THE ORIGINAL INTENT OF THE SECOND AMENDMENT: WHAT THE DEBATES AT THE CONSTITUTIONAL CONVENTION AND THE FIRST CONGRESS SAY ABOUT THE RIGHT TO BEAR ARMS

By

JEFFREY P. CAMPBELL

Bachelor of Arts in History

Oklahoma State University

Stillwater, Oklahoma

2009

Submitted to the Faculty of the Graduate College of the Oklahoma State University in partial fulfillment of the requirements for the Degree of MASTER OF ARTS May, 2012

THE ORIGINAL INTENT OF THE SECOND AMENDMENT: WHAT THE DEBATES AT THE CONSTITUTIONAL CONVENTION AND THE FIRST CONGRESS SAY ABOUT THE RIGHT TO BEAR ARMS

Thesis Approved:

Dr. Richard C. Rohrs

Thesis Adviser

Dr. James L. Huston

Dr. Elizabeth A. Williams

Dr. Sheryl A. Tucker

Dean of the Graduate College

TABLE OF CONTENTS

| Chapter | Page |
|--|------|
| I. INTRODUCTION | 1 |
| II. ORIGINS OF THE SECOND AMENDMENT | 21 |
| III. THE MILITIA VERSUS THE STANDING ARMY | 36 |
| IV. MADISON THROWS A "BATH TUB TO A WHALE" | 65 |
| V. CONCLUSION | 78 |
| REFERENCES | 87 |

CHAPTER I

Introduction

"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." ¹

Perhaps the Constitution's greatest quality lies in its ability to mean different things to different people. Whether the framers intended the document to be ambiguous or not, the vague wording of the Constitution ensured it would remain relevant for centuries after its creation. Surely no framer envisioned the invention of the automobile—let alone that his document provided the proper legal mechanisms to ensure automobile safety, to construct a system of national highways for its use, or to regulate its emissions. Yet, the ability of the Constitution to mean different things to different people comes at great cost. Disagreements regarding the meaning of a passage, phrase, or general spirit of the Constitution have and continue to create political and social discord.

The current political controversy surrounding the gun culture in the United States involves the Second Amendment. Gun rights advocates largely ignore the clause before the comma. They simply emphasize the remainder of the sentence, that people – and, in

1

¹ U.S. Constitution, amendment 2.

their mind, private citizens – have the right to bear arms. Supporters of gun control disagree. They argue that the first portion of the sentence is the purpose of the amendment; the framers sought to protect the collective right of the people to form a militia. There is no individual right to bear arms, they allege; so, the government can regulate and even prohibit gun ownership. The individual and collective rights interpretations of the Constitution divide the nation, resulting in numerous Supreme Court cases, political action committees, lobbies, and a host of scholarship concerning what the founding fathers intended.

Unfortunately for gun rights activists, historical evidence provides no basis for an individual right to firearms. A plain reading of the Second Amendment itself, along with an examination of the debates during the drafting of the Constitution and the amendment's ratification show little concern for private firearm rights. Instead, what routinely surfaces in arguments between Federalists and Anti-Federalists is a concern over standing armies, the role of the militia, and determining how the federal government should exercise military power. James Madison introduced the Second Amendment to placate various fears regarding the military, the balance of power between the federal and state governments, and the use of standing armies.

This paper contributes to the historical understanding of the Second Amendment in two ways. First, it examines the debates regarding the Constitution in the national and state conventions. While these debates do not directly address the current gun rights controversy, they do provide insight into how the founding fathers viewed the use of firearms and are critical to any understanding of the Second Amendment. In addition, this paper concludes that Anti-Federalists were not clamoring for an individual right to gun

ownership. Proponents of an individual right to bear arms routinely use Anti-Federalist writings to buttress their argument, which leaves the impression that Anti-Federalists advocated an individual right to firearm possession. The debates regarding the Constitution demonstrated that the role of militias and the creation of standing armies concerned both Anti-Federalists and Federalists.

It is important to examine why historians are revisiting the Second Amendment with such scrutiny. When conservatives swept into power with the Ronald Reagan presidency, it became popular for many of them to advocate a "return" to the Constitution that the founding fathers intended. Part of this included a pro-gun agenda that rewarded the National Rifle Association – strong backers of the Republican Party. In this interpretation, the Second Amendment served as proof that the founding fathers intended for private citizens to have access to firearms free from government interference. The reasoning used by many conservatives relied upon originalist arguments. The founding fathers, conservatives alleged, intended for the Second Amendment to provide the right of gun ownership to private citizens. Indeed, it is impossible to discuss the Second Amendment without engaging in some sort of originalism.

In its simplest form, originalism is the process of determining what the framers meant in drafting the Constitution and the Bill of Rights. This is an incredibly difficult process, one that many historians struggle with. Due to the reverence many Americans have for the founding fathers, it is a powerful tool in any argument to claim that the founders intended for guns to be available without government interference.

Jack N. Rakove is a historian at Stanford University who studies the original intent of the founding fathers. His Pulitzer Prize-winning work Original Meanings examines the difficult concept of originalism. Drawn to the topic due to the numerous legal and political controversies that arose from the "original meaning" of the Constitution, Rakove determined that the debate over originalism can be reduced to two positions. The supporters of "originalism argue that the meaning of the Constitution (or of its individual clauses) was fixed at the moment of its adoption, and that the task of interpretation is accordingly to ascertain that meaning and apply it to the task at hand." Simply put, advocates of originalism believe that everyone involved in ratifying the Constitution agreed to the intent and meaning of each provision, passage, and phrase in the document. Not everyone supports this premise. Those critical of originalism argue that it is not easy to ascertain the original meaning of a particular clause, "and that even if it were, a rigid adherence to the ideas of the framers and ratifiers would convert the Constitution into a brittle shell incapable of adaptation to all the changes that distinguish the present from the past."² Rakove himself falls into the second camp, as he considers the arguments produced by proponents of originalism as being inherently undemocratic. By sticking faithfully to the intentions of the founding fathers, future generations are "subordinate to the judgment of present generations to the wisdom of their distant (political) ancestors." Yet, Rakove does not go so far as to condemn originalism, noting that he is "ambivalent" about whether it is "a viable or valid theory of constitutional interpretation." While originalism is vulnerable to criticism, Rakove does enjoy originalist arguments "when the weight of the evidence seems to support the

⁻

¹ Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Alfred A. Knopf, 1996), xii.

² Ibid.

constitutional outcomes I favor – and that may be as good a clue to the appeal of originalism as any other."³

Despite Rakove's hesitation to accept originalism as a valid historical interpretation, he explores the difficulties historians experience when interpreting the Constitution. The process is not easy. Not only is the document both complex and vaguely-worded, the debates, discussions, votes, and compromises used to pass and then ratify the Constitution involved thousands of individuals. The ratification of the Constitution involved representatives in national and state conventions, in addition to the input and concerns of many citizens in pamphlets and newspapers. Words like "meaning," "intention," and "understanding" reoccur throughout originalist arguments. Yet, finding out the exact meaning of a clause that involved hundreds of individuals to agree (and disagree) upon is a herculean task that almost rivals the actual writing and passing of the Constitution itself. Rakove himself notes that "with its pressing ambition to find the determinate meanings at a fixed moment, the strict theory of originalism cannot capture everything that was dynamic and creative."

Perhaps the most important lesson taken from *Original Meanings* is that an author should use as many sources as possible to support his or her position on this argument. Due to the political nature of many originalist arguments, non-historians often weigh in on incredibly complicated historical events. It is not uncommon to read works in which historical events and quotations are distorted to fit an agenda. Unfortunately, some authors on the Second Amendment are too eager to rely upon a group of passages for

³ Ibid., xv.

⁴ Ibid., 7.

⁵ Ibid., 10.

support while ignoring the cumulative evidence rebutting their argument. When examining the Constitution, Rakove points out that evidence of the founders' intent is not limited to James Madison's notes, or the debates in the press, but also the philosophical and intellectual underpinnings of American political thought during the Revolution. Some works, such as Stephen P. Halbrook's *The Founders' Second Amendment*, either refrain from dealing with the broad historical background of the American Revolution and the Constitution, or simply misrepresent them to strengthen the originalist argument.

The Founders' Second Amendment and That Every Man Be Armed are examples of well-researched yet flawed originalist texts. Written by author Stephen P. Halbrook, they both contain errors in the historical record of the American Revolution and the Constitution. Halbrook is a lawyer and not a historian; he takes liberties with historical events to buttress arguments that the Second Amendment supports an individual's right to own firearms. Halbrook relies heavily on originalist thought. He states in That Every Man Be Armed that "if the Bill of Rights has any meaning at all, it must be based on the linguistic usage of those who wrote it." When considering the Second Amendment, "the highest court is not bound by judicial precedent but by the intent of the Framers of the Constitution." That Every Man Be Armed links the right to bear arms to an ideological reverence for armed citizenry resisting tyranny. To Halbrook, the Second Amendment is a guarantee implemented by the founders to ensure not only the right to own a weapon for personal reasons, but also to protect its owners against an oppressive government, and, if need be, to overthrow it. That the Second Amendment was a "right to rebel"

⁶ Ibid., 7.

⁷ Stephen P. Halbrook, *That Every Man Be Armed: The Evolution of a Constitutional Right* (Oakland, CA: Independent Institute 1994), x.

⁸ Ibid., xi-xii.

provision is a popular view among libertarians and gun owners. The author's historical evidence for this theory is puzzling. Halbrook writes that the "American Revolution was sparked at Lexington and Concord, and in Virginia, by British attempts to disarm the individual and hence the militia." Rakove found this statement troubling and sarcastically wrote that "most historians, however, have labored under the delusion that the Revolution arose from an unmanageable dispute over the right of Parliament to make laws 'in all cases whatsoever' for the American colonies."

That the Constitution provides a clause for armed revolution remains a myth espoused by gun-rights' advocates. It is foolish to think the founding fathers would establish a government only to provide for its undoing by violent armed mobs. In addition, the militia is responsible for suppressing riots and insurrections in the Constitution. This still does not deter authors such as Halbrook, who states in *The Founders' Second Amendment* that armed citizenry have the right to overthrow the government. Halbrook again conjures up the notion that the American Revolution was fought over gun rights, stating that "as the experiences of the American Revolution proved, the right to keep and bear arms serves as the ultimate check that the Founders hoped would dissuade persons at the helm of state from seeking to establish tyranny."

Works by authors such as Halbrook underscore the importance originalism plays in Second Amendment scholarship. As Rakove argues in "The Second Amendment: The

_

⁹ Ibid., 7.

¹⁰ Jack N. Rakove, "The Second Amendment: The Highest Stage of Originalism," *Chicago-Kent Law Review* 76 (January 2000), 1.

¹¹Stephen P. Halbrook, *The Founders' Second Amendment: Origins of the Right to Bear Arms* (Chicago: Ivan R. Dee, 2008), 338. Equally troubling is the emphasis the author places on the militia's role in winning the American Revolution. The Continental Army is given just a brief mention on page 122, with the author stating that "the issue of the efficiency of the militia compared with the Continental Army are beyond the scope of this study."

Highest Stage of Originalism," the Second Amendment "represents the highest stage of originalism, because the advocates for its most expansive interpretation place their greatest reliance on arguments about its meaning to the Framers and adopters of the Constitution and its earliest amendments." This is apparent given the current political atmosphere regarding gun rights. Gun advocates routinely attempt to align their views of gun ownership with the founding fathers in an attempt to deflect criticism. Rakove dismisses these arguments, stating that "the case for regulation of the sale, use, and possession of firearms rests on the simple conviction that the high number of casualties incurred annually by the deliberate and accidental use of firearms provides a sufficient, not to say compelling, justification for state action." Even if the Second Amendment prohibited regulation of firearm ownership, Rakove disagrees with originalism in general, as the "concerns of the present have every right to supersede the obsolescent understandings of generations long past." These powerful statements cut to the heart of recent scholarship over the Second Amendment, and do not endear Rakove to members of the National Rifle Association.

Not surprisingly, Rakove rejects the individual right interpretation of the Second Amendment. History does not show the founding fathers were concerned with individual gun rights, as there were "only a handful of sources from the period of constitution formation that bear directly on the questions that lie at the heart of current controversies about the regulation of privately owned firearms." Clearly, if the founders were concerned with this and had addressed it, "proponents of the individual right theory would not have to recycle the same handful of references to the dissenters in the

¹² Rakove, "The Second Amendment," 2.

¹³ Ibid., 3.

Pennsylvania Ratification Convention and the protests of several Massachusetts towns against their state's proposed constitution, or to rip promising snippets of quotations from the texts and speeches in which they are embedded." Rakove laments that many individual rights' supporters "ransack the sources for a set of useful quotations" that do not correspond to the historical record, which shows the founders more concerned with "the militia and its public functions, not with the individual ownership and use of firearms." Rakove refutes common individual rights arguments, namely that the Constitution and an armed citizenry endorsed revolution, or that the founders disapproved of state regulation of firearms. The founders did not support revolution, as "a plain-text reading of the Constitution, which treats the militia as an institution for suppressing armed insurrection, and which nowhere endorses a right to revolution against republican government, would not by itself be conducive to that interpretation." In addition, the eighteenth century was "not a libertarian utopia; their traditions of governance permitted legislatures and institutions of local governance to act vigorously in the pursuit of public health and safety."14

Historians supporting the individual rights argument have looked to England's past for answers. The English Bill of Rights guaranteed arms to Protestants in 1689. The best individual rights argument on this subject comes from Joyce Lee Malcolm's *To Keep and Bear Arms: The Origins of an Anglo-American Right*. Supreme Court Justice Clarence Thomas cited Malcolm's work in *Printz v. United States (1997)*, determining that "a growing body of scholarly commentary indicates that the 'right to keep and bear

¹⁴ Ibid., 4.

arms' is, as the Amendment's text suggests, a personal right." In addition, Justice Antonin Scalia made numerous references to Malcolm's work in *District of Columbia v*. Heller (2008), using To Keep and Bear Arms as historical proof that the right to bear arms "was clearly an individual right, having nothing whatever to do with service in a militia...by the time of the founding, the right to have arms had become fundamental for English subjects." Malcolm argues that to understand the Second Amendment, scholars need to look to the English right established in 1689. Malcolm argues that the efficacy of an armed citizenry supported a government free of standing armies that Americans came to cherish, as armed citizens were effective soldiers and protectors of the peace. The book draws the ire of many historians in its assertions on not only the English Bill of Rights, but also on statements regarding the Constitution. Malcolm, unlike Rakove, believes that "Madison and his associates took seriously the task of selecting and defining the liberties that constitute the American Bill of Rights; that they had a specific intention in each instance; and that in this particular instance their views were profoundly, albeit not exclusively, shaped by the British model." She believes not only that Madison's proposed amendments had specific intentions but also that everyone agreed to what they were. Malcolm goes so far as to state that the Second Amendment's meaning was perfectly clear to the framers and that "changed circumstances and long years of indifference have made it difficult to reconstruct the philosophy behind the right, let alone ascertain with any confidence the intention of its drafters." ¹⁸

-

¹⁵ Printz v. United States, 521 U.S. 938 (1996). Accessed 08 June 2011 from Justia.com.

¹⁶ District of Columbia v. Heller, 554 U.S. 07-290 (2008). Accessed 08 June 2011 from Justia.com

¹⁷ Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* (Cambridge, MA: Harvard University Press, 1994), 135.

¹⁸ Ibid., ix.

In essence, Malcolm recycles the arguments made by many originalists. The framers made their intentions clear; it is simply up to historians to figure out the intention of the Second Amendment. To Keep and Bear Arms is a well-researched and respected text, yet it has flaws. In particular, Malcolm cites the English Bill of Rights as the origin of the Second Amendment. One of the key misunderstandings between the English Bill of Rights and the Second Amendment involves the issue of who was eligible to serve in the militia. Individual rights supporters allege that any able bodied male was eligible to serve in the militia; it was a universal militia, as opposed to a select militia, in which states draft certain citizens for duty. Yet, the English Bill of Rights does not grant the right to bear arms to every person – it restricts ownership to Protestants. This makes sense given England's historical animosity toward Catholics and reveals a paradox for individual rights' supporters. If the English Bill of Rights inspired the Second Amendment, it cannot support a universal, unrestricted access to firearms, as it granted the right to only Protestants. If the Second Amendment does ensure the right to own guns to all individuals, then it cannot credit the English Bill of Rights as precedent. In addition, the English Bill of Rights also includes the troubling passage "Protestants may have Armes for their defence Suitable to their Condition and as allowed by Law." Clearly, the clause allows for some additional governmental regulation. Historian Lois G. Schwoerer agrees. She writes that "the constitutional right of the individual to hold arms at the end of the eighteenth century was what it was at the beginning – a restricted right." She faults Malcolm's thesis, as "if the Americans ignored all these restrictions, as Malcolm claims, then they were not following the English constitutional example."¹⁹

-

¹⁹ Lois G. Schwoerer, "To Hold and Bear Arms: The English Perspective," *Chicago-Kent Law Review* 76

Schwoerer argues that the English right to bear arms was not universal. She finds "that English-men did not secure to 'ordinary citizens' the right to possess weapons."

Article VII of the Bill of Rights was "an excellent example of class law and of law erected on religious, social, and economic prejudices." It granted rights to English subjects based on their religion, "as was 'suitable' to their economic standing, and 'according to the law' that governed such matters — in other words to upper-class Protestants." In a journal article refuting Malcolm's thesis, Schwoerer bluntly states "there was no unrestricted English right of the individual to possess guns for the colonists to inherit." The Declaration of Rights of 1689, like the American Constitution, took considerable time and debate to draft. The grievances brought forth involved "the use of the militia (under the command of the king) to disarm and imprison men without cause" and the establishment of "a standing army in peacetime without parliament's consent." What was lacking, as with the debates surrounding the Constitution, was any discussion of an individual right to possess firearms.

Collective right arguments emphasize historical animosity toward standing armies and reverence for militias. Although not all historians agree with the collective right moniker, they usually reject the premise that the Second Amendment provides unfettered access to firearms for private use. Instead, they argue, the Second Amendment establishes rights regarding the militia which many Americans at the time preferred over standing armies. The framers shared an antagonism toward standing armies that had origins in England. Article VII of the English Bill of Rights reflected not only hostility toward

(January 2000), 18.

²⁰ Ibid.

²¹ Ibid., 19.

²² Ibid., 3.

Catholics but also a "hatred of standing armies in time of peace and the conviction that the militia, as an instrument that was effectively controlled by Parliament and the upper classes, could provide a safeguard against standing armies and an absolute king."²³ Schwoerer's "No Standing Armies!" Antiarmy Ideology in Seventeenth-Century England examines the hostility many English subjects held towards armies maintained in time of peace. English subjects had experienced firsthand the abuses of a standing army and valued a citizen militia that harked back to the days of Ancient Greece and Rome.

Militias, made up of the citizenry, were far less likely to enforce unjust laws and suppress the populace because they were made up of the populace. The English viewed standing armies as "inconsistent with a Free Government, and absolutely destructive to the Constitution of the English Monarchy."²⁴ The negative experiences of many Englishmen with the standing armies of the seventeenth century became the impetus for the right to bear arms in the English Bill of Rights and fueled American perceptions of standing armies in a free government.

Saul Cornell's *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* rejects the Second Amendment as an individual right. He also finds little evidence to support notions that the Second Amendment was a "collective right of the states." Cornell finds fault in the current Second Amendment dichotomy. He labels "partisans of gun rights" as believing the Second Amendment "protects an individual right to keep and bear arms for self-defense, recreation, and if necessary, to

²³ Ibid., 18

²⁴ Lois G. Schwoerer, "No Standing Armies!" The Antiarmy Ideology in Seventeenth Century England (Baltimore: The Johns Hopkins University Press, 1974), 1.

²⁵ Saul Cornell, A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America (New York: Oxford University Press, 2006), 2.

take up arms against their government." Equally problematic is the argument espoused by "gun control advocates." They believe in a collective right of the states to maintain a militia. According to Cornell, "both sides have the history wrong." Instead, research points toward an uncomfortable synthesis: the Second Amendment "was neither an individual right of self-defense nor a collective right of the states, but rather a civic right that guaranteed that citizens would be able to keep and bear those arms needed to meet their legal obligation to participate in a well-regulated militia." If the government enforced the true meaning of the Second Amendment, then the government would require all able bodied males to serve in the militia. Cornell concludes that neither side of the political debate would be happy – instead, he calls it a "nightmare." Libertarians would be appalled at "mandatory gun registration" and the unsettling prospect of "government officials [coming] into homes to inspect privately owned weapons, as they did in the Revolutionary days." Proponents of gun control would hate the requirement of all Americans to "receive firearms training and...the idea of requiring all able-bodied citizens to purchase their own military-style assault weapons."²⁷

In referencing his earlier research on Antifederalism, Cornell could not believe how many individual right proponents relied upon Anti-Federalist quotes to support their views. Cornell finds it baffling that "scholars who claimed to be seeking the original understanding of the Second Amendment would lavish so much attention on the losing side's thoughts." Yet, Cornell is guilty of this same premise; he states, "in my story, the perspective of the backcountry farmers who took up arms during Shays's Rebellion would have to be accorded the same respect as the learned disquisitions of Supreme

²⁶ Ibid.

²⁷ Ibid., 2-3.

Court justices."²⁸ In this regard, Cornell reinvigorates the previous debate over the validity of originalism. The emphasis on using as many resources as possible follows Rakove, providing a much more detailed picture of the meaning of the right to bear arms in the founding era. The difficulty lies not in using lots of sources, but to discern which opinions are more valid. The result is what Cornell calls a "pluralist model that acknowledged that there were a number of different views of the right to bear arms in the Founding era."²⁹ This pluralist model rejects the individual, personal right to gun ownership, and, at the same time, finds only scant evidence that the Second Amendment protected a collective right of the states to form a militia. Instead, Cornell finds his pluralist model best represents the civic character of the time – a generation that embraces the minuteman ideal.³⁰ Cornell's interpretation of the Second Amendment guarantees an individual right to own firearms to fulfill a civic obligation to participate in the militia. This uncomfortable synthesis of individual and collective right interpretations is currently popular among historians; however, the debates involving the ratification of the Constitution do not support this view, as the founders did not mention an individual right to firearm ownership.

The pluralist model is popular with other scholars. Historians such as Robert E. Shalhope and David Thomas Konig support pluralist interpretations of the Second Amendment. Shalhope argues that the founders created a nation intent on fostering communal responsibilities while protecting individual rights, and there is no better example of this than the Second Amendment. Shalhope cites republican ideals regarding

-

²⁸ Ibid., xi.

²⁹ Ibid., x.

³⁰ Ibid., 2.

liberty and armed citizen-soldiers influencing American ideals regarding the right to bear arms.³¹ When creating the Bill of Rights, Shalhope determines that "(1) Individuals had the right to possess arms to defend themselves and their property; and (2) states retained the right to maintain militias composed of these individually-armed citizens."³² These premises sound familiar because they are literally the opposing sides in the debate over the Second Amendment. Shalhope agrees that both sides are correct. His views run counter to Cornell's pluralist approach, which determines both positions are incorrect. In addition, Shalhope relies heavily upon the evidence that Rakove and Cornell despise – the "losing side." Shalhope cites the Pennsylvania minority report, an Anti-Federalist pamphlet that condemned the state's endorsement of the Constitution.

David Thomas Konig rejects both the collective and individual rights interpretations. He states that both are "historically unsatisfactory, the products of present-day normative agendas that have polarized the debate into two competing and largely ahistorical models." ³³ Konig rejects the current dichotomy as being anachronistic and much more a debate about twenty-first century rights. As a result, he emphasizes looking at "eighteenth-century concepts of rights, not those of the twenty-first century, and to contextualize the right to bear arms in an eighteenth-century political struggle now largely ignored but well known to constitutional polemicists framing the Constitution and

³¹ Robert E. Shalhope, "The Ideological Origins of the Second Amendment." *The Journal of American History* 69 (December 1982): 599-614. Shalhope goes into greater depth regarding republican virtues than in his subsequent article, "The Armed Citizen in the Early Republic."

³² Robert E. Shalhope, "The Armed Citizen in the Early Republic." *Law and Contemporary Problems* 49 (Winter 1986): 125-41, 133.

³³ David Thomas Konig, "The Second Amendment: A Missing Transatlantic Context for the Historial Meaning of 'the Right of the People to Keep and Bear Arms,'" *Law and History Review* 22 (Spring 2004): 119-59, 119.

the Bill of Rights."³⁴ Konig emphasizes the role militias played in Scotland and the lessons American colonists learned by "Parliament's rebuilding of an English militia while denying the Scots the right to do so."35 Like Malcolm, Konig looks to England as the "missing context" that solves the Second Amendment riddle. Konig argues that "once the time came for seeking a written guarantee of local militia effectiveness in the federal Constitution, the language and substance of this transatlantic legacy had great influence." In Scotland, like in the American colonies, there was an immense distrust of centralized governments that denied the right to bear arms in the militia, because the population feared they could not resist any governmental oppression, invading armies, or rebellions. The answer was a citizen militia, which would not oppress themselves and but resist foreign and domestic invasions. Konig sees the citizen ideal of service in the militia as a "civic right of a peculiarly eighteenth-century nature unlike either the 'individual' or 'collective models' argued for today." According to Konig, neither Americans or Englishmen believed in an individual or personal constitutional right, however "its common emphasis on widespread individual arms-bearing for public service distinguishes it from today's narrowly applied 'collective' application to the National Guard." Konig underscores his pluralist approach by saying that "no individual right existed unrelated to service in a well-regulated militia; no effective militia could serve its purpose without an armed citizenry."³⁷ He notices that this may seem paradoxical to

³⁴ Ibid., 120.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid., 120-121.

Americans today but made perfect sense to those in the past who were "familiar with the concept of an individual right exercised collectively."³⁸

Historian Don Higginbotham rejects pluralist models. By looking at the importance of local and federal control of the militias, he argues that the debate regarding federalized militia is "virtually absent" from Second Amendment scholarship.³⁹
Higginbotham remarks that the Constitution brought about a radical shift from state control of the militia to a shared authority. This disturbed Anti-Federalists and James Madison attempted to placate them in the Second Amendment. Higginbotham rejects that private gun ownership played any part in the debates or meaning of the Second Amendment. He states that "in all the discussions and debates, from the Revolution to the eve of the Civil War, there is precious little evidence that advocates of local control of the militia showed an equal or even a secondary concern for gun ownership as a personal right." In addition, he states that "colonial and Revolutionary Americans were virtually of one mind in espousing a well-regulated militia under local authority." The War of Independence and Shays's Rebellion severely hurt the militia's credibility, causing many Federalists to advocate a federalized militia. ⁴² Of course, to many Anti-Federalists, a

³⁸ Ibid

³⁹ Don Higginbotham, "The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship," *The William and Mary Quarterly* 55 (January 1998): 39-58, 39.

⁴⁰ Ibid., 40.

⁴¹ Ibid.

⁴² Washington stated, "to place any dependance [*sic*] upon Militia, is, assuredly, resting upon a broken staff." Letter from George Washington to the President of Congress, 24 September 1776, in *The Writings of George Washington from Original Manuscript Sources*, 1775-1799, ed. John C. Fitzpatrick, 39 vols. (Washington, DC: United States Government Printing Office, 1931), 6:120-122.

federalized militia was simply a clever way to create a standing army. Without local control, the federal militia could use some of the people to fight against the other. 43

Higginbotham argues that attempts by Anti-Federalists to limit the federalized militia failed. Madison and a "Congress composed largely of Federalists, showed no inclination whatsoever to mollify Anti-Federalists on the subject of the militia." The author claims that Congress "shared Madison's belief that a bill of rights should be a statement of general principles rather than a document that included particulars and policies that in their view, were more properly determined by statute law." These powerful claims – particularly that the Bill of Rights were mere recommendations for further statutes – provide an interesting interpretation of the Second Amendment.

The digitization of historical documents provides historians with the capability to determine the meaning of the right to bear arms. Nathan Kozuskanich searched "bear arms" in "120 American newspapers from 1690 to 1800" along with numerous newspapers, pamphlets, and broadsides in the Library of Congress online database. He found that nearly all of the articles "use the phrase 'bear arms' within an explicitly collective or military context to indicate military action." Kozuskanich concludes that Americans in the eighteenth century "overwhelmingly used 'bear arms' in a military sense both in times of war and in times of peace."

Scholars disagree over the meaning of the Second Amendment. While largely divergent on individual and collective schools of thought, there are an increasing number

.

⁴³ Higginbotham, "The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship," 46.

⁴⁴ Ibid., 48

⁴⁵ Nathan Kozuskanich, "Originalism in a Digital Age: An Inquiry into the Right to Bear Arms," *Journal of the Early Republic* 29 (Winter 2009): 587-589.

of historians who take a pluralist approach – perhaps, the best in such a heated and divided political climate. Yet, to understand the meaning of the Second Amendment it is necessary to examine its ideological origins and the mindset of the generation who authored it. Colonial American views regarding the right to bear arms originated centuries earlier in England. The events preceding and involving the War for Independence influenced American thinking. Only with careful consideration of these events can one attempt to determine the meaning of the Second Amendment.

It is also important to examine the debates at the Constitutional Convention and the First Congress. Rakove notes that individual right advocates pay "little attention" to these debates, primarily because they do not address "the issues that lie at the core of our contemporary controversy." Cornell laments that individual right proponents "lavish so much attention on the losing side's thoughts" – namely the writings and views of Anti-Federalists. This paper finds that individual right supporters should not focus on the losing side's thoughts, as they actually support a collective right to bear arms. Anti-Federalist writings voiced concern regarding the militia and standing armies. The founders, both Federalists and Anti-Federalists, were not preoccupied with an individual right to firearms. Instead, they were concerned about standing armies, the control of the militia, and what role the national government would have in defending the nation. The debates at the Constitutional Convention and the First Congress demonstrate that the Second Amendment guarantees a collective right.

Historical interpretations of the Second Amendment vary. Conservatives and Libertarians argue that the right to bear arms guarantees an individual right to possess

⁴⁶ Rakove, "The Second Amendment," 12.

20

firearms for self-defense. They rely upon Anti-Federalist writings for much of their evidence. Pluralists allege that the Second Amendment guarantees an individual and a collective right to bear arms as long as the firearm owner participates in the militia. This paper disagrees with both parties; there is no evidence to support an individual right to bear arms.

CHAPTER II

Origins of the Second Amendment

The founders created a Second Amendment that guarantees a collective right to bear arms. When they wrote the Constitution, the founders were not operating in a vacuum. They rejected the authority of Parliament to make laws governing the colonies without representation; however, many Americans did not reject long-established British legal precedents and conceptions of good government. The impetus for the American right to bear arms was born directly out of experiences of the War for Independence, along with ideological and philosophical concerns about the concentration of governmental power and its use of armed force. The founding fathers detested standing armies. Hostility toward standing armies was not a uniquely American trait; its roots began in England. Scholars such as Joyce Lee Malcolm and Lois G. Schwoerer have examined the English view of bearing arms in an attempt to understand the intent of American lawmakers. For the English following the Glorious Revolution, the right extended only to certain classes of Protestants property owners and was subject to legal restrictions. The English right to bear arms mainly protected wealthy landowners from poachers. As a result, there was no individual right for American colonists to

inherit. The framers created a collective right to bear arms that demonstrated an antagonism toward standing armies that was pervasive among English and Americans.

The American concept of a right to bear arms originated in England, in Anglo-Saxon customs concerning warfare. Historians debate when this custom began; however, Francis Grose wrote that King Edward the Confessor incorporated it into his laws in the twelfth century, while evidence exists that William the Conqueror continued this "feudal system about the year 1086." When Edward the Confessor spelled out the responsibility of bearing arms, it, of course, entailed arming the public for war, but also included using the populace to construct castles and fortresses "for the publick defense" and repairing highways and bridges during times of war and invasion. The right to bear arms in this sense served the state and not the individual. All able-bodied males age sixteen to sixty were obligated to defend their country during foreign invasion, internal insurrection, or other emergencies. The term "right" is incorrect in this context, as it is likely no peasant demanded the right to build bridges or go to war for their feudal lord. It would be more appropriate to describe this legal custom as a duty, responsibility, or burden. As Malcolm notes, it was not until "the seventeenth century that the duty turned into a right."

An armed public was crucial to keeping the peace. The burden of law enforcement rested with the citizenry, for "there was no professional police force" in England. Citizens operated under *posse comitatus* and aided sheriffs, constables, and bailiffs in making arrests.⁴ The law called on "all true men to take part in this work and

¹ Francis Grose, *Military Antiquities Respecting a History of The English Army From the Conquest to the Present Time* (London: S. Hooper High Holborn, 1786), 1: 3-4.

² Ibid., 1

³ Joyce Lee Malcolm, *To Keep and Bear Arms* (Cambridge, MA: Harvard University Press, 1994), 1.

⁴ Posse Comitatus granted a sheriff the right to deputize citizens to aid in the pursuit of criminals.

are punishable if they neglect it." Besides legal penalties for failing to apprehend criminals, the "law made residents of a parish liable for compensating a victim of a robbery or riot committed in their parish for half of his loss." A writ from 1252 detailed the relationship between citizens and law enforcement. Whenever a "felony is committed, the hue and cry (hutesium et clamour) should be raised." Common Law put the responsibility for law enforcement in the hands of every English subject. The law was clear that "if, for example, a man comes upon a dead body and omits to raise the hue, he commits an amerceable offense besides laying himself open to ugly suspicions." Failure to answer the hue resulted in punishment as well. Upon hearing the accepted manner of raising hue, which was shouting "Out! Out!," neighbors were expected to "turn out with the bows, arrows, and knives that they bound to keep and besides much shouting, there will be horn-blowing; the 'hue' will be 'horned' from vill to vill." Following the hue, a cry is made "for arms to keep the peace." The law supported whomever "arms himself to suppress dangerous rioters, rebels, or enemies, and endeavours to suppress or resist such disturbers of the peace and quiet of the realm."9

Citizens also performed the duty of keeping watch. The law required householders to take turns guarding the town gates from sundown to sunrise. Widows, the elderly, and those without the means of serving hired substitutes or faced fines.

Malcolm writes of citizens "from all classes" refusing to perform this duty and being put in the stocks. By the seventeenth century, hostility toward these policing duties grew.

⁵ Frederick Pollock and Frederic Maitland, *The History of English Law before the Time of Edward I*, 2 vols. (Cambridge: Cambridge University Press, 1898), 2: 582.

⁶ Malcolm, To Keep and Bear Arms, 3.

⁷ Pollock and Maitland, *The History of English Law*, 2:578.

⁸ Ibid 570

⁹ Richard Burn, *The Justice of the Peace and Parish Officer*, 5 vols. (London: Law Booksellers and Publishers, 1837), 1:258.

Citizen peacekeeping was time consuming and dangerous. The proliferation of firearms added to the danger. As a member of Parliament noted, when the policing duties were written in 1252, "men had not the use of fire-arms; nothing but clubs and pitchforks; and the thieves might have been stopped." During "the heyday of highway robbers" in the late seventeenth century, bearing arms for peacekeeping transitioned from a duty to a dangerous and unpopular burden. ¹¹

Clearly, none of the English Medieval customs established an individual right to gun ownership. In each circumstance, the responsibilities of the citizenry served the state's interest and best exemplified a collective right. Malcolm argues that the Medieval English right transformed into an individual right following the Glorious Revolution; however, evidence does not support this claim. Article VII of the Bill of Rights of 1689 stipulates "that the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law." The notion that this established an individual right to gun ownership fails for many reasons. The clause discriminated against Catholics, allowing only subjects who were Protestant to keep arms. In addition, the passage adds the stipulation "suitable to their conditions and as allowed by law." The first qualification references English "legislation making the possession of weapons, and again especially firearms, dependent on the holders' social and economic status." Schwoerer writes that English game laws restricted "the right to have a gun to persons

1/

¹⁰ Malcolm, To Keep and Bear Arms, 3.

¹¹ Ibid

¹² An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown, 1689. 1 Will and Mary, c. 2. Accessed via avalon.law.yale.edu.

¹³ Lois G. Schwoerer, "To Hold and Bear Arms: The English Perspective," *Chicago-Kent Law Review* 76 (January 2000) 5-6; *District of Columbia v. Heller*, Brief of Amici Curae, 478 U.S. 370 (2008) 6. Historians filed a brief of *Amici Curae* (friend of the court) on behalf of the petitioners establishing the collective right argument. The historians included were Carl T. Bogus, Jack N. Rakove, Saul Cornell, David T. Konig, William J. Novak, Lois G. Schwoerer, et al.

with a freehold of at least £100 a year, or a long term leasehold or copyhold of £150 per year, or who were sons and heirs of persons of high degree." This exempted all but the very wealthy from owning a gun, as "the annual income of a laborer in the period ranged from £9 to £15; the average income of a temporal lord was estimated at £3,200."

An often overlooked provision of the Bill of Rights of 1689 is the article prohibiting standing armies in time of peace. Individual right historians neglect popular animosity toward standing armies in both England and North America. English citizens across the spectrum of social and economic classes despised standing armies. Separated from Europe by a body of water, England watched in horror as standing armies on the Continent trampled liberties at the behest of tyrannical monarchs. This, paired with the few instances when England had standing armies solidified an already intense disdain for them.¹⁵

There were a variety of reasons many Englishmen hated standing armies. Soldiers serving in the army came from poor backgrounds and were likely to be criminals. The army under Elizabeth used a "recruitment system riddled with corruption and graft and operated so that vagabonds, misfits, and prisoners, who traded their sentence for service in the army, filled the regiments." Elizabeth even said that the men in her army were "thieves [who] ought to hang." This conscription method continued well into the seventeenth century. As a result, many English subjects were less than enthusiastic about having armed criminals stationed in their towns. Even more problematic was the billeting

-

¹⁴ Schwoerer, "To Hold and Bear Arms," 5.

¹⁵ Lois G. Schwoerer, "No Standing Armies!" The Antiarmy Ideology in Seventeenth-Century England (Baltimore: John Hopkins University Press, 1974), 8-18.

¹⁶ Ibid., 10.

¹⁷ Ibid.

of soldiers. Even the most loyal English subjects detested housing and feeding common criminals. Citizens expected the Crown to pay for quartering troops; yet, given the financial constraints involving warfare and the political ramifications of calling Parliament to levy funds, the Crown routinely neglected to pay for maintaining soldiers.¹⁸

Adding to its unpopularity, the army raised its own funds. After Charles I failed to "win a grant from Parliament or a free gift from his subjects, [he] resorted to the expedient of a forced loan to raise money for his army." Soldiers forced loans from many wealthy gentlemen and jailed those who refused to pay. The army also targeted middle-class families. The Crown forcibly billeted soldiers in homes of individuals who refused to pay a "billeting tax" while unscrupulous soldiers "extorted money from men on the threat of pulling down and firing their houses."

While the standing army had the potential to wreak havoc upon the population, it was equally capable of destroying free government. In 1648, troops under Colonel Thomas Pride removed members from Parliament who did not support the army. This coup d'état demonstrated that standing armies could quickly turn into "illegal instruments of power." Schwoerer notes that between 1647 and 1660, the army in England either played an important role or directly interfered in the political activities of the government. Following the Glorious Revolution, the army "refused to disband at Parliament's order." Incidents such as these reinforced negative perceptions of standing

¹⁸ Schwoerer, "No Standing Armies!" 22, 25.

¹⁹ Ibid., 22.

²⁰ Ibid., 22, 26.

²¹ Ibid., 53.

armies for generations to come, both in England and North America. With good reason, the populace feared that a standing army might eventually impose despotic government.²²

Perhaps the most common mistake made by contemporary gun advocates is equating the right to bear arms with a right to use weapons for self-defense. There is a difference between bearing arms in service of the community and keeping weapons to protect against home invasion, for example. This misconception stems primarily from people today interpreting laws written centuries ago literally. Adding to the confusion is the way in which laws and rights changed over time. At the time of its writing, the right to bear arms listed in the Bill of Rights of 1689 applied to service in the English militia. By the time of the American Revolution, perceptions of the right to bear arms listed in the English Bill of Rights had changed greatly. Virginia Jurist St. George Tucker, writing on this subject in 1803, explained that the English law granted the right to Protestant aristocrats for hunting game.²³ Well-to-do Englishmen were more concerned about poor farmers poaching on their lands than they were about the right to bear arms.²⁴

English common law established guidelines for using arms for self-defense. These intricacies were likely to be familiar to legal-savvy framers who helped author the Constitution. One of the liberties that Englishmen enjoyed by birthright was "the right of

²² Ibid.

²³ St. George Tucker, ed., *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia*, 3 vols. (Philadelphia: William Young Birch, 1803) 3:409. Accessed via books.google.com

²⁴ P.B. Munsche, *Gentlemen and Poachers: The English Game Laws, 1671-1831* (New York: Cambridge University Press, 1981), 6, 8. Munsche stated the game laws were "measures designed to preserve a stable society, one which was rural-based, hierarchical and paternalist. Accordingly, gentlemen tended to regard any opposition to the game laws with alarm." Accessed via books.google.com; Lois G. Schwoerer, "To Hold and Bear Arms: The English Perspective," *Chicago-Kent Law Review* 76 (January 2000) 5.

having and using arms for self-preservation and defence."²⁵ By 1788, English common law on self-defense evolved into a very limited capacity. Homicide by self-defense "occurs where one who hath no other possible means of preserving his life is reduced to such an inevitable necessity."²⁶ The law demanded that such a person must first flee, or "retreat to a wall…beyond which he cannot go further."²⁷ Conversely, protecting one's property did not permit the use of lethal force. The "retreat to the wall provision" and the emphasis on alerting authorities instead of using violence to protect property shatters many commonly-held myths regarding life in the eighteenth century. Gun supporters today tend to portray life during this period as being lawless, with citizens using guns and taking the law into their own hands. While there is some evidence of this happening — particularly on the frontier — this was not the legally-accepted norm.

Experiences before and during the Revolution influenced American perceptions on the right to bear arms. Historian Saul Cornell writes, "apprehensions demonstrated how American thinking about the right to bear arms was powerfully influenced by a fear of British-style disarmament of the militia." In 1768, English authorities in Boston seized the *Liberty*, a vessel belonging to John Hancock. Colonists took to the docks and "drove revenue officers from the scene." The *Liberty* Riot resulted in English officials hiding in Royal Navy vessels while colonists looted their homes. British troops,

²⁵ Sir William Blackstone, *Commentaries on the Laws of England*, 4 vols. (Philadelphia: Robert Bell, Union Library, 1771), 2:136-40, 184; Sir Michael Foster, *A Report of Some Proceedings of the Commission for the Trial of the Rebels in the Year 1746, in the County of Surry; and of Other Crown Cases* (London: E. and R. Brooke, 1762), 277;

William Hawkins, *A Treatise of the Pleas of the Crown*, 2 vols. (London: C. Roworth, Bell Yard, Temple Bar, 1716), 1:68. Accessed via books.google.com

²⁶ James Parker, *Conductor Generalis: Or the Office, Duty, and Authority of Justices of the Peace* (New York: John Patterson, 1788), 216. Accessed via books.google.com ²⁷ Ibid

Saul Cornell, A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America (New York: Oxford University Press, 2006), 25.
 Ibid., 8.

dispatched at the request of the royal governor, Francis Bernard, restored order. To the colonists, a "standing army garrisoned among the people without their consent was inconsistent with liberty." American experiences with standing armies reinforced their disdain for them. The British used soldiers to suppress riots, enforce unpopular taxes, and police hostile areas such as Boston. American responses to the quartering of British troops mirrored the disapproval English subjects held toward the quartering of troops in their homes. Incidents such as the enforcement of the Townshend Duties, the Quartering Acts, the Coercive Acts, the Boston Massacre, and many other altercations with British regulars only reinforced in American minds that standing armies were a threat to liberty. ³¹

American disdain for standing armies coincided with a reverence for militias. Americans at this time were conscious heirs of the minority "radical Whig tradition that regarded standing armies as a bane to liberty, and which celebrated the idea of a citizens militia as the optimal form of military organization for the republic." Thoughts such as these were "a staple theme of eighteenth-century political writing, and its lessons were reinforced when Britain sent its standing army to Boston." When war erupted, it was the militia that challenged the British army at Lexington and Concord. ³³ Cornell writes, "It would be impossible to overstate the militia's centrality to the lives of American colonists. For Americans living on the edge of the British Empire, in an age without

³⁰ Ibid., 12.

³¹ Cornell, A Well-Regulated Militia, 10.

³² D.C. v. Heller, Amici Curiae, 13. The Whigs were not the majority party in England at this time; however, their writings influenced colonial views.

³³ Ibid.

police forces, the militia was essential to the preservation of public order and also protected Americans against external threats."³⁴

Militia played an important role in early American life. Musters were important social events that caused "friends and neighbors to come together to drill and celebrate." They served a vital role in the defense of colonists' perceived rights and liberties. George Mason, upon forming the Fairfax County militia in 1774, wrote that "this time of extreme danger, with the Indian enemy in our Country, and threat'ned with the Destruction of our Civil-rights, & Liberty" the militia served as a means of protecting "all that is dear to...Freemen." Being "composed of gentleman freeholders, and other freemen," Mason believed the militia would "relieve our mother country from any expense in our protection and defence." In addition, the militia "will obviate the pretence of a necessity for taxing us on that account, and render it view of the militia was not unique. Many Founding Fathers believed in the altruistic nature of the militia; the idea of noble citizen soldiers appealed to them."

During the drafting of the Constitution, there were no debates involving individual gun rights. Discussions regarding the individual ownership of firearms were "not an issue at the Federal Convention of 1787." The historical records show no deliberation over "whether the government – national, state, or local – could regulate possession of firearms." Framers generally believed in the state's ability to regulate

3.

³⁴ Cornell, A Well-Regulated Militia, 13.

³⁵ Ibid.

³⁶ George Mason, "Fairfax County Committee of Safety Proceedings," in *The Papers of George Mason*, Robert A. Rutland ed., 3 vols. (Chapel Hill: University of North Carolina Press, 1970), 1:210.

³⁷ The Impartial Examiner I, "On The Diversity Of Interests And The Dangers Of Standing Armies And A Supreme Court," in *The Debate on the Constitution: Federalist and Anti-Federalist Speeches, Articles, and Letters During the Struggle over Ratification*, Bernard Bailyn ed., 2 vols. (New York: Library of America, 1993), 2:254.

³⁸D.C. v. Heller, Amici Curiae, 14.

"most facets of daily life – ownership and use of property, rules of inheritance, criminal law, and all the aspects of communal health, welfare, and safety." Evidence of these beliefs resided in the numerous state constitutions that affirmed the power of policing and regulating property and the general welfare of the public. Historians note the "lack of discussion of an individual right to firearms is unsurprising." This appears shocking to contemporary readers who are all too familiar with the controversy surrounding gun ownership today. However, firearm "ownership and [their] use were not major issues in eighteenth-century America." The United States had no game laws, primarily due to the availability of land and lack of a privileged aristocracy. As a result, guns were easily obtainable and Americans enjoyed "the use of firearms as they could other property, subject to the regulation to which all property was liable."

While debates surrounding individual gun rights were non-existent, the national and state ratifying conventions did address standing armies and militias. Central to the debate surrounding these topics was whether the states should ever surrender control of their militia to the national government. In addition, the ability of the national government to raise standing armies prompted concerns from both Federalists and Anti-Federalists. The Constitution allows Congress to call forth the militia to execute the laws of the United States, repel invasions, and suppress rebellions. This essentially turned state militias into a national force under arms. The nationalization of the militia caused many to fear that Congress would be able to use it as a standing army. 42

³⁹ Ibid., 14.

⁴⁰ Ibid., 12-13.

⁴¹ Ibid., 13.

⁴² Federal Farmer, "Examine Coolly Every Article, Clause, and Word," in *The Debate on the Constitution: Federalist and Anti-Federalist Speeches, Articles, and Letters During the Struggle over Ratification*, 1:70.

The nationalization of the militia caused concerns, yet more troubling were the provisions in the Constitution that allowed for Congress to maintain a standing army. This angered Anti-Federalists, who "steeped in the literature of the age knew that this amounted to the creation of a standing army, the dreaded enemy to the liberty of the people."⁴³ Anti-Federalists attempted to modify or eliminate those clauses. Anti-Federalists feared Congress would disarm the militia. George Mason and Patrick Henry of Virginia cited British attempts to seize "the militia's muskets more than a decade earlier." Federalists responded with an assurance that Congress would do no such thing; it is responsible to the people, and the militia "serve[d] the vital function of providing states with a means to deal with riots and insurrections." This did not placate Anti-Federalists, who attempted to introduce rights inhibiting the use of standing armies. Elbridge Gerry of Massachusetts demanded that delegates "emulate the many state constitutions and include a ban on standing armies." Saul Cornell views Gerry's "qualms as prescient." Without the ban, "the failure to include such a prohibition ... inspire[ed] vigorous opposition once the convention's work was made public." ⁴⁶ George Mason proposed rights similar to the ones he drafted in Virginia:⁴⁷

That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power.⁴⁸

-

⁴³ Ibid., 17.

⁴⁴ Cornell, A Well-Regulated Militia, 53.

⁴⁵ Ibid., 54.

⁴⁶ Ibid., 43.

⁴⁷ Ibid.

⁴⁸ George Mason, *The Papers of George* Mason, ed. Robert A. Rutland, 3 vols. (Chapel Hill: University of North Carolina Press, 1970), 274.

While not an explicit prohibition of standing armies, Mason's proposal discouraged their use in times of peace and made them subordinate to civilian control. Virginia Anti-Federalist Richard Henry Lee "urged the Continental Congress to endorse a 'Bill of Rights' that would declare, *inter alia*, 'That standing Armies in times of peace are dangerous to liberty,' and should only be raised with a two-thirds vote in both houses of Congress." It is worth noting that Lee "identified a number of fundamental rights deserving recognition, but said nothing about firearms." 50

Anti-Federalists championed the use of militias as an alternative to standing armies. This drew criticism from Federalists who reminded everyone how poorly the militia had performed during the War for Independence. South Carolina Federalist Charles Pinckney confessed he had "little faith in the militia," while George Washington's famous quote that "to place any dependence on the militia, is, assuredly, resting upon a broken staff," reinforced Federalist arguments. ⁵¹ In addition to debates concerning the militia's efficacy, Federalists and Anti-Federalists disagreed over who should serve in the militia. Many Anti-Federalists supported a militia drawn from the entire body of the citizenry. They argued this would be the best way to create a militia that reflected the interests of the people. In addition, Anti-Federalists wanted to be sure that the militia would be sizeable enough that it could easily overrun any standing army.

⁴⁹D.C. v. Heller, Amici Curae, 17.

⁵⁰ Ibid., 17.

⁵¹ For Pinckney's quote, see James Madison, *Notes of Debates in the Federal Convention of 1787*. Bicentennial ed. (New York: Ohio University Press, 1966), 484. For Washington's quote, see: "Letter from George Washington to the President of Congress," 24 September 1776, in *The Writings of George Washington from Original Manuscript Sources, 1775-1799*, ed. John C. Fitzpatrick, 39 vols. (Washington, DC: United States Government Printing Office, 1931), 6:120-122.

Federalists had entirely different concerns about the militia. An ineffective militia, not standing armies, worried Alexander Hamilton. Many Federalists "held to the Framers' view that a state-governed, mass militia would lack the training and discipline needed to turn citizens into battle-ready soldiers." Hamilton wrote in *Federalist* #29 that proper military training required more than a few musters every year, and that subjecting the entire male populace to the amount of drilling needed to produce effective soldiers would be simply too costly and burdensome. Training every capable male would "be a real grievance to the people, and a serious public inconvenience and loss." Hamilton figured the annual reduction of productivity "would not fall far short of the whole expense of the civil establishments of all the States." Instead, he advocated a select militia capable of training the length of time "necessary to acquire the degree of perfection which would entitle them to the character of a well-regulated militia." To Federalists like Hamilton, costs, not the fear of a standing army, dictated the need for a select militia over a militia comprised of every male capable of bearing arms.

During the ratification debates of 1787-1788, discussions regarding guns focused on militias and standing armies, not on a citizen's private right to own firearms. The lack of discussion over a citizen's private right is damning to individual right supporters. The numerous debates over standing armies and militias invited ample opportunities for framers to address private firearm rights, yet the lack of discussion over those rights proves that it held little import in the minds of framers. The sheer volume of written evidence shows that discussions over firearms "focused nearly exclusively on the

⁵²D.C. v. Heller, Amici Curae, 18.

⁵³ Publius (Alexander Hamilton), "Number XXIX: Concerning the Militia," in *The Federalist Papers*, ed. Isaac Kramnick (New York: Penguin Books, 1987), 210.

comparative merits and risks of a standing army or the militia."⁵⁴ The subject of standing armies and their threat to liberty dominated the political discussion. Equally important was the reverence for a citizen militia. The idea of the citizen-soldier defending the republic resonated with many Americans. Republican thinking "as far back as Machiavelli treated the *obligation* to bear arms in defense of one's country as one of the rights and privileges that distinguished republican *citizens* from the *subjects* of other polities that slavishly relied on hireling soldiers lacking intrinsic loyalty to the regime."⁵⁵ Jack Rakove notes that historians neglect the ratification debates because they do not address the individual or collective rights arguments with any specificity. ⁵⁶ However, by closely examining each discussion regarding firearms, one can understand that the Framers were concerned with standing armies and militia – not individual gun rights.

⁵⁴D.C. v. Heller, Amici Curae, 18.

³⁵ Ibid

⁵⁶Jack N. Rakove, "The Second Amendment: The Highest Stage of Originalism," *Chicago-Kent Law Review* 76 (January 2000), 4. Rakove laments that because of this individual right supporters continually "recycle the same handful of references to the dissenters in the Pennsylvania Ratification Convention" among others.

CHAPTER III

The Militia versus the Standing Army

In May 1787, delegates convened in Philadelphia to revise the Articles of Confederation. By September, Congress presented the Constitution to the states for ratification. Delegates at the closed-door convention debated numerous issues; however, there is no evidence of personal firearm rights being discussed. The subsequent debate in the press and state ratifying conventions involved passionate arguments, yet there was very little on an individual's right to bear arms. What was discussed, at great length, was the comparable merits of standing armies and militias. Newspapers and pamphlets published letters from both Federalists and Anti-Federalists disturbed by standing armies and espousing the virtues of a citizen militia. When examining the arguments of both sides, it becomes evident that standing armies scared everyone. What became contentious was the role the militia would play in the future defense of the country. While Anti-Federalists wanted a universal militia to defend the republic, the Federalists were wary of the militia's performance during the Revolution. In addition, many Anti-Federalists were fearful of provisions in the Constitution allowing for the creation of a standing army. The heated discussions showed that while standing armies and the role of the militia concerned many leading minds of the time, an

individual's right to bear arms was absent from the debate.

The Constitution provides Congress with the authority to raise armies when not at war. This provoked an outcry from many Americans fearful of a government using a standing army to suppress the populace. Writing in the October 17th, 1787 edition of the Pennsylvania Herald, an author named "A Democratic Federalist" cautioned against allowing the national government not only the ability to raise standing armies that could overpower the states, but also supremacy in legal matters. His letter entitled "What Shelter from Arbitrary Power?" asked that if the laws of the national government "are paramount to the laws of the different states, what then will there be to oppose their encroachments?" He warned that "should they ever pretend to tyrannize over the people, their standing army, will silence every popular effort, it will be theirs to explain the powers which have been granted to them." "A Democratic Federalist" railed against James Wilson of Pennsylvania for calling standing armies "absolutely necessary" to protect the public. The author explained that "the enquiries of the best and most celebrated patriots have taught us to dread a standing army above all earthly evils." The antagonism to standing armies was not limited to one political persuasion. "A Democratic Federalist" argued that "even Mr. [David] Hume, an aristocratical writer, has candidly confessed, that an army is a mortal distemper in a government, of which it must at last inevitably perish," while the Earl of Oxford called "a standing army in peace as dangerous to the constitution." Before declaring that "Congress has no right to keep a

standing army in time of peace," the author asked "is not a well regulated militia sufficient for every purpose of internal defense?" ¹

The outcry against standing armies was common in many publications and personal letters. In a letter entitled "The Loss of American Liberty," Pennsylvania's David Reddick asked "why will [Congress] have power to keep standing armies in time of peace?" Many believed that the Constitution was intentionally creating a tyrannical government. Pennsylvanian Samuel Bryan, writing under the pseudonym "Centinel," wrote in a letter entitled "A Most Daring Attempt To Establish A Despotic Aristocracy" that the Constitution granted "all the great executive powers of a confederation, and a Standing army in time of peace, that great engine of oppression." He believed the Constitution was written in secrecy to promote the interests of the few over the many.

In another publication, "Centinel" urged others to "avoid the usual fate of nations" by prohibiting a standing army. He warned that standing armies were the "grand machine of power and oppression [that] may be made a fatal instrument to overturn public liberties." Particularly worrisome to "Centinel" was the duration of army funding. The Constitution allowed Congress to fund troops for two years, whereas in Britain armies were funded annually. "Centinel," like others, believed a two-year term invited trouble, as a "standing army with regular provision of pay and contingencies, would afford a strong temptation to some ambitious man to step up into the throne, and to seize absolute power." The idea of a general installing himself in a military coup haunted

.

¹ A Democratic Federalist, "What Shelter from Arbitrary Power?," in *The Debate on the Constitution: Federalist and Anti-Federalist Speeches, Articles, and Letters During the Struggle over Ratification*, ed. Bernard Bailyn, 2 vols. (New York: Library of America, 1993), 1:70.

² David Reddick, "The Loss of American Liberty," in ibid., 15.

³ Centinel I (Samuel Bryan), "A Most Daring Attempt to Establish A Despotic Aristocracy," in ibid., 57.

many; as a result, "Centinel" argued that "the keeping on foot a hired military force in time of peace ought not to be gone into" because "standing armies in times of peace are dangerous to liberty and they ought not be kept up."

Other authors voiced their displeasure with standing armies. Someone writing under the pseudonym "Cincinnatus" pointed out that "some of the freest republics in the world, never kept up a standing army in time of peace." George Bryan of Pennsylvania, writing as "An Old Whig" envisioned violence every time the Constitution was amended and feared that a standing army would determine an amendment's passing or not. He stated that "no amendments shall ever be made without violent convulsion or civil war," and that "in the power of the Congress to raise and maintain a standing army for their support, and when they are supported by an army, it will depend on themselves to say whether any amendments shall be made in favor of liberty."

In the *New York Journal*, "Brutus" argued that the Constitution would foster tyranny. He stated that "this form of government contains principles that will lead to the subversion of liberty." Like "Centinel," "Brutus" thought the Constitution will "establish a despotism, or what is worse, a tyrannic aristocracy." He reminded the citizens of New York that "a free republic will never keep a standing army to execute its laws" and that "it might be shewn, that the power in the federal legislative, to raise and support armies at pleasure, as well in peace as in war, and their controul [*sic*] over the militia, tend, not only to a consolidation of the government, but the destruction of liberty." Whoever

⁴ Centinel II (Samuel Bryan), "To Avoid the Usual Fate of Nations," in ibid., 85.

⁵ Cincinnatus V (Arthur Lee), "O Sense Where Is Your Guard! Shame Where Is Your Blush!," in ibid.,

⁶ An Old Whig (George Bryan) I, "No Amendments Will Ever Be Made Without Violent Convulsion or Civil War," in ibid., 125.

agreed to the passage of the Constitution in its current form, "Brutus" argued, would destroy the "only remaining asylum for liberty...and posterity will execrate your memory."⁷

"Brutus" was not the only writer hostile to an aristocracy. Elements of class conflict appeared in many articles disparaging the Constitution. The pseudonym "John Humble" addressed the "three millions of low born American slaves" who are "to lick the feet of our well born masters." "Humble" called the Constitution a "direful desease [sic]" that will grant the "600 well born" a "royal government" immune from opposition thanks to a standing army. The dystopian nightmare that "Humble" predicted involved a "standing army, composed of the purgings of the jails of Great Britain, Ireland and Germany...employed in collecting the revenue of this our king and government." Any attempt to resist soldiers collecting taxes will result in them slicing off an arm of "one of our fellow slaves, [and] we will conceive our case remarkably fortunate if he leaves the other arm on."8

Few Anti-Federalists were willing to reveal their names in the press, but the few who did wrote passionately about a lack of bill of rights. George Mason wrote in a letter published in the Virginia Journal that the United States under the new Constitution would resemble "a monarchy, or a corrupt oppressive aristocracy." He complained that there were "no declaration of rights" and listed numerous rights that should have been included: the right to trial by jury, the liberty of the press, and a declaration "against the

 ⁷ Brutus I, "If You Adopt It...Posterity Will Execrate Your Memory," in ibid., 168.
 ⁸ John Humble, "To Lick The Feet of Our Well Born Masters," in ibid., 224-225.

danger of standing armies in time of peace." While serving in France, Thomas Jefferson wrote a letter to James Madison expressing his concerns with the Constitution over a lack of a bill of rights. Jefferson liked portions of the Constitution, particularly granting the legislature the powers to levy taxes. What Jefferson did not like was "the omission of a bill of rights providing clearly & without the aid of sophisms for freedom of religion, freedom of the press, protection against standing armies, restriction against monopolies, the eternal & unremitting force of the habeas corpus laws," and trial by jury. ¹⁰ In both circumstances, Mason and Jefferson listed rights not protected in the Constitution.

Nowhere in their letters do they list the private ownership of firearms, but they do explicitly mention a disdain for standing armies.

Many letters found national control of the militia and the ability to raise standing armies too dangerous for any one branch of the government. Writing for the *New York Journal*, "Cato" found it troubling "that standing armies may be established, and appropriation of money made from their support, for two years; that the militia of the most remote state may be marched into those states situated at the opposite extreme of this continent." In addition, the constitutional stipulation that armies be appropriated funds for two years caused many to envision situations which would lead to abuse. "Centinel" feared that because Congress had "the absolute control over the time and mode of its appointment and election" it could influence elections using armies to "establish hereditary despotism." Congress alone authorized the keeping of standing

⁹ George Mason, "America Under the Constitution: A Monarchy, or a Corrupt Oppressive Aristocracy," in ibid., 347-348.

¹⁰ Thomas Jefferson, "The Will of the Majority Should Always Prevail," in ibid., 210.

¹¹ Cato V, "Can An American Be A Tyrant? On The Great Powers Of The Presidency, The Vagueness Of The Constitution, And The Dangers of Congress," in ibid., 401.

armies in times of peace, and also "subjects the militia to absolute command," allowing Congress to subjugate other branches of government and the people. 12

Richard Henry Lee, writing as "The Federal Farmer" found numerous problems with standing armies and the militia. He stated that because "so many men in America [are] fond of a standing army, and especially among those who probably will have a large share in administering the federal system [Congress would always] pass laws" to fund the army. Lee admitted that "the power to raise armies must be lodged some where; still this will not justify the lodging this power in a bare majority of so few men without any checks." Because the people were likely to suffer the most from abuse of military power, his solution was that the "yeomanry, &c. of the country ought substantially to have a check upon the passing of these laws." Lee conceded that the "yeomanry of the country possess the lands, the weight of property, possess arms, and are too strong a body of men to be openly offended" and that the government would not dare antagonize them. However, the idea of a select militia negated those concerns. He argued that

should one fifth, or one eighth part of the men capable of bearing arms, be made a select militia, as has been proposed, and those the young and ardent part of the community, possessed of but little or no property, and all the others put upon a plan that will render them of no importance, the

former will answer all the purposes of an army, while the latter will be

defenseless.

As a result, the select militia would replace the standing army, and because Congress had the power to call forth the militia to execute federal laws, Lee found that *posse*

¹² Centinel VIII (Samuel Bryan), "The Rapacious Hand Of Power," in ibid., 688.

¹³ Federal Farmer, "Examine Coolly Every Article, Clause, and Word," in ibid., 268-270.

comitatus¹⁴ would be replaced with "an entire military execution of the laws." The views espoused by Lee highlighted a growing fear that even the select militia could be converted into a standing army.

Some letters emphasized the importance of the people bearing arms; however, this should not be construed as evidence supporting an individual's right to possess firearms. A June 7th, 1788 letter by the "The Republican," printed in the *Connecticut Courant*, stressed that "the people themselves are the military power of our country." "The Republican" stressed that "in countries under arbitrary government, the people oppressed and dispirited neither possess arms nor know how to use them. Tyrants never feel secure, until they have disarmed the people." These statements, especially when taken out of context, provide individual rights proponents with a much-needed historical reference to support their views on gun control. However, when reading the rest of "The Republican's" letter, it is clear the author emphasized the right to bear arms in a military fashion. He goes on to say, that tyrants "can rely upon nothing but standing armies of mercenary troops for the support of their power." The United States was special because the people have arms and "they are not destitute of military knowledge; every citizen is required by law to be a soldier; we are all martialed into companies, regiments, and brigades, for the defence [sic] of our country." Clearly, the right to bear arms involved military service, not personal use.

Massachusetts Anti-Federalist Samuel Nasson used historical examples to illustrate previous abuses of standing armies. Speaking before the Massachusetts

¹⁴ *Posse Comitatus* was a common law statute that allowed a county sheriff to enlist members of the militia to aid in law enforcement.

¹⁵ Federal Farmer, "Examine Coolly Every Article, Clause, and Word" in Bailyn ed., *The Debate on the Constitution*, 270.

convention in February 1788, Nasson asked "that the gentlemen of Boston, would bring to their minds the fatal evening of the 5th of March 1770 – when by standing troops they lost five of their fellow townsmen." By referring to the Boston Massacre, Nasson questioned the United States' need for a standing army, as the armed populace should "fear no foe – if one should come upon us, we have a militia, which is our bulwark. Let Lexington witness that we have the means of defense among ourselves." Certainly, the Boston Massacre and the militia's heroics at Lexington and Concord reinforced in many minds that not only had standing armies carry out atrocities against Americans, but that militias were more than capable of repelling a foreign power. Recent history was not enough for Nasson; he reminded the convention that standing armies were the "bane of republics!" He asked "was it not with [standing armies] that Caesar passed the Rubicon, and laid prostrate the liberties of his country?" The speaker claimed that because of standing armies "seven eighths of the once free nations of the globe [have] been brought into bondage" and reminded others that "Britain attempted to inforce her arbitrary measures, by a standing army." Clearly, this was a reference to events preceding the War for Independence, when the British attempted to enforce taxes without colonial representation in Parliament. Nasson ended his speech by admitting that "time would fail me were I to attempt to recapitulate the havock [sic] made in the world, by standing armies," and wishing that he had "an arm like Jove" so that he could "hurl from the globe those villains that would dare attempt to establish in our country a standing army." ¹⁶

"Brutus" also relied on historical examples to demonstrate the danger of standing armies. He referred to William Pulteney, a member of the House of Commons, who in

¹⁶ Samuel Nasson, "'Pathetick Apostrophe' to Liberty, and Judge Increase Sumner's Reply," in ibid., 928-929.

1758 gave a speech detesting the use of standing armies. In describing the many faults of a standing army, Pulteney touched on many of the themes espoused by Americans: standing armies were loyal only to their officers; they were detached from the body of the people; they disregard liberty and the rule of law; and, they were capable of enslaving their fellow countrymen. Perhaps the most persuasive part of the speech detailed two instances in which standing armies subverted free governments. Pulteney praised Julius Caesar, commending his men for their brave and faithful service in combat and their excellent commanding officers who came from noble and wealthy lineages, and "yet that army enslaved their country." Because of the blind obedience and discipline instilled in soldiers, they followed orders. Pulteney said "if an officer were commanded to pull his own father out of his house, he must do it," and Pulteney even went so far as to state that "if a body of musketeers with screwed bayonets, and with orders to tell us what we ought to do, and how we were to vote" were to enter the House of Commons, the fellow members of Parliament would be helpless to oppose them. Pulteney dismissed the notion that such an act would be unlikely, as the English army had previously carried out such an act, an "army that was raised by that very house of commons, and army that was paid by them, and an army that was commanded by generals appointed by them." Pulteney was describing Pride's Purge, an event during the English Civil War in which the House of Commons was emptied of members opposed to the New Model Army. ¹⁷ The horror of Pride's Purge influenced much of the anti-standing army rhetoric that permeated English, and, subsequently, American colonial thought. "Brutus" reiterated that keeping standing

¹⁷ Lois G. Schwoerer. "No Standing Armies!" The Antiarmy Ideology in Seventeenth Century England (Baltimore: The Johns Hopkins University Press, 1974), 53.

armies "would be the highest degree dangerous to the liberty and happiness of the community" and that no government "ought not to have the authority to do it." ¹⁸

Federalists acknowledged concerns about standing armies; yet, they did not believe the nation was at risk. Writing under the name "Publius," Alexander Hamilton warned that the United States under the Articles ran a greater risk of civil war. Hamilton believed the Articles of Confederation created a situation conducive to the establishment of standing armies, as the small states were similar to the fractured political climate of Europe. Hamilton warned that states at war with each other would quickly fall to despotism, as "safety from external danger is the most powerful director of national conduct." Any war between states would result in destruction of property and life, and states would quickly "resort for repose and security, to institutions, which have a tendency to destroy their civil and political rights" – namely standing armies. ¹⁹ Under the new Constitution of 1787, Hamilton believed rampant militarism and standing armies to be unlikely. Compared to other nations, the United States was "seldom exposed by its situation to internal invasions" and, as a result, citizens would be "apprehensive" toward rulers who attempted to keep "on foot armies so numerous" without a valid reason. To exemplify this point, Hamilton described France and the German States which, due to political and geographical traits, developed standing armies. Because of the threat of invasion, many of these European nations created armies sufficient for their defense and "the continual necessity for their services enhances the importance of the soldier, and

¹⁸ Brutus VIII, "On The Calamity Of A National Debt That Cannot Be Repaid, And On Standing Armies," in Bailyn ed., *The Debate on the Constitution*, 1:734-736.

¹⁹ Publius (Alexander Hamilton), "Number VIII: The Effects of Internal War In Producing Standing Armies And Other Institutions Unfriendly To Liberty," in *The Federalist Papers*, ed. Isaac Kramnick (New York: Penguin Books, 1987), 114.

proportionally degrades the condition of the citizen." Eventually, Hamilton argued, "the military state becomes elevated above the civil," and circumvents liberty. ²⁰

For a variety of reasons, the United States did not resemble a typical, continental European state. Hamilton compared the United States to Great Britain. Because the English Channel separated Great Britain from the Continent, Great Britain represented "an insular situation, and a powerful marine, guarding it in a great measure against the possibility of foreign invasion, supercede the necessity of a numerous army within the kingdom." This geographic protection allowed Great Britain to maintain a small standing army, "a sufficient force to make head against a sudden descent, till the militia could have time to rally and embody."²¹ Hamilton and many Federalists envisioned the United States similarly. With no hostile neighbors and an ocean separating it from Europe, the United States, in the minds of many Federalists, needed only a small standing army to provide sufficient time for the militia to rally. This argument convinced Hamilton so much that he speculated if Great Britain had been situated on the Continent, it would have need for a large military establishment and "would, in all probability, be at this day a victim to the absolute power of a single man."²² Hamilton's views regarding the size of standing armies and the geographical protection afforded to the United States represented the majority of Federalist thought concerning what kind of military establishment the nation should have.²³

²⁰ Ibid., 116.

²¹ Ibid., 117.

²² Ibid.

²³ Don Higginbotham. "The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship," *The William and Mary Quarterly* 55 (January 1998): 44.

Even if a standing army attempted to subjugate the American citizenry, Hamilton argued, the army's size prevented it from succeeding. By its nature, the "smallness of the army renders the natural strength of the community an overmatch for it." Citizens' attitudes toward standing armies also ensured its defeat. Unlike Europeans, Americans were "not habituated to look up to the military power for protection, or to submit to its oppressions." The common citizen did not love or fear the soldier; but, Americans did view standing armies "with a spirit of jealous acquiescence in a necessary evil and stood ready to resist a power which they supposed may be exerted to the prejudice of their rights."²⁴ Hamilton considered a small standing army to possess the benefits of an army without any of the adverse consequences. A small standing army could repel an enemy invasion or "may usefully aid the magistrate to suppress a small faction or an occasional mob, or insurrection." But, Hamilton was careful, stating that such an occurrence would be rare and that "the people are in no danger of being broken into military subordination."²⁵ Hamilton did not reject the idea that standing armies were dangerous to liberty. In fact, much of his writings agreed with Anti-Federalists' apprehensions. However, the Federalist position outlined by Hamilton attempted to allay Anti-Federalist concerns by emphasizing how the United States' exceptional qualities prevented standing armies from threatening liberty.

Other Federalists were not so courteous. Noah Webster, writing as "A Citizen of America," derisively mocked attempts by Anti-Federalists to include anti-standing army language in the Constitution. He asked, "why do not people object that no provision is

Publius (Alexander Hamilton), "Number VIII: The Effects of Internal War In Producing Standing
 Armies And Other Institutions Unfriendly To Liberty," in Kramnick ed., *The Federalist Papers*, 116.
 Ibid.

made against the introduction of a body of Turkish Janissaries; or against making the Alcorn the rule of faith and practice, instead of the Bible?" Webster answered his question by stating that "no such provision is necessary" because the American people would not "forget their apprehensions from a British standing army quartered in America." Pennsylvania and North Carolina banned standing armies, while "other states declared that 'no standing armies shall be kept up without the consent of the legislature;" yet, many other states "have made no provision against this evil." Webster mocking added, "what hazards these states suffer!" The author continued to suggest other sarcastic provisions, even asking "why does not a man pass a law in his family, that no armed soldier shall be quartered in his house by his consent?" Like other Federalists, Webster recognized that "Americans are directly opposed to standing armies...there is as little necessity to guard against them by positive constitutions, as to prohibit the establishment of the Mahometan Religion." 28

James Madison, like Hamilton, also downplayed the threat of standing armies. Writing as "Publius" in the *Federalist*, Madison hypothetically pitted a standing army against the armed citizenry. Madison stated "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." Even in this circumstance, Madison argued that "the State Governments with the people on their side would be able to repeal the danger." Madison's argument was identical to Hamilton's; yet, it went into more detail in an attempt to reassure critics

²⁶ A Citizen of America (Noah Webster), "An Examination Into The Leading Principles Of The Federal Constitution," in Bailyn ed., *The Debate on the Constitution*, 1:150-151.

²⁷ Ibid.

²⁸ Ibid., 151.

²⁹ Publius (James Madison), "Number XLVI: Federal Tyranny – The Incoherent Dreams Of A Delirious Jealousy," in Kramnick ed., *The Federalist Papers*, 301.

of a standing army. Madison estimated that no country could support a standing army greater than "one hundredth part of the whole number of souls; or one twenty fourth part of the number able to bear arms." He reassured skeptics that in the United States, this would yield an army of "more than twenty-five or thirty thousand men." Opposed to that army would be "a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen amongst themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence."³⁰

Individual right supporters often point to Madison's comments as evidence that the right to bear arms supported armed citizens resisting government tyranny or even overthrowing the government. These claims lack merit because Madison was describing the right to bear arms in a militia. In his statement, he was careful to identify the militia not as a spontaneous uprising, but as men "united and conducted by governments possessing their affections and confidence." The right to bear arms in this context described the states exercising a martial role – forming a militia and officers drawn from the populace – not a mob of citizens armed with weapons. Historians determined that "the ratifiers constructed...a struggle between national and state governments, and manifestly not a conflict between the people, on the one hand, and the combined power of the two levels of the federal system on the other. Madison's statements reflected a concern about federalism and the role standing armies could play in tipping the balance of power toward the national government, not an endorsement of an individual right to possess firearms.

³⁰ Ibid.

³¹ Ibid.

³² District of Columbia v. Heller, Brief of Amici Curae, 478 U.S. 370 (2008), 19; Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution (New York: Alfred A. Knopf, 1996), 199-200.

Federalist assurances that standing armies posed no threat failed to assuage many Anti-Federalists. Newspapers continued to publish essays addressing the role of the militia and standing armies, showing that the issue remained prescient in the minds of many Americans. "Brutus" wrote two more essays condemning standing armies.

Returning to themes common in his previous works, he questioned the logic of granting the government powers that could potentially be used to establish tyranny. Using the arguments of Federalists – that standing armies were a necessary evil – Brutus asked "why should this government be authorized to do evil?" In response to Noah Webster's claim that standing armies did not need to be outlawed because the public found them so detestable, "Brutus" wondered "why should the government be vested with the power? No reason can be given, why rulers should be authorized to do, what, if done, would oppose the principles and habits of the people." He did, however, find reasons why they should be prohibited from exercising such power. "Brutus" touched on an often repeated fear – the Federalists desired to become despots.

"Brutus" accused Federalists of wanting standing armies to suppress dissent. He claimed "it is a well known fact, that a number of those who had an agency in producing this system...are avowedly in favour of standing armies." One of the persons alluded to was Alexander Hamilton, a target of many Anti-Federalists. Playing on the fears that Hamilton was a monarchist secretly plotting to circumvent American liberties, "Brutus" warned that Hamilton would not need much of an excuse to create a standing army. There were numerous reasons "to justify raising one, drawn from the danger we are in from the

³³ Brutus IX, "The Dangers Of A Standing Army," in Bailyn ed., The Debate on the Constitution, 2:41.

Indians on our frontiers, or from the European provinces in our neighborhood."³⁴
"Brutus" also warned that such a standing army would consist of dregs from the lower classes "who are too indolent to follow occupations that will require care and industry."³⁵
These soldiers would "subvert the forms of the government, under whose authority, they are raised, and establish one, according to the pleasure of their leaders."³⁶ Instead of a militia that protected the public interest and preserved the republic, a standing army consisting of the lower classes would be loyal only to the despot who paid their wage.³⁷

"Brutus" presented his best case against standing armies in his tenth essay entitled "That Dangerous Engine of Despotism A Standing Army." This was a broadside against standing armies, using historical examples to support his arguments. "Brutus" mentioned the obvious dangers of a standing army. A ruler may employ the army to support himself politically. The greater hazard, "Brutus" argued, was that "an army will subvert the forms of the government, under whose authority, they are raised, and establish one, according to the pleasure of their leaders." ³⁸

As with other writers, "Brutus" reminded readers that standing armies changed history for the worse. Standing armies turned on both England and Rome. "Brutus" pointed out that in both circumstances the governments that approved the creation of the standing armies were eventually destroyed by them. Julius Caesar used a standing army, created by the Roman Republic, and turned the nation into a despotic state. "Brutus" reiterated that a standing army supported tyrants throughout the Roman Empire and that

³⁴ Ibid., 43.

³³ Ibid

³⁶ Brutus X, "That Dangerous Engine Of Despotism A Standing Army," in ibid., 86.

³⁷ Brutus IX, "The Dangers Of A Standing Army," in ibid., 41

³⁸ Brutus X, "That Dangerous Engine Of Despotism A Standing Army," in ibid., 86.

the annals of history remembered this army with carrying out numerous atrocities.³⁹ "Brutus" pointed to standing armies' more recent history in England. The author noted that in Britain a standing army "vindicated the liberties of the people from the encroachments and despotism of a tyrant king" only to assist Oliver Cromwell in seizing from the people "that liberty they had so dearly earned."

"Brutus" argued that the United States was lucky to win independence without submitting to a standing army. If George Washington had "possessed the spirit of a Julius Caesar or a Cromwell, the liberties of this country, [would have] in all probability, terminated with the war." Such an army would have supported itself by looting and caused more bloodshed and destruction than the war with Great Britain. 42 The constitutional debate would not exist; instead, the army would have allied with men in the states who disdained republican virtues and dictated to the people "at the point of a bayonet" a new form of government. The reason the United States did not descend into despotism was simple. George Washington was no Caesar and the officers "did not abandon the characters of citizens," and become soldiers. 43 In this regard, "Brutus" focused on an anti-militarist sentiment that characterized much of the writings of the era. The thoughts and actions of a soldier were incompatible with free government. Although the United States was fortunate to avoid the fate of other nations, "Brutus" asked, "are we to expect that this will always be the case? Are we so much better than the people of other ages and countries?" ⁴⁴ As standing armies in times of peace are dangerous to liberty

2

³⁹ Ibid.

⁴⁰ Ibid., 87.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ihid.

and have overthrown governments, "Brutus" and many Anti-Federalists saw no need to allow them under the new government.⁴⁵

The paranoia some authors exhibited about standing armies fueled speculation about potential abuses. Many writers were anxious about the money needed to support standing armies. In a letter from Massachusetts Anti-Federalist Nathaniel Barrell to Massachusetts Federalist George Thatcher, Barrell addressed concern that taxation and standing armies would combine to threaten liberties. He wrote that "a continental collector at the head of a standing army will not be so likely to do us justice in collecting the taxes, as the mode of collecting now practiced." An author writing under the name "An Old State Soldier" believed that any "alterations [to the Constitution] have universally been for the better," and pointed out that "the appropriations of monies under the pretense of providing for our national defense...is now restricted to two years." He approved of this change, yet still found it troubling that Congress could maintain a standing army in times of peace and alone could declare war. He disliked Congress possessing the power to declare war. The subject of these letters used hypothetical situations involving Congress conspiring to create wars to support standing armies and using standing armies to suppress the public.

Paired with accusations from "Brutus" that Federalists desired standing armies for this purpose, the writings of many Anti-Federalists took an increasingly desperate and critical tone. A poem published in South Carolina called the new Constitution "a mere

⁴⁵ Ibid., 90.

⁴⁶ Nathaniel Barrell, "Will Congress Remain A Faithful Guardian," in ibid, 18.

⁴⁷ An Old State Soldier I, "To Complete The Designs Of A War That Ended Many Years Before," in ibid., 36.

disguise for Parliament and King."⁴⁸ The poem detested the return of British-style rule under a standing army:

'Tho British armies could not here prevail
Yet British politics shall turn the scale;—
In five short years of Freedom wear grown
We quite or plain republics for a throne;
Congress and President full of proof shall bring,
A mere disguise for Parliament and King.
A standing army! – curse the plan so base;
A despot's safety – Liberty's disgrace.—⁴⁹

Massachusetts author James Winthrop, writing under the name "Agrippa," asked for additional assurances concerning standing armies. In an essay entitled "Amend the Articles of Confederation or Amend the Constitution?" "Agrippa" suggested that each state should command its own militia. In addition, he proposed that in times of peace no national army would be allowed in a state without the consent its legislature. Do Both of these amendments protected the militia and the public. Each state having the command of its own militia prevented a situation in which a tyrant could use the militia to repress the local population or even to fight in another state. The prohibition against standing armies marching through states was rather obvious; many stated it was necessary to protect communities from being oppressed by the army. However, it failed to be explained why a supposed tyrant would heed the wishes of a state.

Another essayist expanded upon this anti-soldier sentiment. Evoking some of the same arguments as "Brutus," "The Impartial Examiner" wrote in a Richmond newspaper that "it has ever been held that standing armies in times of peace are dangerous to a free

⁴⁸ "A Mere Disguise for Parliament and King" On the New Constitution, in ibid., 107.

⁴⁹ Ibid.

⁵⁰ Agrippa XVIII (James Winthrop), Amend The Articles Of Confederation Or Amend The Constitution? Fourteen Conditions For Accepting The Constitution," in ibid., 158.

country; and no observation seems to contain more reason to it." He complained that, during peacetime, armies were useless and expensive. The worst aspect of the army was the "soldiery, who are generally composed of the dregs of the people, when disbanded, are unfit for military service, being equally unfit for any other unemployment." This argument mirrored arguments Englishmen made earlier and highlighted much of the antagonism English and American citizens held toward standing armies. Disbanded armies were "extremely burthensome as they are a body of men exempt from the common occupations of social life, having an interest different from the rest of the community." The author accused these men of being parasites and a drain on the treasury, for they are "wanton in the lap of ease and indolence, without feeling the duties which arise from political connection, though drawing their subsistence from the bosom of the state." ⁵¹ Here, the hostility toward soldiers took on multiple forms, and represented views many Englishmen and Americans held. The soldier was either a drain on the treasury, or, when his unit disbanded, he became an armed brigand unable to adapt to society because military service was all he knew. These were harsh criticisms, but not uncommon in many discussions concerning the dangers of standing armies.

Equally bad, "The Impartial Examiner" argued that soldiers could not be a good republicans. The author wrote that "the severity of discipline necessary to be observed reduces them to a degree of slavery," and, as a result, soldiers did not exhibit the qualities desired in a free government. They lacked the ability to think for themselves due to "the unconditional submission to the commands of the superiors to which they are bound." As a result, soldiers were simply "the instruments of tyranny and oppression – Hence they

⁵¹ The Impartial Examiner I, "On The Diversity Of Interests And The Dangers Of Standing Armies And A Supreme Court," in ibid., 251-253.

have in all ages afforded striking examples of contributing, more or less, to enslave mankind." Like countless others, "The Impartial Examiner" repeated that nations which "have fallen from the glorious state of liberty, owe their ruin to standing armies."⁵²

With standing armies vilified in the press, many advocated a strong militia to provide for national defense. Despite strong rhetoric against standing armies, no author suggested the nation remain defenseless. Many believed the militia sufficient to provide security and espoused virtues favoring free government. Much of the influence for this thinking came from the writings of Greek and Roman philosophers who idealized the citizen soldier. The "Impartial Examiner" argued that "a well regulated militia, duly trained to discipline" afforded ample security from sudden attacks while providing "the surest means of protection, which a free people can have when not actually engaged in war." He found two advantages to militias, namely that "when it is necessary to embody an army, they at once form a band of soldiers, whose interests are uniformly the same as those of the community." The other advantage was that "if one army is cut off, another may be immediately raised already trained for military service." Indeed, the idea of militias instantaneously forming into armies appealed to many who were scared of the cost of a standing army and its threat to liberty. The author claimed that "by a policy, somewhat similar to this, the Roman empire rose to the highest pitch of grandeur and magnificence."53

Massachusetts author Mercy Otis Warren, writing as "A Columbian Patriot," espoused the virtues of the militia while damning the use of a standing army. She stated

⁵² Ibid.

⁵³ Ibid., 254.

that "freedom revolts at the idea, when the Divan, or the Despot, may draw out his dragoons to suppress the murmurs of a few." Warren argued that "standing armies have been the nursery of vice and the bane of liberty from the Roman legions...to the planting of the British cohorts in the capitals of America." The militia was preferred to standing armies. Warren considered militias the "bulwark of defence, and the security of civil authority." ⁵⁴

Warren found it troubling that the Constitution granted control of the militia to "the sovereign power" and that the militia was "no longer under the control of the civil authority." She speculated that the militia would be used as a *de facto* standing army, "employed to extort the enormous sums that will be necessary to support the civil list – to maintain the regalia of power – and the spendour of the most useless part of the community." Warren also feared the militia would cease to be used for defense.

Assuming an offensive role, she thought it possible that the militia "may be sent into foreign countries for the fulfillment of treaties, stipulated by the President and two thirds of the Senate." Because the country recently established its independence from an empire, there was considerable opposition to the United States becoming an empire or intervening in foreign disputes. Warren thought a standing army was likely to foment imperial ambition.

Patrick Henry voiced trepidation about the creation of standing armies while empathically supporting militias. In a response to Virginia Governor Edmund Randolph, Henry used Switzerland as a model. Switzerland did not have a standing army; it relied

⁵⁴ A Columbian Patriot (Mercy Otis Warren), "The Gulph Of Despotism Set Open," in ibid., 292.

⁵⁵ Ibid

⁵⁶ Ibid.

entirely on a militia for defense. Henry praised Switzerland for its militia, which has "stood the shock of 400 years" and enjoyed internal tranquility most of that period.⁵⁷ He noted that Switzerland endured little internal dissent during that period, while neighboring countries experienced "wars, dissensions, and intrigues." Henry lamented the thirty years of civil war that ravaged Germany, while also noting that France "with her mighty monarchy [was] perpetually at war." He asked fellow Virginians to "compare the peasants of Switzerland with those of any other mighty nation: you will find them far more happy – for one civil war among them, there have been five or six among other nations."58 Many authors championed the republican qualities of the militia. Yet, Henry alone argued that militias unified the nation and the people with a common identity. He contended that the "necessity of national defense has prevailed in invigorating their councils and arms, and has been in a considerable degree the means of keeping these honest people together." This impressive feat was due to the militia system which also saved considerable amounts of money by not supporting a standing army. Henry encouraged fellow lawmakers to follow the example of the Swiss, which "acquired their reputation no less by their undaunted intrepidity, than by the wisdom of their frugal and economical policy."59

Henry Lee was one of the Federalists who objected to Patrick Henry's portrayal of the militia. As an officer in the American Revolution, Lee witnessed firsthand the militia's poor performance. In addition, Lee took umbrage in Henry's remarks claiming that opponents of the Constitution were not "firm supporters of liberty." Lee chastised

57

⁵⁷ Patrick Henry, "Patrick Henry replies to governor Randolph," in ibid., 629.

⁵⁸ Ibid

⁵⁹ Ibid.

Henry for impolitely addressing the convention in "a desultory manner." In addition, Lee accused Henry of "having discarded in a great measure, solid argument and strong reasoning." On the subject of the militia's efficacy, Lee was equally critical. He told the Virginia convention that during his career in the military he had "seen incontrovertible evidence that militia cannot always be relied upon." Lee said numerous instances came to mind, but the events at Guilford Court House stand out. There, the "American regular troops behaved there with the most gallant intrepidity. What did the militia do? The greatest numbers of them fled." Because the militia panicked, the Americans lost the field. Lee stated that "had the line been supported that day, Cornwallis, instead of surrendering at York, would have laid down his arms at Guilford." To Lee and many others, the reliance upon only a militia for national defense was negligent. Lee affirmed his preference for the Federalist plan which "provides for the public defense as it ought to do. Regulars are to be employed when necessary; and the service of the militia will always be made use of."

Lee's condemnation did not deter Patrick Henry. The following week, Henry objected to provisions in the Constitution allowing for the establishment of a standing army. Congressional power to raise an army alarmed him; he called Congress' power "unlimited," and stated "there is no control on Congress in raising or stationing them." He disliked that Congress held the legal mechanism to both raise and support armies. All Congress needed to do was state that it was in the general welfare to keep standing armies

⁶⁰ Henry Lee, "Henry Lee's Sharp Reply to Patrick Henry's Attacks on the Constitution," in ibid., 637.

and "they may keep armies continually on foot." When addressing standing armies themselves, Henry voiced concern that would be addressed in the Third Amendment. He warned that Congress had the ability to billet soldiers "on the people at pleasure." The quartering of troops in private homes was a "most dangerous power: Its principles are despotic. If it be unbounded, it must lead to despotism." Henry noted that the billeting of troops among the public was "one of the first complaints under the former government. This was one of the principle reasons for dissolving the connection with Great Britain." It astonished him that the Constitution allowed for the sort of abuses that had been unconscionable to many colonists. Paired with the provisions allowing for standing armies, it appeared to Henry that the nation was willing to substitute a tyrannical British government with an American one. ⁶⁴

Henry also faulted congressional powers pertaining to the militia. The ability to call forth the militia to execute laws troubled many Anti-Federalists. Henry called the provision dangerous and complained that many Anti-Federalists had asked for cases in which "the militia would be wanting to execute the laws. Have we received a satisfactory answer?" At its essence, he saw this provision as proof that the Constitution established a government that "is a government of force, and the genius of despotism expressly." To Henry, the prospects of a government using the militia to execute tyrannical laws did not seem so farfetched. He contended that there "is no principle to guide the legislature to restrain them from inflicting the utmost severity of punishment." The militia could be

⁶² Patrick Henry, "Patrick Henry's Objections to a National Army and James Madison's Reply," in ibid., 696.

⁶³ Ibid.

⁶⁴ Ibid.

used to execute civilians, which Henry stated was "unprecedented. Have we ever seen it done in any free country? It was never so in any well regulated country."

James Madison's response to Henry was succinct. Unlike Lee, Madison was more cordial. On the issue of standing armies, Madison agreed they were to be avoided, yet he stated that "the only possible way to provide against standing armies, is, to make them unnecessary." The Constitution did so, because it organized and disciplined the militia "so as to render them capable of defending the country against external invasions and internal insurrections." For many Federalists, the national government's ability to discipline and train the militia ensured that it would not perform as unpredictably as it had during the Revolution. Madison did not directly address Henry's hypothetical situations regarding abuses of the militia. Madison did, however, take issue with Henry denouncing governments of force. As if exasperated, Madison asked "was there ever a constitution, in which, if authority was vested, it must not have been executed by force, if resisted?"

Following months of heated debate in conventions and newspapers, various states submitted resolutions as amendments to the Constitution. Many contained provisions protecting militia service and warning against the use of standing armies. Most of the language was identical from state to state. Apprehensions regarding standing armies and the militia were national issues, while concerns regarding an individual right to bear arms was absent. New York proposed an amendment stating:

⁶⁵ Ibid, 697

⁶⁶ James Madison, "Patrick Henry's Objections to a National Army and James Madison's Reply," in ibid., 698.

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 [sic] of a free state.

That standing armies in time of peace are dangerous to liberty, and ought not to be kept up, except in cases of necessity, and that at all times the military should be under strict subordination to the civil power.⁶⁷

That the militia of any state shall not be compelled to serve without limits of the state for longer term than six weeks without the consent of the legislatures thereof.⁶⁸

New York's italicization of the phrase "capable of bearing arms" suggested animosities many held over religious exemption to military service. Pennsylvania, inhabited by pacifist Quakers, did not have a state militia for much of its existence, leaving the citizens vulnerable to Indian raids. There were other political concerns regarding religious exemptions. Some Anti-Federalists feared that citizens would claim exemption to avoid service in the militia, or perhaps a tyrannical government would determine which religious denominations were exempt, preventing some groups from serving in the militia. By stressing the phrase "capable of bear arms," New York was addressing these concerns. North Carolina and Virginia included amendments exempting religiously scrupulous persons from bearing arms; however, they were required to pay for a substitute. 69

Virginia proposed an amendment very similar to New York:

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 [*sic*] of a free state. That standing

⁶⁷ Resolutions of New York, "Principles Affirmed And Amendments Proposed: The Ratifications and Resolutions of Seven State Conventions," in ibid., 537. In between the first and second clauses, New York also recommended that the militia be immune to martial law except in time of war, rebellion or insurrection. (Emphasis in the original.)

⁶⁸ Ibid., 545

⁶⁹ Resolutions of Virginia and North Carolina, "Principles Affirmed And Amendments Proposed: The Ratifications and Resolutions of Seven State Conventions," in ibid., 561-568. See article 19.

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. ⁷⁰

North Carolina proposed an amendment nearly identical to Virginia a month later in August 1788. New York and Virginia's amendments contained language similar to what became the Second Amendment. Both amendments endorsed the militia over standing armies. Neither passage could be interpreted as an individual right, because every mention of the right to bear arms involves service in the militia. Clearly, the subject of all the proposed amendments dealt with the role the militia played in defending the nation and the security militia service provided as an alternative to standing armies. While some states left out arms-bearing provisions, others directly addressed standing armies. Maryland proposed the following amendment in April 1788: "that no standing army shall be kept up in time of peace, unless with the consent of three-fourths of the members of each branch of Congress."

The debate over ratification of the Constitution involved many issues. Missing from the debate were arguments over an individual's right to bear arms. The reason is simple: it was not a concern for either Federalists or Anti-Federalists. Instead, they grappled with what role the militia should play in the defense of the nation and the threat to liberty posed by standing armies. Despite Federalist assurances that provisions in the Constitution were the best security against standing armies, Anti-Federalists insisted on additional guarantees. Federalists were unwilling to change provisions in the Constitution granting Congress the power to raise armies and use the militia to enforce laws.

⁷⁰ Ibid., 561.

⁷¹ Ibid., 568.

⁷² Ibid., 555.

Federalists believed a well-regulated militia negated the need for standing armies. The passage of the Constitution came with a guarantee by Madison that amendments would be considered. In examining the creation and adoption of the Second Amendment, it becomes clear that congressmen were not addressing an individual right to bear arms; instead, they were ensuring the presence of the militia in the nation's national defense.

CHAPTER IV

Madison Throws a "Bath Tub to a Whale" 1

The Convention in Philadelphia passed the Constitution without a bill of rights. At the time, Federalists and Anti-Federalists remained divided over the necessity of such a declaration. Many Anti-Federalists believed the Constitution granted the national government too much power at the expense of the states and that the national government had the potential to infringe upon personal liberties. Federalists initially dismissed these concerns, "arguing that the Constitution should be allowed a trial period for problems to emerge" before attempting to amend the document.² As Anti-Federalist opposition grew, especially in key states such as Pennsylvania, New York, North Carolina, and Virginia, James Madison realized that not including a declaration of rights during the convention was a mistake.³ Rather than risk the Constitution not passing, Federalists agreed that the first Congress would attach a bill of rights.

On June 8, 1789, Madison, responding to two hundred state proposals,

¹ Kenneth R. Bowling, "'A Tub to the Whale': The Founding Fathers and Adoption of the Federal Bill of Rights," *Journal of the Early Republic* 8 (Autumn 1999): 233-251.

² Helen E. Veit, Kenneth R. Bowling, Charlene Bangs Bickford, ed. *Creating the Bill of Rights: The Documentary Record from the First Federal Congress* (Baltimore: Johns Hopkins University Press, 1991), ix.

³ Ibid., xi.

introduced twelve amendments to the Constitution. Drawing heavily from Virginia's Bill of Rights, most of Madison's amendments emphasized personal liberties. In this regard, individual rights' supporters argue that the Second Amendment protected a personal right to keep firearms, as so many other amendments addressed personal rights. This theory lacks evidence, as the debates surrounding the ratification of the Second Amendment focused on public liberties – namely promoting the use of the militia and preventing the creation of standing armies. All the amendments proposed by Madison attempted to placate Anti-Federalists while not significantly altering the Constitution. In this regard, Madison was successful; Alexander Hamilton reflected "that Madison's Amendments met 'scarcely any of the important objections which were urged, leaving the structure of the government and the mass and distribution of its powers where they were." Not all were blind to this reality. Anti-Federalists recognized they were negotiating from a position of weakness. Richard Henry Lee confided to Patrick Henry that "if we cannot gain the whole loaf, we shall at least have some bread." Yet, the amendments Madison proposed disappointed even the most optimistic Anti-Federalists. Members of both factions criticized Madison for "throwing a tub to a whale." This was a reference to Jonathan Swift's *Tale of a Tub* which involved a ship being attacked by a whale. To avoid being shipwrecked, the crew threw large objects into the water, particularly a tub, to distract the whale while sailing away to safety. The metaphor fit perfectly for the time, as Madison lobbed amendments into the water while steering the ship of state safely away from the Anti-Federalist leviathan.³

¹ Ibid., xvi.

² Richard Henry Lee to Charles Lee, 28 August 1789, in ibid., 290.

³ Ibid., xv; Bowling, "'A Tub to the Whale," 223.

The language of Madison's original amendment regarding arms provided insight into his intent. He aimed to protect and promote the militia while also addressing the issue of religious exemptions. The working text stated that

The Right of the People to keep and Bear Arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person. ⁴

This amendment showed a desire to protect the right to bear arms in a military capacity. If Madison intended to protect personal liberties in each amendment, then the last clause clearly fit that criterion. Several religious denominations (particularly the Quakers in Pennsylvania, a crucial ratifying state) voiced concerns over serving in the militia.

Lawmakers immediately ridiculed Madison's proposed amendments. Even fellow Federalists had harsh words for his work. In a letter to fellow Massachusetts Federalist Thomas Dwight, Fisher Ames sarcastically concluded that Madison's amendments "were the fruit of much labour and research. He has hunted up all the grievances and complaints of newspapers – all the articles of Conventions – and the small talk of their debates." Ames described every right to be guaranteed, including "the right of enjoying property – of changing the govt. at their pleasure...at least this is the substance. There is too much of it – O. I had forgot, the right of the people to bear arms." Ames followed his criticism of the right to bear arms with "*Risum teneatis amici* [Could you forbear the laughter of a friend?]" After laughing heartily, Ames concluded that the real reason for the

69

⁴ "Madison Resolution," 8 June 1789, in Veit et al. ed., Creating the Bill of Rights, 12.

amendments was that "it may do good towards quieting men who attend to sounds only, and may get the mover some popularity – which he wishes." 5

Others were equally as critical. Federalist George Clymer wrote to fellow Pennsylvania Federalist Richard Peters on the morning of Madison's speech before the Congress. Clymer speculated whether Madison would actually provide amendments of substance or if "he means merely a tub to the whale." Clymer worried that Anti-Federalists in Virginia had frightened Madison enough to "lop off essentials" in the Constitution. After Madison read his amendments, Clymer immediately wrote "Afternoon – Madison's has proved a tub on a number of [amendments]." Clymer noted that many were upset and that, in response, Eldridge Gerry "proposes to treat us with all the amendments of all the antifederalists [sic] in America." Upon receiving his letter from Clymer, Peters wrote Madison criticizing the entire process. Peters did not agree with "offering Amendments to the Machine before it is known whether it wants any." By "Machine," Peters referred to the Constitution. He believed that proposing amendments was pointless, espousing a common Federalist belief that Anti-Federalists were set on opposing the Constitution regardless of the inclusion of a declaration of rights. Continuing with the mechanical metaphor, Peters told Madison that "the Ingenuity of those who wish to embarrass its Motions will find some things that it wants & so after making it as complicated as a Combination of Dutch Stocking Looms they will alledge [sic] it to be too intricate for Use." In essence, Peters accused the Anti-Federalists of wasting time and complicating the Constitution to the point of futility – an allegation

⁵ Fisher Ames to Thomas Dwight, 11 June 1784, in ibid., 247.

⁶ George Clymer to Richard Peters, 8 June 1789, in ibid., 245.

many Federalists made. Peters admonished Madison to "throw out tubs" only if he was afraid of the whale.⁷

Both factions treated Madison's amendments with derision. Rather than addressing legitimate concerns with the Constitution, South Carolina Anti-Federalist Aedanus Burke viewed the amendments as nothing more than a distraction. He deemed them to "be little better than whip-syllabub, frothy and full of wind, formed only to please the palate." They were "like a tub thrown out to a whale, to secure the freight of the ship and its peaceable voyage." Burke determined the amendments to be "very far from giving satisfaction to our constituents; they are not those solid and substantial amendments which the people expect."8 Federalist Noah Webster wrote Madison that "from the unanimous declaration of men in several states, through which I have lately travelled, that amendments are not general wished for." People wanted more substantive changes to the document. Instead, they realized "the alterations proposed can do very little good, or hurt, as to the merits of the Constitution." Guaranteeing frivolous rights offered no real security to liberty, and "in general they are subject to ridicule." Webster regretted "that Congress should spend their time in throwing out an empty tub to catch people, either factious or uninformed, who might be taken more honorably by reason and equitable laws." Not all Federalists appreciated the criticism. The tub to whale analogy angered Madison. William L. Smith denounced Burke's tub to whale comments and

⁷ Richard Peters to James Madison, 5 July 1789, in ibid., 259.

⁸ *The Congressional Register*, 15 August 1789, in ibid., 175.

⁹ Noah Webster (Pacificus) to James Madison, 14 August 1789, in ibid., 275-276.

noted that "there has been more ill-humour & rudeness displayed today than has existed since the meeting of Congress." ¹⁰

Regardless of the views many held toward Madison's proposed rights, the House of Representatives went to work. In addressing the Second Amendment, they did not question what the right to bear arms meant; instead, records show concern with the religious exemption clause and how it affected the militia. Federalist Thomas Scott of Pennsylvania objected to the provision, because "if this becomes part of the constitution, we can neither call upon such persons nor an equivalent." He further stated that it weakened an already undependable institution – the militia. Providing further proof that the right to bear arms was linked to the concern over standing armies, Scott claimed that the religious exemption clause revoked the right to bear arms. He told the House that the "right to keeping arms" was the "recourse to a standing army." By exempting religious objectors from serving, they were being denied their right to bear arms. He concluded that citizens would use the religious exemption to avoid military service. 11 New Jersey Federalist Elias Boudinot argued that the clause was necessary because the militia could not depend on men who were conscientiously opposed to service. Boudinot argued that "in forming the militia we ought to calculate for an effectual defence, and not compel characters of this description to bear arms." The debate between Boudinot and Scott regarding the right to bear arms showed that the amendment pertained to military service and that the House viewed it as a collective right.

¹⁰ William L. Smith to Edward Rutledge, 15 August 1789, in ibid., 278.

¹¹ Gazette of the United States, 20 August 1789, in ibid., 198.

¹² Ibid., 198-199.

Elbridge Gerry warned that the religious exemption would disband the militia. As a matter of principle, he argued the declaration of rights was a protection against the maladministration of government. He saw in the exemption "an opportunity [for] the people in power to destroy the constitution itself." If the government wished, it could "declare who are religiously scrupulous, and prevent them from bearing arms." Gerry stated that the militia's purpose was to "prevent the establishment of a standing army, the bane of liberty." He believed that Congress could "make a standing army necessary" by declaring certain groups religiously exempt from service. Echoing concerns made throughout the ratification process, Gerry argued that "whenever government means to invade the rights and liberties of the people, they always attempt to destroy the militia, in order to raise an army upon their ruins." He cited previous examples involving Great Britain at the end of the Glorious Revolution, and the attempts by the crown to disarm Massachusetts's militia.

13

Other members of the House disagreed with Gerry. James Jackson of Georgia was not convinced that people would convert to a religion to avoid military service. He told fellow members not to "expect that all the people of the United States would turn Quakers or Moravians." Jackson supported adding further language stipulating that those exempt were required "to secure an equivalent" and moved to have the phrase "upon paying an equivalent be established by law" added to the amendment. South Carolina Federalist William Loughton Smith thought individuals "were to be excused provided they found a substitute." Jackson accommodated Smith and moved to amend Madison's wording for "no one, religiously scrupulous of bearing arms, shall be compelled to render

¹³ The Congressional Register, 17 August 1789, in ibid., 182.

military service in person, upon paying an equivalent."¹⁴ By attempting to add this language, it is clear that the members of the House believed that bearing arms meant serving in the military.

Roger Sherman of Connecticut did not see a need for the religious exemption. He stated that it was "well-known that those who are religiously scrupulous of bearing arms, are equally scrupulous of getting substitutes or paying an equivalent." He contended that "many of them would rather die than do one or the other." Delaware Federalist John Vining preferred the clause remain as initially proposed. It would be better for the government to require someone to pay for a replacement, because it would be "the same as if the person himself turned out to fight." Anti-Federalist Michael Stone of Maryland thought the clause confusing. He inquired what "religiously scrupulous" meant. If it meant in regard to bearing arms, then Stone thought "it ought so to be expressed." While others attempted to alter the religious scrupulous clause, New York's Egbert Benson agitated for its removal. He moved to have the entire clause struck out and leave the question of exemption to Congress; his move failed in a 22-24 vote. 16

Elbridge Gerry voiced other concerns with the Second Amendment. As with the debates over religious exemption, Gerry's argument did not challenge the meaning of the right to bear arms. He opposed the "first part of the clause, on account of the uncertainty with which it is expressed: a well-regulated militia being the best security of a free state, admitted an idea that a standing army was a secondary one." This upset Gerry and other Anti-Federalists, who remained dedicated to banning all standing armies and

¹⁴ Ibid., 183.

¹⁵ Ibid.

¹⁶ Ibid., 184.

strengthening the militia. Gerry preferred the clause to read "'a well regulated militia, trained to arms,' in which case it would become the duty of the government to provide this security, and furnish a greater certainty of its being done." Having the national government arm the militia sent the message that it was the preferred means of defense and also prevented the militia from falling into disrepair due to a lack of funding by the individual states. Many opponents of standing armies maintained this view, yet it did not carry sufficient votes in the House. ¹⁸

The House tabled Gerry's motion to strengthen the militia, while South Carolina's Aedanus Burke moved to attach anti-standing army language to the amendment. Burke proposed adding

A standing army of regular troops in time of peace, is dangerous to public liberty, and such shall not be raised or kept up in time of peace but from necessity, and for the security of the people, nor then without the consent of two-thirds of the numbers present of both houses, and in all cases the military shall be subordinate to the civil authority.¹⁹

The House rejected Burke's Amendment by a margin of 33-13. The failure to add language prohibiting the creation of standing armies irked many Anti-Federalists. On July 28, 1789, the House voted to change the amendment to state

Article [6] "A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed, but no person religiously scrupulous shall be compelled to bear arms."²⁰

This change provides an insight into the House's interpretation of what the right to bear arms meant. The last clause – "but no person religiously scrupulous shall be compelled to

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ House Committee Report, 28 July 1789, in ibid., 30.

bear arms" – demonstrates that bearing arms was interpreted in a military capacity. It would make no sense for Congress to exempt religiously scrupulous people from owning firearms for other reasons. On August 24, 1789, the House sent the following amendment to the Senate for consideration:

Article the Fifth: A well regulated militia, composed of the body of the People, being the best security of a free State, the right of the People to keep and bear arms shall not be infringed, but no one religiously scrupulous of bearing arms shall be compelled to render military service in person.²¹

The language of this revision was the culmination of months of arguing. Compared to the previous version, this final draft went further in proving that the right to bear arms related to military service. The last clause even mentioned "military service." The House understood the right to bear arms in strictly a military sense, and did not associate the right with individual firearm ownership.

The Senate busied itself with altering the amendments approved by the House.

Like the House, the Senate rejected language prohibiting standing armies. On September 4th, by a vote of 9-6, the Senate disagreed to a motion adding

That standing armies, in time of peace, being dangerous to Liberty, should 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. That no standing armies or regular troops shall be raised in time of peace, without the consent of two-thirds of the Members present in both Houses, and that no solider shall be enlisted for any longer term than the continuance of the war. ²²

In addition, the Senate also rejected a motion to insert "'for the common defense' after 'bear arms.'" Individual right supporters use such a rejection to claim that the right to

²¹ House Resolution and Articles of Amendment, 24 August 1789, in ibid., 38.

²² Ibid., 39.

bear arms was not strictly a communal right.²³ This argument lacks any evidence, as there are no records of any senator or representative arguing that position. It is likely that "for the common defense" was simply redundant. It was obvious that the militia would be called out to defend against mobs or invading armies. In addition, there was the possibility that "for the common defense" could be interpreted to nullify another contentious clause in the Constitution – the power of the Congress to call forth the militia to enforce laws. It is conceivable that a militia would enforce an unjust law to the chagrin of the general populace.

The Senate made other changes. On September 9th, it voted to erase "but no one religiously scrupulous of bearing arms shall be compelled to render military service in person." The reason the Senate removed the religious exemption clause is unclear, as no records exist of its discussion. Perhaps, the removal reflected a general desire by lawmakers to keep the amendments as concise as possible. The clause pertaining to exemptions required additional language to define who would be exempt – a point raised by many members of the House. The desire to be concise also explained another edit. In the same vote, the Senate removed the passage "composed of the body of the people" and the word "best." ²⁴ Stating that the militia was "composed of the body of the people" was redundant. It was obvious that the people would be bearing arms in the militia, unless the language was an attempt to ban the use of foreign mercenaries. The removal of "best" is puzzling. It was immediately replaced with "necessary to." In the House, Gerry

²³ Lund argued "And lest there be any doubt about the fact – a fact unambiguously reflected in the constitutional language – that the more liberal, individual-right position was to be *fully* satisfied, the senate *rejected* a proposal to qualify the individual right by adding the words "for the common defense" to the Second Amendment." Nelson Lund, "The Past and Future of the Individual's Right to Arms," *Georgia Law Review* 31 (January 1996): 35.

²⁴ House Resolution and Articles of Amendment, 24 August 1789, in Veit *et al.* ed., *Creating the Bill of Rights*, 46.

complained it promoted a standing army.²⁵ There is no evidence the Senate shared this view. It is plausible that replacing "best" with "necessary to" strengthened the emphasis on the militia; perhaps, the Senate offered this as a concession to its rejection of language prohibiting standing armies. This makes sense, because it was the view of many Federalists, including Madison, that a strong militia was the best defense against standing armies.²⁶

The Senate considered other amendments related to the right to bear arms. John Randolph wrote to famed lawyer St. George Tucker that "a majority of the Senate were not for allowing the militia arms & if two thirds had agreed it would have been an amendment to the Constitution." An issue pertinent to the militia was whether or not the national government would fund each state's militia. Without funding, many feared the militia would fall into disrepair. Randolph agreed with this view, telling Tucker that the refusal to arm the militia proved that Congress was "afraid that the citizens will stop their full career to Tyranny and Oppression." Additional amendments were also rejected. The Senate disapproved of a separate amendment banning standing armies. It read "That no standing army or regular troops shall be raised or kept up in time of peace, without the consent of two thirds of the numbers present in both houses." Another of the rejected amendments aimed to limit soldiers' tenure in a standing army. It declared "That no

²⁵ The Congressional Register, 17 August 1789, in ibid., 184.

²⁶ James Madison, "Patrick Henry's Objections to a National Army and James Madison's Reply," in ibid., 698.

²⁷ John Randolph to St. George Tucker, 11 September 1789, in ibid., 293.

²⁸ Additional Articles of Amendment, 8 September 1789, in ibid., 44.

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."²⁹

On September 14th, 1789, the Senate approved what would become the language of the Second Amendment. It read "Article the Fourth: 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." Certainly, no lawmaker at the time thought that article would become the most controversial and misunderstood amendment. Read literally, it is a brilliant display of obfuscating language. However, the men of the House and Senate knew exactly what they were voting on. It was a reaffirmation of the militia without a ban on standing armies. The debates in Congress clearly demonstrated a concern with how the amendment affected service in the militia. Regarding the religious exemption clause, Congress showed that "to bear arms" pertained to a collective right in the militia. As events following the ratification showed, Congress was not the only entity to interpret the Second Amendment that way.

²⁹ Ibid

³⁰ Articles of Amendment, As Agreed to by the Senate, 14 September 1789, in ibid., 48.

CHAPTER V

Conclusion

In Februrary 1799, four men in Philadelphia convened at St. Mary's Catholic Church to gather signatures protesting the Alien Act. William Duane, the editor of the *Philadelphia Aurora*, along with Dr. James Reynolds and two Irish aliens, posted notices in the church courtyard. A group of Federalists exiting the church confronted the petitioners and a riot ensued on the "sacred grounds" of the church. In the commotion, Reynolds drew a pistol and threatened the mob, who quickly overpowered him. Duane and his accomplices were charged with inciting a riot, while Reynolds was also charged with assault with a deadly weapon. The ensuing trial provides historians another contemporary opinion of the Second Amendment and the right to bear arms.

While the debates in Congress showed an amendment emphasizing militia rights, several events following ratification demonstrated public conceptions of rights relating to firearms. The Whiskey Rebellion affirmed that the Second Amendment did not

¹ Saul Cornell, A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America (New York: Oxford University Press, 2006), 89; William Duane, A Report of the Extraordinary Transactions which Took Place at Philadelphia, in February 1799 (Philadelphia: Aurora, 1799), 30.

² Duane, A Report, 2.

³ Cornell, A Well-Regulated Militia, 89.

provide a right to take up arms against the government. The militia helped put down the rebellion, not defend it. The Duane Trial is of particular interest for the assertions it makes regarding guns and gun culture. Supporters of an individual rights interpretation argue that the United States developed a gun culture that is represented in the Second Amendment. This gun culture evokes a mythologized past, with characteristics of a rugged, lawless, frontier society and an emphasis on individual self-reliance. In discussing firearms, many individual rights supporters claim that the United States at its inception was a society of firearm owners concerned with their personal self-defense.

In the Duane Trial, the arguments presented by both the prosecution and defense cast doubt on the gun culture mythos. At no time during the trial did Reynolds's defense invoke the Second Amendment. Neither the prosecution nor the defense "believed that the use of a gun for personal self-defense had any connection to the constitutional right to bear arms." Instead, the case hinged upon whether Reynolds adhered to long-established common law principles regarding self-defense. When Reynolds stood his ground and confronted the angry mob, instead of fleeing, he "forfeited the right of self-defense guaranteed under common law." Common law conceptions of self-defense at the time required an individual "to retreat to the wall" before using deadly force. Perhaps the

¹ In *The Founders' Second Amendment*, Stephen P. Halbrook argues the Second Amendment allows for the violent overthrow of government. Stephen P. Halbrook, *The Founders' Second Amendment: Origins of the Right to Bear Arms* (Chicago: Ivan R. Dee, 2008), 3.

² Although Reynolds was charged with assault with a deadly weapon, the trial is named after Duane, who published a lengthy account of the proceedings in "A Report," which was reprinted in newspapers throughout the country.

³ Cornell, A Well-Regulated Militia, 90.

⁴ Ibid., 91.

⁵ For the duty to retreat, see James Parker, *Conductor Generalis: Or the Office, Duty, and Authority of Justices of the Peace* (New York: John Patterson, 1788), 213.

most startling revelation of the trial was the contemporary opinion regarding the use of firearms for self-defense. Both Duane and Reynolds acknowledged that a pistol was a poor weapon for self-defense. Reynolds was told that "a pistol was an uncertain defence [because] it was liable to so many accidents; a dirk was a more secure weapon." Duane wrote that the dirk or sword cane were better weapons, as they were less likely to miss. Duane, as well as the attorney general prosecuting the case, both used sword canes. These revelations cast doubt on the existence of an early American gun culture. In addition, the case provided "a rare and remarkable glimpse into how leading lawyers of the early republic viewed carrying firearms outside of the context of bearing them as part of a well-regulated militia." The generation following the passage of the Second Amendment understood the distinction between the constitutional right to bearing arms in the militia and the common law right to carry arms for self-defense.

Many prominent legal scholars of the era commented on Second Amendment. In his lengthy treatise on law, Virginia jurist St. George Tucker believed "the adoption of the amendment was a direct response to Anti-Federalist concerns over the future of the state militias." Tucker viewed the Second Amendment as a key component of states' rights. As Cornell notes, this view "still shared with others of his generation a belief that the phrase 'bear arms' was legally distinct from bearing or carrying a gun for personal use." Massachusetts lawyer John Danforth Dunbar, in an oration before Republicans in 1805, commended the Constitution for its resistance to "arbitrary government." Dunbar viewed the Second Amendment in the context of opposition to standing armies and a

⁶ Duane, A Report, 14.

⁷ Ibid., 14.

⁸ Cornell, A Well-Regulated Militia, 92.

⁹ Ibid., 102.

¹⁰ Ibid., 240.

preference for the militia. He noted that "while conscriptions and impressments drain the vital energies of the old world, our militia is a sufficient bulwark." Given the well-documented antagonism many held toward standing armies, these views are not surprising. Dunbar implored the crowd to "let every friend to his country encourage the militia, assist and support them; and they will always be the dread of tyrants at home, and invaders from abroad." Many viewed the Second Amendment as a collective right. In a speech before a Concord, Massachusetts audience, jurist Samuel Dana told the crowd that "the right of bearing arms for the common defense, is a right recognized among our unalterable laws."

The collective rights' interpretation remained the majority view throughout much of American history. In 1868, John Norton Pomeroy wrote that the object of the Second Amendment "was to secure a well-armed militia." As Dean of the New York University Law School, he told students that the amendment had a basis in preventing standing armies and promoting the militia for public defense. The government was prohibited from preventing the militia to "exercise the use of warlike weapons"; yet, he cautioned, that this was not an unlimited right free from regulation. He stated that with "all such provisions, all such guaranties, must be construed with reference to their intent and design." Just as free speech did not grant an individual the right to libel, the Second Amendment was "certainly not violated by laws forbidding persons to carry dangerous or

¹¹John Danforth Dunbar, *An Oration Pronounced on the 4th of July 1805* (Boston: True and Parks, 1805), 14-15

¹² Samuel Dana, *An Address on the Importance of a Well Regulated Militia* (Charlestown, MA: Samuel Etheridge, 1801), 10.

concealed weapons, or laws forbidding the accumulation of quantities of arms with the design to use them in a riotous or seditious manner."¹³

The question of whether gun regulations violated the Second Amendment eventually went before the Supreme Court. Due to the gangland violence of the Prohibition era, Congress passed the National Firearms Act in 1934, which restricted access to machine guns, sawed-off shotguns, silencers, and other firearms used by criminals. Two Oklahoma men, Jack Miller and Frank Layton, were arrested crossing the Arkansas border with a sawed-off shotgun. Prosecuted under the National Firearms Act, the pair claimed it violated their Second Amendment right to bear arms. In *U.S. v. Miller*, Franklin Roosevelt's Solicitor General, Robert Jackson, who would later become a Supreme Court justice, argued that the Second Amendment protected only the collective right to participate in the militia. He stated that "the scope of the Second Amendment's protection 'generally restricted to keeping and bearing of arms by the people collectively for their common defense and security." ¹⁴

The Supreme Court agreed. In a unanimous ruling, the Court determined that there was no conflict between the Second Amendment and the regulation of firearms under the National Firearms Act. Justice James Clark McReynolds read the Court's opinion from the bench, stating that "we construe the amendment as having relation to military service and we are unable to say that a sawed-off shotgun has any relation to the militia." He further clarified the Court's stance by stating that "certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its

¹³ John Norton Pomeroy, *An Introduction to the Constitutional Law of the United States* (New York: Houghton, Mifflin and Company, 1888), 152-153.

¹⁴ Cornell, A Well-Regulated Militia, 200-201.

use could contribute to the common defense." The verdict in *U.S. v. Miller* was astonishing for a variety of reasons. McReynolds's decision to read the ruling from the bench was a practice typically reserved for instances in which the Court desired to make its position explicitly clear. In addition, the ruling was unanimous, a rarity for the bitterly-divided Hughes Court. Perhaps the most surprising facet of *U.S. v. Miller* was that seventy years later an even more politically conservative and contested court overturned the decision, erasing centuries of precedent.

In 2009, the United States Supreme Court ruled in *D.C. v. Heller* that the Second Amendment protected an individual's right to own a firearm unconnected with militia service. ¹⁵ The conservative bloc issuing the majority opinion (in a 5-4 ruling) argued that the amendment always protected a right to individual firearm ownership and that the Court's majority opinion reflected the original intent of the founding fathers. Sticking to the philosophy of originalism, Justice Antonin Scalia determined that the operative clause "the right of the people" was describing individuals, because the First and Fourth Amendments also used the word "people" and were describing rights bestowed upon individuals. ¹⁶

The majority opinion conveniently disregarded the first clause – "a well regulated militia being necessary to the security of a free State," which the Court declared "does not expand or limit the scope of the operative clause." ¹⁷ According to Scalia, the first clause had no significance whatsoever; it was empty language that could be omitted.

¹⁵District of Columbia v. Heller, 478 U.S. 370 (2008) 2.

¹⁶ Ibid., 5.

¹⁷ Ibid., 4.

However, the mere definition of "people" in the second clause was so important it involved reexamining the entire Constitution for its true meaning.

Writing the dissenting opinion, Justice John Paul Stevens condemned Scalia's argument and stated that Scalia determined the meaning of "people" in the Second Amendment to mean "law-abiding gun owners." If this were true, that would mean the founding fathers predicted the gun control debate hundreds of years in the future and preemptively acted to protect gun owners. Or, even less likely, the founders lived in a society plagued by gun violence and decided against granting the government regulatory oversight, coincidentally in an amendment that has the phrase "well-regulated" in it.

It is difficult to say how the founding fathers would address the current gun control debate. However, historians can state with confidence how the founding fathers viewed the Second Amendment. Historical evidence, including the statements of the founders themselves, supports the conclusion that the Second Amendment provided a collective right of the states to form well-regulated militias. This was not a right that appeared suddenly; it culminated from centuries of political thought originating in England and reflected public antagonism toward standing armies and a reverence for citizen militias. American colonists inherited these ideals and the events of the American Revolution reinforced themes central to their premise: standing armies were a threat to liberty and militias were necessary to the security of a free state.

.

¹⁸ District of Columbia v. Heller, Dissenting Stevens, 478 U.S. 370 (2008) 9. Stevens's quote in full: "When each word in the text is given full effect, the Amendment is most naturally read to secure to the people a right to use and possess arms in conjunction with service in a well-regulated militia. So far as appears, no more than that was contemplated. But the Court itself reads the Second Amendment to protect a 'subset' significantly narrower than the class of persons protected by the First and Fourth Amendments; when it finally drills down on the substantive meaning of the Second Amendment, the Court limits the protected class to 'law-abiding, responsible citizens.'"

The founding fathers disagreed over how to defend the new nation. At the Constitutional Convention and state ratifying conventions, many voiced a desire to ban standing armies. Others conceded their danger to public liberties, yet saw the necessity of standing armies in defending the nation. Central to this debate was the poor performance of the militia during the American Revolution. Many prominent Federalists, including George Washington, desired a better trained and more disciplined force. Federalists and Anti-Federalists disagreed over what role the national government would play in commanding, funding, and training the militia.

The amendments proposed by Madison attempted to placate Anti-Federalist concerns over the power of the national government. What would become the Second Amendment addressed issues central to federalism. Under the Constitution, the national government could use the militia to enforce laws. Many Anti-Federalists voiced concern over this provision and feared that the militias could become an instrument of arbitrary power. Madison's amendment guaranteeing the right to bear arms addressed these concerns. The amendment provided states with the right to create militias, while still protecting congressional authority over their organization. The amendment did not ban standing armies; yet, it deemed militias as being "necessary to the security of a free state." In addition, the amendment initially proposed by Madison provided an exemption for individuals religiously opposed to service in the militia. While the final amendment did not include this language, it showed Madison's intent to address militia service.

Absent from the language of the amendment and the debates regarding its ratification were any discussion of an individual's right to possess firearms. While there were ample

opportunities for the founding fathers to address this issue, there is no evidence of any consideration of individual gun rights.

The right to bear arms in the Second Amendment provided a collective right. The historical record reinforces this premise, while any concern for an individual right is absent. In describing the Constitution, Madison deemed its powers as "partly federal, and partly national." The Second Amendment exemplifies this position, as the states and the national government shared powers regarding the militia and the defense of the nation. Individual right supporters continue to insist the Second Amendment supports personal gun rights; yet, there is no evidence to support this claim.

¹⁹ Publius (James Madison), "Number XXIX: Concerning the Militia," in *The Federalist Papers*, ed. Isaac Kramnick New York: Penguin Books, 1987), 259.

REFERENCES

Primary Sources

- Bailyn, Bernard, ed. *The Debate on the Constitution: Federalist and Anti-Federalist*Speeches, Articles, and Letters During the Struggle over Ratification. 2 vols. New York: Library of America, 1993.
- Blackstone, Sir William. *Commentaries on the Laws of England*. Philadelphia: Robert Bell, Union Library, 1771.
- Burn, Richard. *The Justice of the Peace and Parish Officer*. Vol. 1. London: Law Booksellers and Publishers, 1837.
- Dana, Samuel. *An Address on the Importance of a Well Regulated Militia*. Charlestown, MA: Samuel Etheridge, 1801.
- Duane, William. A Report of the Extraordinary Transactions Which Took Place at Philadelphia, in February 1799. Philadelphia: Aurora, 1799.
- Dunbar, John Danforth. *An Oration Pronounced on the 4th of July 1805*. Boston: True and Parks, 1805.

- Fitzpatrick, John C., ed. *The Writings of George Washington from Original Manuscript Sources*. 39 vols. Washington, DC: U.S. Government Printing Office, 1931.
- Foster, Sir Michael. A Report of Some Proceedings of the Commission for the Trial of the Rebels in the Year 1746, in the County of Surry; and of Other Crown Cases.

 London: E. and R. Brooke, 1762.
- Grose, Francis. *Military Antiquities Respecting a History of the English Army from the Conquest to the Present Time*. London: S. Hooper High Holborn, 1786.
- Hawkins, William. *A Treatise of the Pleas of the Crown*. London: C. Roworth, Bell Yard, Temple Bar, 1716.
- Kramnick, Isaac, ed. The Federalist Papers. New York: Penguin Books, 1987.
- Madison, James. *Notes of Debates in the Federal Convention of 1787*. New York: W.H. Norton and Company, 1987.
- Parker, James. Conductor Generalis: Or the Office, Duty, and Authority of Justices of the Peace. New York: John Patterson, 1788.
- Rutland, Robert A., ed. *The Papers of George Mason*. 3 vols. Chapel Hill: University of North Carolina Press, 1970.
- Tucker, St. George, ed. Blackstone's Commentaries: With Notes of Reference to the

 Constitution and Laws of the Federal Government of the United States and of the

 Commonwealth of Virginia. 5 vols. Philadelphia: William Young Birch, 1803.
- Veit, Helen E. and Kenneth R. Bowling, Charlene Bangs Bickford, ed. *Creating the Bill of Rights: The Documentary Record from the First Federal Congress*. Baltimore: Johns Hopkins University Press, 1991.

Secondary Sources

Books

- Cornell, Saul. A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America. New York: Oxford University Press, 2006.
- Halbrook, Stephen P. *The Founders' Second Amendment: Origins of the Right to Bear Arms*. Chicago: Ivan R. Dee, 2008.
- _____. *That Every Man Be Armed: The Evolution of a Constitutional Right*. Oakland, CA: Independent Institute, 1994.
- Maitland, Frederick Pollack and Frederic. *The History of English Law before the Time of Edward I*. 2 vols. New York: Cambridge University Press, 1898.
- Malcolm, Joyce Lee. *To Keep and Bear Arms: The Origins of an Anglo-American Right*.

 Cambridge, MA: Harvard University Press, 1994.
- Munsche, P.B. Gentleman and Poachers: The English Game Laws, 1671-1831. New York: Cambridge University Press, 1981.
- Pomeroy, John Norton. *An Introduction to the Costitutional Law of the United States*.

 New York: Houghton, Mifflin and Company, 1888.
- Rakove, Jack N. Original Meanings: Politics and Ideas in the Making of the Constitution.

 New York: Alfred A. Knopf, 1996.
- Schwoerer, Lois G. "No Standing Armies!" The Antiarmy Ideology in Seventeenth

 Century England. Baltimore: The Johns Hopkins University Press, 1974.

Articles

- Bowling, Kenneth R. "'A Tub to the Whale': The Founding Fathers and Adoption of the Federal Bill of Rights." *Journal of the Early Republic* 8 (Autumn 1999): 233-51.
- Higginbotham, Don. "The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship." *The William and Mary Quarterly* 55 (January 1998): 39-58.
- Konig, David Thomas. "The Second Amendment: A Missing Transatlantic Context for the Historial Meaning of 'the Right of the People to Keep and Bear Arms.'" *Law and History Review* 22 (Spring 2004): 119-59.
- Lund, Nelson. "The Past and Future of the Individual's Right to Arms." *Georgia Law Review* 31 (January 1996): 1-76.
- Rakove, Jack N. "The Second Amendment: The Highest Stage of Originalism." *Chicago- Kent Law Review* 76 (January 2000): 1-50.
- Schwoerer, Lois G. "To Hold and Bear Arms: The English Perspective." *Chicago-Kent Law Review* 76 (January 2000): 1-27.
- Shalhope, Robert E. "The Armed Citizen in the Early Republic." *Law and Contemporary Problems* 49 (Winter 1986): 125-41.
- . "The Ideological Origins of the Second Amendment." *The Journal of American History* 69 (December 1982): 599-614.

VITA

Jeffrey Patrick Campbell

Candidate for the Degree of

Master of Arts

Thesis: THE ORIGINAL INTENT OF THE SECOND AMENDMENT: WHAT THE

DEBATES AT THE CONSTITUTIONAL CONVENTION AND THE FIRST

CONGRESS SAY ABOUT THE RIGHT TO BEAR ARMS

Major Field: History

Biographical:

Education:

Completed the requirements for the Master of Arts in History at Oklahoma State University, Stillwater, Oklahoma in May, 2012.

Completed the requirements for the Bachelor of Arts in History at Oklahoma State University, Stillwater, Oklahoma in 2009.

Experience: Teaching Assistant at Oklahoma State University from September, 2010 to May, 2011.

Name: Jeffrey P. Campbell Date of Degree: May, 2012

Institution: Oklahoma State University Location: Stillwater, Oklahoma

Title of Study: THE ORIGINAL INTENT OF THE SECOND AMENDMENT: WHAT THE DEBATES AT THE CONSITUTIONAL CONVENTION AND THE FIRST CONGRESS SAY ABOUT THE RIGHT TO BEAR ARMS

Pages in Study: 92 Candidate for the Degree of Master of Arts

Major Field: History

Scope and Method of Study: This paper examined the original intent of the Second Amendment to the United States Constitution using the debates in the press, at the ratification conventions and the Constitutional Convention, and the First Congress.

Findings and Conclusions: The founding fathers do not mention an individual right to bear arms in their debates at the ratification conventions, the Constitutional Convention, and the First Congress. The original intent of the Second Amendment guarantees a collective right to bear arms.