The Hidden History of the Second Amendment

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ABSTRACT

Professor Bogus argues that there is strong reason to believe that, in significant part, James Madison drafted the Second Amendment to assure his constituents in Virginia, and the South generally, that Congress could not use its newly-acquired powers to indirectly undermine the slave system by disarming the militia, on which the South relied for slave control. His argument is based on a multiplicity of the historical evidence, including debates between James Madison and George Mason and Patrick Henry at the Constitutional Ratifying Convention in Richmond, Virginia in June 1788; the record from the First Congress; and the antecedent of the American right to bear arms provision in the English Declaration of Rights of 1688.

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> For the great enemy of the truth is very often not the lie — deliberate, contrived, and dishonest — but the myth — persistent, persuasive, and unrealistic. Too often we hold fast to the cliches of our forebears. We subject all facts to a prefabricated set of interpretations. We enjoy the comfort of opinion without the discomfort of thought.
>
> - John F. Kennedy[1]

INTRODUCTION

The Second Amendment is unique. No other constitutional provision has lived so small a life in the law while looming so large in the realms of policy, politics, and popular culture. Among the Bill of Rights, only the Third Amendment, which prohibits the quartering of troops in homes, has received less judicial attention.[2] Annotations of all the cases that have dealt with the Second Amendment take up a mere ten pages in the United States Code Annotated, compared, for example, to 1452 pages for First Amendment cases.[3] In the history of the republic, the United States Supreme Court has handed down only three opinions dealing directly with the Second Amendment,[4] the last in 1939,[5] and no federal statute or administrative regulation has ever been invalidated on Second Amendment grounds.

Based on this lack of activity, one might expect the Second Amendment to be something of a constitutional relic, obscure

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[1] Commencement Address at Yale University, PUB. PAPERS 470, 471 (June 11, 1962).

[2] *See* Douglas O. Linder, *Trends in Constitution-Based Litigation in the Federal Courts*, 63 U. MO. AT KAN. CITY L. REV. 41, 69 (1994) (stating that third amendment cases were least litigated). *Compare* U.S. CONST. amend. II *with* U.S. CONST. amend. III.

[3] *Compare* U.S. CONST. amend. I *with* U.S. CONST. amend. II (totaling pages in bound volumes and 1996 Supplementary Pamphlets).

[4] *See* United States v. Cruikshank, 92 U.S. 542 (1976); United States v. Miller, 307 U.S. 174 (1939); Presser v. Illinois, 116 U.S. 252 (1886). Gun control supporters like to call attention to *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980) (noting that Second Amendment does not guarantee right to either keep or bear firearms if there is no relationship to militia), while gun control opponents often cite *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (suggesting that term "the people" as used in First, Second, and Fourth Amendments may all refer to "persons who are part of a national community"). However, neither of these cases presented a Second Amendment issue, and the court's brief and passing comments about the Second Amendment in both of these cases are clearly dicta.

[5] *See Miller*, 307 U.S. 174.

and forgotten. That is hardly the case. The right to bear arms is invoked constantly on the political stump, the op-ed page, the radio talk show, and the floors of Congress.[6] Politicians of all persuasions consider it essential to pledge fealty to the right to bear arms, often in extravagant terms.[7] According to Senator Orrin Hatch, who currently chairs the Senate Judiciary Committee, the right to bear arms is the "right most valued by free men."[8] While most Americans may not consider the right to bear arms more precious than freedom of speech or religion, few constitutional provisions are more familiar to the public-at-large. One national poll showed that more Americans know that the Constitution contains a right to bear arms than know that it guarantees a right to remain silent if accused of crimes.[9]

There can be little doubt that the Second Amendment has a powerful impact on public policy. The United States is the only industrialized nation in the world in which tens of thousands of citizens are killed or wounded by guns each year.[10]

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[6] For a sampling of expressions of devotion to the right to keep and bear arms by leading American politicians, see, for example, Ben Bradlee Jr., *Dukakis Aides Foresee a Debate of One-Liners*, BOSTON GLOBE, Sept. 24, 1988, at 1 (regarding Michael S. Dukakis); John Jacobs, *Foley After the Fact*, SACRAMENTO BEE, Mar. 21, 1996, at B6 (regarding Thomas S. Foley); George Larner, Jr., *Gingrich Promised NRA No Gun Control Legislation*, WASH. POST, Aug. 1, 1995, at A1 (regarding Newt Gingrich); William March, *Where They Stand — Campaign '96: Taking Shotgun Approach Works on Gun Issue*, TAMPA TRIB., June 18, 1996, at 1 (regarding Bill Clinton and Robert Dole); John J. Pitney, Jr., *Powell and Clinton: Two Sides of a Coin; Politics: On Quotas, School Prayer, Gun Control and Values, There's Not a Dime's Worth of Difference Between the Two*, L.A. TIMES, Sept. 21, 1995, at B9 (regarding Colin Powell); *The Republicans in New Orleans; Transcript of Bush Speech Accepting Presidential Nomination*, N.Y. TIMES, Aug. 19, 1988, at A14 (regarding George H. Bush).

[7] It is an American irony that presidential candidates feel compelled to pledge fealty to the right to bear arms while running for office, and then reaffirm that pledge after surviving assassination attempts. *See, e.g.*, Tom Morganthau & Bob Cohn, *A Boost for Brady*, NEWSWEEK, April 8, 1991, at 30 (quoting Reagan as saying, "I'm a member of the NRA, and my position on the right to bear arms is well known."). *See also The President; Still Against Gun Control?*, THE ECONOMIST, Sept. 13, 1975, at 68 (reporting that after "Squeaky" Fromme attempted to shoot him with .45 caliber pistol, President Gerald Ford remained "reluctant to offend the right wing of his own Republican party, which considers the right to bear arms fundamental to the Constitution").

[8] SUBCOMM. ON THE CONSTITUTION OF SENATE COMM. ON THE JUDICIARY, 97TH CONG., 2D SESS., THE RIGHT TO KEEP AND BEAR ARMS viii (Comm. Print 1982).

[9] *See* Bob Baker, *The Bill of Rights: America's Basic Freedoms After 200 Years*, L.A. TIMES, December 14, 1991, at 28 (presenting poll showing that more Americans know Constitution contains right to bear arms than know it guarantees right to remain silent).

[10] *See* Jeff Brazil & Steve Berry, *Australia Takes Aim at Abundance of Assault Weapons with Program*, SALT LAKE TRIB., August 31, 1997, at A14 (illustrating how America greatly exceeds

Consequently, the United States is far and away the leader in criminal homicide in the industrialized world.[11] Efforts to reduce handgun violence through legislation is by no means a hopeless cause. Research demonstrates that stringent handgun regulation can dramatically reduce murder, robbery, and suicide;[12] yet except for modest legislation, such as the Brady Act,[13] the United States neither has nor is seriously considering an effective system for regulating handguns in the United States.[14] The Second Amendment is part of the reason that the United States tolerates a level of carnage and terror unparalleled

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other nations in gun fatalities and deaths with statistical comparisons such as America having more gun deaths in one week than Western Europe has in one year). Handguns are responsible for most of the carnage. Handguns are portable, easy to conceal, and, for some inexplicable reason, psychologically easier to use against human beings than rifles or shotguns. In 1994, 12,765 people were murdered, about 64,000 were wounded, and 250,000 were robbed with handguns in the United States. *See* BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1996, at 204-05 (116th ed. 1996); ERIK LARSON, LETHAL PASSAGE: HOW THE TRAVELS OF A SINGLE HANDGUN EXPOSE THE ROOTS OF AMERICA'S GUN CRISIS 18 (1994) (noting that although there is no data on number of non-fatal injuries, in part because gun lobby has opposed efforts to gather it, it is estimated that number of nonfatal gunshot shootings is about five times number of fatalities); Carl T. Bogus, *Pistols, Politics and Products Liability*, 59 U. CIN. L. REV. 1103, 1116 (1991) [hereinafter Bogus, *Pistols, Politics and Products Liability*] (computing number of robberies and aggravated assaults from incident rates and national population). The second bloodiest Western country, Canada, had only 170 handgun homicides in 1995. KWING HUNG, FIREARM STATISTICS TABLE 9 (Dept. of Justice Canada, Aug. 1996). Canadians are alarmed at their level of handgun violence and are taking steps to strengthen their county's already rigorous gun control laws. Canada is not alone. Alarmed by a total of 75 gun-related deaths that occurred in all of England, Scotland, and Wales in 1994, the British Government proposed new legislation banning all handguns, with the exception that handguns of .22 caliber or less may be kept under lock and key at licensed gun clubs. The then-opposition Labor Party proposed, instead, an outright ban on all handguns. *See* Sarah Lyall, *British Government Proposes Ban on Possession of Most Handguns*, N.Y. TIMES, Oct. 17, 1996, at A1.

[11] *See* FRANKLIN E. ZIMRING & GORDON HAWKINS, CRIME IS NOT THE PROBLEM 55 (1997). In 1990, the homicide rate in the United States was 9.4 per 100,000 citizens. No other G7 nation had a homicide rate exceeding 2.6. *See id.* Among the large industrial countries, the United States is the only nation in which a majority of homicides are committed with guns. *See id.* at 109. Indeed, the rate that handgun homicides occur in the United States is 175 that of England and Wales (per million population). *See id.* at 110.

[12] *See* Carl T. Bogus, *The Strong Case for Gun Control*, AM. PROSPECT, Summer 1992, at 19 [hereinafter Bogus, *Strong Case for Gun Control*]; Bogus, *Pistols, Politics and Products Liability*, *supra* note 10, at 1117-23.

[13] Brady Handgun Violence Prevention Act, 18 U.S.C.A. § 921 (West 1997).

[14] *See* Bogus, *Strong Case for Gun Control*, *supra* note 12, at 26-28 (discussing political barriers to effective gun control in United States); LARSON, *supra* note 10, at 208-13 (criticizing lack of effective firearm regulation).

in any other nation at peace.[15] The public more or less assumes that the Second Amendment prohibits the kind of gun control regulations that effectively protect public safety in other countries.[16]

Exactly what the parameters of the right to bear arms are and why the Founders considered it sufficiently important to include it in the Bill of Rights may seem a mystery shrouded by mists of time. The words of the Second Amendment are familiar to many Americans: "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."[17] Americans have an image of the militia — minutemen rushing with muskets onto the greens at Lexington and Concord to fire the "shot heard around the world."[18] The fact that colonists were armed helped make the Revolution possible. Indeed, it was a British plot to confiscate American militia weapons that propelled Paul Revere on his famous ride.[19] These images blend with other visions of colonial America. Many believe guns and survival went hand-in-hand in early America — that settlers depended upon firearms to defend themselves from Indians, thieves, and wild animals, as well as to hunt for food.[20] Some assume that the Founders incorporated the right to bear arms in the Bill of Rights because an armed citizenry had been important to security in colonial America and essential to throwing off the yoke of British oppression.[21]

Much of this is myth. It is not myth in the sense that the images are wholly divorced from historical truth. Rather, myths can be powerful and sinister because they blend fact and fiction.

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[15] *See* Bogus, *Strong Case for Gun Control*, *supra* note 12, at 26-28.

[16] *See id.*

[17] U.S. CONST. amend. II.

[18] *See* KENNETH C. DAVIS, DON'T KNOW MUCH ABOUT HISTORY: EVERYTHING YOU NEED TO KNOW ABOUT AMERICAN HISTORY BUT NEVER LEARNED 50-51 (1995) (presenting popular version of events at Lexington and Concord).

[19] *See* ROBERT LECKIE, GEORGE WASHINGTON'S WAR: THE SAGA OF THE AMERICAN REVOLUTION 105 (1993).

[20] *See generally* RICHARD SLOTKIN, REGENERATION THROUGH VIOLENCE: THE MYTHOLOGY OF THE AMERICAN FRONTIER, 1600-1860 (1993).

[21] *See* STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 58 (1984) [hereinafter HALBROOK, THAT EVERY MAN BE ARMED] (arguing that Revolution succeeded only because colonists owned and used firearms).

Myths do not so much misrepresent as mislead, not so much concoct as distort. That is the case with the Second Amendment. When the Bill of Rights was adopted, some believed that the right to bear arms was important to defend and feed citizens and their families or to resist foreign aggression and domestic tyranny.[22] But, as this Article will show, that was not the principal reason that the Founders created the Second Amendment.

The story of the Second Amendment is both more complex and more interesting than previously understood. It is a tale of political struggle, strategy, and intrigue. The Second Amendment's history has been hidden because neither James Madison, who was the principal author of the Second Amendment, nor those he was attempting to outmaneuver politically, laid their motives on the table.

Before describing this hidden history, I wish to briefly explain why it is particularly important for scholars and courts to understand this hidden history and why this history will encounter great resistance. While in the past scholars have not ignored the Second Amendment quite as much as the courts, even within academic circles it was a reasonably dormant topic. Then about a decade ago, things changed; suddenly there was an explosion of academic interest in the Second Amendment. The Second Amendment became the subject of a constant stream of books,[23] articles,[24] conferences,[25] symposia,[26] and even entire

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[22] *See* FRANKLIN E. ZIMRING & GORDON HAWKINS, THE CITIZENS GUIDE TO GUN CONTROL 143-44 (1987) (noting that while there was considerable body of thought in American colonies that individuals had inherent right to own weapons to hunt and defend themselves in wilderness, "the disarming of individuals was apparently not one of the grievances leading to the American Revolution").

[23] *See generally* JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (1994); HALBROOK, THAT EVERY MAN BE ARMED, *supra* note 21; *see also* DENNIS A. HENIGAN ET AL., GUNS AND THE CONSTITUTION: THE MYTH OF SECOND AMENDMENT PROTECTION FOR FIREARMS IN AMERICA (1995) (differing from other works cited herein because it is not from academic press and does not promote insurrectionist theory).

[24] *See infra* note 34 and accompanying text.

[25] *See* Eric Healy, *Gun Control Debate Takes Diverse Aim at 2d Amendment*, ARIZ. DAILY STAR, Nov. 10, 1991 (reporting on Second Amendment symposium held at University of Arizona College of Law on Nov. 9, 1991); Scott Heller, *The Right to Bear Arms: Some Prominent Legal Scholars Are Taking a New Look at the Second Amendment*, CHRON. OF HIGHER EDUC., July 21, 1995, at A8 (reporting that at least two Second Amendment conferences were held

organizations.[27] This is not the result of mere chance; it is part of a concerted campaign to persuade the courts to reconsider the Second Amendment, to reject what has long been a judicial consensus, and to adopt a different interpretation — one that would give the Amendment judicial as well as political vitality and would erect constitutional barriers to gun control legislation.

The Second Amendment has been the subject of so little judicial activity because courts have unanimously adopted what is generally referred to as the "collective rights" theory.[28] According to this view, the Second Amendment grants people a right to keep and bear arms only within the state-regulated militia. In contrast, those who advocate an "individual rights" theory believe that the Second Amendment grants individuals a personal right to keep and bear arms. This model has long been advocated by the firearm industry, shooting organizations, and political libertarians.[29] However, state[30] and federal courts[31] consistently ad-

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during annual meetings of Association of American Law Schools in recent years).

[26] Law review symposia on the Second Amendment have been published in 1998-1 BYU L. REV. (forthcoming 1998); *A Second Amendment Symposium Issue*, 62 TENN. L. REV. 443 (1995); *The Bill of Rights Yesterday and Today: A Bicentennial Celebration Symposium Issue*, 26 VAL. U. L. REV. 1 (1991); *Symposium: Gun Control and the Second Amendment*, 15 U. DAYTON L. REV. 1 (1989); *Second Amendment Symposium: Rights in Conflict in the 1980's*, 10 N. KY. L. REV. 1 (1982). Another symposium dealing in large part with the Second Amendment is published in Symposium, *Gun Control*, 49 L. & CONTEMP. PROBS. 1 (1986).

[27] For example, two such organizations are Academics for the Second Amendment in St. Paul, Minnesota and Second Amendment Foundation in Bellevue, Washington.

[28] *See* Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5, 40-57 (reviewing case law).

[29] *See* ROBERT J. SPITZER, THE POLITICS OF GUN CONTROL 44-45, 57 n.67 (1995); JOSH SUGARMANN, NATIONAL RIFLE ASSOCIATION: MONEY, FIREPOWER, FEAR 45-64, 131-34 (1992).

[30] *See, e.g.*, Burton v. Sills, 248 A.2d 521 (N.J. 1968), *appeal dismissed*, 394 U.S. 812 (1969) (holding that Framers of Second Amendment were attempting to maintain states' rights and organized militias, not to protect individual rights).

[31] In *United States v. Miller*, the Supreme Gourt reviewed Article I, Section 8 of the Constitution, which grants Congress the lion's share of responsibility, including the power to organize, arm, and discipline the militia, and wrote: "With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view." United States v. Miller, 307 U.S. 174, 178 (1939). *Miller* was consistent with the two prior Supreme Court cases dealing with the Second Amendment: *Pressler v. Illinois*, 116 U.S. 252 (1886), and *United States v. Cruikshank*, 92 U.S. 542 (1876). While these three cases are not without some ambiguity, the lower courts have unanimously interpreted them and the language of the Second Amendment itself to mean that the right to keep and bear

hered to the collective rights interpretation, and it became clear that further head-on assaults would likely be counterproductive. The gun lobby apparently decided to suspend efforts to have the courts reconsider the Second Amendment until a body of secondary authority could be developed to support its position.

For a period of time, legal challenges to gun control legislation studiously avoided the Second Amendment. The challenge to the Brady Act, for example, was made exclusively on Tenth Amendment grounds.[32] Meanwhile, the gun lobby pursued an aggressive campaign to build a body of favorable literature. An arm of the National Rifle Association ("NRA") dispensed sizable grants to encourage writing that favored the individual rights model, and even stimulated student articles with a Second Amendment essay contest.[33] Gun rights advocates then decided that the project had borne enough fruit to return to the courts. In an amicus brief asking the Court to grant certiorari and reconsider the right to bear arms in its 1996-97 term, a group calling itself Academics for the Second Amendment told the Court that thirty-seven of forty-one law review articles addressing the topic since 1980 endorse the individual rights position.[34]

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arms is limited to doing so within the state-regulated militia. For example, in a case concerning whether a city could prohibit the possession of handguns within its borders, the Seventh Circuit held: "Construing [the language of the Second Amendment] according to its plain meaning, it seems clear that the right to bear arms is inextricably connected to the preservation of a militia. This is precisely the manner in which the Supreme Court interpreted the second amendment in *United States v. Miller*." Quilici v. Morton Grove, 695 F.2d 261, 270 (7th Cir. 1982).

[32] *See generally* Printz v. United States, 117 S. Ct. 2365, 2385-86 (1997) (Thomas, J., concurring).

[33] *See* Jim Schneider, *What You Can Do (Sponsorship of Essay Contests Among Gun Shop Operators)*, SHOOTING INDUSTRY, Apr. 1, 1997, at 14 (discussing NRA sponsored student essay contests about Second Amendment). I refer to the Firearms Civil Rights Legal Defense Fund ("FCRLDF"). *See* Jan Hoffman, *Fund Linked to N.R.A. Gave $20,000 for Goetz's Defense*, N.Y. TIMES, Apr. 16, 1996 (establishing FCRLDF connection to NRA).

[34] *See* Brief for Amicus Curiae Academics for the Second Amendment, U.S. v. Lopez, U.S. (No. 93-1260) (available on LEXIS in GENFED/BRIEFS file) [hereinafter "A2A Brief"]. Similar lists are set forth in Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139, 1143-44 nn.12-13 (1996); and David B. Kopel & Christopher C. Little, *Communitarians, Neorepublicans, and Guns: Assessing the Case for Firearms Prohibition*, 56 MD. L. REV. 438, 523 n.445 (1997).

However, the following articles, all of which support the collective rights model, are omitted from the list compiled by Academics for the Second Amendment: Michael A. Bellesiles, *The Origins of Gun Culture in the United States, 1760-1865*, 83 J. AM. HISTORY 425 (1996); Carl T. Bogus, *Race, Riots and Guns*, 66 S. CAL. L. REV. 1365 (1993); Lawrence

The bulk of this writing has been produced by a small band of true believers who belong not merely to the individual rights school of thought but a particular wing commonly called "insurrectionist theory."[35] The leader of this band is Stephen P. Halbrook,[36] who, with the support of tens of thousands of dollars in NRA grants,[37] has written no less than two books and thirteen law review articles advocating this particular theory of the Second Amendment.[38] Insurrectionist theory is premised on

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Delbert Cress, *An Armed Community: The Origin and Meaning of the Right to Bear Arms*, 71 J. AM. HISTORY 22 (1984); Peter Buck Feller, *The Second Amendment: A Second Look*, 61 NW. L. REV. 46 (1966); Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57 (1995); Ronald B. Levine & David B. Saxe, *The Second Amendment: The Right to Bear Arms*, 7 HOUS. L. REV. 1 (1969); Ralph P. Rohner, *The Right to Bear Arms: A Phenomenon of Constitutional History*, 16 CATH. U. L. REV. 53 (1966); Roy G. Weaherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 HASTINGS CONST. L.Q. 961 (1975); Frederick Bernays Wiener, *The Militia Clause of the Constitution*, 59 HARV. L. REV. 181 (1940).

[35] Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 VAL. U. L. REV. 107, 110 (1991) [hereinafter Henigan, *Arms, Anarchy and the Second Amendment*].

[36] Halbrook, a lawyer and former assistant professor of philosophy at George Mason University, divides his time between writing, lecturing, and practicing law, where he routinely represents gun manufacturers and gun rights organizations.

[37] In 1991 and 1992, the FCRLDF, an arm of the NRA., gave research grants totaling $38,569.45 to Halbrook. *See* FIREARMS CIVIL RIGHTS LEGAL DEFENSE FUND: ANNUAL REPORT 9 (1991) (listing Halbrook as grant recipient of $16,800 to research right to possess arms based on Fourteenth Amendment); FIREARMS CIVIL RIGHTS LEGAL DEFENSE FUND: ANNUAL REPORT 11 (1992) (listing Halbrook as recipient of two grants: (1) $16,800 to research right to possess arms based on Fourteenth Amendment; and (2) $4969.45 to research Hawaii's state constitutional guarantee to keep and bear arms) (on file with author). FCRLDF no longer releases this information.

[38] *See* STEPHEN P. HALBROOK, A RIGHT TO BEAR ARMS: STATE AND FEDERAL BILLS OF RIGHTS AND CONSTITUTIONAL GUARANTEES (1989); HALBROOK, THAT EVERY MAN BE ARMED *supra* note 21; Stephen P. Halbrook, *Congress Interprets the Second Amendment: Declarations by a Co-Equal Branch of the Individual Right to Keep and Bear Arms*, 62 TENN. L. REV. 597 (1995); Stephen P. Halbrook, *Encroachments of the Crown of Liberty of the Subject: Pre-Revolutionary Origins of the Second Amendment*, 15 U. DAYTON L. REV. 91 (1989); Stephen P. Halbrook, *Firearms, the Fourth Amendment, and Air Carrier Security*, 52 J. AIR L. & COM. 585 (1987); Stephen P. Halbrook & Richard E. Gardiner, *NRA and Law Enforcement Opposition to the Brady Act*, 10 ST. JOHN'S J. LEGAL COMMENT. 13 (1994); Stephen P. Halbrook, *Personal Security, Personal Liberty, and "the Constitutional Right to Bear Arms": Visions of the Framers of the Fourteenth Amendment*, 5 SETON HALL CONST. L.J. 341 (1995); Stephen P. Halbrook, *Rationing Firearm Purchases and the Right to Keep and Bear Arms: Reflections on the Bills of Rights of Virginia, West Virginia, and the United States*, 96 W. VA. L. REV. 1 (1993); Stephen P. Halbrook, *Second-Class Citizenship and the Second Amendment in the District of Columbia*, 5 GEO. MASON U. CIV. RTS. L.J. 601 (1995); Stephen P. Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 GEO. MASON L. REV. 1 (1981); Stephen P. Halbrook, *The Right of the People or the Power of the State: Bearing Arms, Arming Militias, and the Second Amendment*, 26 VAL. U. L. REV. 131 (1991); Stephen P. Halbrook, *The Right to Bear Arms in Texas*, 41 BAYLOR L. REV.

the idea that the ultimate purpose of an armed citizenry is to be prepared to fight the government itself. Halbrook believes that "the Second Amendment's framers anticipated a force of the whole armed populace, not a select group, to counter inroads on freedom by government,"[39] and that they intended "to guarantee the right of the people to have 'their private arms' to prevent tyranny and to overpower an abusive standing army or select militia."[40] Such writings conjure up a romantic image of the colonial militia: rugged individualists who answer to no one but their own conscience and stand ready to protect their homes, families, and communities from all manner of threats, both foreign and domestic. Because they serve no master other than their own sense of patriotism, they cannot be manipulated or commandeered as might a government controlled force. Because they are armed, they have the means, as well as the will, to resist tyranny.

Despite a surface allure, Halbrook paints a dismal picture. It is animated by a profound mistrust not only for government, but for constitutional democracy. For Halbrook, all of the constitutional mechanisms ensuring that government power will not be misused — the division of power between the federal and state governments, the separation of powers among the three branches of government, a bicameral legislature, an independent judiciary, freedom of speech and the press, and a civilian Commander in Chief — are inadequate.[41] He is afraid the constitutional structure will fail. When Halbrook speaks of an armed citizenry as necessary to "counter inroads on freedom by government"[42] and "prevent tyranny and to overpower an abusive standing army,"[43] he is arguing that the constitutionally elected

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629 (1989); Stephen P. 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); Stephen P. Halbrook, *To Keep and Bear Their Private Arms: The Adoption of the Second Amendment, 1787-1791*, 31 N. KY. L. REV. 13 (1982); Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to "Bear Arms,"* 49 LAW & CONTEMP. PROBS. 151 (1986).

[39] HALBROOK, THAT EVERY MAN BE ARMED, *supra* note 21, at 195 (1984).

[40] *Id.* at 77.

[41] *See* HALBROOK, THAT EVERY MAN BE ARMED, *supra* note 21, at 193-96 (arguing that armed citizens are able to protect themselves against government that infringes upon their rights).

[42] *Id.* at 195.

[43] *Id.* at 77.

government will itself become the enemy. In short, Halbrook believes both that the ultimate guarantee of freedom must come from the barrel of a gun and that the Founders believed this as well.

Insurrectionist theory may be paranoic, anarchistic, and antidemocratic, but it is a theory that has won some important converts. While, as a general matter, mainstream scholars have only a cold disdain for the work of insurrectionist theorists,[44] at least three prominent constitutional scholars — Sanford Levinson of the University of Texas,[45] Akhil Reed Amar of Yale,[46] and William Van Alstyne of Duke[47] — have recently joined the insurrectionist school, giving it a respectability it did not previously enjoy. "This was a frivolous, crazy position, and it no longer is anymore," Cass R. Sunstein remarked.[48]

The campaign to have the Supreme Court reconsider the Second Amendment may be winning converts within the Court

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[44] *See* Garry Wills, *To Keep and Bear Arms*, N.Y. REV. BOOKS, Sept. 21, 1995, at 62 [hereinafter Wills, *To Keep and Bear Arms*] (critiquing work of five most prolific insurrectionists — Robert J. Cottrol, Stephen P. Halbrook, Don B. Kates, Joyce Lee Malcom, and Robert Shalhope — and concluding that "it is the quality of their arguments that makes them hard to take seriously").

[45] *See* Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 656, 648 (1989) (arguing that "it seems foolhardy to assume that the armed state will necessarily be benevolent," and appearing to endorse view "that the ultimate 'checking value' in a republican polity is the ability of an armed populace . . . to resist governmental tyranny").

[46] *See* Akhil Reed Amar, *The Bill of Rights and Our Posterity*, 42 CLEV. ST. L. REV. 573, 579-80 (1994) (arguing that drafters of Second Amendment intended that "[j]ust as the Minutemen farmers of Lexington and Concord had stood up to paid soldiers of the English crown at the beginning of the Revolutionary War, so local militias under the Constitution would prevent the new federal government from attempting any similar scheme of military intimidation"); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1162-73 (1991) [hereinafter Amar, *Bill of Rights as a Constitution*] (arguing that "[t]he ultimate right to keep and bear arms belongs to 'the people,' not the 'states'"); Akhil Reed Amar, *The Fifteenth Amendment and "Political Rights,"* 17 CARDOZO L. REV. 2225, 2225-26 (1996) (arguing that "[i]n Republican theory, those who vote traditionally bear arms, and those who bear arms vote"); *cf.* Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1205-12 (1992) (recognizing that in eighteenth century America, "[t]he word 'right' had no talismanic natural law significance; after all, many sought a Bill to confer — or declare — *states'* rights, once again revealing the original intertwining of rights and structure").

[47] *See* William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1255 (1994) (arguing that "the essential claim . . . advanced by the NRA with respect to the Second Amendment is extremely strong").

[48] Heller, *supra* note 25, at A8.

as well. In his concurring opinion in *Printz v. United States,*[49] Justice Thomas took note of the "growing body of scholarly commentary" supporting the view that the Second Amendment grants an individual right.[50] Justice Thomas hinted that he agrees with the individual rights position and suggested that "[p]erhaps, at some future date, this Court will have the opportunity to determine" the meaning of the Amendment.[51]

This Article challenges the insurrectionist model. The Second Amendment was not enacted to provide a check on government tyranny; rather, it was written to assure the Southern states that Congress would not undermine the slave system by using its newly acquired constitutional authority over the militia to disarm the state militia and thereby destroy the South's principal instrument of slave control. In effect, the Second Amendment supplemented the slavery compromise made at the Constitutional Convention in Philadelphia and obliquely codified in other constitutional provisions.[52]

Part I of this Article relates the hidden history of the Second Amendment. In many ways, the story begins in June 1788 at a convention in Richmond at which Virginia was to decide whether to ratify the Constitution of the United States. However, before relating the events at Richmond, Part I provides some background involving slavery, slave control, the militia, and the dynamics of the struggle between the Federalists and anti-Federalists as they headed toward a showdown in Richmond. Part I then describes political events occurring after Richmond which persuaded Madison to write a bill of rights, including the provision we now know as the Second Amendment.

Part II of this Article tells a different part of the story, one that occurred a hundred years before Madison wrote the Second Amendment. Insurrectionist theorists increasingly stress what they call the Anglo-American legacy of the right to keep and bear arms. They argue that the Second Amendment is a direct descendant of the English Declaration of Rights of 1689, which, they contend, granted an individual right to have arms as a

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[49] 117 S. Ct. 2365 (1997).

[50] *See id.* at 2386 n.2 (Thomas, J., concurring).

[51] *Id.*

[52] *See infra* notes 299-304 and accompanying text.

check on governmental tyranny. Part II focuses on the Declaration of Rights, placing it and its right to have arms provision in the context of the British "Glorious Revolution." This Article does not quarrel with the premise that the Second Amendment was inspired by the Declaration of Rights. On the contrary, it tries to illuminate the parallels between the two provisions, showing that Madison wrote the Second Amendment to address a problem analogous to the one faced a century earlier by the authors of the Declaration of Rights. This Article argues that the insurrectionist interpretation of the Declaration of Rights is fundamentally flawed. An historically sound understanding of the Second Amendment's English heritage belies the proposition that the Second Amendment was intended to grant an individual right to keep or bear arms against governmental tyranny. Instead, the Amendment's English heritage provides further support for the hidden history of the Second Amendment.

Parts III and IV respond to opposing arguments. Modern insurrectionists claim the Founders as their own, offering many quotes from venerated figures of the early republic that appear to endorse the idea of the right to keep and bear arms against government tyranny. Part III takes up the question of whether the Founders were insurrectionists. Part IV deals briefly with the insurrectionists' claim that the word "militia," as used in the Second Amendment, means a militia composed of all able-bodied, adult citizens. The Article concludes by offering final thoughts on the implications of the Second Amendment's hidden history.

I. THE HIDDEN HISTORY OF THE SECOND AMENDMENT

A. Showdown in Richmond

The story of the hidden history of the Second Amendment begins in June 1788 at a convention, held in Richmond, to consider whether Virginia would ratify the Constitution of the United States. The Constitution had been a controversial document since its adoption in Philadelphia in September 1787.[53]

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[53] Clinton Rossiter, *Introduction* to THE FEDERALIST PAPERS viii (Clinton Rossiter ed., 1961).

Though the Federalists, who favored a stronger federal government, did not achieve all they desired, they were the perceived victors at the Constitutional Convention.[54] The anti-Federalists were now engaged in a campaign to stop the Constitution from being ratified.[55]

The anti-Federalists were skeptical, even bitter, about the ratification process. Some felt that the Philadelphia Convention had exceeded its authority, that the delegates should have interpreted their charge as one to modify the Articles of Confederation, not to create a radically different structure.[56] They were further irritated by the fact that the Constitution would become effective not by the unanimous consent of the Union's thirteen states but by the ratification of only nine.[57] Moreover, the state legislatures had been cut out of direct participation in the process; the Constitution would be put before state ratifying conventions rather than the state legislatures.[58]

From the moment the Convention proposed the Constitution, both sides had been engaged in a struggle over ratification. There was, of course, a scintillating debate of ideas. John Jay, James Madison, and Alexander Hamilton argued for ratification in a series of essays published in New York newspapers under the pseudonym "Publius," which today are collectively known as *The Federalist Papers*.[59] Meanwhile, anti-Federalists wrote essays opposing ratification. Those published under the names

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[54] *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 486 (1969) [hereinafter WOOD, CREATION OF THE AMERICAN REPUBLIC].

[55] *See* THORNTON ANDERSON, CREATING THE CONSTITUTION: THE CONVENTION OF 1787 AND THE FIRST CONGRESS 6-12, 174-76 (1993) (recounting anti-Federalist efforts to counter Nationalists' ratification campaign).

[56] *See generally* EDMUND S. MORGAN, THE BIRTH OF THE REPUBLIC 1763-89, at 145-56 (3d ed. 1992) [hereinafter MORGAN, BIRTH OF THE REPUBLIC]; JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 131-60 (1996) [hereinafter RAKOVE, ORIGINAL MEANINGS].

[57] U.S. CONST. art. VII.

[58] *See* WOOD, CREATION OF THE AMERICAN REPUBLIC, *supra* note 54, at 532-33 (describing benefits to Federalists of bypassing state legislatures in favor of ratifying conventions).

[59] *See* Rossiter, *supra* note 53, at viii.

"Brutus,"[60] "Centinel,"[61] "John Dewitt,"[62] and "The Federal Farmer"[63] were among the most prominent.

The battles were not limited to an exchange of ideas, however. This was a no-holds-barred struggle, and the adversaries pressed every available strategic or tactical advantage. The following example gives a sense of the intensity of the struggle. The day after delegates to the Philadelphia Convention signed the proposed new Constitution, Federalists sought to have the Pennsylvania Legislature, which had been meeting upstairs at the Philadelphia State House while the Constitutional Convention was in session downstairs, vote to convene a ratifying convention in Pennsylvania two months hence.[64] Lacking the votes to defeat this proposal, the anti-Federalists sought to block the measure by failing to return after the noon recess, thereby preventing a quorum.[65] The legislative session was due to end the next day, and without a quorum there would be considerable delay before the Pennsylvania Legislature could consider the matter again.[66] The Federalists, capitalizing on the opportunity to create a sense of momentum by having Pennsylvania vote to convene a ratifying convention before the ink had dried on the proposed new Constitution, directed the sergeant of arms to fetch the missing members.[67] The sergeant located two — just

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[60] *See* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 269 (Ralph Ketcham ed. 1986) [hereinafter ANTI-FEDERALIST PAPERS] (stating that "Brutus" is believed to have been New York Judge named Robert Yates who published 16 essays in *New York Journal* between October 1787 and April 1788).

[61] *See id.* at 227 (stating that Samuel Bryan wrote under pseudonym "Centinel" and published 18 essays in Philadelphia newspapers between October 1787 and April 1788).

[62] *See id.* at 189 (stating that unknown author published five essays under pseudonym of "John Dewitt" in *Boston Herald American* from October to December 1787).

[63] *See id.* at 256-57, 336 (stating that historians now believe "Federal Farmer" was Melancton Smith of New York). A long series of essays titled "Letters from a Federal Farmer," originally published in a Poughkeepsie, New York newspaper between November 1787 and January 1788 were republished and widely distributed in pamphlet form. Smith debated the Constitution with Alexander Hamilton and other Federalists before the New York ratifying convention. *See id.*

[64] *See* MORGAN, BIRTH OF THE REPUBLIC, *supra* note 56, at 150-51.

[65] *See id.*

[66] *See* CRAIG R. SMITH, TO FORM A MORE PERFECT UNION: THE RATIFICATION OF THE CONSTITUTION AND THE BILL OF RIGHTS 1787-1791, at 38 (1993) [hereinafter SMITH, TO FORM A MORE PERFECT UNION] (noting that Pennsylvania's assembly was having final session of year on September 29).

[67] *See id.* (describing Captain John Barry's search for assemblymen in order to establish

the number needed to complete a quorum — escorted them against their will back to their seats in the State House, and barred the doors until the assembly voted by a narrow margin to convene a state ratifying convention.[68] For the anti-Federalists, this incident became a symbol of a Federalist campaign to steamroll the Constitution to ratification and heightened their resolve to resist.[69]

Nine months later, the fate of the Constitution and, thus, the United States was in doubt. Eight states had ratified the Constitution; only one more was needed. But there was not another state where ratification was certain or perhaps even likely. Rhode Island was a sure bet against ratification. So unenthusiastic had it been about a strong Union in which it would have little influence as a small state, Rhode Island had not even sent delegates to the Philadelphia Convention.[70] New Hampshire and North Carolina were also considered likely to oppose ratification.[71] Though it was perhaps more unpredictable, New York too seemed unlikely to ratify. New York's Governor George Clinton was opposed to ratification, and forty-six of the sixty-five delegates elected to the state's ratifying convention were committed anti-Federalists.[72]

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quorum).

[68] *See* MORGAN, BIRTH OF THE REPUBLIC, *supra* note 56, at 151 (describing events two weeks before Pennsylvania ratifying convention, including Federalists' vote for ratification).

[69] *See* RAKOVE, ORIGINAL MEANINGS, *supra* note 56, at 110-12 (describing incident and critical anti-Federalist sentiment).

[70] *See id.* at 101. Rhode Island had other objections as well, the failure to abolish slavery and to include a bill of rights among them. Rhode Island's largest single objection was probably fiscal. America was sharply divided between creditors and debtors. Rhode Island wanted to pursue a monetary policy that eased the burden on debtors, and it would have been unable to do so within the United States. The Rhode Island Legislature voted 13 times against convening a ratification convention. It was not until May 1790, after Providence threatened to secede from Rhode Island and join the Union on its own, that ratification was ultimately obtained, and even then by a vote of only 34 to 32. *See* WILLIAM G. MCLOUGHLIN, RHODE ISLAND: A HISTORY 102-04 (1978).

[71] ANTI-FEDERALIST PAPERS, *supra* note 60, at 14. North Carolina would reject ratification by an overwhelming margin in August 1787 before ultimately ratifying the Constitution in November 1789. *Id.* at 26.

[72] *See id.* at 336. New York was home to some of the most prominent anti-Federalists, including Robert Yates, John Lansing, and Melancton Smith. *See id.*; *see also* M.E. BRADFORD, FOUNDING FATHERS 49-53 (1994) (containing biographical information on Robert Yates and John Lansing).

This left only Virginia. The stakes were enormous. Not only was Virginia critical as a possible ninth state, but because it was the largest[73] and one of the most prosperous and respected states[74] — the home of George Washington, Thomas Jefferson, and James Madison, among others — it was by no means clear that the United States could succeed without it.[75] However, the prospect of Virginia's ratification was uncertain.[76] Madison would serve as the principal advocate for ratification, and no one understood the new Constitution better than Madison. Yet the opposition was equally formidable. Virginia's anti-Federalist delegates included two of the three men who had refused to sign the Constitution in Philadelphia — George Mason and the state's eloquent Governor Edmund Randolph[77] — as well as Patrick Henry, who was the most famous orator of the day.[78]

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[73] *See* 1 BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, at 22-36 (1976) [hereinafter HISTORICAL STATISTICS OF THE U.S.] (stating that in 1790, Virginia had total population of 692,000 people, consisting of 442,000 whites and 306,000 blacks; compared to Pennsylvania, second largest state, with total population of 434,000).

[74] *See* SMITH, TO FORM A MORE PERFECT UNION, *supra* note 66, at 98 (describing Virginia as most influential state in Union).

[75] *See id.* (stating that because of Virginia's geographic location, Union would be split in two if Virginia failed to ratify constitution).

[76] In a letter George Mason sent to Thomas Jefferson the week Mason set out for the Richmond Convention, Mason wrote: "From the best information I have had, the Members of the Virginia Convention are so equally divided upon the Subject, that no Man can, at present, form any certain Judgment of the Issue." *See* Letter from George Mason to Thomas Jefferson (May 26, 1788) *in* THE ORIGIN OF THE SECOND AMENDMENT: A DOCUMENTARY HISTORY OF THE BILL OF RIGHTS 1787-1792, at 365, 366 (David E. Young ed., 2d ed., 1995) (relating objections over Federal control of state militias); *see also* ANTI-FEDERALIST PAPERS, *supra* note 60, at 14.

[77] *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 603 (Max Farrand ed., 1911) [hereinafter 1 FARRAND'S RECORDS]. Randolph argued that the Constitution should be ratified only with prior amendments and called for a second national constitutional convention. In one of the most significant political events of the struggle, Madison succeeded in converting Randolph to the Federalist cause shortly before the Convention began in June. Instead of a powerful opponent, Randolph became an influential supporter of ratification. *See* LANCE BANNING, THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC 236 (1995); *see also* BRADFORD, *supra* note 72, at 148-56 (providing biographical information on George Mason); HARRY AMMON, JAMES MONROE: THE QUEST FOR NATIONAL IDENTITY 70-79 (1971) (describing ratification convention in Richmond, Virginia).

[78] *See* AMMON, *supra* note 77, at 71. Richard Henry Lee, who, according to historian Gordon S. Wood, was "undoubtedly the strongest mind the Antifederalists possessed," was also from Virginia. Although he had been defeated by a Federalist candidate and would not be a delegate to the Convention, he was expected to be a force behind the scenes. *See*

B. Anti-Federalist Strategy

The anti-Federalists were prepared to raise any argument that would win votes against ratification.[79] Their strongest ally was fear, and they raised a multitude of concerns about the potential calamities under the new Constitution.[80] Among these was one topic about which Virginia was already concerned and fearful — the subject of slavery.[81]

One of Virginia's main concerns was that the federal government would abolish or directly interfere with the slave system. During the Constitutional Convention, Pierce Butler of South Carolina declared: "The security the Southn. States want is that their negroes may not be taken from them which some gentlemen within or without doors, have a very good mind to do."[82] Most believed that question had been settled in Philadelphia. The Southern states had made it plain that they would not join the Union if emancipation was an open issue and insisted that the Constitution protect the slave system.[83]

Though the Constitution did not do so expressly, it included a number of provisions directly related to slavery. Taken together, these provisions evidenced an agreement that neither Congress nor the Northern states[84] would attempt to interfere with slavery in the South.[85] Most believed this was sufficient. Charles

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WOOD, CREATION OF THE AMERICAN REPUBLIC, *supra* note 54, at 485 (1969). Two other intellectual giants were also not delegates. George Washington, as chair of the Philadelphia Convention, believed that he should not directly participate in a ratifying convention. The other was Thomas Jefferson, then serving as ambassador to France. *See* AMMON, *supra* note 77, at 70.

[79] *See* RAKOVE, ORIGINAL MEANINGS, *supra* note 56, at 116 (noting that anti-Federalists would "freely credit any objection their imaginations could conjure, no matter how wild").

[80] *See id.* at 113-28 (discussing strategy of anti-Federalists).

[81] *See* HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES 32-38 (1980) (describing growth and importance of slavery in South generally and Virginia specifically); *see also* RAKOVE, ORIGINAL MEANINGS, *supra* note 56, at 70-93 (describing concerns over slavery at Constitutional Convention in Philadelphia).

[82] 1 FARRAND'S RECORDS, *supra* note 77, at 605.

[83] *See* ANDERSON, *supra* note 55, at 103; RAKOVE, ORIGINAL MEANINGS, *supra* note 56, at 85-88 (chronicling position of Southern delegates on slavery at Philadelphia Convention).

[84] I use the terms "North" and "Northern" states to refer to Pennsylvania, New Jersey, New York, and the New England states.

[85] *See infra* notes 299-304 and accompanying text (discussing slavery compromise).

Pinckney, one of South Carolina's delegates to the Constitutional Convention, went home and told the state house of representatives:

> We have a security that the general government can never emancipate them, for no such authority is granted and it is admitted, on all hands, that the general government has no powers but what are expressly granted by the Constitution, and that all rights not expressed were reserved by the several states.[86]

Others wanted this principle expressly included in the Constitution and would soon seize upon the opportunity to include such a provision in a bill of rights. A little over a year later, for example, William L. Smith of South Carolina wrote a letter urging adoption of a proposed bill of rights because "if these amendts. are adopted, they will go a great way in preventing Congress from interfering with our negroes after 20 years . . . . Otherwise, they may even within the 20 years by strained construction of some power embarrass us very much."[87] The dominant view, however, was expressed by Pickney. Pickney believed that it was sufficiently clear that the new Constitution did not give the federal government any authority that it could legitimately employ to abolish slavery.[88] Although the federal government could not abolish slavery directly, however, there were ways in which it might undermine the slave system indirectly. For the South, this was a terrifying prospect.

C. Southern Fear

When the delegates to the ratifying convention met in Richmond on June 2, 1788, they knew that the Northern states were increasingly disgusted by slavery. The Revolution had changed

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[86] PAUL FINKELMAN, SLAVERY AND THE FOUNDERS 6 (1996) [hereinafter FINKELMAN, SLAVERY AND THE FOUNDERS].

[87] Letter from William L. Smith to Edward Rutledge (Aug. 10, 1789) *in* CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST CONGRESS 273 (Helen E. Veit, et al. eds., 1991) [hereinafter CREATING THE BILL OF RIGHTS].

[88] *See* ANDERSON, *supra* note 55, at 103; FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 86, at 5. Nor were Virginians particularly concerned about Congress abolishing the slave trade in 20 years time. Virginia was a slave exporting state, and if Congress ended the importation of slaves from abroad, Virginia's slaves would increase in value. *See* ANDERSON, *supra* note 55, at 103 (quoting Charles Pickney to this effect).

everything.[89] Americans had embraced an ideology grounded on the premise that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness."[90] Although some sought to reconcile these beliefs with the continuation of the slave system,[91] for many, of course, that was impossible.

From the start, revolutionary rhetoric was turned easily and sharply against the South. "How is it that the loudest yelps for liberty come from the drivers of slaves?" Dr. Samuel Johnson had asked from England.[92] When Massachusetts effectively ended slavery in 1783, it did so in a way that must have been profoundly embarrassing to the slave states. Based on language in the state constitution quite similar to that in the Declaration of Independence — "that all men are born free and equal" and "that every subject is entitled to liberty" — the Massachusetts Supreme Court held that the state constitution, adopted three years earlier, effectively abolished slavery.[93]

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[89] *See* GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 186 (1991) [hereinafter WOOD, RADICALISM OF THE AMERICAN REVOLUTION] (describing attitudes toward slavery before and after Revolution).

[90] THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776).

[91] When, during the Philadelphia Convention, Luther Martin had the temerity to suggest that slavery was "inconsistent with the principles of the revolution and dishonorable to the American character," he was met with a barrage of responses from Southern delegates. The most famous is probably that of Charles Pickney of South Carolina, who declared: "If slavery be wrong, it is justified by the example of all the world." *See* RAKOVE, ORIGINAL MEANINGS, *supra* note 56, at 87 (quoting Martin and Pickney); *see also* FAWN M. BRODIE, THOMAS JEFFERSON: AN INTIMATE HISTORY 110 (1974) (speculating that Southerners found comfort in blaming British as source of slavery).

[92] *Id.* at 96

[93] In the case of *Commonwealth v. Jennison*, the Chief Justice of the Massachusetts Supreme Court declared:

> Sentiments more favorable to the natural rights of mankind, and to that innate desire for liberty which heaven, without regard to complexion or shape, has planted in the human breast — have prevailed since the glorious struggle for our rights began. And these sentiments led the framers of our constitution of government . . . to declare — *that all men are born free and equal;* and that *every subject* is *entitled to liberty* . . . [S]lavery is in my judgment as effectively abolished as it can be by the granting of rights and privileges wholly incompatible and repugnant to its existence.

A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR 94-95 (1978) [hereinafter HIGGINBOTHAM, IN THE MATTER OF COLOR] (quoting the charge to the jury by Chief Justice William).

Abolition fervor was running strongly in the North. Vermont, though not yet recognized as an independent state, abolished slavery outright in 1777.[94] Pennsylvania,[95] Rhode Island,[96] and New York[97] had all enacted gradual emancipation legislation. Some Northerners were not satisfied with gradual methods. Frustrated by the failure to end slavery immediately, prominent New York citizens formed the New York Society for Promoting the Manumission of Slaves.[98] The first two presidents of this group were John Jay and Alexander Hamilton.[99]

The South must have realized that although the Constitution did not grant the federal government the power to abolish slavery, it did not eliminate the desire to end the slave system. There were many in the North who continued to feel a moral imperative to bring slavery in America to an end.[100] Many in the South also railed against slavery, among them prominent Virginians such as Thomas Jefferson[101] and George Mason.[102]

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[94] *See* James Oakes, *"The Compromising Expedient": Justifying a Proslavery Constitution*, 17 CARDOZO L. REV. 2023, 2027 (1996).

[95] *See* HIGGINBOTHAM, IN THE MATTER OF COLOR, *supra* note 93, at 299-305. Pennsylvania's "Act for the Gradual Abolition of Slavery," enacted in 1780, was a partial measure. It provided that children born after the act was enacted were to be freed upon reaching age 28, and a later clarification of the act declared that all slaves brought into the state by persons residing in or intending to reside in Pennsylvania were deemed to be immediately freed. *See id.*

[96] *See* MCLOUGHLIN, *supra* note 70, at 106 (1978) (stating that Rhode Island enacted a gradual emancipation act in 1784).

[97] *See* HIGGINBOTHAM, IN THE MATTER OF COLOR, *supra* note 93, at 136-43. The history of New York's emancipation legislation is rather tortured. In 1777, delegates to New York's constitutional convention overwhelmingly passed a resolution declaring that "every human being who breathes the air of the state shall enjoy the privileges of a freeman." The convention declined to go further because they believed it essential to maintain control of the slaves during the war. In 1785, New York legislation prohibited the importation of slaves into the state, and placed children born to slave mothers after the effective date of the act into a sort of half-way house: they were freed but denied the right to vote, hold public office, and testify against whites in court. In 1799, New York enacted legislation providing that children born to slave mothers after July 4 of that year were to be freed at either age 25 (female children) or age 28 (male children); no restrictions were placed on civil or political rights after the individuals became free. *See id.*

[98] HIGGINBOTHAM, IN THE MATTER OF COLOR, *supra* note 93, at 140.

[99] *Id.*

[100] *See* MORGAN, BIRTH OF THE REPUBLIC, *supra* note 56, at 142 (expressing view of Roger Sherman of Connecticut at Constitutional Convention that if Constitution granted national government authority to end slave trade, it would be incumbent upon the government to do so).

[101] *See* BRODIE, *supra* note 91, at 50 (stating that Jefferson denounced slavery). Although

But there was a difference. The instinct among Northerners was to emancipate slaves while Southerners tended to want to deport them.[103] This was not principally due to a more extreme racism in the South but to a legitimate fear about what would happen if it loosened its tight control over a black population that had long suffered horrible cruelties.[104] Even more chilling than emancipation was the prospect of continuing the slave system but weakening the white population's control over the slave population.

Jefferson denounced slavery, he talked of emancipation with colonization. *Id.* At first he proposed deporting slaves to Africa, and later to Santo Domingo (but only after their masters had been compensated for the loss of this property). *See* Conor Cruise O'Brien, *Thomas Jefferson: Radical and Racist*, ATLANTIC MONTHLY, Oct. 1996, at 66 [hereinafter O'Brien, *Thomas Jefferson*]. He believed whites and blacks could never live together and was adamantly opposed to free blacks remaining in Virginia. *See* BRODIE, *supra* note 91, at 50. Jefferson's personal life was consistent with this philosophy. *See id.* at 441. Though he personally owned hundreds slaves, he freed only two during his life — both brothers of Sally Hemings, who is believed to have been Jefferson's slave mistress. *See id.* at 248. In his will, Jefferson freed five more slaves; again, all of these were related to Sally Hemings, including her two sons, who are believed to be Jefferson's sons as well. *See id.* at 466. Two hundred more slaves were sold on the auction block to provide funds for Jefferson's estate. *See* FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 86, at 106. Though he may have treated slaves more kindly than some of his contemporaries, he was not above threatening them with a whip or, if one escaped, offering a reward for his capture. *See* BRODIE, *supra* note 91, at 92.

[102] *See* FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 86, at 24. Mason refused to sign the Constitution, in part, because it did not give the federal government the authority to end the slave trade. He opposed the slave trade, however, not slavery itself. As other delegates understood at the time, Mason's rhetoric against slavery was a transparent ruse to bolster credibility for his proposal to end the slave trade. His proposal was designed to help, not hinder, Virginia's slave holders. Virginia had a slave surplus. Its slaves were an exportable commodity and would increase in value if the competition from slave importers were eliminated. Mason, who personally owned three hundred slaves, opposed every attempt to end slavery and sponsored state legislation making it difficult for slave holders to emancipate their slaves. *See id.* at 24-25, 152 (describing George Mason's motives); *see also* BRADFORD, *supra* note 72, at 148-57 (providing biographical information on George Mason).

[103] *Compare* AMMON, *supra* note 77, at 522-23 (explaining James Monroe's support for American Colonization Society's efforts to deport slaves to Liberia) *with* MCLOUGHLIN, *supra* note 70, at 106-07 (stating that slave population in Rhode Island fell from 4692 or 11.5% of population in 1755 to 985 or 1.4% in 1790, due in part to Moses Brown and other Quakers promoting voluntary emancipation), *and* HISTORICAL STATISTICS OF THE U.S., *supra* note 73, at 34 (stating that 4370 free blacks lived in Rhode Island in 1790).

[104] *See* JOHN HOPE FRANKLIN, THE MILITANT SOUTH 1800-1861, at 68-78 (1956) [hereinafter FRANKLIN, MILITANT SOUTH] (describing slave patrol systems).

Southerners, therefore, had to worry that Northerners, whether morally committed to ending slavery or merely indifferent to the precarious situation in the South, might subvert the slave system indirectly. Even Virginians who wanted to end slavery had to tremble at such a prospect. Virginia was a state living in perpetual fear.[105] Fully forty-four percent of Virginia's total population was black,[106] and in some areas, particularly in the eastern part of the state, blacks constituted the majority. Whites were ever mindful that if the right opportunity presented itself, blacks might cut their heads off.[107] This is not hyperbole. On a Sunday morning in September 1739, for example, a group of about twenty blacks broke into a store near Stono, South Carolina for guns and powder.[108] They decapitated the two storekeepers, displayed their heads on the front steps, and then headed South, sacking and burning homes and killing whites on their way. They marched while flying banners, beating drums, and

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[105] An example of Southern paranoia may be found in the following passage from Thomas Jefferson's notorious book, *Notes on the State of Virginia:*

> Deep rooted prejudices entertained by the whites; ten thousand recollections, by the blacks, of the injuries they have sustained; new provocations; the real distinctions which nature has made; and many other circumstances, will divide us into parties, and produce convulsions which will probably never end but in the extermination of the one or the other race.

BRODIE, *supra* note 91, at 198.

[106] *See* HISTORICAL STATISTICS OF THE U.S., *supra* note 73, at 36.

[107] In a letter written in 1736, William Byrd of Virginia worried about the growing "publick danger" from the importation of so many slaves.

> We have already at least 10,000 Men of these descendants of Ham fit to bear Arms, and their Numbers increase every day as well by birth as Importation. And in case there should arise a Man of desperate courage amongst us, exasperated by a desperate fortune, he might with more advantage than Cataline kindle a Servile War. Such a man might be dreadfully mischievous before any opposition could be formed against him, and tinge our Rivers as wide as they are with blood.

PETER H. WOOD, BLACK MAJORITY: NEGROES IN COLONIAL SOUTH CAROLINA FROM 1670 THROUGH THE STONO REBELLION 224 (1974) [hereinafter WOOD, STONO REBELLION] (quoting letter of William Byrd). At the time Byrd wrote this letter, Virginia's total population was approximately 114,000. *See* HISTORICAL STATISTICS OF THE U.S., *supra* note 73, at 1168 (Series Z 1-19). When the Ratifying Convention met in 1788, Virginia's black population was 306,000. *See id.* at 36.

[108] *See* WOOD, STONO REBELLION, *supra* note 107, at 314-23; ZINN, *supra* note 81, at 36 (describing actions of rebel slaves at Stono, South Carolina, in 1739).

calling out "Liberty!" to attract more slaves to the rebellion.[109] According to one account, their numbers "increased every minute by new Negroes coming to them, so that they were above Sixty, some say a hundred."[110] But for a coincidence, the rebellion may have grown considerably larger and perhaps even succeeded.[111] By chance, the Lieutenant Governor of South Carolina rode within eyesight of the rebel group while he was on his way to Charleston with four other men.[112]

As best as events can be reconstructed, the Lieutenant Governor raced to the Presbyterian church in Wiltown, which happened to be in the midst of Sunday services, and assembled a contingent of white planters.[113] By four o'clock in the afternoon, somewhere between twenty and one hundred armed and mounted militiamen attacked the rebel group. About forty-four blacks and twenty-one whites died in the ensuing battle.[114] As a warning against future insurrections, the militia decapitated black rebels and placed their heads "up at every Mile Post they came to."[115] However, at least thirty blacks escaped.[116] The entire white population was ordered under arms, and a desperate manhunt was conducted to find the remaining rebels.[117] It was not until a week later that a militia company located the largest remnant of the insurrectionist band and killed most of the group in a second battle.[118] Perhaps a half dozen blacks escaped from this second battle,[119] and one of the leaders of the rebellion was not captured until three years later.[120]

Everyone in the South knew the story of the Stono Rebellion; it was the largest and best known of the slave insurrections. It

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[109] *See* WOOD, STONO REBELLION, *supra* note 107, at 315.

[110] *Id.* at 316.

[111] *See id.* at 315-16.

[112] The rebels pursued the Lieutenant Governor's small group; they did not want any white who could raise an alarm to escape. Had they captured the state's second highest official, the rebels would have gained a psychological advantage, but they did not know the identity of the men they were pursuing and eventually gave up the chase. *See id.* at 316.

[113] *See id.* at 317.

[114] *See* HIGGINBOTHAM, IN THE MATTER OF COLOR, *supra* note 93, at 193.

[115] *See* WOOD, STONO REBELLION, *supra* note 107, at 317.

[116] *See id.* at 318.

[117] *See id.*

[118] *See id.* at 318-19.

[119] *See id.* at 319.

[120] *See id.* at 320.

was not, however, the only slave rebellion. One researcher identified about 250 rebellions or conspiracies involving at least ten slaves.[121] It is no wonder, therefore, that in a letter he wrote some time after this period, Jefferson worried that the "day which begins our combustion must be near at hand; and only a single spark is wanting to make that day to-morrow . . . if something is not done and done soon, we shall be the murderers of our own children."[122]

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[121] *See* ZINN, *supra* note 81, at 36 (referring to Herbert Aptheker's research). Herbert Aptheker is a controversial figure. Many credit his book, *American Negro Slave Revolts*, originally published in 1949 and still in print, with bringing about a sea change in the history of American slavery. The prevailing view prior to Aptheker's work was that the slave population was largely docile. Black slaves accepted their fate with resigned complacency, and eruptions such as the Stono and Nat Turner rebellions were aberrations, or so many believed. In *American Negro Slave Revolts*, however, Aptheker cataloged all manner of slave insurrections — large and small, threatened and executed — spanning American history from the seventeenth century to the Civil War. For our purposes, the fear of slave uprisings are more important than the uprisings themselves, and on this there was less disagreement. As Aptheker put it: "While there is a difference of opinion as to the prevalence of discontent amongst the slaves, one finds very nearly unanimous agreement concerning the widespread fear of servile rebellion." HERBERT APTHEKER, AMERICAN NEGRO SLAVE REVOLTS 18 (6th ed. 1993). The controversy over Aptheker revolves around his politics. Aptheker, a prominent member of the Communist Party of the United States and editor of its journal on political theory, was one of Joseph McCarthy's targets in the 1950s. Anyone who cited Aptheker's work ran a risk. During his confirmation hearings for the Supreme Court, Thurgood Marshall was grilled about whether he knew about Aptheker's political affiliation when he cited one of his books in an appellate opinion. Although Aptheker held a doctorate from Columbia, wrote or edited more than 80 books, and had his work praised by other historians, he never succeeded in finding a faculty position. According to political scientist John Manley of Stanford University, who studied Aptheker, it was Aptheker's politics that kept him from being fully accepted by the academic community. *See* Jack Fisher, *Shattering Sterotypes: Author-Radical Herbert Aptheker Is a Seminal Figure in Black History*, DALLAS MORNING NEWS, March 6, 1994, at 34A; *see also* Aptheker v. Secretary of State, 378 U.S. 500, 521 (1964) (Clark, J., dissenting) (stating Aptheker was editor of journal *Political Affairs* published by Communist Party); Stephen L. Carter, *Thurgood Marshall: A Remembrance*, 47 OKLA. L. REV. 5, 8 (1994) (regarding Marshall's confirmation hearing). Some historians still believe that the black slave population was easily controlled. *See, e.g.*, EDMUND S. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA 309 (1975) (arguing that free or semi-free laborers were more dangerous than slaves and noting that no white person was killed in any slave revolts in colonial Virginia).

[122] BRODIE, *supra* note 91, at 291 (quoting Jefferson's letter to St. George Tucker dated Aug. 28, 1797).

D. Slave Control

"Slavery was not only an economic and industrial system," one scholar noted, "but more than that, it was a gigantic police system."[123] Over time the South had developed an elaborate system of slave control. The basic instrument of control was the slave patrol, armed groups of white men who made regular rounds.[124] The patrols made sure that blacks were not wandering where they did not belong, gathering in groups, or engaging in other suspicious activity.[125] Equally important, however, was the demonstration of constant vigilance and armed force. The basic strategy was to ensure and impress upon the slaves that whites were armed, watchful, and ready to respond to insurrectionist activity at all times.[126] The state required white men and female plantation owners to participate in the patrols and to provide their own arms and equipment, although the rich were permitted to send white servants in their place.[127]

Virginia, South Carolina, and Georgia all had regulated slave patrols.[128] By the mid-eighteenth century, the patrols had become the responsibility of the militia.[129] Georgia statutes

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[123] *See* H.M. HENRY, THE POLICE CONTROL OF THE SLAVE IN SOUTH CAROLINA 154-55 (Negro Univ. Press 1968).

[124] *See* John Hope Franklin, *Slavery in the Martial South, in* RACE AND HISTORY: SELECTED ESSAYS 1938-1988 92, at 97 (1989); *see also* DANIEL J. BOORSTIN, THE AMERICANS: THE COLONIAL EXPERIENCE 355-56 (1958) (stating that patrol soon became part of regular militia); HIGGINBOTHAM, IN THE MATTER OF COLOR, *supra* note 93, at 259-62; ZINN, *supra* note 81, at 53-57 (discussing how fear of slave rebellion led to slave patrols); Michael Stauffer, *Volunteer or Uniformed Companies in the Antebellum Militia: A Checklist of Identified Companies, 1790-1859*, 88 S.C. HIST. MAG. 108, 108 (1987) (noting that legislation in South Carolina required every able-bodied white man aged 18 to 45 to serve in militia).

[125] *See* HIGGINBOTHAM, IN THE MATTER OF COLOR, *supra* note 93, at 262 (discussing establishment of militia in South Carolina).

[126] *See id.*

[127] *See* ZINN, *supra* note 81, at 55-56 (noting that fear of slave rebellion led to establishment of slave patrols, which were staffed by hiring poor white men); Stauffer, *supra* note 124, at 109 (stating that South Carolina laws required every able-bodied white male age 18 to 45 to serve in militia).

[128] HIGGINBOTHAM, IN THE MATTER OF COLOR, *supra* note 93, at 307; *see also* FRANKLIN, MILITANT SOUTH, *supra* note 104, at 72-76 (1956) (discussing cooperation between slave patrol and militia).

[129] *See* HIGGINBOTHAM, IN THE MATTER OF COLOR, *supra* note 93, at 259-61 (stating that in 1755 and 1757 Georgia enacted legislation regulating manner in which militia would organize and conduct slave patrols); Stauffer, *supra* note 124, at 111 (stating that slave patrols in South Carolina came under control of militia in 1721).

enacted in 1755 and 1757, for example, carefully divided militia districts into discrete patrol areas and specified when patrols would muster. The Georgia statutes required patrols, under the direction of commissioned militia officers, to examine every plantation each month and authorized them to search "all Negro Houses for offensive Weapons and Ammunition" and to apprehend and give twenty lashes to any slave found outside plantation grounds.[130]

In the South, therefore, the patrols and the militia were largely synonymous. The Stono Rebellion had been quickly suppressed because the white men worshiping at the Wiltown Presbyterian church on that Sunday morning had, as required by law, gone to church armed.[131] Some of the accounts of Stono refer to the body of white men who attacked the black insurrectionists as the "militia"[132] while others refer to them as "planters."[133] This is a distinction without a difference; the two groups were one and the same. Virtually all able-bodied white men were part of the militia, which primarily meant that they had slave control duties under the direction and discipline of the local militia officers.[134]

The militia was the first and last protection from the omnipresent threat of slave insurrection or vengeance.[135] The War for Independence had placed the South in a precarious position: sending the militia to the war against the British would leave Southern communities vulnerable to slave insurrection. The Southern states, therefore, often refused to commit their militia to the Revolution, reserving them instead for slave control.[136] Nor could the South help by sending much in the

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[130] HIGGINBOTHAM, IN THE MATTER OF COLOR, *supra* note 93, at 261-62.

[131] *See* HENRY, *supra* note 123, at 149-50 (stating that assembly of white male churchgoers surrounded and captured nearly all rebellious blacks).

[132] *See id.* at 149.

[133] *See* HIGGINBOTHAM, IN THE MATTER OF COLOR, *supra* note 93, at 192-93; WOOD, RADICALISM OF THE AMERICAN REVOLUTION, *supra* note 89, at 317.

[134] *See* ZINN, *supra* note 81, at 76 (noting that much of white population went into military service during war).

[135] *See id.*

[136] *See* Bellesiles, *supra* note 34, at 429.

way of arms, for rifles were in short supply[137] and necessary to defend against possible slave insurrection.[138]

After the war, the militia remained the principal means of protecting the social order and preserving white control over an enormous black population. Anything that might weaken this system presented the gravest of threats. The South's fear that the North might destabilize the slave system — weakening white control over the slave population — gave anti-Federalists a powerful weapon.[139]

E. The Militia

One more piece of background is necessary before we turn to the events at the Richmond Convention. Much of the discussion at the Convention concerned the militia. What exactly was the public perception of the militia in 1789? Perhaps more importantly, what did political leaders — men such as James Madison, George Mason, Patrick Henry, and the other delegates to the Virginia ratifying convention — think of the militia? Specifically, did they believe in a "universal militia," that is, a militia composed of all able-bodied, adult, white citizens? An understanding of these issues is necessary to appreciate and perhaps deconstruct the Richmond debate. In addition, because the Second Amendment connects the right to bear arms to the militia, this background helps to shed light on Madison's thinking when he ultimately drafted the Amendment.

At the beginning of the American Revolution, the Founders extolled the virtues of the citizen militia, and particularly the universal militia. Modern insurrectionist theorists fill their writings with samples of this rhetoric. Stephen Halbrook, for

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[137] *See id.* at 425, 428-31. Bellesiles writes: "Even in the heavily armed and deeply paranoid state of South Carolina, militia officers continually expressed shock over the shortage of firearms." *Id.* at 432; *see also* BRODIE, *supra* note 91, at 136.

[138] *See* RUSSELL F. WEIGLEY, HISTORY OF THE UNITED STATES ARMY 202 (1984). During the war, a loyalist officer of the South Carolina militia urged the British to exploit this situation by attacking the Southern states. In a letter to British authorities he suggested that "the instant that The Kings Troops are put in motion in those Colonies, these poor Slaves would be ready to rise upon their Rebel Masters." Randall M. Miller, *A Backcountry Loyalist Plan to Retake Georgia and the Carolinas, 1778*, 75 S.C. HIST. MAG. 207, 213 (1974) (quoting letter of Moses Kirkland). And in fact, during the war many black slaves in Virginia joined the British side. *See* BRODIE, *supra* note 91, at 111-12.

[139] *See infra* notes 299-304 and accompanying text.

example, quotes from a militia plan prepared by George Mason in 1775. Halbrook writes: "In his Fairfax County Militia Plan 'For Embodying the People,' Mason reiterated that 'a well regulated Militia, composed of the Gentlemen, Freeholders, and other Freemen' was necessary to protect 'our antient Laws & Liberty' from the standing army."[140] Halbrook also quotes the following passage from Patrick Henry's famous "Give me Liberty of Give Me Death" oration:

> They tell us . . . that we are weak — unable to cope with so formidable an adversary. But when shall we be stronger? . . . *Will it be when we are totally disarmed,* and when a British guard shall be stationed in every house? . . . *Three million people, armed* in the holy cause of liberty . . . are invincible by any force which our enemy can send against us.[141]

It was natural, if not essential, for the leaders of the Revolution to glorify the citizen militia, for they were trying to rally a people without an army to war. Borrowing heavily from Whig ideology,[142] the revolutionaries sought to persuade themselves and the community that an army composed of armed citizens — farmers and tradesmen willing to grab a musket — would prevail over professional soldiers and mercenaries in service to King George.[143] And how would these men defeat a better armed, better equipped, better trained, and more experienced force? They would win because they were virtuous.[144] Their opponents, the Americans told themselves, were corrupt.[145] A standing army was a tool of tyrants, and greed and ambition corrupted professional soldiers, making them little better than the mercenaries who fought at their side.[146]

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[140] HALBROOK, THAT EVERY MAN BE ARMED, *supra* note 21, at 61.

[141] *Id.* at 62 (Halbrook quoting Henry, with Halbrook's emphasis).

[142] *See generally* WOOD, RADICALISM OF THE AMERICAN REVOLUTION, *supra* note 89, at 3-45 (1969) (discussing Whig ideology).

[143] *See generally* CHARLES ROYSTER, A REVOLUTIONARY PEOPLE AT WAR: THE CONTINENTAL ARMY AND AMERICAN CHARACTER, 1775-76, at 25-53 (1979) (discussing *rage militaire* — a passion for arms — that swept colonies in 1775 but "vanished by the end of 1776 and never returned").

[144] *See* WOOD, RADICALISM OF THE AMERICAN REVOLUTION, *supra* note 89, at 104-06, 215-20 (discussing American Revolutionaries' faith in classical virtue).

[145] *See* ROYSTER, *supra* note 143, at 35-36 (discussing how, according to republican ideology, "the rise of a standing army implicated the people in the corruption of the government").

[146] *See id.* at 17 (contrasting virtuous Americans with "British derelicts and Hessian mer-

At first the American belief in the citizen militia seemed justified, at least to the public at large. The Minutemen won victories at Lexington, Concord, and Bunker Hill.[147] Charles Royster writes: "For militia who were facing regulars, [American militiamen] showed great willingness and respectable competence in 1775."[148] Yet even in these early victories, where the Minutemen enjoyed the advantage of shooting at advancing Redcoats while crouching behind walls, the limitations of the militia were evident to the trained eye.[149] At the Battle of Bunker Hill, for example, Americans, firing from well-fortified positions on top of the hill, successfully repulsed two waves of British soldiers foolishly attempting a frontal assault.[150] They inflicted overwhelming losses on the enemy; some British companies had casualty rates of ninety percent, and every member of the British commander's personal staff was killed or wounded.[151] Nevertheless, a third attack forced the Americans to retreat, not because the British had won the upper hand, but because, in the words of Robert Leckie, "a steady trickle of desertions had drained [the defenders] like a leaking pipe."[152] Meanwhile, fresh militia troops nearby refused to come forward.[153] One colonel of the militia said he was too "exhausted" from building fortifications

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cenaries).

[147] *See generally* LECKIE, *supra* note 20, at 103-15, 145-63 (describing victory at Concord). Although the battle at Lexington could be characterized as a loss, Americans have long perceived it to be a symbolic victory. *See* ROBERT MIDDLEKAUFF, THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION 1763-1789, at 268-73 (1982) (describing battle of Lexington). Bunker Hill can be characterized either as a victory or a loss for revolutionary forces depending on whether one focuses on casualties or the final outcome. Although Americans portrayed it as a victory for propaganda purposes, Howard Zinn calls it a defeat. *See* ZINN, *supra* note 81, at 78.

[148] ROYSTER, *supra* note 143, at 29-30.

[149] *See generally* Charles J. Dunlap, Jr., *Revolt of the Masses: Armed Civilians and the Insurrectionary Theory of the Second Amendment*, 62 TENN. L. REV. 643, 658-60 (1995) (stating that militia's armed amateurs were no match for trained British armies).

[150] *See* LECKIE, *supra* note 19, at 144-63 (describing Battle of Bunker Hill). Despite the name of the battle, the Americans were actually on top of Breed's Hill. *See id.* at 151.

[151] *See id.* at 161-62.

[152] *See id.* at 161-63. Leckie continues: "Whenever a wounded man had been taken to safety, there were, in a cowardly dodge as old as arms, as many as twenty 'volunteers' to carry him." *Id.* at 162.

[153] *See id.* at 161. Two companies did come forward, but "for every man [the American battle commander] got, he lost three." *Id.* at 162. Equally devastating was the fact that militia behind the lines refused to send gunpowder. *See id.* at 161.

to lead his men to the battle front.[154] Thus, although they publicly celebrated Bunker Hill as a victory and praised the militia,[155] the more astute leaders of the Revolution realized almost immediately that the militia were not up to the job. Charles Royster writes:

> Early in the war some revolutionaries argued that the militia, which had proven its competence at Lexington and Bunker Hill, could sustain a large part of the resistance to the British. By late 1776 little attachment to this idea remained . . . . Almost all revolutionaries agreed that a standing army — no matter how suspect and unwelcome — was necessary. Every state supported the idea that a Continental Army should bear the main fighting; every state tried to recruit and supply it; every state preferred to be defended by it.[156]

It is not hard to see why the states ultimately supported a standing army. The militia were untrained. "Musters were, after all, usually held but once a year; parading, drinking, and partying clearly took priority over target practice; and uniforms evoked far more passion and interest than musket fire," writes Michael A. Bellesîles.[157] The militia were undisciplined. They fired their muskets in camp, sometimes shooting at geese, sometimes to start campfires, sometimes at random for fun.[158] "Seldom a day passes but some persons are shot by their friends," Washington wrote in 1776.[159] Militiamen drank heavily, sometimes even drinking themselves into stupors in the midst of battle.[160] Worst of all, militia deserted in droves.[161] Washington wrote Congress: "The militia . . . are dismayed, intractable and impatient to return home. Great numbers have gone off, in

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[154] *See id.* at 162.

[155] *See* ROYSTER, *supra* note 143, at 41 (quoting General Charles Lee's extravagant praise of militia in 1774 and 1775, and his condemnation of militia in 1776).

[156] ROYSTER, *supra* note 143, at 37.

[157] Bellesîles, *supra* note 34, at 435.

[158] *See* ROYSTER, *supra* note 143, at 59.

[159] *See id.* at 59, 389 n.3 (quoting Washington).

[160] *See* LECKIE, *supra* note 19, at 294-95 (discussing incident at Fort Washington where 300 to 400 men got drunk).

[161] *See* ROYSTER, *supra* note 143, at 71. The average desertion rate of Revolutionary forces was between 20 and 25%. The rate was lower at the end of the war when the bulk of the army consisted of long-term regulars and apparently higher in the early years when the proportion of militia was greatest. *See id.*

some instances by whole regiments."[162] Some left because military life failed to provide sufficient comforts;[163] others fled when confronting the enemy. The New England militia panicked in the Battle of Long Island;[164] New Jersey's militia surrendered rather than help defend retreating Continental Army troops;[165] and in the battle of Camden, South Carolina, the North Carolina and Virginia militia, although outnumbering the British and supported by substantial Continental Army forces, bolted without firing a single shot.[166] When positioning their forces for battle, American commanders learned to not only place militia units between regular troops, but to station Continental soldiers behind the militia with orders to shoot the first militiamen to run.[167]

Most militiamen were not even good shots.[168] We think of men as having grown up with guns in colonial America.[169] We assume they were sharpshooters by necessity. Did not men have to become proficient with muskets to protect themselves from ruffians and Indians or to hunt to put food on the table? Contrary to myth, the answer, in the main, is no. In reality, few Americans owned guns.[170] When Michael A. Bellesîles reviewed more than a thousand probate records from frontier areas of northern New England and western Pennsylvania for the years 1765 to 1790, he found that although the records were so detailed that they listed items as small as broken cups, only fourteen percent of the household inventories included firearms and

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[162] *See* LECKIE, *supra* note 19, at 270 (quoting Washington's letter to Congress).

[163] *See* SAMUEL ELLIOT MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 227 (1965) (stating that logistic deficiencies — lack of food, clothes, and shoes — led to large mutinies).

[164] *See id.* at 239.

[165] *See id.* at 241. "Instead of turning out to defend their country, and affording aid to our army, [the New Jersey militia] are making their submissions as fast as they can," Washington wrote at the time. *Id.*

[166] *See* LECKIE, *supra* note 19, at 536; ROYSTER, *supra* note 143, at 282.

[167] *See* ROYSTER, supra note 143, at 322-23.

[168] *See* Bellesîles, *supra* note 34, at 440-41; *see also* LECKIE, *supra* note 19, at 292 (stating that Yankees were poor shots); *cf.* ROYSTER, *supra* note 143, at 33-34 (regarding revolutionary riflemen's ability to hit small targets).

[169] *See* Bellesîles, *supra* note 34, at 426 (discussing U.S. history and psyche).

[170] *See id.* (noting that gun ownership was exceptional in eighteenth and early nineteenth century).

fifty-three percent of those guns were listed as not working.[171] In addition, few Americans hunted. Bellesîles writes: "From the time of the earliest colonial settlements, frontier families had relied on Indians or professional hunters for wild game, and the colonial assemblies regulated all forms of hunting, as did Britain's Parliament."[172]

"One year's experience convinced most American officials that they needed a standing army to fight the war," writes Charles Royster.[173] It was not only American military commanders who learned that the reality of the militia did not correspond to war rhetoric. The Continental Congress relented and authorized raising an army only after receiving message after message from Washington explaining in great detail the inadequacies of the militiamen and volunteers.[174] When Patrick Henry, then Governor of Virginia, informed Washington that the state was unable to fill its quota of regular troops but would send volunteers to make up the difference, Washington refused the offer. Volunteers were "ungovernable" Washington explained.[175] Even those who had sung the praises of the militia were reluctantly converted. According to Fawn M. Brodie, Thomas Jefferson's "faith that the militia could be counted on at least to defend home and family was shattered as time and again the raw troops broke ranks and ran from seasoned British regulars."[176]

The Founders, therefore, had a different view of the militia after the war than they had when the Revolution began. For many people, if not most, faith in the universal militia composed of the whole "body of the people" had been shattered. The post-war attitude is evident in *The Federalist Number 29*, written by Alexander Hamilton. Hamilton defended the wisdom of placing the organization and discipline of the militia in the

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[171] *Id.* at 427.

[172] *Id.* at 438-39.

[173] ROYSTER, *supra* note 143, at 66.

[174] *See, e.g., supra* notes 159, 162 and accompanying text; *see also* CHRISTOPHER COLLIER & JAMES LINCOLN COLLIER, DECISION IN PHILADELPHIA 37 (1986). Disciplinary problems were so bad that Washington asked Congress for authority to increase the maximum punishment he could inflict for infractions such as shooting guns in camp or plundering from 100 to 500 lashes with the whip. Although Madison supported Washington's request, Congress never granted it. *See* ROYSTER, *supra* note 143, at 77-78.

[175] *See* ROYSTER, *supra* note 143, at 50.

[176] BRODIE, *supra* note 91, at 137.

hands of Congress.[177] "What plan for the regulation of the militia may be pursued by the national government is impossible to be foreseen," Hamilton wrote.[178] However, were he to deliver his thoughts on the militia to the federal legislature,[179] he would offer the following views:

> The project of disciplining all the militia of the United States is as futile as it would be injurious if it were capable of being carried into execution. A tolerable expertness in military movements is a business that requires time and practice. It is not a day, nor a week nor even a month, that will suffice for the attainment of it. To oblige the great body of the yeomanry and of the other classes of the citizens to be under arms for the purpose of going through military exercises and evolutions, as often as might be necessary to acquire the degree of perfection which would entitle them to the character of a well-regulated militia, would be real grievance to the people . . . . and would form an annual deduction from the productive labor of the country to an amount which . . . would not fall far short of a million pounds . . . . The attention of the government ought particularly to be directed to the formation of a select corps of moderate size, upon such principles as will really fit it for service in case of need.[180]

Although everyone may not have agreed, this was the prevailing view.[181] After what had been learned in the war, it could not have been otherwise. Politicians continued to make Fourth of July speeches praising the militia. And anti-Federalists had their reasons for haranguing about how federal control over the

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[177] *See* THE FEDERALIST NO. 29, at 182 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

> It requires no skill in the science of war to discern that uniformity in the organization and discipline of the militia would be attended with the most beneficial effects . . . . It would enable them to discharge the duties of the camp and of the field with mutual intelligence and concert — an advantage of peculiar moment in the operations of an army . . . .

Id.

[178] *Id.*

[179] *See id.*

[180] *Id.* at 228-29.

[181] In the South, where the militia continued to serve a critical need, ambivalence developed. After the militia disgraced themselves a second time in the war of 1812, public jeering of the militia became so much of a problem that Southern legislatures enacted statutes making it a crime to heckle or disrupt a militia muster. *See* Bellesiles, *supra* note 34, at 438.

militia would destroy a bulwark against tyranny. But in analyzing the events at the Richmond Convention and beyond, we need to keep both soapbox rhetoric designed to flatter an audience and the agenda of the anti-Federalists in perspective.

F. The Richmond Convention

The Virginia ratifying convention convened in Richmond on June 2, 1788. The Convention itself was high drama. As Harry Ammon writes, this was "the most distinguished body ever to assemble in Virginia, numbering among its 173 members the outstanding leaders of the past generation."[182] So many spectators showed up that the proceedings were moved from the capitol to larger facilities nearby.[183] Even before a white audience in the South, matters involving slavery and slave control were considered sensitive and were often raised in muted and oblique ways. But such matters could never be far from the minds of all those present at the Richmond Convention. As Conor Cruise O'Brien notes, "even where the word 'slavery' was not specifically mentioned, the fact of slavery must have been subliminally pervasive in the whole debate over ratification."[184]

Patrick Henry and George Mason took the lead for the anti-Federalists. Though he had a reputation as a great orator, Henry was probably past his prime and tended to ramble.[185] Historians believe that he was an unalterable foe of ratification, and that he raised any argument that might win votes against ratification.[186] His style was emotional rather than analytical. He would roam widely, poking at one point and then another, but seldom discussing subjects methodically. It did not take him long to raise the issue of the militia; he did so in the middle of

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[182] AMMON, *supra* note 77, at 70.

[183] *See id.*

[184] CONOR CRUISE O'BRIEN, THE LONG AFFAIR: THOMAS JEFFERSON AND THE FRENCH REVOLUTION 1785-1800, at 73 (1996) [hereinafter O'BRIEN, THE LONG AFFAIR]. It is possible that remarks about slave control or the potential for slave insurrection were deemed too inflammatory to record, were muted in the transcript, or were not transcribed for other reasons. *See infra* notes 309-16 and accompanying text.

[185] *See* AMMON, *supra* note 77, at 71.

[186] *See id.* (stating that unlike Mason, whose advocacy for amendments prior to ratification was sincere, Henry used amendment argument as method of preventing ratification).

a long speech on the third day of the Convention. He began by quoting Article I, Section 8 of the Constitution, which divides authority over the militia between Congress and the states and, against the wishes of anti-Federalists, gives the lion's share of the power to Congress.

> Let me here call your attention to that part which gives the Congress power 'to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States — reserving to the states, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress.' By this, sir, you see that their control over our last and best defence is unlimited. If they neglect or refuse to discipline or arm our militia, they will be useless: the states can do neither — this power being exclusively given to Congress. The power of appointing officers over men not disciplined or armed is ridiculous; so that this pretended little remains of power left to the states may, at the pleasure of Congress, be rendered nugatory.[187]

What was Henry driving at? In 1788, Americans did not fear foreign invasion.[188] Nor did Americans still harbor the illusion that the militia could effectively contest trained military forces.[189] As previously discussed, the militia had performed woefully during the war. Virginia's militia, in particular, had disgraced itself by bolting before firing a single shot in the critical battle of Camden, South Carolina.[190] The militia were the last and

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[187] 3 DEBATES OF THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 52 (Jonathan Elliot ed., 2d ed. 1891) [hereinafter 3 ELLIOT'S DEBATES].

[188] *See* CLINTON ROSSITER, THE AMERICAN QUEST 1790-1860, at 104 (1971).

[189] Robert Carter Nicholas posed the following rhetorical questions to the Convention:

> Would it be safe to depend on militia alone without the agency of regular forces, even in time of war? Were we to be invaded by a powerful, disciplined army, should we be safe with militia? . . . Although some people are pleased with the theory of reliance on militia, as the sole defence of a nation, yet I think it will be found, in practice, to be by no means adequate.

3 ELLIOT'S DEBATES, *supra* note 187, at 389. Nicholas added: "Its inadequacy is proved by the experience of other nations." *Id.* This was as far as a member of the Convention could go. It would have been an act of both rudeness and political folly to mention that, in fact, the inadequacy of the militia had been proved by recent American experience as well.

[190] The battle of Camden took place in 1780. General Horatio Gates of the Continental Army placed Virginia and North Carolina militia units in the center and on the right of his position. "They alone outnumbered the whole British force," writes historian Charles Royster. ROYSTER, *supra* note 143, at 282 (1979). "But they ran without firing a shot." *Id.*

best defense against slave insurrection but practically useless against a professional army.

Without spelling it out in so many words, Henry was raising the specter of the federal government using Article I, Section 8 powers to subvert the slave system indirectly. He was suggesting that Congress, controlled in the future by an abolitionist North, might use its constitutional authority to arm the militia to, in effect, disarm them. He did not need to explain this; everyone in Richmond would have understood this to be the import of his remarks. George Mason took up the same theme on June 14. He began by adding a new wrinkle:

> Mr. Chairman, unless there be some restrictions on the power of calling forth the militia . . . we may very easily see that it will produce dreadful oppressions. It is extremely unsafe, without some alterations. It would be to use the militia to a very bad purpose, if any disturbance happened in New Hampshire, to call them from Georgia . . . . If gentlemen say that the militia of a neighboring state is not sufficient, the government ought to have the power to call forth those of other states, the most convenient and contiguous. But in this case, the consent of state legislatures ought to be had. On *real* emergencies, this consent will never be denied, each state being concerned in the safety of the rest. This power may be restricted without any danger. I wish such an amendment as this — that the militia of any state should not be marched beyond the limits of the adjoining state; and if it be necessary to draw them from one end of the continent to the other, I wish such a check, as the consent of the state legislature, to be provided.[191]

Mason's remarks gave Henry's supposition a different twist. Instead of Congress leaving the state vulnerable by disarming its militia, George Mason was raising the possibility of Congress simply removing the militia from Virginia. What, he asked, if a Southern state's militia were marched to New Hampshire?[192]

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[191] 3 ELLIOT'S DEBATES, *supra* note 187, at 378-79.

[192] A year earlier at the Constitutional Convention in Philadelphia, Luther Martin of Maryland raised the converse problem — the North being forced to march its militia south. Martin suggested that the slave system would unfairly burden the Northern states because they would be bound to protect their sister states from insurrection. *See* ANTI-FEDERALIST PAPERS, *supra* note 60, at 161 (quoting proceedings of Aug. 21-22, 1787). In this same exchange with Martin, John Rutledge of South Carolina extinguished any thought that slavery might be a negotiable subject at the Constitutional Convention with his now

The consequence of such an act was obvious to everyone in the audience: the state would be unprotected against its slaves. The idea of an insurrection in New Hampshire was not necessarily farfetched; two years earlier the governor of New Hampshire summoned 2000 militiamen to suppress disturbances in the state.[193] New Hampshire had restored order, however, without assistance from sister states. The prospect of Congress ordering militia from the Southern states to deal with disturbances in New England was implausible except, perhaps, to those profoundly mistrustful of Congress's motives. Henry and Mason were not above stoking the coals of Virginia paranoia. "Virginia and North Carolina are despised," Henry told the Richmond Convention at one point.[194]

In addition to adding this new possibility, Mason reiterated Henry's supposition of Congress disarming the militia. He told the Convention:

> The militia may be here destroyed by that method which has been practised in other parts of the world before; that is, by rendering them useless — by disarming them. Under various pretences, Congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for Congress has an exclusive right to arm them, &c.[195]

Mason went on for some time, suggesting that disarming the militia would be part and parcel of a congressional scheme to

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famous statement that "[t]he true question at present is whether the Southern States shall or shall not be parties to the Union." *Id.* Rutledge said he would be willing to exempt the Northern states from an obligation to defend the Southern states from slave insurrection. *See id.* Although Rutledge's suggestion of granting the North an exemption from the duty to suppress slave insurrections in the South was not acted upon by the Constitutional Convention, Maryland later proposed a constitutional amendment providing that the "[m]ilitia not be subject to the rules of Congress, nor marched out of the state, without the consent of the legislature of such state." 2 THE DEBATES ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 555 (1993). Query whether, by raising the possibility of Northern militia being ordered to march to the South, Luther Martin unintentionally stimulated fellow delegate George Mason's thinking about the reverse problem.

[193] During the period of the disturbances which led to Shays's Rebellion in Massachusetts, similar protests verging on armed rebellion over tax and debt policies occurred in New Hampshire. *See* DAVID P. SZATMARY, SHAYS' REBELLION: THE MAKING OF AN AGRARIAN INSURRECTION 78-79 (1980). For a description of Shays's Rebellion, see *infra* notes 418-56 and accompanying text.

[194] 3 ELLIOT'S DEBATES, *supra* note 187, at 161.

[195] *Id.* at 379.

create a standing army, which was something of a non sequitur since the Constitution expressly granted Congress the power to raise an army and navy.[196] Then he continued:

> Why should we not provide against the danger of having our militia, our real and natural strength, destroyed? The general government ought, at the same time, to have some such power. But we need not give them power to abolish our militia. If they neglect to arm them, and prescribe proper discipline, they will be of no use. I am not acquainted with the military profession. I beg to be excused for any errors I may commit with respect to it. But I stand on the general principles of freedom, whereon I dare to meet any one. I wish that, in case the general government should neglect to arm and discipline the militia, there should be an express declaration that the state governments might arm and discipline them. With this single exception, I would agree to this part, as I am conscious the government ought to have the power.[197]

Mason's stories were contradictory. On the one hand, Mason suggested that the Southern militia would be sufficiently sharp instruments that Congress might employ them to quell insurrections as far away as New England. On the other hand, he suggested that Congress would cause the militia to atrophy in order to develop political support to raise a standing army. These were inconsistent visions. Moreover, there was a fundamental flaw in Mason's theory that Congress might deliberately allow the militia to atrophy in order to use their very frailty to develop political support for a standing army. Rather than creating support for a standing army, would not weakened militia stimulate demands for reinvigorating the militia themselves?

Madison responded to Mason's concern about a standing army as follows: "The most effectual way to guard against a standing army, is to render it unnecessary. The most effectual way to render it unnecessary, is to give the general government full power to call forth the militia, and exert the whole natural strength of the Union, when necessary."[198]

Before the Revolution there had been a great deal of rhetoric about the evils of standing armies. Although borrowed from

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[196] *See id.* at 379-80.

[197] *Id.* at 380.

[198] *Id.* at 381.

Whig ideology, bombast equating standing armies with tyranny had a uniquely American perspective in purpose: the revolutionaries were building fervor against what was, in essence, a foreign army of occupation. But an American army in America, raised and controlled by the people's representatives, was another matter. Federalists argued that in a democracy it is difficult, if not impossible, for a government to use a standing army to impose its will on the people.[199] Moreover, the belief that a citizen militia could effectively fight against a professional army had been demolished during the war by the militia themselves.[200] While some anti-Federalists continued to talk about the evils of a standing army, they had lost this argument in Philadelphia.

However, Mason's main concern was not the creation of a standing army but the preservation of the militia. Mason personally owned three hundred slaves.[201] He understood the critical role of the militia in preserving the slave system. He knew firsthand from service at the Philadelphia Convention that the North was not sanguine about the slavery compromise and he could not help fearing how Congress would exercise its authority over the militia. Mason was simply using every device possible to stoke the fires of fear, fear his audience certainly shared.

Patrick Henry was even more direct. He drew the audience's attention to the section of the Constitution that provides that no state may, without the consent of Congress, "engage in War, unless actually invaded,"[202] and asked: "If you give this clause a fair construction, what is the true meaning of it? What does this relate to?"[203] Henry answered this question as follows:

> Not domestic insurrections, but war. If the country be invaded, a state may go to war, but cannot suppress insurrections. If there should happen an insurrection of slaves, the country cannot be said to be invaded. They cannot, therefore, suppress it without the interposition of Congress . . . . Congress, and *Congress only*, can call forth the militia.[204]

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[199] *See* WOOD, RADICALISM OF THE AMERICAN REVOLUTION, *supra* note 89, at 146.

[200] *See supra* notes 149-81 and accompanying text.

[201] *See* BRADFORD, *supra* note 72, at 156.

[202] U.S. CONST. art. I, § 10, cl. 3.

[203] 3 ELLIOT'S DEBATES, *supra* note 187, at 423.

[204] *Id.* at 421.

If members of the audience were previously uncertain about the meaning of Mason and Henry's warning, this had made it plain. Congress might want to leave the South defenseless against its slaves.

The Federalists did their best to respond to the suggestions that the federal government would, in one way or another, render the militia impotent as a slave control device. They sought to show, for example, that Mason's proposal for a constitutional amendment that would prohibit Congress from sending the militia beyond the borders of an adjoining state without the consent of the state legislature would itself imperil the South. A Federalist delegate named Wilson Nicholas addressed Mason's proposal as follows:

> Who will be most likely to want the aid of the militia? The Southern States, from their situation. Who are the most likely to be called for? The Eastern States, from their strength, &c. Should we put it in the power of the particular states to refuse the militia, it ought to operate against ourselves.[205]

Madison also addressed Mason's concern that Congress could march Georgia's militia to New Hampshire: "There is something so preposterous, and so full of mischief, in the idea of dragging the militia unnecessarily from one end of the continent to the other, that I think there can be no ground of apprehension."[206] And Madison responded to the argument that only Congress could arm the militia, "I cannot conceive that this Constitution, by giving the general government the power of arming the militia, takes it away from the state governments. The power is concurrent, and not exclusive."[207]

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[205] *Id.* at 390. Madison reiterated the same point later in the Convention, as follows:

> I conceive that we are peculiarly interested in giving the general government as extensive means as possible to protect us. If there be a particular discrimination between places in America, the Southern States are, from their situation and circumstances, most interested in giving the national government the power of protecting its members.

Id. at 415.

[206] *Id.* at 383.

[207] *Id.* at 382. Madison continued:

> Have we not found, from experience, that, while the power of arming and governing the militia has been solely vested in the state legislatures, they were neglected and rendered unfit for immediate service? Every state neglected too

Madison blundered by arguing that the power to arm the militia was concurrent. John Marshall avoided this pitfall later in the Convention when he said simply: "If Congress neglect our militia we can arm ourselves. Cannot Virginia import arms? Cannot she put them into the hands of her militia-men?"[208] However, instead of putting the matter in practical terms such as these, Madison suggested that even though the Constitution gave Congress the authority to arm the militia, the states also possessed a constitutional power to arm the militia. This position is difficult, if not impossible, to maintain. Though he generally could not spar with Madison on a technical level, Patrick Henry saw an opportunity and seized it. When Madison sat down, Henry rose and ridiculed Madison's argument:

> As my worthy friend said, there is a positive partition of power between the two governments. To Congress is given the power of 'arming, organizing, and disciplining the militia, and governing such part of them as may be employed in the service of the United States.' To the state legislatures is given the power of 'appointing the officers, and training the militia according to the discipline prescribed by Congress.' I observed before, that, if the power be concurrent as to arming them, it is concurrent in other respects. If the states have the right of arming them, &c., concurrently, Congress has a concurrent power of appointing the officers, and training the militia. If Congress have that power, it is absurd. To admit this mutual concurrence of powers will carry you into endless absurdity — that Congress has nothing exclusive on the one hand, nor the states on the other.[209]

Henry proceeded for some time to further demonstrate the absurdity of implied concurrent powers. Then Henry made the following point:

> When this power is given up to Congress without limitation or bounds, how will your militia be armed? You trust to chance . . . . If gentlemen are serious when they suppose a concurrent power, where can be the impolicy to amend it? Or, in other words, to say that Congress shall not arm or

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much this most essential object. But the general government can do it more effectually.

Id.

[208] *Id.* at 421.

[209] *Id.* at 386.

> discipline them, till the states shall have refused or neglected to do it? This is my object. I only wish to bring it to what they themselves say is implied.[210]

What was Madison thinking at this juncture? Henry had suggested that all he wanted was this one modest and reasonable change in the Constitution, to allow the states to arm the militia if the federal government failed to do so. Henry's real objective, of course, was to destroy rather than reform the Constitution. Besides kicking himself for handing Henry an oratorical weapon, Madison may well have been thinking that Henry's point had merit — the states ought to have a concurrent authority to arm their militia. What harm would there be in it, especially if it would relieve some of the anti-Federalist paranoia about Congress emasculating the militia? Two years later Madison would write the Second Amendment, which has essentially the same effect as the provision that Henry claimed to be advocating.

In one of his last speeches in the final days of the Convention, Patrick Henry raised the question of slavery in so direct a fashion that he appears to have violated the mores of that time and place. "In this state there are two hundred and thirty-six thousand blacks, and there are many in several other states. But there are few or none in the Northern States,"[211] he began. He suggested that under its power to provide for the general defense, Congress might enlist blacks in the army and then emancipate them. "Slavery is detested," he explained.[212] In a moment he continued:

> [T]hey will search that paper, and see if they have power of manumission. And have they not, sir? Have they not power to provide for the general defence and welfare? May they not think that these call for the abolition of slavery? May they not pronounce all slaves free, and will they not be warranted by that power? This is no ambiguous implication or logical deduction. The paper speaks to the point: they have the power in clear, unequivocal terms, and will clearly and certainly exercise it.[213]

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[210] *Id.*

[211] *Id.* at 590.

[212] *Id.*

[213] *Id.*

He sought to drive home the point that Congress would inevitably attempt to abolish slavery. "[A] decided majority of states have not the ties of sympathy and fellow-feeling for those whose interest would be affected by their emancipation. The majority of Congress is to the north, and the slaves are to the south."[214]

Jack N. Rakove of Stanford University suggests Henry's speech may have been a mark of desperation.[215] The tide was apparently now running in the Federalists' direction. Based on his own head count, Madison had privately calculated that the Federalists had a small majority of between three and four delegates.[216] Henry's speech probably did the anti-Federalist cause more harm than good. He weakened his point by overstating it; whatever implied powers one might claim to find, the Constitution did not in "clear, unequivocal terms" grant Congress the power of emancipation. "I was struck with surprise when I heard him express himself alarmed with respect to the emancipation of slaves," Madison responded shortly thereafter.[217] "There is no power to warrant it, in that paper. If there be, I know it not."[218] Although Madison's argument may have been persuasive and, on the whole, reassuring, it may also have heightened Southern anxiety. If the federal government found the slave system so obnoxious but lacked the constitutional authority to attack it directly, it might look for ways to undermine the system indirectly.

As the Convention reached its final days, the anti-Federalists increasingly criticized the absence of a bill of rights. Some believe that this was their most persuasive argument.[219] Their strategy was to ask the Convention to declare that the Constitution should be ratified, but only after a bill of rights had been included. Madison and the Federalists adopted a counter-strategy. They did not oppose a bill of rights in principle, but argued that failure to ratify the Constitution until the states had all agreed on a bill of rights would lead to chaos.[220] Madison ar-

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[214] *Id.*

[215] *See* RAKOVE, ORIGINAL MEANINGS, *supra* note 56, at 124.

[216] *See* BANNING, *supra* note 77, at 234.

[217] 3 ELLIOT'S DEBATES, *supra* note 187, at 621.

[218] *Id.* at 622.

[219] *See* BANNING, *supra* note 77, at 240 (asserting that demands for explicit guarantees was so wide spread that Federalists were forced to promise Bill of Rights).

[220] *See* RAKOVE, ORIGINAL MEANINGS, *supra* note 56, at 123-24 (examining concept of

gued that if the anti-Federalists were right when they asserted that the desire for a bill of rights was strong everywhere, then there will be little difficulty adding one through the amendment process.[221]

The anti-Federalists submitted a resolution stating that it was the "opinion" of the Convention that the Constitution ought to be ratified, but that the states should first consider a bill of rights proposed by the Virginia Convention.[222] The Federalists submitted a resolution to ratify the Constitution and appoint a committee to draft a proposed bill of rights that the Convention would recommend for subsequent adoption.[223] The anti-Federalist resolution came to a vote first, and was defeated by a vote of eighty to eighty-eight. Then, on a second vote, the Federalist resolution carried eighty-nine to seventy-nine.

G. Virginia's Proposed Declaration of Rights

The Richmond Convention was not quite done. A twenty member committee had been appointed to draft a recommended bill of rights. The committee included George Mason and Patrick Henry, as well as John Madison, John Marshall, and James Monroe. The opportunity to write a recommended bill of rights was all the anti-Federalists had left. Naturally, they wanted a strong and elaborate document, one that would restrict the power of the federal government as much a possible. The proposed bill of rights would be a different matter for the Federalists. They had won. The Convention had ratified the Constitution unequivocally; the recommended bill of rights would be a document without legal effect. The work of the committee was anti-climatic.[224] For the Federalists, and particularly for politicians such as Madison, this was a political opportunity. Since Virginia was nearly evenly divided between Federalist and anti-Federalists, it made sense to assuage the feelings of the

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ratification and Richmond Convention).

[221] *See* 3 ELLIOT'S DEBATES, *supra* note 187, at 629-30 (discussing extreme risk of perpetual disunion and urging proposal of amendments).

[222] *See id.* at 652-53.

[223] *See id.* at 655-56.

[224] There is no record of the committee proceedings. *See* JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 142 (1996) [hereinafter SMITH, DEFINER OF A NATION].

defeated. Thus, despite the fact that the committee's proposed declaration of rights contained twenty provisions in addition to twenty proposed amendments to the Constitution, many of which would have been highly controversial if taken seriously, the Convention passed the committee's documents unanimously and without recorded debate.[225]

The committee recommended forty separate provisions, a "declaration or bill of rights" consisting of twenty provisions and twenty amendments to the Constitution, four relating to the right to bear arms or the militia. The seventeenth and nineteenth provisions in Virginia's proposed Declaration of Rights stated:

> 17th. That the people have a right to keep and bear arms; that a well-regulated militia, composed of the body of the people trained to arms, is the proper, natural, and safe defence of a free state; that standing armies, in time of peace, are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the community will admit; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power.
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> . . . .
>
> 19th. That any person religiously scrupulous of bearing arms ought to be exempted, upon payment of an equivalent to employ another to bear arms in his stead.[226]

The two proposed constitutional amendments relevant to the militia were as follows:

> 9th. That no standing army, or regular troops, shall be raised, or kept up, in time of peace, without the consent to two thirds of the members present, in both houses.
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> . . . .
>
> 11th. That each state respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same. That the militia shall not be subject to martial law, except when in actual service, in time of war, invasion, or rebellion; and when not in the actual service of the United

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[225] There was a motion to strike the proposed amendment which held that Congress must inform each state of its quota whenever it enacted taxes and that states may raise their quota rather than allowing the federal government to collect the tax. The motion to delete this proposal was defeated 65 to 85. *See* 3 ELLIOT'S DEBATES, *supra* note 187, at 661-63.

[226] *Id.* at 659.

> States, shall be subject only to such fines, penalties, and punishments, as shall be directed or inflicted by the laws of its own state.[227]

Advocates of the individual rights theory of the Second Amendment tend to attach great significance to Virginia's proposed Declaration of Rights. This is a mistake. The passionate debate over ratification that culminated in the vote of eighty to eighty-nine was followed, without debate, by a unanimous vote for a long list of proposed rights and amendments to the Constitution. The Declaration of Rights did not so much represent the sense of the Richmond Convention as a cathartic exercise for the defeated anti-Federalists.

In one sense, the right to bear arms provisions in the Declaration of Rights were standard anti-Federalist fare. They were rhetoric recycled from newspaper articles and from speeches made and rejected at the Constitutional Convention in Philadelphia.[228] The issue of whether Congress should have the authority to raise a standing army, for example, was exhumed after having been laid to rest in Philadelphia. Including this issue in a list of proposed constitutional amendments may have been emotionally gratifying to the defeated anti-Federalists, but it is doubtful many expected the issue to be reopened. In another sense, however, the Declaration's right to bear arm provisions represented something new.

The Virginia Bill of Rights, which had been adopted in 1776 and was still in effect, did not contain a right to bear arms provision.[229] The principal author of that document was none other than George Mason.[230] Why did Mason and the Richmond delegates attach greater significance to a right to bear

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[227] *Id.* at 660. In addition, the tenth proposed amendment read: "10th. That no soldier shall be enlisted for any longer term than four years, except in time of war, and then for no longer term than the continuance of the war." *Id.*

[228] *Compare, e.g.*, DECLARATION OF RIGHTS, *in* LOUIS G. SCHWOERER, THE DECLARATION OF RIGHTS, 1689 app. at 295-98 (1981) [hereinafter DECLARATION OF RIGHTS] *with Letters from the Federal Farmer, I and II, in* ANTI-FEDERALIST PAPERS, *supra* note 60, at 256, 268; "John DeWitt," Essay II (Oct. 27, 1787), *in id.* at 189, 197-98.

[229] *See* 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATE, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3812-19 (Francis Newton Thorpe ed., 1909) [hereinafter THORPE'S CONSTITUTIONS].

[230] *See* SMITH, DEFINER OF A NATION, *supra* note 224, at 142.

arms in 1788 than in 1776? Mason and Henry had raised the specter of the national government undermining the slave system by disarming the state militia, and although they had failed to stop ratification, they had persuaded many Virginians, and perhaps even themselves, that this was a real concern.

The structure and language of the Declaration of Rights provide further evidence that the right to bear arms was linked to the militia. Both concepts are incorporated in the same provision. Moreover, the phrase "to bear arms" was a term of art that meant participating in military affairs, not merely carrying weapons. As Garry Wills put it: "[O]ne does not bear arms against a rabbit."[231]

This is not to say that the concept of a right to bear arms originated in Richmond. It did not. Four of the thirteen state constitutions adopted between the signing of the Declaration of Independence in 1776 and the ratification of the Constitution in 1789 contained a right to bear arms provision.[232] As Part II discusses, the English Declaration of Rights of 1689 contained a right to have arms provision. Nor were the concerns raised at Richmond unique to Virginia. Fears about whether the federal government would attempt to destroy the slave system were voiced at the ratifying conventions in the other Southern states,[233] as were apprehensions about federal control over the

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[231] Wills, *To Keep and Bear Arms, supra* note 44, at 64; *see also* John Levin, *The Right to Bear Arms: The Development of the American Experience*, 48 CHI.-KENT L. REV. 148, 153 (1971) (noting that to "bear arms" means "to serve in the armed forces of the state").

[232] *See infra* notes 265-74 and accompanying text. However, they were divided over the purpose and nature of that right. *See infra* notes 265-74 accompanying text.

[233] *South Carolina:* During debates over ratification in the South Carolina legislature in January 1788, anti-Federalist Rawlins Lowndes noted that "the Northern States would so predominate as to divest us of any pretensions to the title of a republic." *See* 4 DEBATES OF THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 272 (Jonathan Elliot ed., 2d ed. 1891) [hereinafter 4 ELLIOT'S DEBATES]. He continued:

> Without negroes, this state would degenerate into one of the most contemptible in the Union; and he cited an expression that fell from General Pinckney on a former debate, that whilst there remained one acre of swamp-land in South Carolina, he should raise his voice against restricting the importation of negroes. . . . Negroes were our wealth, our only natural resource; yet behold how our kind friends in the north were determined soon to tie up our hands, and drain us of what we had!

Id. at 272-73.

In response, Charles Pinckney, a Federalist who served as a delegate to the Constitu-

militia.[234] But it was at Richmond that concerns about slave control and federal authority over the militia were united, producing a new rationale for a right to bear arms.

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tional Convention, did not challenge the assumption that the North might like to interfere with the slave system. Instead, he argued that the South had made a necessary bargain:

> The honorable gentleman alleges that the Southern States are weak. I sincerely agree with him. We are so weak that by ourselves we could not form a union strong enough for the purpose of effectually protecting each other. . . . I am of the same opinion now as I was two years ago, when I used the expressions the gentleman has quoted — that, while there remained one acre of swamp-land uncleared in South Carolina, I would raise my voice against restricting the importation of negroes. . . . We [at the Constitutional Convention] endeavored to obviate the objections that were made in the best manner we could. . . . By this settlement we have secured an unlimited importation of negroes for twenty years. Nor is it declared that the importation shall be then stopped; it may be continued. We have a security that the general government can never emancipate them, for no such authority is granted; and it is admitted, on all hands, that the general government has no powers but what are expressly granted by the Constitution, and that all rights nor expressed were reserved by the several states. We have obtained a right to recover our slaves in whatever part of America they may take refuge, which is a right we had not before. In short, considering all circumstances, we have made the best terms for the security of this species of property it was in our power to make. We would have made better if we could . . . .

Id. at 283-86.

A speech delivered by Patrick Dollard later in the South Carolina ratification debates also evidences paranoia about Northern and, therefore, federal designs. "My constituents are highly alarmed at the large and rapid strides which this new government has taken towards despotism," he said. *Id.* at 337-38. "They say it is big with political mischiefs, and pregnant with a greater variety of impending woes to the good people of Southern States, especially South Carolina, than all the plagues supposed to issue from the poisonous box of Pandora." *Id.*

Georgia: Debates in Georgia's ratifying convention were not recorded. From the convention's journals, which recorded motions and votes, as well as letters written by delegates, we know that after no more than three days of debate, the delegates voted to ratify the Constitution by a vote of 26 to 0. The speed and decisiveness of the vote is attributed to the fact that Georgia feared an impending war with the Creek Indian nation and hoped for protection from a strengthened Union. However, one delegate expressed the view that the Constitution should be ratified with a provision requiring a second convention a set number of years later to reconsider the interests of the Southern states, which might not be able to adequately protect the slave trade under the constitutional framework. *See* SMITH, TO FORM A MORE PERFECT UNION, *supra* note 66, at 77-78 (1993).

[234] *South Carolina:* Arguing for ratification, Robert Barnwell alluded to concerns about the Southern militia being taken out-of-state:

H. Madison's Political Career

The anti-Federalists had been defeated twice: first at the Constitutional Convention in Philadelphia, and again in the battle to prevent ratification. Virginia's ratification was a watershed. As Irving Brant noted: "Virginia's ratification, following New Hampshire's,[235] not only built the state total to ten, but added overpowering weight to the new system. Rejection by any state would mean blockaded isolation."[236] The steam went out of the opposition at the convention in Poughkeepsie, New York,[237] and New York ratified the Constitution on July 26.[238]

> In the first instance, it appeared to him that the gentleman [Rawlins Lowndes] had established, as the basis of his objections, that the Eastern States entertained the greatest aversion to those which lay to the south, and would endeavor in every instance to oppress them. This idea he considered as founded in prejudice, and unsupported by facts. . . . Did [during the Revolutionary War] they demand the southern troops to the defence of the north? No!

4 ELLIOT'S DEBATES, *supra* note 233, at 291-92

North Carolina: At the ratifying convention in Hillsborough, a delegate expressed the same fear George Mason voiced in Richmond about the disarming of the militia. "When we consider the great powers of Congress, there is great cause of alarm. They can disarm the militia," he declared while arguing that an armed militia was necessary to enable the state to resist attempts by the federal government to enforce "oppressive" laws. *Id.* at 203.

[235] New Hampshire ratified the Constitution on June 21, 1788, four days before Virginia. *See* ANTI-FEDERALIST PAPERS, *supra* note 60, at 26.

[236] IRVING BRANT, JAMES MADISON: FATHER OF THE CONSTITUTION 1787-1800, at 229 (1950).

[237] The proceedings at the New York ratifying convention in Poughkeepsie reflect the influence of the anti-Federalist arguments advanced at Richmond, although — having been repackaged for a Northern audience — the arguments lacked punch. John Lansing, a delegate from upstate New York, proposed the following constitutional amendment:

> Respecting the organization and arming the *militia*, &c., —
> *Provided*, That the militia of any state shall not be marched out of such state without the consent of the executive thereof, nor be continued in service out of state, without the consent of the legislature thereof, for a longer term than six weeks; and *provided*, that the power to organize, arm, and discipline the militia, shall not be construed to extend further than to prescribe the mode of arming and disciplining the same.

2 DEBATES OF THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 406 (Jonathan Elliot ed., 2d ed. 1891) [hereinafter 2 ELLIOT'S DEBATES]. The motion was seconded but never voted upon. *See id.* The convention finally ratified the Constitution, but at the same time propounded an aspiratory list of amendments, including the following: "[T]he militia of this state will not be continued in service out of this state for a longer term than six weeks, without the consent of the legislature thereof . . . ." *Id.* at 411.

[238] *See id.* at 413.

Yet the anti-Federalists refused to give up. Their new strategy was two-fold. First, they planned to try to convene a second constitutional convention to consider a bill of rights, which they hoped would constrict the power of the federal government. Second, they planned to send as many anti-Federalists to Congress as possible.[239]

Intent on sending two anti-Federalists to the United States Senate from Virginia, Patrick Henry employed the Machiavellian strategy of supporting Madison for a seat in the old Congress to keep Madison out of Virginia.[240] Then, in Madison's absence, Henry sought to elect anti-Federalists Richard Henry Lee and William Grayson to the United States Senate.[241] Henry was still a powerful figure. Even Washington was in awe of his political prowess in the Virginia Legislature. "He has only to say let this be law, and it is law," Washington remarked.[242] When the Senate election took place in the Virginia Legislature, Henry pulled no punches. He openly questioned Madison's character, and stated that Madison's election to the Senate would produce "rivulets of blood throughout the land."[243] Henry was successful; Madison lost to Lee and Grayson.[244]

In an age when politicians preferred to portray themselves as statesmen who were reluctantly drafted for public office, Madison had to scramble to win a seat in the House of Representatives.[245] Henry sought to slam this door closed as well. With the specific purpose of keeping Madison out of Congress altogether, Henry gerrymandered the congressional districts so that

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[239] *See generally* BANNING, *supra* note 77, at 264 (regarding Henry's pledge "to retrieve the loss of liberty and remove the defects of that system in a constitutional way"); BRANT, *supra* note 236, at 235 (discussing Federalists and anti-Federalists competing for control of new Congress).

[240] *See* AMMON, *supra* note 77, at 75 (explaining methods Henry used to keep Madison out of Senate and House of Representatives).

[241] *See* BRANT, *supra* note 236 at 236-37 (discussing Patrick Henry's effort to re-elect James Madison to U.S. House of Representatives so that two anti-Federalists could represent Virginia in U.S. Senate).

[242] BRANT, *supra* note 236, at 237 (discussing Patrick Henry's power over Virginia Legislature).

[243] *Id.* (quoting Henry Lee's account).

[244] *See id.;* BANNING, *supra* note 77, at 270.

[245] *See* BANNING, *supra* note 77 at 271 (discussing inauguration of Federal Republic).

Madison's home county was lumped into a district strong in anti-Federalist sentiment. In addition, he ensured legislation was enacted to confine candidates to the district in which they resided.[246]

Madison's political career hung by a thread. Though reluctant at first, he threw himself into a vigorous campaign for Congress. His opponent James Monroe was a formidable candidate[247] who was promoted as a champion of a bill of rights.[248] Here, Madison was vulnerable. Madison had not supported a bill of rights in either Philadelphia or Richmond — he strongly believed in structural rather than rights based checks on the arbitrary will of the majority[249] — and yet he was now standing for election in a congressional district in which a bill of rights was widely popular. Cognitive dissonance set in.[250] In a long letter to Jefferson on October 17, 1788, Madison wrestled with his views on a bill of rights.[251] "My own opinion has always been

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[246] *See id.* at 270.

[247] *See id.* at 274.

[248] *See* AMMON, *supra* note 77, at 76 (noting that Monroe was presented to voters as consistent supporter of bill of rights).

[249] *See* THE FEDERALIST NO. 10 (James Madison) (containing Madison's famous statement, "In the extent and proper structure of the Union, therefore, we behold a republican remedy for the diseases most incident to republican government"); *see also* PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 196 (1997) (arguing that Madison believed "best way to protect liberty . . . was by imposing structural limits on power"); RAKOVE, ORIGINAL MEANINGS, *supra* note 56, at 310-16 (explaining why Madison believed that "at the national level of government . . . a bill of rights would prove redundant or pointless"). *See generally* GORDON S. WOOD, THE MAKING OF THE CONSTITUTION (1987) (explaining why Madison believed that democracy was problem — particularly in hands of state legislatures — and that solution lay in size and structure of national government).

[250] *Cf.* BANNING, *supra* note 77, at 281 (arguing that although Madison still harbored reservations, he had privately concluded that Bill of Rights was "proper in itself"); Jack N. Rakove, *James Madison and the Bill of Rights: A Broader Context*, 22 PRESIDENTIAL STUD. Q. 667, 674 (1992) (arguing that Madison's views evolved over time but conceding that Madison believed that principal value of bill of rights would be to reassure moderate anti-Federalists).

[251] *See* Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* 1 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON, 1776-1826, at 562 (James Morton Smith ed., 1995) [hereinafter REPUBLIC OF LETTERS]. Madison wrote to Jefferson:

> My own opinion has always been in favor of a bill of rights; provided it be so framed as not to imply powers not meant to be included in the enumeration. 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

in favor of a bill of rights; provided it be so framed as not to imply powers not meant to be included in the enumeration," Madison wrote.[252] His heart was not in it; the arguments Madison set out against a bill of rights were more vigorously expressed than those he listed in its favor.[253] Nevertheless, the deed was done. From this time forth, Madison campaigned as a supporter of a bill of rights, promising that if elected he would feel "bound by the strongest motives" to work to append a bill of rights to the Constitution.[254] Madison ultimately prevailed in his campaign for a seat in the House of Representatives, defeating Monroe by a comfortable majority.[255]

I. The Drafting of the Second Amendment

How personally committed Madison became to a bill of rights is unknown, but after his election to Congress in February 1789, he was at least politically committed.[256] Moreover, Madison was

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> than that it is anxiously desired by others . . . I have not viewed it in an important light . . . .

Id. at 564.

[252] *Id.* at 564.

[253] *See, e.g., id.* (explaining why Madison disfavored bill of rights). Madison wrote,

> [E]xperience proves the inefficacy of a bill of rights on those occasions when its control is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State. In Virginia I have seen the bill of right violated in every instance where it has been opposed to a popular current.

Id.; *see also* BANNING, *supra* note 77, at 281 (noting that Madison voted against preparation of bill of rights at Constitutional Convention).

In his reply, Jefferson noted that Madison omitted what Jefferson considered the strongest reason for enacting a bill of rights: "[T]he legal check which it puts into the hands of the judiciary." Letter from Thomas Jefferson to James Madison (Oct. 17, 1788), *in* REPUBLIC OF LETTERS, *supra* note 251, at 587.

[254] *See* BANNING, *supra* note 77, at 272 (quoting letter by Madison published in Virginia newspaper). Madison explained that he had previously opposed amendments "as calculated to throw the states into dangerous contentions and to furnish the secret enemies of the Union with an opportunity of promoting its dissolution," but that now that circumstances had changed "it is my sincere opinion that . . . [Congress] ought to prepare and recommend to the states for ratification the most satisfactory provisions for all essential rights. . . . " *Id.* (quoting letter by Madison which was possibly intended for publication).

[255] *See id.* at 273 (stating that Madison won with 57% of popular vote).

[256] *See* ANDERSON, *supra* note 55, at 176-77 (expressing view that "Patrick Henry blocked his chances for a seat in the Senate, and placed Madison's candidacy for the House in such jeopardy that he felt constrained to promise his constituents that he would support

determined not to allow the anti-Federalists to use a bill of rights as an excuse to call a second constitutional convention at which any part of the Constitution might be reconsidered. The anti-Federalists persuaded New York to send a letter to the governors of the thirteen states calling for a "general convention" to consider amendments to the Constitution.[257] In addition, North Carolina refused to ratify the Constitution until Congress called a second constitutional convention.[258] Madison was intent that the process of drafting a bill of rights not be used to unravel the carefully woven fabric of the republic.[259] To preempt this mischief, and to fulfill his commitment to his constituents, Madison propelled himself forward as the prime mover of a bill of rights.

There are a few rights that Madison considered of special importance, or "the great rights" as he called them. These rights included trial by jury, freedom of the press, and "liberty of conscience."[260] He was especially concerned with religious liberty.[261] But how did Madison decide what other rights to enshrine in the Constitution? It was not an easy task, especially for a man who was at best profoundly skeptical of the wisdom of a

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amendments").

[257] *See* 2 ELLIOT'S DEBATES, *supra* note 237, at 413-14; *see also* RAKOVE, ORIGINAL MEANINGS, *supra* note 56, at 125-27.

[258] *See* 4 ELLIOT'S DEBATES, *supra* note 233, at 242-52; *see also* RAKOVE, ORIGINAL MEANINGS, *supra* note 56, at 128. Rhode Island had also refused to ratify. While one of the rationales for Rhode Island's refusal was the failure to include a bill of rights, principally Rhode Island wanted time to pursue its own monetary policy. *See* MCLOUGHLIN, *supra* note 70, at 102-04.

[259] *See* Letter of James Madison to Thomas Jefferson (Aug. 10, 1788), *in* THE REPUBLIC OF LETTERS, *supra* note 251, at 547 (reflecting how Madison's concern for "opposition sensitivities" fueled framing of Bill of Rights). *See generally* BANNING, *supra* note 77, at 279-81. "I enclose . . . a circular address to the other States on the subject of amendments, from which mischiefs are apprehended," Madison wrote in a letter to Thomas Jefferson. "The great danger in the present crisis," he continued, "is that if another Convention should be soon assembled, it would terminate in discord, or in alterations of the federal system which would throw back *essential* powers into the State Legislatures." Letter of James Madison to Thomas Jefferson (Aug. 10, 1788), *in* THE REPUBLIC OF LETTERS, *supra* note 251, at 547.

[260] *See* CREATING THE BILL OF RIGHTS, *supra* note 87, at 80 (setting forth's Madison's remarks before House of Representatives on June 8, 1789); *see also* Letter of James Madison to Thomas Jefferson (Oct. 17, 1788), *in* REPUBLIC OF LETTERS, *supra* note 251, at 564 (speaking of essential rights and mentioning rights of conscience specifically).

[261] *See* RAKOVE, ORIGINAL MEANINGS, *supra* note 56, at 310-13 (discussing Madison's commitment to religious liberty).

bill of rights.[262] Eighteenth century America reverberated with a cacophony of proclaimed rights. The thirteen state constitutions[263] collectively contained a total of more than four hundred separate provisions, what Gordon S. Wood calls "a jarring but exciting combination of ringing declarations of universal principles with a motley collection of common law procedures."[264]

But for the events at Richmond, it is doubtful that Madison would have included a right to bear arms in his proposed list of rights. Only four of the thirteen state constitutions — Massachusetts, North Carolina, Pennsylvania, and Vermont — contained a right to bear arms provision. Moreover, these documents were divided on the scope of the right. The Massachusetts and North Carolina declarations of rights guaranteed a collective right only; they spoke, respectively, of a right to bear arms "for the common defence"[265] or "for the defence of the State."[266] The declarations of rights of Pennsylvania[267] and Vermont,[268] on the other hand, guaranteed citizens a right to bear arms "for

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[262] *See generally id.* at 330-36 (discussing Madison's reservations in adopting Bill of Rights).

[263] Although there were 13 states and 13 state constitutions, there was not a complete identity between the two. Only 12 of the original 13 states had adopted constitutions (Rhode Island had not done so). The thirteenth state constitution belonged to Vermont, which was not yet recognized as a separate state (having been claimed to belong to New York).

[264] WOOD, CREATION OF THE AMERICAN REPUBLIC, *supra* note 54, at 271.

[265] Article XVII of the Massachusetts Declaration of Rights (1780) reads in full:

> The people have a right to keep and to bear arms for the common defence. And as, in time of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it.

3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATE, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1892 (Francis Newton Thorpe ed., 1909).

[266] North Carolina Constitution § XVII.

[267] *See* 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATE, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3114 (Francis Newton Thorpe ed., 1909).

[268] *See* 6 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATE, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3741 (Francis Newton Thorpe ed., 1909).

the defence of themselves and the State."[269] Thus, over two-thirds of the state constitutions did not contain a right to bear arms, and the minority was divided on the essential purpose of such a right. There is little reason to believe that, in rummaging among a collection of more than four hundred different provisions, Madison would have selected one embraced by a small and divided minority of states. In addition, five states and North Carolina, which remained outside the Union pending Congress's consideration of amendments, had transmitted to Congress proposed bills of rights and other constitutional amendments.[270] Neither of the two documents adopted before the Richmond Convention contained a right to bear arms.[271] New Hampshire, which held its ratifying convention simultaneously with Virginia, proposed that "Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion."[272] But New Hampshire was the only state to suggest a right to bear arms that was not connected to the militia. New York's proposal was substantially similar to Virginia's,[273] and with the exception of inconsequential differences in the placement of commas, North Carolina adopted Virginia's right to bear arms provision verbatim.[274] The proposed bills of rights were, of course, largely anti-Federalist documents.

On June 8, 1789, Madison submitted a resolution proposing a list of nine multi-part constitutional amendments that, if

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[269] This language is identical in both documents.

[270] *See* CREATING THE BILL OF RIGHTS, *supra* note 87, at 14-28. The five states, and the dates on which they formally adopted proposals at their ratifying conventions, were: Massachusetts (Feb. 6, 1788), South Carolina (May 23, 1788), New Hampshire (June 21, 1788), Virginia (June 27, 1788), and New York (July 26, 1788). *See id.* North Carolina adopted its proposals on August 1, 1788. 4 ELLIOT'S DEBATES, *supra* note 233, at 240-51.

[271] Massachusetts and South Carolina's proposals did not contain a right to bear arms. *See* CREATING THE BILL OF RIGHTS, *supra* note 87, at 14-16.

[272] *Id.* at 17.

[273] *See id.* at 19, 22. The pertinent part of New York's proposal reads:

> That the People have a right to keep and bear Arms; that a well regulated Militia, including the body of the People *capable of bearing Arms*, is the proper, natural and safe defence of a free State;
>
> That the Militia should not be subject to Martial Law, except in time of War, Rebellion or Insurrection.

Id. at 22.

[274] *See* 4 ELLIOT'S DEBATES, *supra* note 233, at 244.

adopted, would integrate a bill of rights into the main body of the Constitution.[275] He included a right to bear arms provision that read:

> The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.[276]

We do not know why Madison chose to draft his provision precisely this way. He did not explain his thinking in any speech or letter that has come to light. Only by examining Madison's drafting choices can we hope to understand his objective.

Madison's provision clearly tracks item seventeen in Virginia's proposed Declaration of Rights.[277] Most significantly, like Virginia's provision (and unlike New Hampshire's),[278] Madison's provision connected the right to bear arms to the militia. However, Madison made a number of significant changes to Virginia's language.

In comparing Madison's proposal to the Virginia model from which he was working,[279] the first obvious difference is structure. Virginia's provision begins by declaring that "the people have a right to keep and bear arms."[280] This is a simple sentence consisting of a subject ("the people"), verb ("have"), and

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[275] *See* CREATING THE BILL OF RIGHTS, *supra* note 87, at 11-14.

[276] *Id.* at 12.

[277] *See supra* note 226 and accompanying text.

[278] *See supra* note 272 and accompanying text; CREATING THE BILL OF RIGHTS, *supra* note 87, at 17, 19. In this respect (and in others as well), Madison's text is also unlike that proposed by anti-Federalist dissenters at the Pennsylvania ratifying convention. Their proposal read:

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

The Address and Reasons for Dissent of the Minority of the Convention of Pennsylvania Speaking to their Constituents (Dec. 18, 1787), *in* ANTI-FEDERALIST PAPERS, *supra* note 60, at 240.

[279] The key language in the Virginia provision reads: "That the people have a right to keep and bear arms; that a well-regulated Militia composed of the body of the people trained to arms is the proper, natural and safe defence of a free state . . . ." *See* CREATING THE BILL OF RIGHTS, *supra* note 87, at 19.

[280] *Id.*

object ("a right to keep and bear arms"). The verb is in the active voice and stated affirmatively. Although the meaning of the words may be open to interpretation, this much is clear: Virginia's provision purports to grant a right, regardless of whether one previously existed. But Madison elected not to use Virginia's language. He wrote a different sentence. The implied subject of Madison's sentence is the federal government. The verb, translated from Madison's passive voice into the active voice, is "shall not infringe." The object of Madison's sentence ("The right of the people to keep and bear arms") begins with the specifying article "the" rather than the generalizing article "a" used in Virginia's proposal ("a right to keep and bear arms").

With strong and clear language available to him, why did Madison use a patently weaker structure? Madison's thinking about constitutional issues was both precise and nuanced, and we must be sensitive to even subtle connotations in his language. Madison was inclined to protect rights by limiting the power of government, and his drafting may reflect this preference. But it appears that something else may be here as well, and perhaps it is this: Madison's language does not so much grant a right as acknowledge that one exists and protect that right, whatever it may be, from being infringed by the federal government. Madison may have been suggesting that one must look outside the amendment — to state or common law perhaps — for the definition of this right.

Far more clear is Madison's reason for deleting Virginia's description of the militia as being "composed of the body of the people trained to arms." Madison knew that Virginia's provision would substantively change the Constitution. Article I, Section 8 gives Congress the power to "provide for organizing" the militia,[281] which implicitly includes the power to decide the composition of the militia.[282] This was a controversial matter. Anti-

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[281] *See* U.S. CONST. art. I, § 8, cl. 16.

[282] Madison intended that the Constitution be read broadly so that grants of government authority include implied as well as express powers. "[I]t was impossible to confine a government to the exercise of express powers, there must necessarily be admitted powers by implication," he told the House of Representatives. CREATING THE BILL OF RIGHTS, *supra* note 87, at 197.

Federalists opposed congressional control of the militia. Moreover, they favored "general" rather than "select" militia. That is, they believed that the militia should be drawn from the entire community, or, more precisely, from all adult, able-bodied, white males, rather than only individuals well suited and well trained for militia service.[283] The Federalists wanted Congress to have authority to organize the militia as it saw fit, and they prevailed at the Constitutional Convention. Virginia's provision included a back door attempt to incorporate into the Constitution an endorsement of the general militia. Madison, choosing not to limit Congress's authority to determine the composition of the militia, deleted the offending phrase.

Madison changed another phrase as well. Virginia's proposal states that the militia is "the proper, natural and safe defence of a free State."[284] Madison changed this to "the best security of a free country."[285] His use of the word "country" rather than "state" reflects his Federalist inclination to emphasize the national government. Particularly relevant for our purposes, however, is Madison's substitution of "security" for "defence." Political rhetoric notwithstanding, no one who understood the recent history of the Revolutionary War considered the militia the best defense against foreign invasion.[286] As a Virginian, Madison knew that the militia's prime function in his state, and throughout the South, was slave control. His use of the word "security" is consistent with his writing the amendment for the specific purpose of assuring the Southern states, and particularly his constituents in Virginia, that the federal government would not undermine their security against slave insurrection by disarming the militia.

Finally, it is important to note that Madison retained the exemption in Virginia's proposed Declaration of Rights for persons "religiously scrupulous of bearing arms."[287] Madison's inclusion of this provision establishes that he did not believe the right belonged to individuals themselves. Rather, Madison was

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[283] *See, e.g.*, 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES, PENNSYLVANIA 509-10 (Merrill Jensen ed., 1976) (setting forth remarks of John Smilie at Pennsylvania ratifying convention).

[284] *See* CREATING THE BILL OF RIGHTS, *supra* note 87, at 19.

[285] *Id.* at 12.

[286] *See infra* notes 140-81 and accompanying text.

[287] *See* CREATING THE BILL OF RIGHTS, *supra* note 87, at 12, 19.

addressing what he perceived to be not merely a right, but an obligation to keep and bear arms, that would necessarily be subject to governmental regulation. Madison passionately believed in religious liberty and "rights of conscience,"[288] and he wanted to protect Quakers and others from being compelled to violate their faith. Significant for our purposes, however, is that Madison was writing an amendment to set limits on federal control over the militia. In other words, he sought to prohibit the federal government from compelling Quakers to bear arms in the militia, as well as to prohibit the federal government from disarming the militia.

All of these actions — Madison's structure of the amendment, his refusal to define the militia as "composed of the body of the people trained to arms," his substitution of the phrase "security of a free state" for "defence of a free state," and his retention of the exemption for those with religious objection to bearing arms — are consistent with the thesis that Madison's objective in writing the Second Amendment was not to grant an individual right but to set limits on congressional power. Specifically, Madison sought to assure that Congress's power to arm the militia would not be used to disarm the militia. In a sense, Madison wrote the amendment that Patrick Henry claimed to want during the ratification debate in Richmond. That is, Madison's draft of the Second Amendment made the power to arm the militia concurrent rather than exclusive to the federal government.

J. Legislative History

The recorded legislative history is sparse indeed. No notes were made of Senate debates,[289] and notes of the House proceedings are incomplete.[290] There is, therefore, little that illuminates why Madison's draft ultimately emerged into the form finally proposed by Congress and transmitted to the states on September 28, 1789. We know that the House inserted "composed of the body of the people"[291] and that the Senate

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[288] *See* BANNING, *supra* note 77, at 272 (quoting Madison).

[289] *See* James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 36 (1986).

[290] *See id.* at 36-38.

[291] *See* CREATING THE BILL OF RIGHTS, *supra* note 87, at 30, 38.

removed the phrase.[292] We know that the House committee changed "free country" to "free State,"[293] and that the Senate changed "being the best security of a free State" to "necessary to the security of a free state." But the only recorded debate about the right to bear arms concerned whether persons should be exempted for religious reasons.

In debate on the floor of the House, Elbridge Gerry, the prominent anti-Federalist from Massachusetts who was one of the three delegates who refused to sign the Constitution at the Philadelphia Convention, complained that "congress could take such measures with respect to a militia, as to make a standing army." However, when challenged as to what precisely he was advocating, Gerry stated that he wanted to confine the exemption to "persons belonging to a religious sect, scrupulous of bearing arms."[294] Following brief discussion, the House declined to take any action on this point. The entire phrase was later deleted by the Senate. A motion by Gerry to insert the phrase "trained to arms" after "militia" failed for want of second.[295]

It is difficult to glean much from this sparse congressional history. From what little history exists, it appears that most of the attention was focused on other amendments. In any event, Madison's proposed amendment was changed in two respects. First, the religious exemption was deleted. Second, the two remaining clauses were reversed and separated by a comma rather than a semi-colon, thereby tightening the connection between the militia and the right to keep and bear arms. With the exception of these changes, the provision finally adopted by Congress and ratified by the states is essentially identical to the one proposed by Madison.[296]

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[292] *See id.* at 46.

[293] *See id.* at 30.

[294] *Id.* at 183.

[295] *See id.* at 184.

[296] *See id.* at 12. The right to bear arms provision was the fourth of the Amendments to the Constitution adopted by Congress on September 28, 1789. Respectively, the First and Second Amendments would have changed the number of Representatives, and required changes in congressional salaries to only take effect after the next election of Representatives. These amendments were not ratified by the states. To avoid confusion, however, the right to bear arm's provision is referred to as the Second Amendment even when it is being discussed in the context of the amendments adopted on September 28,

Madison's colleagues in the House and Senate almost certainly considered the Second Amendment to be part of the slavery compromise. Many members of the First Congress had been delegates to the Constitutional Convention in Philadelphia and were well aware that without the slavery compromise it would have been impossible to include both the Northern and slave holding states in a common Union. The Southern delegates had made it clear that there was no point in even drafting a constitution if the federal government had the power to abolish slavery. "The true question at present is whether the Southn. States shall or shall not be parties to the union," John Rutledge of South Carolina had told them.[297] From that point on the delegates worked mightily to produce a constitution palatable to both North and South.[298] The carefully negotiated compromise was reflected in (1) the fugitive slave provision, requiring that runaway slaves escaping across state lines be returned to their owners;[299] (2) the provision prohibiting Congress from abolishing the African slave trade until 1808 or imposing an import tax of more than ten dollars per slave;[300] and (3) provisions counting slaves as three-fifths of free persons for the purposes of apportioning congressional representation and direct taxation.[301] In effect, Madison proposed that the slavery compromise be supplemented by another constitutional provision prohibiting Congress from emasculating the South's primary instrument of slave control, and Congress acceded to that request.[302]

1789.

[297] ANDERSON, *supra* note 55, at 103.

[298] *See generally id.* at 102-06; BRANT, *supra* note 236, at 172-81; FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 86, at 1-33; MORGAN, BIRTH OF THE REPUBLIC, *supra* note 56, at 141-42; RAKOVE, ORIGINAL MEANINGS, *supra* note 56, at 72-75.

[299] *See* U.S. CONST. art. IV, § 2, cl. 2.

[300] *See* U.S. CONST. art. I, § 9, cl. 1.

[301] *See* U.S. CONST. art. I, § 2, cl. 3.

[302] Some considered the Ninth and Tenth Amendments part and parcel of the slavery compromise as well. For example, in a letter dated August 10, 1789, William Loughton Smith of South Carolina, a member of the First Congress, advised Edward Rutledge that he would support these amendments because, if adopted, "they will go a great way in preventing Congress from interfering with our negroes after 20 years or prohibiting the importation of them. Otherwise, they may even within 20 years by a strained construction of some power embarrass us very much." Letter of William L. Smith to Edward Rutledge (Aug. 10, 1789), *in* CREATING THE BILL OF RIGHTS, *supra* note 87, at 273.

K. The Absence of Direct Evidence

The evidence that the Second Amendment was written to assure the South that the federal government would not disarm its militia is, I suggest, considerable. However, the evidence is almost entirely circumstantial.[303] Madison never expressly stated that he wrote the Second Amendment for that purpose. If the thesis is sound, why is no direct evidence to be found supporting it?

There are a number of possible answers to that question. The most important concerns the genesis of the Amendment. It originated in a political struggle, one in which the combatants attempted to use issues for their own purposes. Mason and Henry fanned the flames of Southern paranoia to manipulate the ratifying Convention, and Madison later became a fire fighter to protect both the Constitution and his own political career. These were games of masquerade and innuendo. No one's purpose was served by laying cards upon the table. The history of the Second Amendment was hidden by design.

This, however, may not be the only reason for the absence of direct evidence. Another reason is that the available records are woefully incomplete. No notes whatever were made of the Senate's debate in the First Congress, and the stenographer for the House of Representatives was a drunkard whose mind often wandered for long periods of time during which he filled the journals with doodles and sketches instead of the remarks of the members.[304] Similar problems plague the transcripts of the Virginia ratifying convention.[305] In fact, after reviewing transcripts

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[303] As evidence experts understand, however, circumstantial evidence can be just as strong and compelling as direct evidence and sometimes even more so. *See* JOHN HENRY WIGMORE, 1A EVIDENCE IN TRIALS AT COMMON LAW § 26, at 961 (rev. by Petter Tillers 1983); *see also* GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 49 (3d ed. 1996).

[304] Hutson, *supra* note 289, at 36-37. Debates in the House were transcribed by Thomas Lloyd, who also transcribed the Pennsylvania and Maryland ratifying conventions. Everyone, including first-hand participants such as James Madison and Elbridge Gerry, seemed to agree that Lloyd's transcripts were wholly incompetent. *See id.* at 35-38. Lloyd's transcripts are "not to be relied on," wrote Madison. *Id.* at 38 (quoting Madison). "He was indolent and sometimes filled up blanks in his notes from memory or *imagination*." *Id.*

[305] David Robertson, the reporter for the Virginia ratifying convention, who was later hired and fired by the North Carolina ratifying convention as well, was not highly regarded. Madison said that when he reviewed Robertson's transcripts he found some passages "to be

of the state ratifying conventions, Elbridge Gerry said that he found them "generally partial and mutilated."[306] It is therefore possible that express statements were made but no longer survive.

Another reason for the absence of more explicit statements concerning the true purpose behind the Second Amendment is that the slave comprise and slave control were sensitive topics. Although the Founders incorporated the terms of the slavery compromise into the Constitution, they did so obliquely. The words "slaves" or "slavery" do not appear anywhere in the document.[307] "The delegates carefully chose language designed to make the Constitution more palatable to the North,"[308] even going so far as to employ "inscrutable language that the people could not readily understand," Paul Finkleman writes.[309] Indeed, the Founders themselves admitted to this deception.[310]

The politics over winning Northern support for the Constitution, and later the Bill of Rights, was undoubtedly a large part of the reason slavery is not expressly mentioned in those documents. However, there may have been more to it than that. Bargaining over slavery produced a sense of shame on both sides.[311] Northerners felt shame for becoming complicit in the slave system. For Southerners, the issue was more complex and confused, but even staunch defenders of the system struggled with a sense of disgrace.[312] It seems de rigueur for Southern

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defective, others obscure, if not unintelligible, others again which must be more or less erroneous." *Id.* at 23.

[306] *Id.* at 24 (quoting Gerry).

[307] The word "slavery" first appeared in the Thirteenth Amendment, adopted in 1865.

[308] Paul Finkelman, *Intentionalism, the Founders, and Constitutional Interpretation*, 75 TEX. L. REV. 435, 447 [hereinafter Finkelman, *Constitutional Interpretation*] (1996).

[309] *Id.* at 446.

[310] For example, James Iredell, who had served as a delegate to the Constitutional Convention, told the North Carolina ratifying convention: "The northern delegates, owing to their particular scruples on the subject of slavery, did not choose the word *slave* to be mentioned." *See* 4 ELLIOT'S DEBATES, *supra* note 233, at 176.

[311] William Patterson, who represented New Jersey at both the Constitutional Convention and the First Congress, noted that, even under the Articles of Confederation, Congress "had been ashamed to use the term 'Slaves' & had substituted a description." *See* 1 FARRAND'S RECORDS, *supra* note 77, at 561. *But see* Finkelman, *Constitutional Interpretation*, *supra* note 308, at 445 (arguing that Founders used euphemisms instead of words "slave" and "slavery" in Constitution "not out of embarrassment, but because the delegates self-consciously believed they had to hide what they were doing to win ratification").

[312] George Mason told his fellow delegates to the Constitutional Convention that having

politicians, even those who were themselves large slave holders, to preface remarks about slavery with statements of how personally repugnant the institution of slavery was to them.[313] Politicians of the time, from both North and South, avoided the subject of slavery as much as possible.[314]

It cannot be overemphasized that slavery was the central feature of life in the slave holding states, and that the South depended on arms and the militia to protect itself against the

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slaves was "evil" and that "[e]very master of slaves is born a petty tyrant." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 370 (Max Farrand ed., 1911) [hereinafter 2 FARRAND'S RECORDS]. How did this evil come about? "This infernal trafic originated in the avarice of British Merchants. The British Govt. constantly checked the attempts of Virginia to put a stop to it," Mason explained. *Id.* Mason believed others were to blame as well: "He lamented that some of our Eastern brethren had from a lust of gain embarked in this nefarious traffic." *Id.* Mason made his remarks to persuade his colleagues to end the African slave trade, which was not in the economic interests of slave exporting Virginia. However, within the state, he staunchly defended the institution of slavery itself. *See* BRADFORD, *supra* note 72, at 152; FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 86, at 24.

[313] Thomas Jefferson is the most famous example. David Brion Davis writes that Jefferson experimented with and refined his rhetoric regarding his contempt for slavery. Davis wrote:

> Since [Jefferson's replies to questions about his belief in slavery] became so standardized, it is not unfair to conflate a number of examples: there was not "a man on earth" who more "ardently desired" emancipation or who was more prepared to make "any sacrifice" to "relieve us from this heavy reproach, in any practicable way", but — and Jefferson's "hints" deserve underscoring — the public mind needed "ripening" and would not yet "bear the proposition."

See O'BRIEN, THE LONG AFFAIR, *supra* note 184, at 270 (quoting Davis). Jefferson's most famous statements along these lines are probably those in his *Notes on the State of Virginia*, in which he bemoaned the blight of slavery. *See* BRODIE, *supra* note 91, at 49-50. Slavery, he wrote, produced "the most unremitting despotism on the one part, and degrading submissions on the other." *See* O'BRIEN, THE LONG AFFAIR, *supra* note 184, at 259-60 (quoting Jefferson).

Both Jefferson and Mason owned hundreds of slaves. *See* BRADFORD, *supra* note 72, at 156 (noting that Mason owned 300 slaves); and FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 86, at 127-33, 200 n.97 (observing that during his lifetime Jefferson owned between 385 to 500 slaves and, despite many opportunities to do so, freed only eight).

[314] When in later years they became Presidents, Washington and Jefferson both consciously avoided mentioning the subject of slavery as much as possible. "I was not inclined to express my sentiments on the merits of the question," Washington recorded in his diary. MATTHEW T. MELLON, EARLY AMERICAN VIEWS ON NEGRO SLAVERY 71 (1934). "I have most carefully avoided every public act or manifestation on that subject," noted Jefferson. RICHARD K. MATTHEWS, THE RADICAL POLITICS OF THOMAS JEFFERSON 67 (1984); *see also* MELLON, *supra* at 8-9, 82-83 (regarding Franklin's and John Adams's reticence to publicly discuss slavery).

constant danger of a slave revolt. It is true that in eighteenth century America there was a great deal of soapbox rhetoric about freedom and the right to keep and bear arms, much as there is today. Nevertheless, by virtue of their daily circumstance, Southerners had to be infinitely more concerned about slave control than abstract, ideological, or contingent beliefs about liberty and guns. Much of the rhetoric about guns and liberty was probably both bravado and smokescreen — a defense mechanism, if you will, to emphasize the importance of being armed without unveiling the ever present dread of having one's throat slit in the night. Northern statesmen understood this. As Madison noted, everyone recognized that slavery produced a great division between the Northern and Southern states.[315] It would have been injudicious, to say the least, for Northern politicians to rub Southern noses in cold realities. One would not expect frank discussions about the consequences of an unarmed militia, but rather a tacit collaboration to leave unsaid what everyone so clearly understood.

These factors may have combined. That is, to the extent that express statements about slave control were made at ratifying conventions in the South or later in the First Congress, stenographers may have considered it both politic and convenient to abbreviate or omit those remarks. Clearly it would have been unwise to acknowledge the possibility that Congress might undermine the slave system by disarming the militia and then fail to foreclose this possibility by constitutional amendment.

II. THE MYTH OF AN ANGLO-AMERICAN RIGHT

The events at the Richmond ratifying convention in June 1788 provided the impetus for embodying a right to bear arms in the Bill of Rights. However, the concept of such a right did not

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[315] Madison said:

> It seemed now to be pretty well understood that the real difference of interests lay, not between the large & small but between the N. & Southn. States. The institution of slavery & its consequences formed the line of discrimination.

2 FARRAND'S RECORDS, *supra* note 312, at 9-10. Pierce Butler of South Carolina said he "considered the interests . . . [of the Northern and Southern states] to be as different as the interests of Russia and Turkey." *Id.* at 451.

originate in Richmond. Madison and the Founders borrowed more than they created. A right to have arms provision was contained in the English Declaration of Rights of 1689, a document considered part and parcel of the English Constitution. Although the English Declaration of Rights is not directly part of the American experience, it is nevertheless an integral part of the story of the Second Amendment. The Founders were intimately familiar with the Declaration and its history. Indeed, the Declaration and its history helps illuminate the Founders' thinking about a right to bear arms, and specifically the purpose of such a right.

A. Malcolm's Thesis

One of the stars in the constellation of insurrectionist right theorists is Joyce Lee Malcolm, a professor of history at Bentley College in Massachusetts. In 1994, Malcolm published a book entitled *To Keep and Bear Arms: The Origins of an Anglo-American Right*,[316] which has become something of a cult classic. Praised by fellow insurrectionists as "the definitive historical treatise on the right to arms"[317] and ballyhooed in publications such as the NRA's *American Rifleman*,[318] Malcolm's book was so unexpectedly popular that it went into a third printing within a year of its initial publication.[319] Within the gun rights community at least, Malcolm's name has been associated with the proposition that the right of the individual to keep and bear arms was part of English constitutional law for a hundred years before the

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[316] MALCOLM, *supra* note 23.

[317] Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139, 1187 (1996); *see also* Robert J. Cottrol and Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 YALE L.J. 995 (1995) (praising Malcolm's book); Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 GA. L. REV. 1, 6 (1996) (praising Malcolm's book); Glenn Harlan Reynolds, *A Line of Defense*, A.B.A. J., Aug. 1994, at 94 (reviewing and praising Malcolm's book).

[318] Book Review, AM. RIFLEMAN, April 1994, at 27; *see also* WAYNE LAPIERRE, GUNS, CRIME, AND FREEDOM 14-15 (1994). LaPierre is the chief executive officer of the NRA.

[319] *See* MALCOLM, *supra* note 23, at iv.

Founders drafted the American Bill of Rights.[320] The Second Amendment is, in Malcolm's words, "a legacy of the English Bill of Rights."[321]

Malcolm's thesis is that the Second Amendment was derived from the English Declaration of Rights, also known as the Bill of Rights, of 1689. With this, there is no quarrel. But Malcolm goes further. She argues that the Declaration of Rights granted an individual right, that is, that it gave individuals the right to keep and bear arms notwithstanding the enactment of any laws to the contrary. She also argues that the purpose of this right was to allow individuals "to have arms for self-defence and self-preservation."[322] With these last two propositions, Malcolm stands on shaky ground. In fact, it may not be too extreme to say that she is patently wrong.

Malcolm concedes that until 1689 there was no individual right to keep and bear arms in England.[323] Indeed, she spends more than a hundred pages describing all manner of governmental restrictions on the ownership of guns and weapons including: a 1541 law prohibiting persons with incomes of less than a hundred pounds a year from owning handguns;[324] instructions issued to the militia in 1655 to confiscate all arms and ammunition from strangers and to store all weapons, including those belonging to militia members themselves, in safe

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[320] Malcolm's book, *To Keep and Bear Arms: The Origins of an Anglo-Saxon Right*, has won acclaim outside the gun community as well. Justice Antonin Scalia has pronounced it to be an "excellent study." ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 136-37 n.13 (1997). Scalia is impressed that Malcolm, in his words, "is not a member of the Michigan Militia, but an Englishwoman." Scalia may be right about Malcolm not being a member of the Michigan Militia, but it is unclear why he believes her to be an Englishwoman. Perhaps it is because the institution at which she teaches, Bentley College, sounds as if it might be a part of Oxford or Cambridge University. Bentley College, however, is located in Waltham, Massachusetts.

[321] MALCOLM, *supra* note 23, at 162.

[322] *Id.*

[323] Malcolm writes: "While the right of subjects to have arms had been singled out as one of the 'true, ancient, and indubitable' rights to be included in the Declaration of Rights, it was neither true, ancient, nor indubitable. The Convention members themselves were its authors." *Id.* at 115; *see also id.* at 9 (stating that for 500 years before Declaration of Rights, Englishmen did not have explicit right to keep weapons for either peace keeping or self-defense); *id.* at 28 (arguing that provision marked final shift from private ownership of arms as political duty to right to have arms for individual defense).

[324] *See id.* at 9-10, 80.

places;[325] measures enacted in 1659 requiring the inventorying of all arms and ammunition in private hands[326] and the disarming of anyone of "suspected or knowne disaffection" to the government;[327] and the adoption of a firearm registration system in 1660.[328] If she is to succeed in her argument that the Declaration of Rights granted an individual right, therefore, Malcolm must argue that the Bill of Rights of 1689 created a new right, one that did not previously exist in England. It is at this point that Malcolm enters dangerous terrain. Leading English historians emphasize that when Parliament[329] presented William of Orange with the Declaration of Rights, all agreed that no new rights were being created.[330] William was acknowledging and agreeing to abide by pre-existing principles, nothing more. Indeed, the Declaration itself described the rights

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[325] *See id.* at 26-27.

[326] *See id.* at 28.

[327] *See id.* at 35-36.

[328] *See id.* at 43.

[329] Parliament was then technically sitting as a Convention. *See infra* note 356 and accompanying text.

[330] Thomas Babinton Macaulay writes:

> Not a single new right was given to the people. The whole English law, substantive and adjective, was, in the judgment of all the greatest lawyers, of Holt and Treby, of Maynard and Somers, exactly the same after the Revolution as before it.

2 MACAULAY'S HISTORY OF ENGLAND 377-78 (1906).

G. M. Trevelyan writes:

> The Declaration of Right was, in form at least, purely conservative. It introduced no new principle of law. . . . For the Convention had wisely decided that alternations in the existing laws would require time for debate, and not another day could be spared before the throne was filled, without great risk to the public safety. Therefore the Declaration of Right had been framed as a mere recital of those existing rights of Parliament and of the subject, which James had outraged, and which William must promise to observe. All further changes, however pressing their need, must wait till Parliament should have time to discuss and pass them, and till there was a King to give them statutory force by royal assent to new laws.

J.M. TREVELYAN, THE ENGLISH REVOLUTION 1688-1689, at 79-80 (1938); *see also* 6 THE NEW CAMBRIDGE MODERN HISTORY 208 (J.S. Bromley ed., 1970) [hereinafter BROMLEY].

Lois G. Schwoerer argues that despite the Declaration's claim to the contrary, it was a radical reforming document, and that eight of the 13 enumerated rights were not undisputed or ancient. However, she lists article 7, the right to have arms provision, as among those that "reaffirmed ancient law." LOIS G. SCHWOERER, THE DECLARATION OF RIGHTS, 1689, at 78 (1981).

listed as "antient rights."[331] This, however, is only the beginning of Malcolm's radical departure from accepted history.

B. The Glorious Revolution

A short description of what the English refer to as the Glorious Revolution[332] is necessary to put the Declaration of Rights into historical context. On February 16, 1685, King Charles II died unexpectedly. He left no legitimate heir and was succeeded by his brother James.[333] Although James II was popular at first, as time went on he became despised both by the people and Parliament. In the words of one historian, "James II was rigid, proud, single-minded and self-centered."[334] And that was not the worst of it. James was also Catholic, having secretly converted in 1673. The King was the Supreme Governor of the Church of England,[335] and James promised Parliament he would defend and support the Church of England.[336] Nevertheless, spurred on by his devoutly Roman Catholic Queen, James sought to restore Catholicism in England.[337]

During the reign of Charles II, Parliament had enacted the Test Acts, which forbade the King from appointing Catholics to positions of high civil or military office, and disqualified Catholics from membership in Parliament.[338] Indeed, James's conversion to Catholicism had come to light when this legislation was enacted. James had shocked the nation by resigning his position as the Lord High Admiral rather than taking sacrament according to rites of the Church of England.[339] Now, as King, James opened a Catholic chapel in London, surrounded himself with Catholic advisers, and began appointing Catholics to the Privy Council, the faculties of Oxford and Cambridge, and, most disturbing of all, as officers in his rapidly expanding army.[340]

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[331] DECLARATION OF RIGHTS, *supra* note 228.

[332] *See, e.g.*, TREVELYAN, *supra* note 330, at 7.

[333] *See* BROMLEY, *supra* note 330, at 193-94; MALCOLM, *supra* note 23, at 93-94.

[334] BROMLEY, *supra* note 330, at 194.

[335] *See id.* at 197.

[336] *See* TREVELYAN, *supra* note 330, at 26.

[337] *See* BROMLEY, *supra* note 330, at 194; MALCOLM, *supra* note 23, at 96.

[338] *See* BROMLEY, *supra* note 330, at 196.

[339] *See* MALCOLM, *supra* note 23, at 95; TREVELYAN, *supra* note 330, at 15-16.

[340] *See* BROMLEY, *supra* note 330, at 199-200; GOLDWIN SMITH, A CONSTITUTIONAL AND

James dealt with the inevitable public outcry over his violation of the Test Acts by arranging a case challenging his appointment of Catholic military officers. The case would come before the Court of King's Bench, but only after he packed the court with judges who would do his bidding.[341] The court held that the King of England was a sovereign prince, that "the laws of England are the king's laws," and that the King could therefore dispense with the law "in particular cases and upon particular necessary reasons" as he saw fit.[342]

Catholics were detested and feared in late seventeenth century England.[343] There were constant rumors of Catholic plots and outrages. In 1666, for example, a terrible fire destroyed most of London, which many believed had been set by Catholics.[344] Following the Great Fire, as the English called it, and again after a public panic known as the Popish and the Rye House plots, Charles II ordered that weapons in the hands of Catholics and dissident Protestants be seized.[345] Now, it seemed that James II was trying to turn the tables. Not only was he expanding the army under the direction of Catholic officers, but he was working strenuously to reduce all weapons in private hands,[346] which of course meant mostly Protestant hands.

All of this was political madness; Catholics comprised less than ten percent of the English population, and probably no more than two percent.[347] Undeterred, James finally pushed things to the breaking point. In May 1688, he issued a Declaration of Indulgence granting freedom of worship to Catholics and Protestant dissidents, abolishing the Test Acts, and ordering bishops throughout the realm to have the Declaration read during church services on two consecutive Sundays.[348] When six

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LEGAL HISTORY OF ENGLAND 364 (1990) [hereinafter SMITH, LEGAL HISTORY OF ENGLAND]; MALCOLM, *supra* note 23, at 100; TREVELYAN, *supra* note 330, at 37-39.

[341] *See* SMITH, LEGAL HISTORY OF ENGLAND, *supra* note 340, at 364.

[342] *See id.*

[343] *See id.* at 354.

[344] *See* MALCOLM, *supra* note 23, at 62.

[345] *See id.* at 62, 85, 92.

[346] *See id.* at 102-06.

[347] *See* BROMLEY, *supra* note 330, at 196 n.2.

[348] *See* MALCOLM, *supra* note 23, at 109-110; SMITH, LEGAL HISTORY OF ENGLAND, *supra* note 340, at 364-65; TREVELYAN, *supra* note 330, at 46-49.

bishops and the Archbishop of Canterbury refused, James had them arrested and imprisoned in the Tower of London.

The following month, the Queen gave birth to a son.[349] Instead of merely tolerating a Catholic king for the rest of his life, England was now faced with the prospect of a line of Catholic kings. Seven prominent Englishmen promptly sent a secret letter to William of Orange inviting him to invade England, and promising him the overwhelming support of the English people if he did. William, the Stadtholder of Holland, was married to James' sister, Mary.[350] As the principal force challenging the expansionism of Louis XIV, the Catholic king of France, William was the champion of Protestantism on the continent. While this letter was en route to William, James, frustrated with its refusal to repeal the Test Acts, dissolved Parliament.[351]

Flying under the banner of English colors emblazoned with the motto "the Protestant Religion and the Liberties of England," William set sail for England with the Dutch fleet.[352] James, learning of the danger, asked Louis XIV for help. Although Louis promised to send the French fleet to intercept William, this did not come to pass.[353] On November 15, William landed at Torbay with a considerable force and began marching toward London. James set forth with his army to meet him. The people, both common folk and gentry, rallied to William's cause. Plagued by desertions, including the desertion of one of his most trusted commanders, James fled with his family to France. On his way he burned writs convening Parliament in December and, because Parliament could not lawfully be convened unless summoned by writs impressed with the Great Seal, James threw the Great Seal into the Thames River.[354] Crowds in London stormed Catholic chapels, and the

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[349] Some believed the Queen gave birth to a girl, and that Catholics successfully executed a plot to substitute a boy and provide the King with a successor. *See* BROMLEY, *supra* note 330, 201-02; *see also* MALCOLM, *supra* note 23, at 110; TREVELYAN, *supra* note 330, at 49.

[350] *See* MALCOLM, *supra* note 23, at 109-13; TREVELYAN, *supra* note 330, at 16-18.

[351] *See* BROMLEY, *supra* note 330, at 199, 204 (stating James dissolved Parliament on July 12 and issued writs for new elections to new Parliament convening on December 7).

[352] *See* MALCOLM, *supra* note 23, at 111.

[353] *See* BROMLEY, *supra* note 330, at 204.

[354] *See id.* at 205; MALCOLM, *supra* note 23, at 112.

mayor ordered that searches for weapons be conducted and that all Catholics be disarmed.[355]

William arrived in London on December 28. Since Parliament could not lawfully be convened, the House of Lords met informally and advised William to summon a convention. In effect, the Convention was a parliament meeting under a different name.[356] The Convention and William engaged in friendly negotiations as to the terms under which the Convention would offer, and William would accept, the Crown. William imposed the condition that he would rule as King or not at all, rejecting a suggestion that Mary, as James's rightful successor, would be sole sovereign and that William would rule as her consort. It was agreed that William and Mary would be joint sovereigns but that William would administer the kingdom.[357]

C. The Declaration of Rights of 1689

The Convention had some conditions of its own.[358] The Convention, one must remember, was Parliament, or as close a surrogate for Parliament as could be convened under the circumstances.[359] As such, the Convention was concerned with parliamentary prerogatives. It wanted to resolve matters involving the allocation of power between King and Parliament. James II had not recognized Parliament's authority to make law. He had, for example, violated the Test Acts, and the court had supported him. "[T]he laws of England are the king's laws," the court had declared.[360] Most relevant to our concerns, James had sought to disarm Protestants, notwithstanding Parliament's laws prescribing who could possess weapons, what weapons they could possess, and under what conditions they could possess them.[361]

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[355] *See* MALCOLM, *supra* note 23, at 112.

[356] *See* BROMLEY, *supra* note 330, at 206; SMITH, LEGAL HISTORY OF ENGLAND, *supra* note 340, at 366.

[357] *See* SMITH, LEGAL HISTORY OF ENGLAND, *supra* note 340, at 367.

[358] SCHWOERER, *supra* note 330, at 282-83. The quid pro quo was implied. William was told that it would be politically disadvantageous to reject the Declaration. *See id.*

[359] *See* SMITH, LEGAL HISTORY OF ENGLAND, *supra* note 340, at 366 (stating that Convention met on Jan. 22, 1689).

[360] *See supra* note 342 and accompanying text.

[361] *See supra* notes 343-46 and accompanying text.

Thus, as a condition for making him King, the Convention wanted William to acknowledge Parliament's authority to make law and to agree to abide by those laws within prescribed areas.[362] Therefore, the Declaration of Rights provided, for example, that "[t]he pretended power of suspending of laws or the execution of laws by regal authority without consent of Parliament is illegal"[363] and that "levying money for or to the use of the crown by pretense of prerogative without grant of Parliament for longer time or in other manner than the same is or shall be granted is illegal."[364] The right to have arms provision is very much in the same vein. That is, it speaks to a right of Parliament vis-á-vis the crown rather than a right of the individual vis-á-vis the state.[365] That provision reads in full: "That the subjects which are Protestants may have arms for their defence suitable to their condition and as allowed by law."[366]

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[362] Thomas Macaulay writes:

> Unhappily the Church had long taught the nation that hereditary monarchy, alone among our institutions, was divine and inviolable; that the right of the House of Commons to a share in the legislative power was a right merely human, but that the right of the King to the obedience of his people was from above . . . that the rule which called the princes of the blood royal to the throne in order of succession was of celestial origin, and that any Act of Parliament inconsistent with that rule was a nullity. . . . Thus the Convention had two great duties to perform. The first was to clear the fundamental laws of the realm from ambiguity. The second was to eradicate from the minds, both of the governors and of the governed, the false and pernicious notion that the royal prerogative was something more sublime and holy than those fundamental laws.

2 MACAULAY'S HISTORY OF ENGLAND, *supra* note 330, at 377.

Schwoerer writes that the ideas animating the Declaration of Rights "were radical in the sense that they were on the left hand side of the essential issue of the seventeenth century — whether king or Parliament should exercise sovereignty." SCHWOERER, *supra* note 330, at 286.

[363] DECLARATION OF RIGHTS, *supra* note 228, art. 1.

[364] *Id.* art. 4.

[365] Four of the 13 articles of the Declaration of Rights deal with the rights of subjects rather than of Parliament. One of these (article 5) protects the right of subjects to petition the Crown; the other three (articles 10, 11 and 12) all involve procedures of criminal law. Rakove writes: "The Declaration asserted both parliamentary and popular rights; but its crucial feature was that *all* the rights it proclaimed were to be protected against abuse by the Crown, the great and even sole danger to English rights and liberties." RAKOVE, ORIGINAL MEANINGS, *supra* note 56, at 296.

[366] DECLARATION OF RIGHTS, *supra* note 228, art. 7.

Malcolm says that she finds it "difficult to decide what to make of the new clauses tacked to the end of the article 'suitable to their conditions and as allowed by law.'"[367] It cannot be the phrase "suitable to their condition" that gives her difficulty. She notes that "[f]or generations citizens had been required to contribute arms to the militia according to their condition, that is, according to their rank and income."[368] Therefore, it must be the second phrase, "and as allowed by law," that perplexes Malcom. The question here, quite simply is: who makes the law? Obviously, the parties did not intend the Crown to determine what arms Protestants could possess. The provision was written in response to James's attempt to arrogate this power to himself; its purpose was to restrict the Crown's authority. There are only two other possible sources of law: Parliament and common law. As Malcolm concedes, there was no individual right to have arms in England before 1689,[369] and, therefore, no such right had been recognized by common law. This leaves Parliament, which had been regulating the ownership of arms for five hundred years, as Malcolm herself catalogues.[370] Thus, the Declaration of Rights, which became the Bill of Rights when Parliament enacted it by statute after William and Mary signed it,[371] did not give Protestants an individual right to have arms; it decreed that Parliament, and not the Crown, would determine the right of Protestants to have arms.[372]

According to Lois G. Schwoerer of George Washington University, the House of Lords added the clauses "suitable to their condition" and "as allowed by law" to make it clear that all Protestants did not enjoy a right to have arms.[373] Schwoerer explains:

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[367] MALCOLM, *supra* note 23, at 120.

[368] *Id.*

[369] *See id.* at 9; *see also supra* note 323 and accompanying text.

[370] *See* MALCOLM, *supra* note 23, at 9.

[371] *See* BROMLEY, *supra* note 330, at 208 n.1.

[372] *See id.* Presumably, Parliament did not care if the King or the mayor of London, disarmed Catholics. In fact, the Mayor was already in the process of disarming the Catholics. *See supra* note 355 and accompanying text.

[373] *See* SCHWOERER, *supra* note 330, at 74.

> First, the idea that *all* Protestants should be permitted to posses a gun surely terrified the upper House . . . . The potential dangers to property and life from permitting all Protestants to have a weapon were self-evident. Second, the right to possess arms had always been closely connected with the subjects' military obligations, which, since the twelfth century, had been equated with subjects' socioeconomic status . . . . Theoretically, not every person was supposed to have weapons and serve in the military. Third, for over 150 years, other legislation had restricted the possession of guns and other weapons to well-to-do-persons . . . . Fourth, the peers' amendments almost certainly drew inspiration from the game laws, which, since the fourteenth century, had preserved the hunting privileges of the king and the upper classes by restricting the possession of weapons to the wealthy.[374]

"The right to be armed has not worn well," writes Malcolm.[375] "It is no longer a right of Englishmen," she continues. "The curious will still find it in the English Bill of Rights, but it has been so gently teased from public use that most Britons have no notion of when or how it came to be withdrawn."[376] Did some sinister force destroy a fundamental right "so gently" that all of England failed to notice? Hardly. The Declaration of Rights was a critical event in English history because it represented a transfer of power from Crown to Parliament. It remains a fundamental aspect of the English system that the law "sets no limits to the power of Parliament."[377] During more than three hundred years of changing circumstances since 1689, Parliament has been determining what arms Protestants and other British subjects may possess.

None of this precludes the possibility that one hundred years later the American Founders had come to believe in an individual right to keep and bear arms. It does mean, however, that the Founders did not derive such a view from the Declaration of Rights. They understood the Glorious Revolution,[378] saw their

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[374] *Id.* at 77.

[375] MALCOLM, *supra* note 23, at 165.

[376] *Id.*

[377] WILLIAM GELDART, INTRODUCTION TO ENGLISH LAW 3 (10th ed. 1991); *see also* SMITH, LEGAL HISTORY OF ENGLAND, *supra* note 340, at 514.

[378] *See generally* RAKOVE, ORIGINAL MEANINGS, *supra* note 56, at 296-97 (describing how American colonists drew upon settlement of Glorious Revolution in demanding that colo-

own revolution as a parallel endeavor,[379] and, in some instances, modeled the American Bill of Rights on the English Declaration of Rights of 1689.[380] With the most minor of changes, for example, Madison copied article 10 of the Declaration verbatim, where it now stands as the Eighth Amendment to the United States Constitution.[381] Although he did not take it quite so directly, Madison was almost certainly influenced by the right to have arms provision of the Declaration as well. The similarity of circumstance could not have been lost on him. In 1689, Parliament needed to address the fear that Protestants might be disarmed and left defenseless against Catholics. In 1789, Madison needed to allay the fear that the militia might be disarmed, leaving whites defenseless against blacks. Madison followed Parliament's solution. Both the Declaration and the Second Amendment resolve the problem by transferring the power to disarm the favored group (Protestants and the militia) from the distrusted arm of government (the Crown and Congress) to a more trusted authority (Parliament and the states).

III. THE MYTH OF AN INSURRECTIONIST RIGHT

A. Modern Insurrectionist Theory

Timothy J. McVeigh understands insurrectionist theory. When he was arrested hours after bombing the Alfred P. Murrah Federal Building in Oklahoma City, McVeigh was wearing a tee shirt emblazoned with the words and pictures of two of the most venerated figures in American history.[382] On the front was

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nial assemblies have same division of authority with Crown as that guaranteed to Parliament in Declaration of Right).

[379] *See* GARRY WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE 53-54 (1978) [hereinafter WILLS, INVENTING AMERICA].

[380] *See* SCHWOERER, *supra* note 330, at 289 (arguing that Declaration of Rights "had a direct influence on the American Revolution" and American Bill of Rights); MAIER, *supra* note 249, at 51 (arguing that Declaration of Rights was "for the colonists a sacred text").

[381] *See* SCHWOERER, *supra* note 330, at 289-90. *Compare* U.S. CONST. amend. VIII *with* DECLARATION OF RIGHTS, *supra* note 228, art. 10. (demonstrating similarities between Eighth Amendment and article 10 of the Declaration of Rights). In addition, the right to petition the government guaranteed by the First Amendment is clearly drawn from article 5 of the Declaration. *Compare* U.S. CONST. amend. I *with* DECLARATION OF RIGHTS, *supra* note 228, art. 5.

[382] *See* Jo Thomas, *The Oklahoma Bombing: The Overview; McVeigh Guilty on All Counts in the Oklahoma City Bombing; Jury to Weigh Death Penalty*, N.Y. TIMES, June 3, 1997, at A1.

Abraham Lincoln who, more than any other American, symbolizes the permanence and strength of the Union and the federal government. Lincoln was portrayed on a wanted poster. Under his picture were the words that John Wilkes Booth shouted as he leapt to the stage in Ford's Theater: "*Sic Semper Tyrannis.*"[383] On the back of the shirt was a tree with droplets of blood instead of leaves and the words of Thomas Jefferson: "The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants."[384] These were not the only epigrams McVeigh liked. During the siege at the Branch Davidian compound, McVeigh traveled to Waco to sell bumper stickers.[385] One sticker said: "Fear the Government That Fears Your Gun." Another read: "Ban Guns. Make the Streets Safe for a Government Takeover." These slogans capture insurrectionist theory perfectly. The ultimate check on government tyranny is an armed citizenry, and citizens have the right to keep and bear arms so that they can resist the government when it falls into the hands of traitors or tyrants.[386]

Although insurrectionist theory has always represented one strand of American political thought, its great surge of strength is relatively recent. It started to grow in the late 1960s, and acquired important institutional support when Second Amendment hard liners seized control of the NRA in 1977.[387] What

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[383] "Thus always to tyrants." Horowitz, et. al., *Notebook*, TIME, June 16, 1997, at 15.

[384] *Id.*

[385] *See* Sandy Banisky, *McVeigh Defense Focuses on Rage; Jury Sees Tapes of Waco Fire in Bid to Explain Motives*, BALT. SUN, June 11, 1997, at 1A.

[386] *See, e.g.*, HALBROOK, THAT EVERY MAN BE ARMED, *supra* note 21, at 197 (arguing that Founders "regarded arms possession as a fundamental right for protection against both private and official aggression, such as that sanctioned under color of law or committed by state agents"). The problem with insurrectionist theory is also quite simple. Who is to decide whether the government has fallen into the hands of traitors or tyrants? Obviously, that decision cannot be made through the carefully constructed procedures of representative democracy because, by definition, those mechanisms may be controlled by the traitors themselves. Insurrectionists believe the people must decide for themselves. But who are "the people"? Any group that decides for itself that the government is controlled by traitors? And who is "the government" for that matter? In a representative democracy the government is composed of officials chosen by a majority of voters. Thus, the conceptual division between "the people" and "the government" is a false dichotomy.

[387] Josh Sugarmann writes: "During the turbulence of the 1960s, the two contrasting faces of the NRA came into focus: the smiling, benevolent sportsman and the fevered, angry Second Amendment fundamentalist." SUGARMANN, *supra* note 29, at 50 (1992). Sugarmann's book is the best available history both of the NRA generally and the

accounts for the rise of insurrectionism? Sociologist James William Gibson tells us that American cultural mythology has always been torn between two images. The first is that of the soldier who defends the nation as part of an official force. The other is that of the warrior who acts alone.[388] The first figure was portrayed by actors such as John Wayne and Gary Cooper when playing Western sheriffs or World War II soldiers.[389] The second figure was represented by figures such as Daniel Boone and Davy Crockett who, as Gibson puts it, are "men of great bravery and virtue who live on the frontier and fight on behalf of civilization, but who themselves never desire to live in the domesticated interior of society."[390]

Gibson traces a metamorphosis in the second figure since the end of the Vietnam War. The new hero is a paramilitary warrior who is hostile to the police or the government because he realizes that "the official power structure is unwilling to fight even though the enemy threatens to destroy America and the values it represents."[391] This archetype was first portrayed by Sylvester Stallone as Rambo,[392] Charles Bronson in *Death Wish*,[393] and Arnold Schwartzeneggar in *Commando*.[394] The new hero fought in a new frontier: a borderland of decadence and chaos on the perimeter of a decaying society. Society is decaying because of the incompetence or corruption of governmental officials as well as plots by "evil ones" — drug lords, terrorists, malevolent space aliens, or shadowy dark forces — who "can only be satisfied by the collapse of social stability and all moral values."[395] Increasingly, film portrays chaos as overwhelming society, as illustrated

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"Cincinnati Revolt" when hard-liners rose to power.

[388] *See* JAMES WILLIAM GIBSON, WARRIOR DREAMS: VIOLENCE AND MANHOOD IN POST-VIETNAM AMERICA 17 (1995).

[389] *See id.* at 30-31.

[390] *Id.* at 18.

[391] *Id.* at 34.

[392] FIRST BLOOD (Carolco Pictures 1982) (involving National Guard's manhunt of Vietnam War veteran John Rambo against background of official treachery and betrayal).

[393] DEATH WISH (Paramount Pictures 1974) (portraying bleeding-heart liberal's turn to vigilantism as only way to combat rising crime and decadence in New York City after murder of his wife and rape of his daughter).

[394] COMMANDO (20th Century Fox 1985) (involving kidnapping of former special commando strike force colonel's daughter).

[395] *See* GIBSON, *supra* note 388, at 69.

by *Dirty Harry*,[396] *Waterworld*,[397] *Twelve Monkeys*,[398] and the *Terminator*,[399] *Alien*,[400] and *Road Warrior* series.[401]

These two legends, society's soldier versus the paramilitary renegade, may help explain the historical tension between the individual and collective rights visions of the Second Amendment. And the same force responsible for the proliferation of paramilitary warriors in popular culture may be electrifying insurrectionism. Certainly the core themes are the same: a sense of rising chaos, a deep mistrust of lawful authority, faith in the disciplined but renegade gunman. The problem with this system of ideas is that it breeds a profound distrust of not only government but of representative democracy. It undermines respect for constitutional institutions and processes, replacing it with faith in a mythical judgment of "the people." These are dangerous ideas. It is lynch mobs, men in hoods, and people like Timothy McVeigh who deputize themselves in the name of the people. One is reminded of Justice Jackson's statement: "The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."[402]

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[396] DIRTY HARRY (Warner Bros. 1971) (involving character of Inspector Harry Callahan and his unconventional attempt to fight crime in increasingly violent and decadent New York City, with officials, for reasons of personal aggrandizement or professional incompetence, often frustrating law enforcement efforts).

[397] WATERWORLD (MCA Universal 1995) (involving character of mutated human and his attempt to find land in future where Earth is covered by water and civilization has collapsed).

[398] TWELVE MONKEYS (MCA Universal 1995) (involving man sent back from plague-ridden future to stop mysterious underworld group from destroying civilization).

[399] THE TERMINATOR (Live Entertainment 1984); TERMINATOR 2: JUDGEMENT DAY (Carolco Pictures 1991) (involving fight between small band of humans and evil machines in world of chaos following nuclear holocaust unleashed by machines).

[400] ALIEN (20th Century Fox 1979); ALIENS (20th Century Fox 1986); ALIEN 3 (20th Century Fox 1992) (involving battles between space aliens and humans who have been betrayed by leaders who — for personal profit — are attempting to capture rather than destroy evil and uncontrollable aliens).

[401] MAD MAX (Orion Pictures 1979); THE ROAD WARRIOR (Warner Bros. 1982); MAD MAX BEYOND THUNDERDOME (Kennedy Miller Productions 1985) (portraying brutal life in post-World War III world).

[402] Terminello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

Sanford Levinson is worried about insurrectionism corresponding with anarchy. "I am not an anarchist," he writes.[403] Nevertheless, he argues, the Founders were insurrectionists. It was the Founders who proclaimed it is "the Right of the People to alter or to abolish"[404] government by armed revolution when necessary; and, whether we like it not, the Founders enacted the Second Amendment to ensure the people had not only the right but the ability to resist government tyranny.[405] Taking rights seriously means that we must honor and preserve rights even when there is a significant social cost in doing so, Levinson argues.[406] There is no doubt that the Founders were revolutionaries, but whether they were insurrectionists is another matter.

B. Were the Founders Insurrectionists?

Conor Cruise O'Brien[407] argues that Thomas Jefferson ought to be ejected from the pantheon of venerated Founders of the republic.[408] His reason is two-pronged: Jefferson was a virulent racist, even by the standards of seventeenth century Virginia,[409] and Jefferson was an insurrectionist.[410] O'Brien worries that Jefferson will give aid and comfort to the contemporary radical militia movement. "[I]f this movement prospers — as I fear it may in the coming century," he writes, "then it will develop its own intellectuals, its own ideologies, and its own press, and

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[403] Levinson, *supra* note 45, at 656.

[404] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[405] *See* Levinson, *supra* note 45, at 656.

[406] *See id.* at 658 (adopting Ronald Dworkin's argument).

[407] Conor Cruise O'Brien, an Irish legislator and diplomat, is a public intellectual of international reputation. He is the author of more than 20 books. *See* O'BRIEN, THE LONG AFFAIR, *supra* note 184, at iv.

[408] *See id.* at 301-25. An abbreviated version of O'Brien's book was published. *See* O'Brien, *Thomas Jefferson*, *supra* note 101, at 53.

[409] *See* O'BRIEN, THE LONG AFFAIR, *supra* note 184, at 315-25.

[410] O'Brien does not use the term "insurrectionist," but says that Jefferson "was in the grip of a fanatical cult of Liberty, seen as an absolute, to which it would be blasphemous to assign limits" and that he was "intoxicated with what Edmund Burke called 'the wild *gas* of liberty.'" *Id.*

these are certain to seek and find legitimation for *their* revolution — including its excesses — in the writings of Thomas Jefferson."[411]

Jefferson wrote the phrase that appears on Timothy McVeigh's tee shirt[412] in a letter to William Stephens Smith in 1787.[413] Smith, the son-in-law to two of Jefferson's dearest friends, John and Abigail Adams, was a confidant of Jefferson.[414] Jefferson was commenting on Shays's Rebellion, then underway in Massachusetts, and expressing views that he was careful not to make to a statesman friend such as Madison.[415] Shays's Rebellion provides an acid test for insurrectionist sympathies, and a brief description is in order.

Daniel Shays was a veteran of the Continental Army who had fought at Lexington, Bunker Hill, and Saratoga.[416] After the war, Shays returned to western Massachusetts where, along with many small farmers, shopkeepers, and hired hands, he found himself hailed into court by creditors.[417] The war had ruptured commercial relationships. British exporters were no longer shipping goods to America on credit, and were demanding that existing debts be paid in hard currency.[418] To raise money to pay these debts and stay in business, American wholesalers demanded the payment of all debts by retailers. Retailers, in turn, demanded payment of outstanding debts in hard currency by farmers, many of whom had been accustomed to paying debts with crops.[419] The supply of hard currency was not equal to the demand. An economic crisis ensued, pitting creditors against debtors. In the Court of Common Pleas of Hampshire County

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[411] *Id.* at 313.

[412] *See supra* note 384 and accompanying text.

[413] *See* REPUBLIC OF LETTERS, *supra* note 251, at 439.

[414] *See* BRODIE, *supra* note 91, at 205, 208 (discussing Jefferson's correspondence with Smith). Jefferson became close to the Adamses when they were all in Paris together. *See id.* at 239-44.

[415] *See* REPUBLIC OF LETTERS, *supra* note 251, at 439.

[416] *See* ZINN, *supra* note 81, at 92.

[417] *See id.* at 92-94.

[418] *See* SZATMARY, *supra* note 193, at 19-36 (discussing economic state of United States at time of Shays's Rebellion).

[419] *See id.* at 19-20.

Massachusetts, where Shays lived, nearly 3000 debt cases were instituted from August 1784 to August 1786.[420]

Rhode Island was alleviating the crisis by issuing, and allowing debts to be paid in, depreciated paper currency. In Massachusetts, however, creditors were in control.[421] Debts had to be paid in hard money, and the courts were executing judgments by foreclosing on land, seizing animals and crops, and even throwing debtors in jail.[422] In addition, the legislature raised taxes, even while the new state constitution increased property qualifications for voting and holding office.[423] This was a bitter pill for people who had gone to war under the slogan, "No taxation without representation." Armed men began demanding the courts adjourn. The local militia was called out to defend the courts, but when a thousand armed men responded, 800 men lined up with those seeking to stop the court from sitting.[424] The crowd freed debtors held in the local jail.[425] When word got out that the state supreme court would meet in Springfield to indict leaders of this insurrection, Daniel Shays led 700 armed farmers and Continental Army veterans to Springfield, where they paraded menacingly through the streets.[426] Shays's ranks swelled as men from the countryside joined his cause.

A second revolution was in the making. Just as patriots had thrown British tea into Boston harbor,[427] just as they had marched with their muskets onto the greens at Lexington and Concord,[428] now they were rallying to resist oppression once more. The Massachusetts legislature enacted a Riot Act to put an end to armed mobs.[429] Skirmishes broke out. Leading a

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[420] *See id.* at 29.

[421] *See id.*

[422] *See id.* at 33-35.

[423] *See id.* at 49.

[424] *See id.* at 92.

[425] *See* ZINN, *supra* note 81, at 92.

[426] *See id.* at 93.

[427] *See* MIDDLEKAUFF, *supra* note 147, at 226 (describing Boston Tea Party).

[428] *See id.* at 268-73 (describing battles of Lexington and Concord).

[429] *See* ZINN, *supra* note 81, at 92.

group of 1000 armed men, Shays began marching on Boston.[430] Massachusetts raised an army to meet him.[431]

Jefferson found this bracing. In his letter to William Stephens Smith, written while he was serving as ambassador to France, Jefferson said:

> What country before ever existed a century and half without a rebellion? And what country can preserve it's liberties if their rulers are not warned from time to time that their people preserve the spirit of resistance? Let them take arms. The remedy is to set them right as to facts, pardon and pacify them. What signify a few lives lost in a century or two? The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants. It is it's natural manure.[432]

About nine months earlier Jefferson had made similar noises in a letter to Madison. "I am impatient to learn your sentiments on the late troubles in the Eastern states," he began.[433] "So far as I have yet seen, they do not appear to threaten serious consequences," he continued.[434] "Malo periculosam, libertatem quam quietam servitutem [I would rather have a disturbed liberty than a quiet slavery] . . . . I hold it that a little rebellion now and then is a good thing, and as necessary in the political world as storms in the physical."[435] Madison was not of a similar mind, as Jefferson would soon learn. In Congress, Madison was advocating enlisting troops to help Massachusetts quell the rebellion.[436] The "internal enemies" in Massachusetts were threatening "the tranquility of the Union," he said.[437] Jefferson learned of Madison's views when he received a letter that Madison had sent before receiving Jefferson's "a little rebellion now and then

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[430] *See id.* at 93.

[431] *See id.*

[432] BRODIE, *supra* note 91, at 241 n.55 (quoting Jefferson's letter to William Stephens Smith).

[433] Letter from Jefferson to Madison (Jan. 30 and Feb. 5, 1787), *in* REPUBLIC OF LETTERS, *supra* note 251, at 460, 461.

[434] *Id.*

[435] *Id.*

[436] *See id.* at 438-39.

[437] *Id.*

is a good thing" letter. In his letter, Madison called the rebellion "treason."[438] Jefferson did not raise Shays's Rebellion in his correspondence with Madison again.[439]

Jefferson was in Paris when he wrote to Madison and Smith about Shays's Rebellion, and his views on the subject were as far removed from those of his fellow Founders as was his geography. Although Jefferson had been away only three years when he wrote those letters, that short span of time was a critical period in the life of America and its Founders.[440] Revolutionaries had turned into nation builders. Washington was shocked and dismayed by Shays's Rebellion.[441] "[M]ankind, when left to themselves, are unfit for their own government," he declared in a particularly black moment.[442] In a more reflective mood, Washington wrote: "[L]et the reins of government then be braced and held with a steady hand, and every violation of the constitution be reprehended: if defective let it be amended, but not suffered to be trampled upon whilst it has an existence."[443] Hamilton believed Shays's Rebellion demonstrated that "a certain portion of military force is absolutely necessary in large communities."[444] Franklin spoke of Shays's Rebellion in a letter he sent Jefferson in April 1786.[445] "The insurgents in the Massachusetts are quelled," Franklin wrote, "and I believe a great majority of that people approve the measures of government in reducing them."[446] John Marshall feared for the future of the young nation. "These violent, I fear bloody, dissensions in a state I had thought inferior in wisdom and virtue to no one in the union," he wrote, "cast a deep shade over the bright

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[438] *See* Letter of James Madison to Thomas Jefferson (Mar. 19, 1787), in REPUBLIC OF LETTERS, *supra* note 251, at 469, 473.

[439] *See* REPUBLIC OF LETTERS, *supra* note 251, at 439.

[440] *See* BRODIE, *supra* note 91, at 234, 320-21 (stating that Jefferson left for France in July 1784 and returned in December 1789).

[441] *See* 6 DOUGLAS SOUTHALL FREEMAN, GEORGE WASHINGTON: A BIOGRAPHY 70-73 (1954).

[442] 1 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 301 (1916) (quoting Washington).

[443] FREEMAN, *supra* note 441, at 72 (quoting Washington).

[444] FORREST MCDONALD, ALEXANDER HAMILTON: A BIOGRAPHY 102 (1979) (quoting Hamilton); *see also* ROBERT A. HENDRICKSON, THE RISE AND FALL OF ALEXANDER HAMILTON (1981).

[445] *See* CARL VAN DOREN, BENJAMIN FRANKLIN 742-43 (1938).

[446] *Id.* at 743 (quoting Franklin).

prospect which the revolution in America and the establishment of our free government had opened to the votaries of liberty throughout the globe."[447] John Jay felt the same way.[448] So did Samuel Adams,[449] Rufus King,[450] and ultimately even anti-Federalist Elbridge Gerry.[451] John Hancock was elected governor of Massachusetts to deal with the crisis, and he dispatched the state's troops with instructions to "kill, slay, and destroy if necessary, and conquer by all fitting ways, enterprises, and means whatsoever, all and every one of the rebels."[452]

Certainly the changed circumstances were, in part, responsible for this abhorrence of insurrection. But only in part. With few exceptions, the Founders were never insurrectionists in the sense that they believed the people should take matters into their own hands by force of arms. Garry Wills notes that even as late as 1775 John Adams denied that the Continental Congress was engaging in rebellion.[453] "[T]he people of this continent have the utmost abhorrence of treason and rebellion," he said.[454] Wills explains that the Founders took great care to stress that they were engaged in "revolution," not rebellion. They associated the word revolution, derived from astronomy, with ordered and prescribed movement and considered themselves engaged in an orderly and legally justified endeavor.[455] And Gordon S. Wood notes that the Founders repeatedly stressed that American resistance was supported by "both the letter and the spirit of the British constitution."[456]

Insurrectionist theory is generally assembled by cobbling together a wide assortment of statements by admired personages. Little effort is made to put those statements in context or

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[447] BEVERIDGE, *supra* note 442, at 302 (quoting Marshall).

[448] *See id.* at 300; *see also* SZATMARY, *supra* note 193, at 123.

[449] *See* ZINN, *supra* note 81, at 92.

[450] *See* GEORGE ATHAL BILLIAS, ELBRIDGE GERRY: FOUNDING FATHER AND REPUBLICAN STATESMAN 150 (1976).

[451] *See id.* at 151. Patrick Henry, who was most inclined to sympathize with the Shaysites due to his background and ideology, remained silent on the matter. *See* HENRY MAYER, A SON OF THUNDER: PATRICK HENRY AND THE AMERICAN REPUBLIC 374-75 (1986).

[452] *See* SZATMARY, *supra* note 193, at 115.

[453] *See* WILLS, INVENTING AMERICA, *supra* note 379, at 51-52.

[454] *Id.* (quoting John Adams).

[455] *See id.* at 51.

[456] WOOD, CREATION OF THE AMERICAN REPUBLIC, *supra* note 54, at 12 (quoting unnamed revolutionaries).

connect them to the drafting, proposing, or ratifying of the Second Amendment. It is enough if the statements were made by one of the Founders or by someone generally admired by the Founders. Jefferson is the prime example. Jefferson was both a Founder of the republic and an insurrectionist, but that does not mean the Founders as a whole were insurrectionists. As they themselves were acutely aware,[457] the Founders were of different minds on many different matters. Jefferson's insurrectionism is irrelevant to the Second Amendment for at least two reasons: Jefferson's views on this subject were not shared by the Founders generally, and Jefferson was not involved in drafting, proposing, or ratifying the Second Amendment.

Another example is Sir William Blackstone's famous *Commentaries.* Blackstone's *Commentaries* are frequently cited by Stephen P. Halbrook,[458] Joyce Lee Malcolm,[459] and even Wayne LaPierre of the NRA.[460] Malcolm suggests that Blackstone is authoritative because he was the second most cited author by American political writers in the late eighteenth century,[461] and LaPierre calls Blackstone's *Commentaries* "the basis of the American legal system."[462]

It takes a great leap of faith to claim that Blackstone was authoritative in the sense that his exposition of law was accepted *ex cathedra.* Blackstone's *Commentaries,* published in England between 1765 and 1769, were popular in the American colonies.[463] Americans read and cited Blackstone, to be sure, but

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[457] According to Benjamin Franklin, the process of developing the American system of governance was not the methodical work of a small group of like-minded individuals but more like a game with many players. "[T]heir ideas so different, their prejudices so strong and so various, and their particular interests, independent of the general, seeming so opposite, that not a move can be made that is not contested." *Id.* at 593 (quoting Franklin).

[458] *See* HALBROOK, THAT EVERY MAN BE ARMED, *supra* note 21, at 43, 45, 53, 54, 58, 90, 94, 101, 122, and 166.

[459] *See* MALCOLM, *supra* note 23, at 12, 71, 86, 130, 134, 142-43, 144, 145, 150, 157, 160, 162, 165, 166, 167, 172, and 176.

[460] *See* LAPIERRE, *supra* note 318, at 24.

[461] *See* MALCOLM, *supra* note 23, at 142.

[462] LAPIERRE, *supra* note 318, at 24.

[463] Though partial and defective, 1557 sets of *Blackstone's Commentaries* were sold in America, where there was a great demand for a readable and relatively concise summary of English law. *See* LAWRENCE C. FRIEDMAN, A HISTORY OF AMERICAN LAW 21, 102 (2d ed. 1985).

they read and cited many writers,[464] and it is unlikely they accepted anyone's work in its entirety as gospel. According to Gordon Wood, the principal appeal of Blackstone's *Commentaries* was not so much Blackstone's exposition of particular rules of law as Blackstone's attempt to show that rules flowed from general principles. Blackstone's *Commentaries* presented the common law as a science.[465] Science was the vogue of the day, as were theories of natural law, and it was Blackstone's presentation of rules flowing logically from natural law that Americans found so appealing.

Blackstone argued that Englishmen enjoyed three absolute rights: the rights of personal security, personal liberty, and private property.[466] In addition, he believed that there are "certain other auxiliary subordinate rights of the subject, which serve principally as barriers to protect and maintain inviolate the three great and primary rights."[467] He named five auxiliary rights and explained the first four in some detail.[468] The fifth he set forth, without further explanation, as follows:

> 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 natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.[469]

There is indeed an insurrectionist flavor to this provision. Blackstone seems to be attempting to blend the right set forth in the Declaration of Rights, which his provision closely tracts, with his theory of natural law. He adopts the Declaration's restriction that subjects may only have arms allowed by law, but

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[464] *See* WOOD, CREATION OF THE AMERICAN REPUBLIC, *supra* note 54, at 14.

[465] *See id.* at 8.

[466] *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *125.

[467] *Id.* *136.

[468] The first four he described as the "constitution, powers, and privileges of parliament," the "limitation of the king's prerogative," the right "of applying to the courts of justice for redress of injuries," and "the right of petitioning the king, or either house of parliament, for the redress of grievances," and he defined these in some detail as well. *See id.* *136-39.

[469] *Id.* *139.

then hits a discordant note by stating that this right is in furtherance of a "natural right of resistance" and the need "to restrain the violence of oppression."[470] On the one hand, therefore, Blackstone appears to recognize the essence of the right set forth in the Declaration of 1689 — a right to possess only those arms authorized by Parliament, under whatever restrictions Parliament imposes. On the other hand, he posits a natural right to resist and "to restrain the violence of oppression" when society and law have broken down.

Malcolm argues that Blackstone "expanded the role of an armed citizenry beyond the individual's own preservation to the preservation of the entire constitutional structure."[471] Blackstone is alluding to the preservation of the constitutional structure; nevertheless, he was probably not saying the right existed to check a tyrannical government. It is far more likely that Blackstone was saying that subjects enjoyed a right to own weapons, as may be authorized by Parliament, as a check on a tyrannical king, and that is how he was understood on both sides of the Atlantic.[472] First, there is a logical inconsistency in Parliament authorizing the possession of weapons to be used to frustrate the execution of its own laws. Second, Blackstone did not believe Parliament was capable of tyranny. He wrote that tyrannical governments existed only when the power to make and enforce the law were consolidated in a single person or entity.[473] Where, as in England, the legislative and executive authorities were separate, the legislative authority would take care not to entrust the executive with sufficient power to subvert its own independence, thereby protecting the liberty of the subject.[474] This was entirely consistent with the thinking of the day, both in England and America, that liberty is not the ability to do as one pleases but rather it is "the happiness of living

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[470] *See id.* *139.

[471] MALCOLM, *supra* note 23, at 143.

[472] *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *122-23 (explaining English view that absolute rights and civil liberty are preserved through Parliament's laws); WOOD, CREATION OF THE AMERICAN REPUBLIC, *supra* note 54, at 24 (describing American view that civil liberty is preserved through ability of society to share in government and lawmaking). The American view was shared by Alexander Hamilton, Richard Price, and Benjamin Church. *See id.*

[473] *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *142.

[474] *See id.* *142.

under laws of our own making."[475] Thus, wrote Blackstone, Parliament is "coequal with the kingdom itself"[476] and its power is "transcendent and absolute."[477] Moreover, Blackstone expressly rejected Locke's theory that the people retained the supreme power to remove or alter the legislature in the event it violated the people's trust.[478] This too was consistent with the generally accepted theory that while tyranny was a perpetual threat at one end of the spectrum, anarchy was the perpetual threat lurking at the other end.[479]

When passages of the *Commentaries* are not ripped from context, we see that Blackstone was primarily tracking the Declaration of Rights of 1689. He substituted "subjects" for "Protestants" but in no way altered the basic premise that one's right to have arms is prescribed by law, that is, by Parliament. As one might expect from Blackstone, he attempted to explain the reason for the right by putting a gloss of natural law upon it. What to the contemporary eye looks like an insurrectionist rationale, however, had a different appearance to the eighteenth century eye. Blackstone was not saying that Parliament regulated a right to keep arms to resist the government, but to resist the King. In modern terms, then, this was a mechanism for preserving the separation and balance of powers. In a somewhat different cast, that is exactly how the American Founders imported it. In England, Parliament regulated the right to have arms as a check on the Crown. Madison cropped and refashioned this concept so that, in a more limited form, it became a check on a power

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[475] WOOD, CREATION OF THE AMERICAN REPUBLIC, *supra* note 54, at 24 (quoting Benjamin Church). *See also id.* at 61-62. I do not mean to suggest that Blackstone, or others, believed there was nothing to personal liberty but living in a representative democracy. Nor did Blackstone see Parliament as the fountain of liberty, for he was a proponent of natural law. Nevertheless, Blackstone considered Parliament both the principal protector and definer of liberty. He was ambivalent about whether parliamentary encroachments on natural rights were possible, or if possible, whether and to what degree Parliament was subject to legal restriction. For example, Blackstone stated that only Parliament could suspend habeas corpus "for a short and limited time, to imprison suspected persons without giving any reason for so doing." 1 WILLIAM BLACKSTONE, COMMENTARIES *132.

[476] 1 WILLIAM BLACKSTONE, COMMENTARIES *145.

[477] *Id.* *156.

[478] *See id.* *157. It may also be noted Blackstone wrote that riding or going armed with dangerous of unlawful weapons was a crime against the public peace. 4 WILLIAM BLACKSTONE, COMMENTARIES *149.

[479] *See* WOOD, CREATION OF THE AMERICAN REPUBLIC, *supra* note 54, at 19, 23.

entrusted to Congress. The congressional authority to arm and organize the militia was tempered with the proviso that the militia could be armed.

Finally, insurrectionists rely on select writings of Madison to support their argument that the Founders were themselves insurrectionists. Portions of the following passage from *The Federalist Number 46* are often quoted in contemporary insurrectionist literature:

> Let a regular army, fully equal to the resources of the country, be formed; and let it be entirely at the devotion of the federal government: still it would not be going too far to say that the State governments with the people on their side would be able to repel the danger. The highest number to which, according to the best computation, a standing army can be carried . . . . would not yield, in the United States, an army of more than twenty-five or thirty thousand men. To these would be opposed a militia amounting to near half a million citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties and united and conducted by governments possessing their affections and confidence. It may well be doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops. Those who are best acquainted with the late successful resistance of this country against the British arms will be most inclined to deny the possibility of it. Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of.[480]

Insurrectionists argue that this section demonstrates two things. First, they argue that Madison believed in a universal militia since his figure of half-a-million armed citizens equals the entire able-bodied, adult, white male population.[481] Second, they argue that Madison believed that the people had a right to

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[480] THE FEDERALIST NO. 46 (James Madison).

[481] *See* HALBROOK, THAT EVERY MAN BE ARMED, *supra* note 21, at 67.

keep and bear arms as the ultimate check on a tyrannical federal government.[482] Though not entirely wrong, this argument is in many ways misleading.

It is important to appreciate when, why, and how the above passage was written. The eighty-five newspaper articles that collectively came to be known as *The Federalist Papers* were written to persuade the people of New York to ratify the Constitution. According to Clinton Rossiter, they were "written with a haste that often bordered on the frantic, printed and published as if it were the most perishable kind of daily news."[483] They are, of course, a brilliant collection. Rossiter calls them "the most important work in political science that has ever been written, or is likely ever to be written, in the United States."[484] Still, they were essentially advocacy pieces. Scholars are divided as to what extent the authors of *The Federalist Papers* — Hamilton, Madison, and Jay — departed from their private views to persuade readers who held different opinions.[485] Indeed Jefferson himself remarked that in some parts of *The Federalist Papers* "the author means only to say what may be best said in defense of opinions in which he did not concur."[486]

Number 46, one of twenty-six papers written by Madison, appeared in a New York newspaper on January 29, 1788. It is a continuation of the previous paper. The anti-Federalists were raising the specter of an all powerful federal government that would swallow the states and devolve into corruption and tyranny. In *Numbers 45* and *46,* Madison responds with a three-pronged argument: (1) a strong federal government is necessary to provide security against foreign and domestic threats, as well as the possibility of "wars among the different States" themselves;[487] (2) the people will control the federal government under a constitutional process that will assure it serves the

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[482] *See, e.g., id.* at 67-68.

[483] Rossiter, *supra* note 53, at viii.

[484] *Id.* at vii.

[485] *See* BANNING, *supra* note 77, at 396-402 (arguing that Madison's views changed as he was working on *The Federalist Papers*); Rossiter, *supra* note 53, at vii, xv (noting that some have called *The Federalist* "a lawyer's brief"); RAKOVE, ORIGINAL MEANINGS, *supra* note 56, at 391 n.6 (regarding scholarship on *The Federalist*).

[486] BANNING, *supra* note 77, at 400 (quoting comment made by Jefferson on November 18, 1788).

[487] *See* THE FEDERALIST No. 45 (James Madison).

people's will; and (3) power shall continue to reside in both the federal and state governments. With respect to the last point, Madison writes that in the course of writing this series of papers he was becoming more persuaded that if an imbalance were to develop between the state and federal governments, it would be because too much power flowed to the states.[488]

Madison states the theme of *Number 46* in the first sentence of that paper as follows: "Resuming the subject of the last paper, I proceed to inquire whether the federal government or the State governments will have the advantage with regard to the predilection and support of the people."[489] Reading *Number 46* in its entirety, one sees that Madison is arguing arguendo. Madison makes it clear that he believes the carefully constructed constitutional structure will prevent the federal government from becoming an instrument of tyranny. Quite clearly, Madison believed that the fear mongering employed to defeat the Constitution bordered on paranoia. However, he was willing to address this fear mongering on its own terms, to convince those in its grip that they need not fear federal power.

Shortly before the passage quoted at length above, Madison writes:

> The only refuge left for those who prophesy the downfall of the State governments is the visionary supposition that the federal government may previously accumulate a military force for the projects of ambition. The reasonings contained in these papers must have been employed to little purpose indeed, if it could be necessary now to disprove the reality of this danger. That the people and the States should, for a sufficient period of time, elect an uninterrupted succession of men ready to betray both; that the traitors should, throughout this period, uniformly and systematically pursue some fixed plan for the extension of the military establishment; that the governments and the people of the States should silently and patiently behold the gathering storm and continue to supply the materials until it should be prepared to burst on their own heads must appear to everyone more like the incoherent dreams of a delirious jealousy, or the mis-

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[488] *See id.*

[489] THE FEDERALIST NO. 46 (James Madison).

> judged exaggerations of a counterfeit zeal, than like the sober apprehensions of genuine patriotism. Extravagant as the supposition is, let it, however, be made.[490]

It is important to note that Madison is speaking of the relative power between the state and federal government. He says, in effect, that if federal troops were to invade a state they would find themselves outnumbered by the state militia. He also says that the state militia would be armed. He does not say that the people enjoy a right to be armed outside the context of the state regulated militia, nor that there is a right to keep and bear arms beyond what the states authorize. Madison's focus was always on the separation and balance of power among both the branches of government and between the state and federal governments. He is speaking about the power and authority of the states.

In the course of his argument, Madison made certain suppositions. One supposition, for example, is that the number of people employed by the federal government "will be much smaller than the number employed [by] the particular States."[491] The projected sizes of the federal army and state militia are suppositions too. To some extent these suppositions were polemical devices. Madison used them because he believed they were assumptions held by the readers he was seeking to persuade.

Madison's statements also represented his personal preferences. For example, Madison had reservations about a standing army.[492] But, as he understood, it had been decided these would be matters of policy, not constitutional law. The Constitution limited neither the number of people the federal government could employ nor the size of a federal standing army. Moreover, the Constitution did not dictate whether the militia would be universal or select. Madison's tacit suppositions are of essentially the same kind as those Hamilton expressly made elsewhere in *The Federalist Papers*, when he said the organization of the militia was a matter entrusted to Congress but went on to recommend "a select corps of moderate size."[493]

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[490] *Id.*

[491] THE FEDERALIST NO. 45 (James Madison).

[492] *See* BANNING, *supra* note 77, at 188, 396-97.

[493] *See* THE FEDERALIST No. 29 (Alexander Hamilton).

Madison's allusion to an armed population is supposition too. At the conclusion of the war, guns were probably more widely disbursed throughout the American population than ever before. Madison's argument includes assumptions based on the circumstances of the day, but nowhere does he suggest the circumstances may not change as policy changes. Moreover, one cannot read *The Federalist Number 46* as an explanation of the Second Amendment because, of course, it would be several more years before Madison would write that provision. At this point in time Madison was still opposed to a bill of rights.[494]

To the extent that Madison's thinking evolved from the time he made his contributions to *The Federalist Papers* to the time he wrote the Second Amendment, his support for a strong federal government and his fear of anarchy probably both increased. One of his biographers writes that "Madison's opinions changed *as he was working on the series.*"[495] The process of writing *The Federalist Papers* "left Madison convinced that the Constitution was a better document than he had thought a month before he started writing."[496] The full impact of Shays's Rebellion and lesser insurrections had probably not yet been absorbed. And rhetoric that had been so useful in stimulating revolution, such as romanticizing the militia and railing against the evils of a standing army, must have begun to have a different effect on Madison as it became the tool of anti-Federalist opposition.

"In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger," Madison wrote elsewhere in *The Federalist Papers*.[497] Anyone who has read much more of Madison than the excerpts served up by contemporary insurrectionists understands that Madison was, first and foremost, a champion of properly structured governmental power. His faith was in the people as expressed through constitutional institutions, not in people with muskets in their hands.

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[494] *See supra* notes 249-253 and accompanying text.

[495] BANNING, *supra* note 77, at 400.

[496] *Id.*

[497] THE FEDERALIST NO. 51 (James Madison).

IV. THE MYTH OF THE SELF-APPOINTED MILITIA

"In some sense, every participant in the Second Amendment debate agrees that the Framers gave the right to arms to a militia, but we disagree over the exact makeup of the militia," writes David C. Williams.[498] Williams divides the debaters into two camps. As Williams sees it, one camp believes in a universal militia. That is, every adult citizen who has not been convicted of a felony or otherwise disqualified is a member of the militia, and therefore has a right to keep and bear arms. The other camp believes that the people have a right to organize a "well regulated" private militia and it is the members of private militias, such as the Michigan Militia and the Militia of Montana,[499] who are protected by the Second Amendment.

Fundamentally, however, these are different wings of the same school of thought. What binds them together is the belief in a self-appointed militia. Both those who believe that the militia consists of everyone ready and willing to take up arms in an emergency, and those who believe that the militia consists of people who chose to join private organizations, believe that citizens make themselves militia members. The opposing view holds that the militia membership is defined not by its members, but by lawful authority.

The individual rights model is grounded in the belief of a self-appointed militia. Although the idea that only people in organized militia groups enjoy a right to keep and bear arms may be popular within the militia movement itself, the universal militia is by far the more widely held view. Stephen P. Halbrook, for example, maintains that "the two categorical imperatives of the Second Amendment [are] that a militia of the body of the people is necessary to guarantee a free state and that all of the people all of the time (not just when called for organized militia duty) have a right to keep arms."[500] Akhil Amar has made a similar argument: "In 1789, when used without any qualifying

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[498] David C. Williams, *The Militia Movement and Second Amendment Revolution: Conjuring with the People*, 81 CORNELL L. REV. 879, 896 (1996).

[499] According to Kenneth S. Stern, in 1995, private militia groups existed in at least 35 states. KENNETH S. STERN, A FORCE UPON THE PLAIN: THE AMERICAN MILITIA MOVEMENT AND THE POLITICS OF HATE 96 (1996).

[500] HALBROOK, THAT EVERY MAN BE ARMED, *supra* note 21, at 8.

adjective, 'the militia' referred to all Citizens capable of bearing arms."[501] This idea is repeated endlessly in the insurrectionist literature.[502]

The fundamental problem with the view that the Second Amendment mandates a universal militia is the Constitution itself. Article I, Section 8 of the Constitution provides that Congress has the power to organize the militia. Some of the Founders may have believed in a universal militia, but in their collective wisdom they ultimately decided not to write an immutable definition of the militia into the Constitution. When Madison referred to "the militia" in the Second Amendment, he knew full well the term was already defined in the main body of the Constitution, and we must presume the members of the First Congress and the state legislatures knew this as well. Nothing in the Second Amendment changed Article I, Section 8. Indeed, Madison himself said that nothing in the Bill of Rights altered the Constitution.[503] We cannot give "militia" a different mean-

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[501] Amar, *Bill of Rights as a Constitution*, *supra* note 46, at 1166. Amar also writes: "Nowadays, it is quite common to speak loosely of the National Guard as 'the state militia,' but 200 years ago, any band of paid, semiprofessional, part-time volunteers, like today's Guard, would have been called 'a *select* corps' or '*select* militia' — and viewed in many quarters as little better than a standing army." *Id.* at 166. However, that is not what Alexander Hamilton thought when, writing in *The Federalist Papers*, he made it quite clear that the Constitution gives Congress the authority to organize the militia as it sees fit, adding: "What plan for the regulation of the militia may be pursued by the national government is impossible to be foreseen." THE FEDERALIST NO. 29 (Alexander Hamilton). Stressing that he is offering his personal opinion, Hamilton goes on to state that he would advise Congress to opt for a "select corps of moderate size." *Id.*

[502] Malcolm, for example, writes:

> The customary American militia necessitated an armed public, and Madison's original version of the amendment, as well as those suggested by the states, described the militia as either "composed of" or "including" the body of the people. A select militia was regarded as little better than a standing army. The argument that today's National Guardsmen, members of a select militia, would constitute the *only* persons entitled to keep and bear arms has no historical foundation. . . . [T]he amendment guaranteed the right of "the people" to have arms not be infringed. Whatever the future composition of the militia, therefore, however well or ill armed, was not crucial because the people's right to have weapons was to be sacrosanct.

MALCOLM, *supra* note 23, at 162-63.

Incidently, Malcolm is wrong when she states that Madison's original proposal described the militia as being composed of or including the body of the people. It did not. *See supra* note 276 and accompanying text. Malcolm, herself, accurately sets forth Madison's draft just three pages before she misdescribes it.

[503] *See The Daily Advertiser, 9 June 1789, in* CREATING THE BILL OF RIGHTS, *supra* note 87,

ing in the Second Amendment than that expressly given to it in the main body of the Constitution without violating cardinal principles of constitutional construction.[504]

CONCLUSION

In his article, *The Bill of Rights as a Constitution,* Akhil Amar argues that the Bill of Rights was "[o]riginally a set of largely structural guarantees applying only against the federal government."[505] "Like the original Constitution, the original Bill of Rights was webbed with structural ideas," he writes.[506] "Federalism, separation of powers, bicameralism, representation, amendment — these issues were understood as central to the preservation of liberty." Though he has not yet fully appreciated it, the Second Amendment provides a striking example of Amar's thesis. Its parentage is in the English Declaration of Rights of 1689. Although to twentieth century American eyes the right to have arms provision of that document appears at first blush to provide an individual right, the provision is in fact quite a different animal. It is a structural provision. It does not mean that Protestants may have arms, but that Parliament, and not the Crown, has the authority to regulate the matter.

This was the template that Madison, the quintessential structuralist, used when he wrote the Second Amendment, and this was the model in the minds of the members of the First Congress and the state legislatures when they proposed and ratified the Amendment. Like English legislators a century earlier, Madison wrote the Second Amendment to resolve a structural problem. The Constitution had given Congress the power to organize and arm the militia. Focusing on this provision, the anti-Federalists sent a chill down the spine of the South: would Congress, deliberately or through indifference, destabilize the

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at 63 (reflecting Madison's remarks in House of Representatives on June 8, 1789, stating that "[h]e had no design to propose any alterations which in the view of the most sanguine friends to the constitution could affect its main structure or principles, or do it any possible injury").

[504] When construing the Constitution we must read "the whole instrument" and give every word "its due force, and appropriate meaning." Wright v. U.S., 302 U.S. 583 (1937).

[505] Amar, *Bill of Rights as a Constitution, supra* note 46, at 1136.

[506] *Id.* at 1205.

slave system by "disarming" the state militia? Whether Madison personally shared this fear cannot today be known, but there is little doubt that after Richmond this specter plagued many Southerners, including many of Madison's constituents.

What does the hidden history mean with respect to how the Second Amendment should be interpreted? I do not in this Article take any position with respect to "original intent." Nevertheless, two items of significance ought to be mentioned. First, the Second Amendment was written to assure the South that the militia — the very same militia described in the main body of the Constitution — could be armed even if Congress elected not to arm them or otherwise attempted to "disarm" them. From our perspective today, this may seem like a small matter since Congress retained exclusive authority to determine the composition of the militia, and, thus, who could enjoy the right to bear arms. However, in the context of the concern and circumstances of the time, it was significant. The Amendment deals with keeping and bearing arms in the militia, subject to federal and state regulation. Therefore, to the extent original intent matters, the hidden history of the Second Amendment strongly supports the collective rights position.

Second, the Second Amendment lives two lives: one in the law and the other in politics, public policy, and popular culture. The hidden history has ramifications in the second realm as well. The Second Amendment takes on an entirely different complexion when instead of being symbolized by a musket in the hands of the minuteman, it is associated with a musket in the hands of the slave holder.