution and Laws* 300 (St. George Tucker ed. 1803). William Rawle, a noted legal scholar who sat in a State convention which ratified the Bill of Rights, drew a still clearer distinction between the two clauses:

In the Second Article, it is declared that a well regulated militia is necessary to the security of a free state: a proposition from which few will dissent. Although in actual war, the services of regular troops are confessedly more valuable, yet... the militia form the palladium of the country... The corollary from the first position is, that the right of the people to keep and bear arms shall not be infringed. The prohibition is general. No clause in the Constitution could by any rule of construction be conceived to give congress a right to disarm the people.

W. Rale, *A View of the Constitution* 125 (2d ed. 1829). Similar understandings were later voiced by Storey and Colley. See 3 J. Story, *Commentaries on the Constitution of the United States* 746-47 (1833); T. Cooley, *General Principles of Constitutional Law* 298-99 (3d ed. 1898). See generally Hardy, *Armed Citizens*, *supra* note 3, at 611-15.

255. See *supra* note 2.

256. Acceptance of the collective rights view, moreover, edges us into morass after morass. First, who may raise the issue? The only political "collective rights" with which the author is familiar are those of various Indian tribes, which as sovereigns negotiated treaties with the national government. It has been held that individual members of the tribes have standing to raise these tribal rights as a defense to a criminal action. See, e.g., *United States v. Dion*, 106 U.S. 2216, 2220 N. 6 (1986); *United States v. Winans*, 198 U.S. 371, 381 (1905), Second, what does the second amendment bar? Does it repeal by implication the federal power to call forth the militia? Might an individual or state object to any nationalization of military reserve units? Does it restrict the federal power to maintain an army, or require, as a prerequisite to such maintenance, a finding that militia would not better serve the need? If it does none of these things, then why did so many Americans, and the first Congress spend so much time advocating it?

257. The militia recognition, examined carefully, thus stands out from the remainder of the Bill of Rights; it is the only such "recognition," the only provision lacking Madison's strongly prohibitory language, the only provision calling for federal action, the only provision phrased in such ambiguous tones. The author frankly suspects that Madison inserted it primarily to appease George Mason and perhaps Richard Henry Lee. Mason's belief in the efficacy of such recognition has been discussed above, as has his tendency to phrase provisions in terms of what "ought" to be done by a free government, rather than what "shall" not be done. Madison was quite familiar with Mason's outlook, having sat with him on the committee which drafted Virginia's proposals for the federal Bill of Rights. Mason was then a man with considerable power among the dominant gentry in Virginia; Madison was more than a bit suspect among that group for his federalist beliefs \_ in fact, he had been denied a seat in the first Senate by vote of the legislature. Patrick Henry, with characteristic excess, informed the legislature that placing Madison in the Senate would "terminate in producing rivulets of blood through out the land." R. Ketchum, *James Madison: An Autobiography* 275 (1970). Fortunately, his election to the House produced not even a minor insurrection.

To entirely omit a clause so close to Mason's heart as this one would hardly have been very wise. Conversely, if the objection was to please Mason, and the issue not one important to Madison himself, there would be no reason to spend time working out details or firming up language with commands. Mason could hardly complain about a slight paraphrase of his own work, and its very vagueness would avoid conflict which might pull down the guarantees of individual rights for which Madison was so deeply concerned.

258. See *supra* note 237.

259. During a seminar sponsored by the American Academy of Political and Social Sciences, Professor Lawrence Cress maintained that the second amendment was purely militia-related and was "the last act of the Renaissance." The author replied that this was true only of its militia component, sponsored by the conservative framers, and not at all of its right to arms component, which was endorsed by radicals. The second amendment was not the last act of the Renaissance, but a bridge between the Renaissance concept of a republic and the Jeffersonian/Jacksonian concept of democracy.

260. We may be forgiven the suspicion that many advocates of the "collective rights" approach in fact desire the militia statement to subsume the right to bear arms recognition only because they recognize the militia statement is unenforceable and, ultimately, all but meaningless. It is doubtful that most collective right proponents would react favorably to case law finding an enforceable duty to require all citizens to purchase and stockpile M-14's, M-16's or any other standard military firearm, to force each to participate in basic training, and to organize every adult into a reserve military unit. The supposed endorsement of the militia component thus becomes simply an expedient way of negating every provision of the second amendment, and nullifying both the objectives of the conservatives and those of the radicals.