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# THE RIGHT OF THE PEOPLE OR THE POWER OF THE STATE:

# BEARING ARMS, ARMING MILITIAS, AND THE SECOND AMENDMENT

by

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## Introduction

On this two hundredth anniversary of its adoption, the Second Amendment to the United States Constitution, like certain other provisions of the Bill of Rights, has been subjected to politically-valued, result-oriented interpretation.[1] The Second Amendment provides: "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."

The ostensibly-harmless philosophical declaration about the militia which precedes the substantive guarantee belonging to "the people" has given rise to the argument that the amendment somehow protects only the power of a state to maintain a militia. While harboring no agenda for state militia powers, advocates of this hypothesis strongly oppose firearms ownership by the general public.[2]

There is a hidden history of the Second Amendment which is long overdue to be written. It is this: during the ratification period of 1787-1791, Congress and the states considered two entirely separate groups of amendments to the Constitution. The first group was a declaration of rights, in which the right of the people to keep and bear arms appeared. The second group, consisting of amendments related to the structure of government, included recognition of the power of states to maintain militias. The former

[1] S. Levinson, The Embarrassing Second Amendment, 99 YALE L.J. 637, 639-42 (1989).

[2] Id. at 644-45.

became the Bill of Rights, while the latter was defeated.[3] Somehow, through some Orwellian rewriting of history, as applied to the issues of the right of the people to keep and bear arms and the state militia power, that which was defeated has become the meaning of that which was adopted.

The state power to maintain militias vis-a-vis the federal military power was already treated in the text of the Constitution before the Bill of Rights was proposed. Article I, §8 empowers Congress "to declare War, . . . to raise and support Armies . . . [and] to make Rules for the Government and Regulation of the land and naval Forces . . . ." Congress is also empowered:

> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
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> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress . . . .[4]

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[3] As will be seen below, the Virginia ratifying convention proposed, and the United States Senate rejected, an amendment to the Constitution which would have stated: "That each state respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same." 3 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS 660 (1836); JOURNAL OF THE FIRST SESSION OF THE SENATE 75 (1820).

[4] Article II, Sec. 2 provides: "The President shall be the commander in chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual service of the United States . . . ." This provision makes clear that there is no national militia, but only a "Militia of the several States." Similarly, the Fifth Amendment provides for grand jury indictment "except in cases arising in the

The writing of this hidden history of the Second Amendment is timely, given the current assault on firearms ownership in the Congress and some States. By happenstance, the Supreme Court decided two cases in 1990 which contribute to an understanding of these issues. First, in United States v. Verdugo-Urquidez, a Fourth Amendment case, the Court made clear that all law-abiding Americans are protected by the Second Amendment as follows:

> "The people" seems to have been a term of art employed in select parts of the Constitution. . . . The Second Amendment protects "the right of the people to keep and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "the people." See also U.S. Const., Amdt. 1, ("Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble"); Art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second year by the People of the several States")(emphasis added). While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.[5]

In his dissent, Justice Brennan argued even more broadly that "the term 'the people' is better understood as a rhetorical counterpoint 'to the government,' such that rights that were reserved to 'the people' were to protect all those subject to 'the government'. . . 'The people' are 'the governed."[6] Justice Brennan also reviewed the drafting history of the Fourth Amendment, noting that the Framers "could have limited the right to 'citizens,' 'freemen,' 'residents,' or the 'American people.' . . . Throughout that entire process, no speaker

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land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . ." Thus, the militia of the several states always retains its status as such, even though it may be called in the "actual service" of the United States for specified domestic purposes.

[5] United States v. Verdugo-Urquidez, 494 U.S.-, 108 L.Ed.2d 222, 232-33, 110 S.Ct. 1056, 1060-61 (holding the Fourth Amendment warrant requirement inapplicable to the search of a home in a foreign country).

[6] 108 L.Ed.2d at 247.

or commentator, pro or con, referred to the term 'the people' as a limitation."[7] Similarly, the Framers could have limited the Second Amendment right to select state militias, but instead used the terms "the people."

Finally, Justice Brennan pointed out that rights are not "given to the people from the government. . . . The Framers of the Bill of Rights did not purport to "create" rights. Rather, they designed the Bill of Rights to prohibit our Government from infringing rights and liberties presumed to be pre-existing."[8] This statement is particularly applicable to the right to keep and bear arms, which has been recognized as a personal right for centuries.[9]

The second 1990 Supreme Court opinion has relevance to the twentieth-century argument that the Second Amendment protects only the "right" of a state to maintain a militia, and that the "militia" is restricted to the National Guard. In Perpich v. Department of Defense (1990),[10] the Court recognized that the National Guard is part of the Armed Forces of the United States and that the Reserve Militia includes all able-bodied citizens.[11]

The issue was whether the militia clause allows the President to order members of the National Guard to train outside the United States without the consent of a state governor or the declaration of a

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[7] Id. at 248.

[8] Id. at 247.

[9] S. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 7-54 (1984).

[10] 110 S.Ct. 2418.

[11] Id. at 2424-25.

national emergency.[12] Perhaps the most noteworthy fact about the opinion is its failure to mention the Second Amendment at all, that amendment being irrelevant to the issue of the state power to maintain a militia. In fact, the Court refers to the state power over the militia as being recognized only in "the text of the Constitution," not in any amendment:

> Two conflicting themes, developed at the Constitutional Convention and repeated in debates over military policy during the next century, led to a compromise in the text of the Constitution and in later statutory enactments. On the one hand, there was a widespread fear that a national standing Army posed an intolerable threat to individual liberty and to the sovereignty of the separate States, while, on the other hand, there was a recognition of the danger of relying on inadequately trained soldiers as the primary means of providing for the common defense. Thus, Congress was authorized both to raise and support a national army and also to organize "the Militia."[13]

The Court then reviewed Congress' various militia enactments. The first, passed in 1792, provided that "every able-bodied male citizen between the ages of 18 and 45 be enrolled [in the militia] and equip himself with appropriate weaponry . . . ."[14] In 1903, new legislation "divided the class of able-bodied male citizens between 18 and 45 years of age into an 'organized militia' to be known as the National Guard of the several States, and the remainder of which was then described as the 'reserve militia,' and which later statutes have termed the 'unorganized militia.'"[15] Both of the above were passed under the Militia Clauses of the Constitution.[16]

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[12] Id. at 2420.

[13] Id. at 2422-23.

[14] Id. at 2423.

[15] Id.

[16] Id. at 2423-24.

By contrast, in legislation dating to 1916, "the statute expressly provided that the Army of the United States should include not only 'the Regular Army,' but also 'the National Guard while in the service of the United States' . . . ."[17] Today's National Guard came into being through exercise by Congress of the power to raise armies, not the power to organize the militia.

The Court referred to "the traditional understanding of the militia as a part-time, nonprofessional fighting force,"[18] and as "a body of armed citizens trained to military duty, who may be called out in certain cases, but may not be kept on service like standing armies, in time of peace."[19] The Court also recognized the existence of "all portions of the 'militia'--organized or not . . . ."[20]

The Court concluded that "there is no basis for an argument that the federal statutory scheme deprives [a state] of any constitutional entitlement to a separate militia of its own."[21] The Court failed even to suggest that the Second Amendment had any bearing on the issue.

In sum, it was clear enough to the Supreme Court in 1990 that "the people" in the Second Amendment means individuals generally, as it does in the rest of the Bill of Rights; that the "militia" means the body of armed citizens at large, organized and unorganized; and that the Second Amendment is not relevant to the power of a states to maintain the militia.

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[17] Id. at 2424.

[18] Id. at 2426.

[19] Id., quoting Dunne v. People, 94 Ill. 120 (1879) (emphasis added).

[20] Id. at 2429 n.25.

[21] Id. at 2429. "[The Constitution left] under the sway of the states undelegated the control of the militia to the extent that such control was not taken away by the exercise by Congress of its power raise armies." Id. at 2430 n.29, quoting Selective Draft Law Cases, 245 U.S. 366, 383 (1918).

This analysis begins with the adoption of the militia clause, and the first calls for a bill of rights, in the constitutional convention of 1787. It then traces chronologically the ratification struggle in the state conventions and in the writings of federalists and antifederalists. The proposal and adoption of the Bill of Rights in Congress, first by the House and then by the Senate, is scrutinized, along with explanations and criticisms published in the public forum and ratification by the states. The historical portion of this study ends with a review of enactment of the militia act of 1792 by the First Federal Congress. Concluding remarks relate to pre-1990 Supreme Court jurisprudence.

## I. THE CONSTITUTIONAL CONVENTION OF 1787

In the Constitutional Convention of 1787, the issue of the militia was first raised in reaction to a proposal that the national legislature be empowered to negate state laws. Elbridge Gerry of Massachusetts observed on June 8 "that the proposed negative would extend to the regulations of the militia--a matter on which the existence of the state might depend. The national legislature, with such a power, may enslave the states."[22]

George Mason of Virginia raised the topic on August 18, proposing "a power to regulate the militia."[23] Reliance on the militia for the public defense would preclude a peacetime standing army. "Thirteen states will never concur in any one system, if the disciplining of the militia be left in their hands."[24] By regulating or standardizing the militia, the general government would assist the states in preserving their

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[22] J. ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 172 (1845).

[23] Id. at 440.

[24] Id.

powers.

Mason proposed a power "to make laws for the regulation and discipline of the militia of the several states, reserving to the states the appointment of officers."[25] "He considered uniformity as necessary in the regulation of the militia, throughout the Union."[26] Oliver Ellsworth of Connecticut proposed that "the militia should have the same arms and exercise, and be under rules established by the general government when in actual service of the United States; and when states neglect to provide regulations for militia, it should be regulated and established by the legislature of the United States."[27] He explained: "The whole authority over the militia ought by no means to be taken away from the states, whose consequence would pine away to nothing after such a sacrifice of power."[28]

John Dickinson of Delaware supported both Mason and Ellsworth. A most important matter was "that of the sword. His opinion was, that the states never would, nor ought to, give up all authority over the militia."[29] He proposed that the power extend to only part of the militia at any one time, "which, by rotation, would discipline the whole militia."[30] Mason then incorporated this idea of "a select militia" into his proposal.[31] That term had a less innocent meaning in the mind of Ellsworth, who "considered the idea

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[25] Id. at 443.

[26] Id.

[27] Id.

[28] Id.

[29] Id. at 444.

[30] Id.

[31] Id.

of a select militia as impracticable; and if it were not, it would be followed by a ruinous declension of the great body of the militia. The states would never submit to the same militia laws.'[32]

Roger Sherman of Connecticut opined that "the states might want their militia for defense against invasions and insurrections, and for enforcing obedience to their laws.'[33] Mason agreed, adding to his motion an exception that the general power would not extend to "such part of the militia as might be required by the states for their own use.'[34] Mason's proposals were then referred to committee.

When reported back to the convention, the militia clause provided that Congress may "make laws for organizing, arming, and disciplining the militia, and for governing such parts of them as may be employed in the service of the United States, reserving to the states, respectively, the appointment of the officers, and authority of training the militia according to the discipline prescribed . . . .'[35] On August 23, the following debate ensued:

> MR. SHERMAN moved to strike out the last member, "and authority of training," &c. He thought it unnecessary. The states will have this authority, if not given up. . . .
>
> MR. [Rufus] KING [of Massachusetts], by way of explanation, said, that by organizing, the committee meant, proportioning the officers and men -- by arming, specifying the kind, size, and calibre of arms -- and by disciplining, prescribing the manual exercise, evolutions, &c.
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> MR. SHERMAN withdrew his motion.
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> MR. GERRY. This power in the United States, as explained, is making the states

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[32] Id.

[33] Id. at 445.

[34] Id.

[35] Id. at 464.

> drill-sergeants. He had as lief let the citizens of Massachusetts be disarmed, as to take the command from the states, and subject them to the general legislature. It would be regarded as a system of despotism.
>
> MR. [James] MADISON [of Virginia] observed, the "arming," as explained, did not extend to furnishing arms; nor the term "disciplining," to penalties, and courts martial for enforcing them.
>
> MR. KING added to his former explanation, that arming meant not only to provide for uniformity of arms, but included the authority to regulate the modes of furnishing, either by the militia themselves, the state governments, or the national treasury; that laws for discipling must involve penalties, and everything necessary for enforcing penalties.[36]

ıs, which the people would furnish themselves. The objective was to provide discipline for the self-armed populace, not to arm or disarm select groups.

The provision would be adopted substantially as proposed. The convention rejected a more comprehensive substitute for the second clause to the effect that Congress would "establish a uniformity of arms, exercise, and organization for the militia . . . ."[37]

> MR. [Jonathan] DAYTON [of New Jersey] was against so absolute a uniformity. In some states there ought to be a greater proportion of cavalry than in others. In some places, rifles would be more proper; in others, muskets, &c.[38]

Cavalry, of course, were armed with pistol and sword, and perhaps carbine. Rifles were long-range weapons used by independent frontiersmen and backwoodsmen, while muskets were medium-range

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[36] Id. at 464-65.

[37] Id. at 465.

[38] Id.

arms favored in New England.[39] Uniform bore sizes among militiamen in a given locale would allow interchangeable ammunition, but differing terrain and habits of the people precluded uniform types of arms.

In response to Madison's argument that the states neglect the militia, Luther Martin of Maryland replied that "the states would never give up the power over the militia; and that, if they were to do so, the militia would be less attended to by the general than by the state governments."[40] After Gerry warned that granting Congress powers inconsistent with the existence of the states would lead to civil war, Madison rejoined that "as the greatest danger to liberty is from large standing armies, it is best to prevent them by an effectual provision for a good militia."[41] The militia clause would protect the power of the states to maintain militias and to retain their sovereignty by precluding a need for standing armies.

On September 12, George Mason "wished the plan had been prefaced with a bill of rights . . . . It would give great quiet to the people, and, with the aid of the state declarations, a bill might be prepared in a few hours."[42] Roger Sherman thought the state declarations sufficed, and that Congress could be trusted.[43] Mason pointed out that "the laws of the United States are to be paramount to state bills of rights."[44] The convention narrowly killed the motion for a committee to prepare a bill of rights.[45]

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[39] S. HALBROOK, A RIGHT TO BEAR ARMS 26, 32, 46 (1989).

[40] J. ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 466 (1845).

[41] Id. at 466-67.

[42] Id. at 538.

[43] Id.

[44] Id.

[45] Id.

On September 14, Mason moved to insert before the militia clause in Article I, §8, the declaration "and that the liberties of the people may be better secured against the danger of standing armies in time of peace."[46] Draftsman of the Virginia Declaration of Rights of 1776, Mason was the leading author of such declaratory clauses, and would be responsible for a similar one in what became the Second Amendment. Madison supported the motion: "as armies in time of peace are allowed, on all hands, to be an evil, it is well to discountenance them by the Constitution . . . ."[47] However, the convention voted against the proposal.

Attempts to declare various rights also failed. Charles Pinckney of South Carolina and Elbridge Gerry offered a declaration "that the liberty of the press should be inviolably observed."[48] Again, Roger Sherman killed that proposal with the remark, "It is unnecessary. The power of Congress does not extend to the press."[49] This opinion held sway, and the convention proposed the Constitution without a bill of rights.

Two days before the convention ended, delegate Thomas Fitzsimons of Pennsylvania asked Noah Webster to write in support of the proposed Constitution.[50] Webster responded with An Examination of the Leading Principles of the Federal Constitution, the first major pro-Constitution pamphlet.[51] Webster

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[46] Id. at 544.

[47] Id. at 545.

[48] Id.

[49] Id.

[50] R. ROLLINS, THE LONG JOURNEY OF NOAH WEBSTER 52-53 (1980).

[51] 13 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 405-406 (1981).

explained why the armed populace would remain sovereign under a constitution with an army but no bill of rights:

> Another source of power in government is a military force. But this, to be efficient, must be superior to any force that exists among the people, or which they can command; for otherwise this force would be annihilated, on the first exercise of acts of oppression. Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom in Europe. The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any band of regular troops that can be, on any pretence, raised in the United States. A military force, at the command of Congress, can execute no laws, but such as the people perceive to be just and constitutional; for they will possess the power, and jealousy will instantly inspire the inclination, to resist the execution of a law which appears to them unjust and oppressive.[52]

Tench Coxe, a friend of Madison and another prominent federalist, argued in his influential "An American Citizen" that, should tyranny threaten, the "friends to liberty . . . using those arms which Providence has put into their hands, will make a solemn appeal to 'the power above."[53] Coxe also wrote: "The militia, who are in fact the effective part of the people at large, will render many troops quite unnecessary. They will form a powerful check upon the regular troops, and will generally be sufficient to over-awe them . . . ."[54]

Stating the case against ratification of the Constitution without a bill of rights was Richard Henry Lee's Letters from the Federal Farmer, which were first published in October and November of 1787. Predicting the early employment of a standing army through taxation, Lee contended:

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[52] N. Webster, AN EXAMINATION OF THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION 43 (Philadelphia 1787).

[53] Coxe, "An American Citizen IV" (Oct. 21, 1787), in 13 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 433 (1981).

[54] Id. at 435.

> It is true, 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, therefore, it is urged, they will take care of themselves, that men who shall govern will not dare pay any disrespect to their opinions. It is easily perceived, that if they have not their proper negative upon passing laws in congress, or on the passage of laws relative to taxes and armies, they may in twenty or thirty years be by means imperceptible to them, totally deprived of that boasted weight and strength: This may be done in a great measure by congress; if disposed to do it, by modelling the militia. 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. . . . I see no provision made for calling out the posse comitatus for executing the laws of the union, but provision is made for congress to call forth the militia for the execution of them--and the militia in general, or any select part of it, may be called out under military officers, instead of the sheriff to enforce an execution of federal laws, in the first instance, and thereby introduce an entire military execution of the laws.[55]

As federalist and antifederalist pens clashed, the state ratifying conventions began to meet to consider the Constitution. Delaware, New Jersey, Georgia, Connecticut, Maryland, and South Carolina would quickly ratify without proposing a declaration of rights. In the other states, amendments would be seriously debated and proposed.

## II. THE STRUGGLE FOR RATIFICATION OF THE CONSTITUTION

### A. The Pennsylvania Convention and the Dissent of the Minority

The Pennsylvania convention was divided between federalists, who saw Congress' power over the militia as conductive to an armed populace, and antifederalists, who feared that without a bill of rights, the people could be disarmed. The antifederalists also sought an entirely separate amendment to recognize the state power to maintain militias.

James Wilson had served in the constitutional convention of 1787 and was well familiar with the explanation that Congress' power to arm the militia meant standardization, not disarmament. Congress

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[55] R. Lee, Letters of a Federal Farmer, 14 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 38-39 (1983).

could prescribe common sizes of barrels for firearms required to be possessed by the populace so that ammunition would be interchangeable:

> I believe any gentleman, who possesses military experience, will inform you that men without a uniformity of arms, accoutrements, and discipline, are no more than a mob in a camp; that, in the field, instead of assisting, they interfere with one another. If a soldier drops his musket, and his companion, unfurnished with one, takes it up, it is of no service, because his cartridges do not fit it. By means of this system, a uniformity of arms and discipline will prevail throughout the United States.[56]

John Smilie made the classic antifederalist argument against Congress' power:

> Congress may give use a select militia which will, in fact, be a standing army--or Congress, afraid of a general militia, may say there shall be no militia at all.
>
> When a select militia is formed; the people in general may be disarmed.[57]

This argument assumed that the right to keep and bear arms would be protected by the people combining into general militias to prevent being disarmed by select forces. By contrast, James Wilson used the following symbolic argument to contend that the Constitution allowed for the ultimate force in the populace: "In its principles, it is surely democratical; for, however wide and various the firearms of power may appear, they may all be traced to one source, the people.'[58]

The majority of the Pennsylvania convention refused to propose amendments to the Constitution, which was ratified on December 12, 1787. However, the "Dissent of the Minority of the Convention" demanded

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[56] 2 J. ELLIOT, DEBATES IN THE SEVERAL STATES CONVENTIONS 521 (1836).

[57] 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 509 (1976).

[58] Id. at 336.

a declaration of rights. Apparently written by Samuel Bryan, author of "Centinel," the document was first published on December 18, 1787 and was circulated throughout the country.[59] Among the rights declared was the following:

> That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to and be governed by the civil powers.[60]

The above tracked the language of the Pennsylvania Declaration of Rights of 1776 in guaranteeing the right to bear arms for self defense and defense of the state,[61] adding defense of the United States and hunting purposes as well. Bearing arms to hunt was not out of place in the article, because Pennsylvanians were very familiar with British laws which disarmed the people under the guise of game laws.[62] Similar to the federal First Amendment adopted later, which begins "Congress shall make no law," this proposal states that "no law shall be passed for disarming the people, or any of them"--except that criminals or particular dangerous individuals could be disarmed.

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[59] 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 617 (1976).

[60] Id. at 623-24.

[61] See S. HALBROOK, A RIGHT TO BEAR ARMS 22 (1989).

[62] Id. at 23-25. Accordingly, the very next proposal of the "Dissent of the Minority" was as follows:

> The inhabitants of the several states shall have liberty to fowl and hunt in seasonable times, on the lands they hold, and on all other lands in the United States not enclosed, and in like manner to fish in all navigable waters, and others not private property, without being restrained therein by any laws to be passed by the legislature of the United States.

2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 624 (1976).

The above clarifies that the terms "bear arms" is not linguistically restricted to matters of the militia or the national defense. Bearing arms for self-defense and hunting were proper purposes. Mention of standing armies and the subordination of the military to the civil power in the same article did not detract from the individual character of the right guaranteed. Indeed, the state power to maintain a militia was proposed in a completely separate amendment:

> That the power of organizing, arming, and disciplining the militia (the manner of disciplining the militia to be prescribed by Congress) remain with the individual states, and that Congress shall not have authority to call or march any of the militia out of their own state, without the consent of such state, and for such length of time only as such state shall agree.[63]

The "Dissent" deemed an analysis of some of the proposals to be necessary. The need to retain state power over the militia was explained as follows:

> The absolute unqualified command that Congress have over the militia may be made instrumental to the destruction of all liberty, both public and private; whether of a personal, civil, or religious nature.
>
> First, the personal liberty of every man probably from sixteen to sixty years of age may be destroyed by the power Congress have in organizing and governing of the militia. As militia they may be subjected to fines to any amount, levied in a military manner; they may be subjected to corporal punishments of the most disgraceful and humiliating kind, and to death itself, by the sentence of a court martial. . . .
>
> Secondly, the rights of conscience may be violated, as there is no exemption of those persons who are conscientiously scrupulous of bearing arms. These compose a respectable proportion of the community in the state. . . .
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> Thirdly, the absolute command of Congress over the militia may be destructive of public liberty; for under the guidance of an arbitrary government, they may be made the unwilling instruments of tyranny. The militia of Pennsylvania may be marched to New England or Virginia to quell an insurrection occasioned by the most galling oppression, and aided by the standing army, they will no

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[63] Id.

doubt be successful in subduing their liberty and independency . . . .[64]

Thus, the Pennsylvania convention minority made the first demand of a portion of a ratifying convention for a declaration of individual rights, including bearing arms, and a reservation of state powers, including organizing the militia.

Despite Pennsylvania having ratified the Constitution, antifederalists continued to demand amendments. One antifederalist expressed their attitude toward powder and lead (and hence arms) as follows: "the sons of freedom . . . may know the despots have not altogether monopolized these necessary articles."[65]

While the state had already ratified the Constitution, a number of Pennsylvanians gathered at the "Harrisburg Convention" which, on September 3, 1788, reiterated the call for amendments. Instead of a declaration of specific rights, the convention would have incorporated all of the rights declared in the state bills of rights: "that every reserve of the rights of individuals, made by the several constitutions of the states in the Union, to the citizens and inhabitants of each state respectively, shall remain inviolate, except so far as they are expressly and manifestly yielded or narrowed by the national Constitution."[66]

In a totally separate article, the following amendment was proposed: "That each state, respectively, shall have power to provide for organizing, arming, and disciplining the militia thereof, whensoever Congress shall omit or neglect to provide for the same."[67] Thus, individual rights were sharply contrasted

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[64] Id. at 638.

[65] Independent Gazetteer, Feb. 11, 1788, 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (Mfm. Supp.) 1695 (1976).

[66] 2 J. Elliot, DEBATES IN THE SEVERAL STATE CONVENTIONS 545 (1836).

[67] Id. at 545-46.

from state powers, a linguistic usage which would prevail throughout the next three years.

B. The Federalist Response

The right of the people to keep firearms, particularly those with military uses, argued the Constitution's proponents, would be recognized even without a bill of rights. In The Federalist No. 29, first published in the New York Independent Journal on January 9, 1788, Alexander Hamilton expounded the argument that it would be wrong for a government to require

> the great body of yeomanry and of the other classes of citizens to be under arms for the purpose of going through military exercises and evolutions, as often as might be necessary to acquire the degree of perfection which would entitle them to the character of a well regulated militia. . . .
>
> Little more can reasonably be aimed at with respect to the people at large than to have them properly armed and equipped. . . .
>
> . . . This will not only lessen the call for military establishments, but if circumstances should at any time oblige the government to form an army of any magnitude that army can never be formidable to the liberties of the people while there is a large body of citizens, little if at all inferior to them in discipline and the use of arms, who stand ready to defend their rights and those of their fellow citizens.[68]

In The Federalist No. 46, first published in the New York Packet on January 29, 1788, James Madison contended that "the ultimate authority . . . resides in the people alone." To a regular army of the United States government "would be opposed a militia amounting to near half a million citizens with arms in their hands." Alluding to "the advantage of being armed, which the Americans possess over the people of almost every other nation,'[69] Madison continued: "Notwithstanding the military establishments in the

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[68] 15 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 230 (1986).

[69] Id. at 492.

several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms."[70]

Madison sent a copy of the above to Tench Coxe, who found them "very valuable papers" and used the ideas in his own writings.[71] Coxe responded to the "Dissent of the Minority" in Pennsylvania as follows:

> The power of the sword, say the minority of Pennsylvania, is in the hands of Congress. My friends and countrymen, it is not so, for THE POWERS OF THE SWORD ARE IN THE HANDS OF THE YEOMANRY OF AMERICA FROM SIXTEEN TO SIXTY. The militia of these free commonwealths, entitled and accustomed to their arms, when compared with any possible army, must be tremendous and irresistible. Who are the militia? are they not ourselves. Is it feared, then, that we shall turn our arms each man against his own bosom. Congress have no power to disarm the militia. Their swords, and every other terrible implement of the soldier, are the birth-right of an American. . . . [T]he unlimited power of the sword is not in the hands of either the federal or state governments, but, where I trust in God it will ever remain, in the hands of the people.[72]

C. Samuel Adams' Proposal at the Massachusetts Convention

The demand for a bill of rights reached a high pitch in Massachusetts before the ink on the proposed Constitution had time to dry. A "ships's news" satire poking fun at various bill of rights proposals had this to say about the right to keep and bear arms: "It was absolutely necessary to carry arms for fear of pirates, & c. and . . . their arms were all stamped with peace, that they were never to be used but in case of hostile attack, that it was in the law of nature to every man to defend himself, and unlawful for any man to deprive

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[70] Id. at 493.

[71] Pennsylvania Gazette, Feb. 20, 1788, in 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 439 (1976).

[72] Pennsylvania Gazette, Feb. 20, 1788, in 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (Mfm. Supp.) at 1778-1780 (1976).

him of those weapons of self defence.'[73]

Antifederalist John DeWitt published a series in Boston in late 1787 which articulated the position against the Constitution. The following appeared in the American Herald on December 3:

> It is asserted by the most respectable writers upon government, that a well regulated militia, composed of the yeomanry of the country, have ever been considered as the bulwark of a free people. Tyrants have never placed any confidence on a militia composed of freemen.[74]

Dewitt predicted that Congress "at their pleasure may arm or disarm all or any part of the freemen of the United States, so that when their army is sufficiently numerous, they may put it out of the power of the freemen militia of America to assert and defend their liberties . . . .'[75]

In the Massachusetts ratifying convention, William Symmes warned that the new government at some point "shall be too firmly fixed in the saddle to be overthrown by any thing but a general insurrection.'[76] Yet fears of standing armies were groundless, affirmed Theodore Sedwick, who queried, "if raised, whether they could subdue a nation of freemen, who know how to prize liberty, and who have arms in their hands?'[77]

Samuel Adams, the most prolific proponent of the individual right to keep and bear arms in the pre-

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[73] Independent Chronicle (Boston), Oct. 25, 1787, 13 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 523 (1981).

[74] THE ANTIFEDERALIST PAPERS 75 (M. Borden ed. 1965).

[75] Id.

[76] 2 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS 74 (1836).

[77] Id. at 97.

Revolutionary era,[78] introduced the following amendments in the convention:

> And that the said Constitution be never construed to authorize Congress to infringe the just liberty of the press, or the rights of conscience; or to prevent the people of the United States, who are peaceable citizens, from keeping their own arms; or to raise standing armies, unless when necessary for the defence of the United States, or of some one or more of them; or to prevent the people from petitioning, in a peaceable and orderly manner, the federal legislature, for a redress of grievances; or to subject the people to unreasonable searches and seizures of their persons, papers or possessions.[79]

It is noteworthy that the declaration stressed the "keeping" of arms, a favorite theme of Samuel Adams and the other founding fathers of Massachusetts, which experienced the most dramatic arms seizures by the British before the Revolution.[80] However, the right to keep arms extended only to "peaceable citizens," not to criminals.

The federalist majority in the convention prevented passage of Adams' proposals. An antifederalist explained:

> It was his misfortune to have been misconceived, and the proposition was accordingly withdrawn--le[a]st the business of the convention (the session of which was then drawing to a period) might be unexpectedly protracted. His enemies triumphed exceedingly, and asserted to represent his proposal as not only an artful attempt to prevent the constitution being adopted in this state but as an unnecessary and improper alteration of a system, which did not admit of improvements.[81]

The Massachusetts convention ratified the constitution on February 7, 1788 without demanding a declaration of rights. Nonetheless, other than the standing army provision, Adams' proposal would

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[78] S. HALBROOK, A RIGHT TO BEAR ARMS 1-7 (1989).

[79] DEBATES OF THE MASSACHUSETTS CONVENTION OF 1788 at 86-87, 266 (Boston, 1856).

[80] See S. HALBROOK, A RIGHT TO BEAR ARMS 1-16, 39-41 (1989).

[81] From the Boston Independent Chronicle, Independent Gazetteer, Aug. 20, 1789, at 2, col. 2.

be seen as embodying the First, Second, and Fourth Amendments to the Constitution when they were being considered by Congress in 1789.[82]

### D. "Congress Shall Never Disarm Any Citizen": The New Hampshire Demands

When it ratified the Constitution on June 21, 1788, the New Hampshire convention became the first in which a majority voted to recommend a bill of rights, albeit a brief one. The recommended amendments concerning individual rights, which would be reflected in the First, Second, and Third Amendments, were as follows:

> X. 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; nor shall soldiers in a time of peace, be quartered upon private houses without the consent of the owners.
>
> XI. Congress shall make no laws touching religion or to infringe the rights of conscience.
>
> XII. Congress shall never disarm any citizen, unless such as are or have been in actual rebellion.[83]

The prohibitions on Congress would be absolute--"Congress shall make no laws" on religion and "shall never disarm any citizen"--except that "actual" insurgents could be disarmed. The exception was prompted by Shay's Rebellion in Massachusetts and the smaller Exeter, New Hampshire riot of 1786.[84]

One federalist writer set forth an interesting analysis of the New Hampshire and Pennsylvania

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[82] Id.

[83] 1 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS 326 (1836). "The right to bear arms, going back to the English Bill of Rights, received recognition in the Second Amendment to the Constitution. . . . Counting this article, seven out of twelve of New Hampshire's proposals were ultimately accepted." E. Dumbauld, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 21 n.37 (1957).

[84] S. HALBROOK, A RIGHT TO BEAR ARMS 75 (1989).

proposals. The Reverend Nicholas Collin of Philadelphia published a series under the penname "A Foreign Spectator" (from Sweden) entitled "Remarks on the Amendments to the Federal Constitutions" proposed by the state conventions. If the Constitution contained "a scrupulous enumeration of all the rights of the states and individuals, it would make a larger volume than the Bible . . . .'[85] Further, an army was no danger "especially when I am well armed myself." "While the people have property, arms in their hands, and only a spark of noble spirit, the most corrupt Congress must be mad to form any project of tyranny.'[86]

Collin further held that "a good militia is the natural, easy, powerful and honorable defense of a country.'[87] Identifying "a citizen, as a militia man," he referred to "that noble art, by which you can defend your life, liberty and property; your parents, wife and children!"[88]

Collin then considered "those amendments which particularly concern several personal rights and liberties.'[89] Attacking a proposal that the privilege of habeas corpus should not be suspended for more than six months, he supported his position by referring to two of the proposed arms guarantees:

> What is said on this matter, is a sufficient reply to the 12th amend. of the New-Hampshire convention, that congress shall never disarm any citizen, unless such as are or have been in actual rebellion. If, by the acknowledged necessity of suspending the privilege of habeas corpus, a suspected person may be secured, he may much more be disarmed. In such unhappy times it may be very expedient to disarm those, who cannot conveniently be guarded, or whose conduct has been less obnoxious. Indeed to prevent by such a gentle measure, crimes and misery,

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[85] "Remarks," No. II, Federal Gazette (Philadelphia), Oct. 24, 1788.

[86] No. IV, Fayetteville Gazette (N.C.), Oct. 12, 1789, at 1 col. 2-3 and 2, col. 1-2.

[87] No. VIII, Federal Gazette, Nov. 14, 1788.

[88] Id.

[89] No. XI, id., Nov. 28, 1788.

> is at once justice to the nation, and mercy to deluded wretches, who may otherwise, by the instigation of a dark and bloody ringleader, commit many horrid murders, for which they must suffer digan punishments.
>
> The minority of Pennsylvania seems to have been desirous of limiting the federal power in these cases; but their conviction of its necessity appears by those very parts of the 3rd and 7th amendments framed in this view, to wit, that no man be deprived of his liberty except by the law of the land, or the judgment of his peers--and that no law shall be passed for disarming the people, or any of them, unless for crimes committed, or real danger of public injury from individuals. The occasional suspension of the above privilege [of habeas corpus] becomes pro tempore the law of the land, and by virtue of it dangerous persons are secured. Insurrections against the federal government are undoubtedly real dangers of public injury, not only from individuals, but great bodies; consequently the laws of the union should be competent for the disarming of both.[90]

This is the only discussion in the ratification period of the limited power of Congress to disarm any person or group under the two proposed amendments. Since persons involved in an insurrection could be arrested, Collin reasoned, they could certainly also be disarmed. This argument reflected the experiences of the Revolution, in that a Tory who could be tarred and feathered could be disarmed first, and a Redcoat who could be shot could surrender his person and weapons instead. There is no hint in Collin's discussion that Congress could pass any law restricting firearms ownership by law-abiding citizens.

## E. "Things So Clearly Out of the Power of Congress": Debate in the Public Forum

Alexander White published a strong reply to the Pennsylvania "Dissent," which had generated opposition to the Constitution throughout several states, including Virginia. White timed publication of his

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[90] Id. Collin also opposed amendments guaranteeing a free press and jury trial, a prohibition on general warrants and cruel and unusual punishment, and all other proposed amendments. No. XII, id., Dec. 2, 1788 and No. XXVIII, id., Feb. 16, 1789.

article to precede the election of delegates to the Virginia ratifying convention, for which White was running.[91] White regarded the objections of the Pennsylvania minority as bordering on the dishonest, for Congress clearly had no power over rights such as the private bearing of arms:

> There are other things so clearly out of the power of Congress, that the bare recital of them is sufficient, I mean the "rights of conscience, or religious liberty--the rights of bearing arms for defence, or for killing game--the liberty of fowling, hunting and fishing . . . ." These things seem to have been inserted among their objections, merely to induce the ignorant to believe that Congress would have a power over such objects and to infer from their being refused a place in the Constitution, their intention to exercise that power to the oppression of the people.[92]

White proceeded to repeat the federalist dogma that a bill of rights would be dangerous, because it would suggest that Congress had power over any subject not explicitly listed in the bill of rights: "But if they had been admitted as reservations out of the powers granted to Congress, it would have opened a large field indeed for legal construction: I know not an object of legislation which by a parity of reason, might not be fairly determined within the jurisdiction of Congress.'[93]

Nonetheless, White recognized that abuse of a right could be penalized: "The freedom of speech and of the press, are likewise out of the jurisdiction of Congress.--But, if by an abuse of that freedom I attempt to excite sedition in the Commonwealth, I may be punished . . . .'[94] Similarly, Congress had no power over bearing arms for defense or hunting, but could punish armed sedition.

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[91] 8 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 401 (1988).

[92] Winchester Gazette (Virginia), February 22, 1788, in id. at 404.

[93] Id.

[94] Id. at 404-05.

After publication of the above, White was elected as a delegate to the Virginia convention,[95] where he voted with Madison and the other federalists to ratify the Constitution prior to amendments.[96]

An antifederalist who published a proposed declaration of rights in Virginia would have guaranteed a right to keep and bear arms for "the people," but would have stated "the national defense" as the objective of that right. Acting through Arthur Campbell in Pennsylvania, the "Society of Western Gentlemen"[97] proposed a declaration with the following: "The people have a right to keep and bear arms, for the national defense; standing armies in time of peace are dangerous to liberty, therefore the military shall be subordinate to the civil power."[98]

In a second series of Letters from the Federal Farmer, advertised in New York in early May 1788, Richard Henry Lee classified as "fundamental rights" the rights of free press, petition, and religion; the rights to speedy trial, trial by jury, confrontation of accusers and against self-incrimination; the right not to be subject to "unreasonable searches or seizures of his person, papers or effects"; and, in addition to the right to refuse quartering of soldiers, "the militia ought always to be armed and disciplined, and the usual defense of the country. . . ."[99] Since these rights were to be recognized in the Bill of Rights, Lee's concept of the militia warrants further examination:

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[95] Id. at 402.

[96] 3 ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS 654-55 (1836).

[97] 9 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 769-70 (1990).

[98] Virginia Independent Chronicle, April 30, 1788, in id. at 773-74.

[99] R. Lee, ADDITIONAL LETTERS FROM THE FEDERAL FARMER 53 (1788).

> A militia, when properly formed, are in fact the people themselves, and render regular troops in a great measure unnecessary. . . . [T]he constitution ought to secure a genuine [militia] and guard against a select militia, by providing that the militia shall always be kept well organized, armed, and disciplined, and include . . . all men capable of bearing arms; and that all regulations tending to render this general militia useless and defenceless, by establishing select corps of militia, or distinct bodies of military men, not having permanent interests and attachments in the community to be avoided.[100]

Thus, Lee feared that Congress, through its "power to provide for organizing, arming, and disciplining the militia" under Article I, §8 of the proposed Constitution, would establish a "select militia" apart from the people that would be used as an instrument of domination by the federal government. The contemporary argument that it is impractical to view the militia as the whole body of the people, and that the militia consists of the select corps now known as the National Guard, also existed during Lee's time. He refuted it in these terms:

> But, say gentlemen, the general militia are for the most part employed at home in their private concerns, cannot well be called out, or be depended upon; that we must have a select militia; that is, as I understand it, particular corps or bodies of young men, and of men who have but little to do at home, particularly armed and disciplined in some measure, at the public expense, and always ready to take the field. These corps, not much unlike regular troops, will ever produce an inattention to the general militia; and the consequence has ever been, and always must be, that the substantial men, having families and property, will generally be without arms, without knowing the use of them, and defenseless; whereas, <u>to preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them</u>; nor does it follow from this, that all promiscuously must go into actual service on every occasion. The mind that aims at a select militia, must be influenced by a truly anti-republican principle; and when we see many men disposed to practice upon it, whenever they can prevail, no wonder true republicans are for carefully guarding against it.[101]

Lee's view that a well-regulated militia was the armed populace rather than a select group, or "Prussian

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[100] <u>Id</u>. at 169.

[101] <u>Id</u>. at 170 (Emphasis added).

militia,"[102] was reiterated by many others. "Aristocratis" feared that the active militia would "quell insurrections that may arise in any parts of the empire on account of pretensions to support liberty, redress grievances, and the like."[103] "The second class or inactive militia, comprehends all the rest of the peasants; viz., the farmers, mechanics, labourers, & c. which good policy will prompt government to disarm. It would be dangerous to trust such a rabble as this with arms in their hands."[104] "M. T. Cicero" wrote to "The Citizens of America":

> Whenever, therefore, the profession of arms becomes a distinct order in the state . . . the end of the social compact is defeated. . . .
>
> No free government was ever founded, or ever preserved its liberty, without uniting the characters of the citizen and soldier in those destined for the defence of the state. . . . Such are a well regulated militia, composed of the freeholders, citizen and husbandman, who take up arms to preserve their property, as individuals, and their rights as freemen.[105]

### F. "That Every Man Be Armed": The Virginia Convention

Lee's antifederalist colleagues in Virginia, Patrick Henry and George Mason, would effectively argue the above positions in that state's ratifying convention. The result would be an irresistible push for what became the Second Amendment and the rest of the Bill of Rights.

Apparently before the convention began, the Virginia antifederalists had already drafted a declaration

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[102] "A Slave," Oct. 6, 1787, 13 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 345 (1981).

[103] The Government of Nature Delineated (1788), 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (Mfm. Supp.) 2524 (1976).

[104] Id. at 2526.

[105] State Gazette (Charleston), Sept. 8, 1788.

of rights which the convention would later adopt nearly verbatim. Its apparent author was George Mason, who merely added to the Virginia Declaration of Rights of 1776, which he also authored.

In one draft in Mason's handwriting, the following language appears: "That the people have a Right to mass & to bear arms; 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 . . . ."[106] A right to "mass" with arms and bear them recalled the revolutionary days when the armed multitudes would descend upon British colonial officials. This term would be dropped for the more conservative term "keep," which connotes the quiet storage and possession of arms in the home, and which prohibits governmental seizure of arms.

Just after the Virginia convention began, the Virginia antifederalists sent copies of a declaration to antifederalists in the New York convention. George Mason, chairman of a "Committee of Opposition," wrote to John Lamb, chairman of the Federal Republican Committee of New York, on June 9, 1788,[107] enclosing another draft (in Mason's handwriting) of a proposed declaration of "the essential and unalienable Rights of the People."[108] It included: "That the People have a Right to keep and to bear Arms; that a well regulated Militia, composed of the Body of the People, trained to arms, is the proper, natural, and safe Defence of a free State . . . ."[109] William Grayson and Patrick Henry also wrote letters dated the same,

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[106] F. MONAGHAN, HERITAGE OF FREEDOM 58 (1947).

[107] DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 813 (1990).

[108] Id. at 819.

[109] Id. 821.

enclosing the draft, to Lamb.[110] As will be seen, the Virginia convention would adopt this language almost verbatim.

The Virginia ratifying convention met from June 2 through June 26, 1788. Edmund Pendleton, opponent of a bill of rights, weakly argued that abuse of power could be remedied by recalling the delegated powers in a convention.[111] Patrick Henry shot back that the power to resist oppression rests upon the right to possess arms:

> Guard with jealous attention the public liberty. Suspect every one who approaches that jewel. Unfortunately, nothing will preserve it but downright force. Whenever you give up that force, you are ruined.[112]

Henry sneered, "O sir, we should have fine times, indeed, if, to punish tyrants, it were only sufficient to assemble the people! Your arms, wherewith you could defend yourselves, are gone . . . . Did you ever read of any revolution in a nation . . . inflicted by those who had no power at all?"[113]

Since the Constitution had not been tested, Henry's arguments cannot be considered mere exaggerations. He queried, "of what service would militia be to you, when, most probably, you will not have a single musket in the state? for, as arms are to be provided by Congress, they may or may not furnish them."[114] Quoting the militia clause of the Constitution, Henry continued: "By this, sir, you see that their

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[110] Id. at 813.

[111] 3 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 37 (1836).

[112] Id. at 45.

[113] Id. at 51.

[114] Id. at 51-52.

control over our last and best defence is unlimited. If they neglect or refuse to discipline or arm our militia, they will be useless: the states can do neither--this power being exclusively given to Congress."[115]

James Madison responded that the militia provision was "an additional security to our liberty, without diminishing the power of states in any considerable degree. . . . Congress ought to have the power to establish a uniform discipline throughout the states, and to provide for the execution of the laws, suppress insurrections, and repeal invasions: these are the only cases wherein they can interfere with the militia . . . ."[116]

In response to a suggestion that the militia would be made into an instrument of tyranny, Frances Corbin asked: "Who are the militia? Are we not militia? Shall we fight against ourselves?"[117] The federalist line was clear: an armed populace had no need of a written bill of rights.

Patrick Henry objected to the provision in Clause 17 for federal arms magazines in each state:

> Are we at last brought to such an humiliating and debasing degradation, that we cannot be trusted with arms for our own defense? Where is the difference between having our arms in our own possession and under our own direction, and having them under the management of Congress. If our defence be the real object of having those arms, in whose hands can they be trusted with more propriety, or equal safety to us, as in our own hands?[118]

Similarly, Henry reiterated his objections to the militia clause: "We have not one fourth of the arms that would be sufficient to defend ourselves. The power of arming the militia, and the means of purchasing arms, are taken from the states by the paramount power of Congress. If Congress will not arm them, they will

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[115] Id. at 52 (quoting U.S. Const., Art. 1, §8, cl. 16).

[116] Id. at 90.

[117] Id. at 112.

[118] Id. at 168-69 (referring to Art 1, §8, cl. 17).

not be armed at all."[119]

John Randolph denied that the federal power was exclusive of the states. "Should Congress neglect to arm or discipline the militia, the states are fully possessed of the power of doing it; for they are restrained from it by no part of the Constitution."[120] As will be seen, the convention would demand explicit recognition of this in an amendment to the Constitution. George Mason agreed with Henry. Attacking the idea of a standing army, Mason argued: "The militia may be here destroyed by that method which has been practised in other parts of the world before; that is, by rendering them useless--by disarming them. Under various pretenses, Congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for Congress has an exclusive right to arm them . . . ."[121] "When, against a regular and disciplined army, yeomanry are the only defense,--yeomanry, unskillful and unarmed,--what chance is there for preserving freedom?"[122] Mason recalled:

> Forty years ago, when the resolution of enslaving America was formed in Great Britain, the British Parliament was advised by an artful man [Sir William Keith], who was governor of Pennsylvania, to disarm the people; that it was the best and most effectual way to enslave them; but that they should not do it openly, but weaken them, and let them sink gradually, by totally disusing and neglecting the militia. [Here Mr. Mason quoted sundry passages to this effect.] This was a most iniquitous project. Why should we not provide against the danger of having our militia, our real and natural strength, destroyed? The general government ought, at the same time, to have some such power. But we need not give them power to abolish our militia. If they neglect to arm them, and prescribe proper discipline, they will be of no use. . . . I wish that, in case the general government should neglect to arm and discipline the militia, there should be an express declaration that the state governments might arm and discipline

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[119] Id. at 169 (referring to Art. 1, §8, cl. 18).

[120] Id. at 206.

[121] Id. at 379.

[122] Id. at 380.

them.[123]

Mason undoubtedly quoted from a page of Sir William Keith's Collection of Papers and Other Tracts published in London in 1740. Colonial Pennsylvania Governor Keith violated every tenet of the whig-republican philosophy which so influenced the Americans with the following words:

> A Militia in an arbitrary and tyrannical Government may possibly be of some Service to the governing Power; but we learn from Experience, that in a free Country it is of little use. The People in the Plantations are so few in Proportion to the Lands they Possess, that Servants being scarce, and Slaves so exceedingly dear, the men are generally under a Necessity to work hard themselves, in order to provide the common Necessaries of Life for their Families; so that they cannot spare a Day's Time without great Loss to their Interest; wherefore a Militia there would become more burdensome to the poor People, than it can be in any Part of Europe. Besides, it may be question'd how far it would be consistent with good Policy, to accustom all the able Men in the Colonies to be well exercised in Arms; it seems at present to be more advisable, to keep up a small regular Force in each Province, which on Occasion might be readily augmented; so that in Case of a War, or Rebellion, the whole of the regular Troops on the Continent, might without Loss of Time be united or distributed at Pleasure . . . .[124]

Keith's fear of "accustom[ing] all the able Men in the Colonies to be well exercised in Arms" was directly related to his fear of "rebellion." He was the apologist of colonial imperialism par excellence, holding that "Every Act of a dependant Provincial Government therefore ought to terminate in the Advantage of the Mother State"[125] and that none of the colonies "can with any Reason or good Sense pretend to claim an absolute legislative Power within themselves . . . ."[126]

While Mason may not have referred to it in the above speech, in a 1767 publication Keith advocated

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[123] Id.

[124] SIR WILLIAM KEITH, A COLLECTION OF PAPERS AND OTHER TRACTS 180 (London 1740)

[125] Id. at 170.

[126] Id. at 175.

resort to the stamp tax in order to support a "Body of Regular Troops" under the control of the Crown and independent of the colonial governors,[127] and as if that addition of insult to injury was not enough, referred to the "loose, disorderly, and insignificant Militia."[128] One purpose of the standing army would be conquest against the Indians for purposes of economic expansion.[129]

Mason had also made such arguments outside the convention. On May 26, Mason wrote to Thomas Jefferson:

> There are many other things very objectionable in the proposed new Constitution; particularly the almost unlimited Authority over the Militia of the several States; whereby, under Colour of regulating, they may disarm, or render useless the Militia, the more easily to govern by a standing Army; or they may harass the Militia, by such rigid Regulations, and intolerable Burdens, as to make the People themselves desire it's Abolition.[130]

James Madison countered Mason's arguments and quotations from Keith with the assertion that the federal and state governments were "coequal sovereignties," adding: "I cannot conceive that this Constitution, by giving the general government the power of the arming the militia, takes it away from the state governments. The power is concurrent, not exclusive."[131]

Henry again denied that the power was concurrent, and in a single argument asserted both the individual right to have arms and the state power to encourage a militia consisting of the armed populace:

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[127] SIR WILLIAM KEITH, TWO PAPERS ON THE SUBJECT OF TAXING THE BRITISH COLONIES IN AMERICA 9 (London 1767).

[128] Id. at 8.

[129] Id.

[130] 9 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 883 (1990).

[131] 3 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS 381 (1836).

> May we not discipline and arm them, as well as Congress, if the power be concurrent? So that our militia shall have two sets of arms, double sets of regimentals, & c.; and thus, at a very great cost, we shall be doubly armed. The great object is, that every man be armed. But can the people afford to pay for double sets of arms, & c.? Every one who is able may have a gun. But we have learned, by experience, that, necessary as it is to have arms, and though our Assembly has, by a succession of laws for many years, endeavored to have the militia completely armed, it is still far from being the case. When this power is given up to Congress without limitation or bounds, how will your militia be armed? You trust to chance; for sure I am that nation which shall trust its liberties in other hands cannot long exist. If gentlemen are serious when they suppose a concurrent power, where can be the impolicy to amend it? Or, in other words, to say that Congress shall not arm or discipline them, till the states shall have refused or neglected to do it?[132]

Again the federalists countered, with George Nicholas articulating more precisely why the militia power was not exclusive:

> But it is said, the militia are to be disarmed. Will they be worse armed than they are now? Still, as my honorable friend said, the states would have power to arm them. The power of arming them is concurrent between the general and state governments; for the power of arming them rested in the state governments before; and although the power be given to the general government, yet it is not given exclusively; for, in every instance where the Constitution intends that the general government shall exercise any power exclusively of the state governments, words of exclusion are particularly inserted. . . . It is, therefore, not an absurdity to say, that Virginia may arm the militia, should Congress neglect to arm them after Congress had armed them, when it would be unnecessary . . . .[133]

While not applied specifically to the right to have arms, the requirement that a license be obtained before exercise of a right was deemed to be infringement. George Nicholas argued: "The liberty of the press is secured. . . . In the time of King William, there passed an act for licensing the press. That was repealed. . . . The people . . . will not consent to pass an act to infringe it. . . ."[134] The term "infringe"

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[132] Id. at 386 (emphasis added).

[133] Id. at 391.

[134] Id. at 247.

would, of course, be used in the Second Amendment.

William Grayson reasserted the exclusive power interpretation, warning that the militia "might be armed in one part of the Union, and totally neglected in another." He pointed out that England had an excellent militia law for itself, entailing "thirty thousand select militia," but neglected the militia of Scotland and Ireland.[135]

John Marshall examined in detail the reasons why all powers not exclusively delegated are retained, illustrating his point by reference to Article I, Section 10 of the Constitution, which provides that "no state shall engage in war" unless invaded.[136] He continued:

> But the worthy member fears, that in one part of the Union they will be regulated and disciplined, and in another neglected. This danger is enhanced by leaving this power to each state; for some states may attend to their militia, and others may neglect them. If Congress neglect our militia we can arm them ourselves. Cannot Virginia import arms? Cannot she put them into hands of her militia-men?
>
> He then concluded by observing, that the power of governing the militia was not vested in the states by implication, because, being possessed of it antecedent to the adoption of the government, and not being divested of it by any grant or restriction in the Constitution, they must necessarily be as fully possessed of it as ever they had been.[137]

George Mason returned to the earlier remark by Francis Corbin, concerning "who are the militia, if they be not the people of this country . . . ? I ask, Who are the militia? They consist of now of the whole people, except a few public officers. But I cannot say who will be the militia of the future day. If that paper on the table gets no alteration, the militia of the future day may not consist of all classes, high and low, and

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[135] Id. at 418.

[136] Id. at 419-20.

[137] Id. at 421.

rich and poor . . . ."[138] The republican militia was the armed populace at large; to be avoided was a select militia or standing army.

In response, Nicholas detected a contradiction in the antifederalists, in that Grayson objected because there would be no select militia, while Mason objected that there would be. Mason replied that Grayson "had mentioned the propriety of having select militia, like those of Great Britain, who should be more thoroughly exercised than the militia at large could possibly be. But he, himself, had not spoken of a selection of militia, but of the exemption of the highest classes of the people from militia services . . . ."[139] Grayson agreed, opining that "a well-regulated militia ought to be the defence of this country. In some of our constitutions it is said so."[140] Article XIII of the Virginia Declaration of Rights, authored by George Mason, defined such a militia as "the body of the people, trained to arms."

Edmund Pendleton, president of the convention, got in the last word on the power of the state to have a militia. "The power of the general government to provide for arming and organizing the militia is to introduce a uniform system of discipline to pervade the United States of America. . . . [T]hough Congress may provide for arming them, . . . there is nothing to preclude [the states] from arming and disciplining them, should Congress neglect to do it."[141]

Similarly, the final word on the individual right to have arms was by Zachariah Johnson, who argued that the new Constitution could never result in religious persecution or other oppression because "the

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[138] Id. at 425-46.

[139] Id. at 428.

[140] Id. at 430.

[141] Id. at 440.

people are not to be disarmed of their weapons. They are left in full possession of them."[142]

The Virginia convention resolved the above and other disputed provisions by ratifying the Constitution on June 25, 1788, subject to the stipulation that "every power, not granted thereby, remains with [the people of the United States], and at their will . . . ."[143] On June 27, the convention recommended passage of a bill of rights and other amendments drafted by a committee (appointed two days before) which included Henry, Randolph, Mason, Nicholas, Grayson, Madison, John Marshall, and others.[144]

The recommended bill of rights asserting "the essential and unalienable rights of the people"[145] included the following: "That the people have a right to keep and bear arms; that a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state; that standing armies, in time of peace, are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the community will admit; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power."[146] George Mason simply added the first clause--the right to bear arms--to the rest of the provision he had drafted for the Virginia Declaration of Rights of 1776.[147] As noted, Mason, Henry, and Grayson had sent copies of a declaration with essentially the

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[142] Id. at 646.

[143] Id. at 656.

[144] Id.

[145] Id. at 657.

[146] Id. at 659.

[147] 3 MASON, PAPERS 1068-71 (1970).

same language to New York antifederalists at the beginning of the Virginia convention.[148]

The Virginia convention recommended an entirely different set of amendments to the text of the Constitution, including the provision: "That each state respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same."[149] This language was almost verbatim with that proposed by the Harrisburg Convention in Pennsylvania.[150] It did not appear in the draft declaration Mason had authored before the convention. As will be seen, this and the other amendments clarifying the federal-state relationship would later fail in Congress altogether. Even so, the essence of some of these proposals would be ratified in the more general Tenth Amendment.

### G. The New York Convention

The New York convention was preceded by serious antifederalist agitation. One "Common Sense" noted "that the chief power will be in the Congress, and that what is to be left of our government is plain, because a citizen may be deprived of the privilege of keeping arms for his own defence, he may have his property taken without a trial by jury . . . ."[151]

As noted, George Mason and other Virginia antifederalists sent letters and a draft declaration of rights to the New York antifederalists. Antifederalist newspaper editor Eleazer Oswald personally carried and

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[148] 9 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 821 (1990).

[149] 3 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS 660 (1836).

[150] Id., 2, at 545-46.

[151] New York Journal and Daily Advertiser, April 21, 1788, at 2, col. 2.

delivered this correspondence to John Lamb, chairman of the Federal Republican Committee, on June 21. New York Governor George Clinton, also President of the New York convention, gave copies of the letters to a Special Committee of Correspondence.[152]

Robert Yates, chairman of the Special Committee, wrote to George Mason on June 21, thanking him for the proposed amendments, and enclosing a draft agreed to by many of the New York convention delegates.[153] While this draft has not been located, the New York convention would adopt the Virginia language with a slight change in the militia clause.

Following Virginia by one month, New York ratified the Constitution on July 26, 1788. The convention predicated its ratification on the following interconnected propositions:

> That the powers of government may be reassumed by the people whensoever it shall become necessary to their happiness. . . .
>
> That the people have a right to keep and bear arms; that a well regulated militia, including the body of the people capable of bearing arms, is the proper, natural, and safe defence of a free state.[154]

Explicit in this language are the two independent declarations that individuals have a right to be armed and that the militia is the armed people. The convention declared "that the rights aforesaid cannot be abridged or violated . . . ."[155]

New York also adopted an entirely separate list of amendments concerning the structure of

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[152] 9 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 813 (1990).

[153] Id. at 825.

[154] J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS 327-28 (1836).

[155] Id. at 329.

government. While not including a state militia power like that of Virginia, the convention suggested the following: "That the militia of any state shall not be compelled to serve without the limits of the state, for a longer term than six weeks, without the consent of the legislature thereof."[156]

H. The North Carolina Convention

On August 1, 1788, the North Carolina convention demanded the adoption of a declaration of rights securing "the unalienable rights of the people" and of other amendments concerning governmental powers before it would ratify the Constitution.[157] Among the various rights antifederalists anticipated could be infringed was the right to have arms. Equating the militia with the people at large, William Lenoir argued that Congress

> could disarm the militia. If they were armed, they would be a resource against great oppressions . . . . If the laws of the Union were oppressive, they could not carry them into effect, if the people were possessed of proper means of defence.[158]

The declaration of rights included the following taken from Virginia's proposals:

> That the people have a right to keep and bear arms; that a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state; that standing armies, in time of peace, are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the community will admit; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power.[159]

A separate body of amendments dealt exclusively with the powers of the state and federal governments. Like the Harrisburg and Virginia conventions, the North Carolina convention proposed:

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[156] Id. at 331.

[157] 4 J. ELLIOT, DEBATES in the SEVERAL STATE CONVENTION 242 (1836).

[158] Id. at 203.

[159] Id. at 244.

That each state respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same; that the militia shall not be subject to martial law, except when in actual service in time of war, invasion, or rebellion; and when not in the actual service of the United States, shall be subject only to such fines, penalties, and punishments, as shall be directed or inflicted by the laws of its own state.[160]

North Carolina refused to ratify the Constitution until November 21, 1789, several weeks after Congress passed the Bill of Rights and proposed it to the states.

## I. The Armed Populace: Philosophical and Pre-Revolutionary Influences

While federalists and antifederalists differed on the need for a paper declaration, they were unified on the concept that an armed populace is necessary for a free state. As the ratification struggle ensued, prominent authors recalled philosophical influences and pre-Revolutionary experiences which linked the disarming of the people with oppression.

During 1787-1788, John Adams published his Defense of the Constitutions of Government of the United States of America, which became well known in the States and in Europe. Adams relied on classical sources, in the context of an analysis of quotations from Marchamont Nedham's The Right Constitution of a Commonwealth (1656), to vindicate a militia of all the people:

> "That the people be continually trained up in the exercise of arms, and the militia lodged only in the people's hands, or that part of them which are most firm to the interest of liberty, that so the power may rest fully in the disposition of their supreme assemblies." The limitation to "That part most firm to the interest of liberty," was inserted here, no doubt, to reserve the right of disarming all the friends of Charles Stuart, the nobles and bishops. Without stopping to enquire into the justice, policy, or necessity of this, the rule in general is excellent. . . . One consequence was, according to [Nedham], "that nothing could at any time be imposed upon the people but by their consent. . . . As Aristotle tells us, in his fourth book of Politics, the Grecian states ever had special care to place the use of and exercise of arms in the people, because the commonwealth is theirs who hold the arms; the sword and

[160] Id. at 245.

> sovereignty ever walk hand in hand together." This is perfectly just. "Rome, and the territories about it, were trained up perpetually in arms, and the whole commonwealth, by this means, became one formal militia."[161]

After agreeing that all the continental European states achieved absolutism by following the Caesarian precedent of erecting "praetorian bands, instead of a public militia,"[162] the aristocratic Adams recognized the individual right to use arms for personal protection but looked askance at the kind of armed protest exemplified in Shays' Rebellion: "To suppose arms in the hands of citizens, to be used at individual discretion, except in private self-defence, or by partial orders of towns . . . is a dissolution of the government."[163]

For the more radical Thomas Jefferson, individual discretion was acceptable in the use of arms not simply for private but for public defense as well. Writing in 1787, Jefferson stressed the inexorable connection between the right to have and use arms and the right to revolution as follows:

> God forbid we should ever be twenty years without such a rebellion. . . . And what country can preserve its liberties, if its rulers are not warned from time to time, that this people preserve the spirit of resistance? Let them take arms. . . . The tree of liberty must be refreshed from time to time, with the blood of patriots and tyrants.[164]

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[161] 3 J. ADAMS, A DEFENSE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 471-72 (1787-88). Newspapers of the time alluded to Rome's disarming of conquered peoples. The Massachusetts Centinel, April 11, 1787 recalled "the old Roman Senator, who after his country subdued the commonwealth of Carthage, had made them deliver up . . . their arms . . . and rendered them unable to protect themselves. . . ." 13 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 79 (Kaminski and Saladino eds. 1981).

[162] 3 J. ADAMS, A DEFENSE OF THE CONSTITUTIONS, 474 (1787-88).

[163] Id. at 475.

[164] Letter to Wm. S. Smith, 1787, in JEFFERSON, ON DEMOCRACY 20 (S. Padover ed. 1939). In his influential Letter of 1788, Luther Martin stated: "By the principles of the American revolution arbitrary power may, and ought to be, resisted even by arms, if necessary." 1 J. ELLIOT, DEBATES IN

In 1789, Dr. David Ramsay published his History of the American Revolution. A prominent federalist, Ramsay wrote this work while he was a member of the Continental Congress in the 1780s.[165] He also served as a delegate to the South Carolina ratification convention in 1788. Madison had served with Ramsey in the Continental Congress, and was aware of the book.[166]

Ramsey's account of grievances leading to the Revolution was apropos, because bills of rights were then being drafted to prevent a recurrence of infringements on rights such as keeping and bearing arms. Ramsey recalled General Gage's disarming of the inhabitants of Boston just after Lexington and Concord in 1775, the most significant infringement which would destine the Second Amendment's recognition of the right to "keep" arms, as follows:

> To prevent the people within Boston from co-operating with their countrymen without in case of an assault which was now daily expected, General Gage agreed with a committee of the town, that upon the inhabitants lodging their arms in Faneuil-hall or any other convenient place, under the care of the selectmen, all such inhabitants as were inclined, might depart from the town, with their families and effects. In five days after the ratification of this agreement, the inhabitants had lodged 1778 fire arms, 634 pistols, 273 bayonets and 38 blunderbusses. The agreement was well observed in the beginning, but after a short time obstructions were thrown in the way of its final completion, on the plea that persons who went from Boston to bring in the goods of those who chose to continue within the town, were not properly treated. Congress remonstrated on the infraction of the agreement, but without

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THE SEVERAL STATE CONVENTIONS 382 (1836). See New York Journal, Aug. 14, 1788, at 2, col. 4 (the people will resist arbitrary power). A writer in the Pennsylvania Gazette, April 23, 1788, in DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (Mfm.Supp.) at 2483 (Jensen ed. 1976), criticized "the loyalists in the beginning of the late war, who objected to associating, arming and fighting, in defense of our liberties, because these measures were not constitutional. A free
people should always be left . . . with every possible power to promote their own happiness."

[165] 1 D. RAMSAY, THE HISTORY OF THE AMERICAN REVOLUTION xliii (Liberty Classics ed. 1990).

[166] 13 PAPERS OF JAMES MADISON 233 (1981).

effect.[167]

Specifically, in the Declaration of Causes of Taking Up Arms of 1775, the continental Congress decried Gage's seizure of the arms that had been surrendered with the assurances that the arms would be kept only temporarily by the selectmen, and that the inhabitants would be allowed to depart from Boston.[168] Ramsey listed the specific types of arms seized--firearms (i.e. muskets and other long-barrelled shoulder arms), pistols, bayonets, and blunderbusses, which are short-barrelled shotguns.

It would be naive to believe that the inhabitants did not keep a substantial number of their arms. Ramsay noted Gage's skepticism as follows:

> The select-men gave repeated assurances that the inhabitants had delivered up their arms, but as a cover for violating the agreement, general Gage issued a proclamation, in which he asserted that he had full proof to the contrary. A few might have secreted some favourite arms, but nearly all the training arms were delivered up.[169]

Evidently, the American tradition of civil disobedience to firearms prohibitions was well entrenched by

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[167] 1 D. RAMSAY, THE HISTORY OF THE AMERICAN REVOLUTION 176 (1990).

[168] Connecticut Courant, July 17, 1775, at 2, col. 1.

[169] 1 D. RAMSAY, THE HISTORY OF THE AMERICAN REVOLUTION 177 (1990). Gage's proclamation, issued on June 19, 1775, stated:

> Whereas notwithstanding the repeated assurances of the selectmen and others, that all the inhabitants of the town of Boston had bona fide delivered their fire arms unto the persons appointed to receive them, though I had advices at the same time of the contrary, and whereas I have since had full proof that many had been perfidious in this respect, and have secreted great numbers: I have though fit to issue this proclamation, to require of all persons who have yet fire arms in their possession immediately to surrender them at the court house, to such persons as shall be authorized to receive them; and hereby declare that all persons in whose possession any fire arms may hereafter be found, will be deemed enemies to his majesty's government.

New York Journal, Aug. 31, 1775, at 1, col. 4.

1775.

Ramsay also recalled King George's 1774 ban on importation of firearms into the colonies. "The provincials laboured under great inconveniences from the want of arms and ammunition. Very early in the contest, the king of Great-Britain, by proclamation, forbad the exportation of warlike forces to the colonies."[170] This infringement on the right to keep arms was circumvented by domestic manufacture and smuggling.

Ramsay extolled the Americans' superiority in the bearing and use of arms. "All their military regulations were carried on by their militia, and under the old established laws of the land. For the defence of the colonies, the inhabitants had been, from their early years, enrolled in companies, and taught the use of arms."[171] Ramsey noted: "Europeans, from their being generally unacquainted with fire arms are less easily taught the use of them than Americans, who are from their youth familiar with these instruments of war . . . ."[172]

Ramsay pointed out the close connection between a nation of hunters and target shooters and a well regulated militia. Of the Battle of Bunker Hill, he wrote:

> None of the provincials in this engagement were riflemen, but they were all good marksmen. The whole of their previous military knowledge had been derived, from hunting, and the ordinary amusements of sportsmen. The dexterity which by long habit they had acquired in hitting beasts, birds, and marks, was fatally applied to the destruction of British officers.[173]

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[170] Id. at 243.

[171] Id. at 178.

[172] Id. at 181.

[173] Id. at 190.

Due to the shortage of gunpowder, the Revolutionary leaders encouraged preservation of the article only for overthrow of tyranny. "The public rulers in Massachusetts issued a recommendation to the inhabitants, not to fire a gun at beast, bird or mark, in order that they might husband their little stock for the more necessary purpose of shooting men."[174] But Ramsay remembered the difficulty of regimenting armed free thinkers: "The husbandmen who flew to arms were active, zealous, and of unquestionable courage, but to introduce discipline and subordination, among free men who were habituated to think for themselves, was an arduous labour."[175]

Ramsay aptly captured the Americans' perception of themselves in 1789 as free people who were entitled to speak their minds and to keep and bear arms. His account of British infringements on these rights must have been considered most timely by the architects and craftsmen of what became the Bill of Rights.

## III. THE ADOPTION OF THE BILL OF RIGHTS

### A. Madison's Proposed Amendments

In the first federal elections under the new Constitution, James Madison ran for a seat in the new House of Representatives against James Monroe, who championed the antifederalist cause. Departing from previous federalist positions, Madison championed a bill of rights, and won the election.[176]

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[174] Id at 207.

[175] Id.

[176] R. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 196 (1962).

In what is thought to be a speech he drafted to deliver to the House had he won the election, Monroe advocated a declaration of rights, stating:

> The following appears to be the most important objects of such an instrument. It should more especially comprise a doctrine in favor of the equality of human rights; of the liberty of conscience in matters of religious faith, of speech and of the press; of the trial by jury of the vicinage in civil and criminal cases; of the benefit of the writ of habeas corpus; of the right to keep and bear arms . . . . If these rights are well defined, and secured against encroachment, it is impossible that government should ever degenerate into tyranny.[177]

As fate would have it, Madison would give a similar speech. Madison had been keeping a scrapbook of newspaper clippings from around the country of proposed amendments, including those from the state conventions.[178] In his notes for a speech introducing what became the Bill of Rights, Madison wrote: "They [the proposed amendments] relate first to private rights--fallacy on both sides-espec[iall]y as to English Decl[aratio]n. of Rights--1. mere act of parl[iamen]t. 2. no freedom of press--Conscience . . . attainders--arms to protest[an]ts."[179]

Thus, Madison stated that the rights he would propose, such as freedom of the press and keeping and bearing arms, were "private rights." The "fallacy" as to the English Declaration of Rights was that it was a "mere act of Parliament" which Parliament itself could repeal; by contrast, the American bill of rights would not, as part of the Constitution, be subject to repeal by Congress. Moreover, the English Declaration either omitted or unreasonably limited fundamental rights. Freedom of the press was not recognized at all, and

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[177] James Monroe Papers, New York Public Library, Miscellaneous Papers and Undated Letters.

[178] R. RUTLAND, JAMES MADISON: THE FOUNDING FATHER 59-60 (1987).

[179] Madison, Notes for Speech in Congress, June 8, 1789, 12 MADISON PAPERS 193-94 (Rutland ed. 1979). In a letter to Edmund Pendleton, Oct. 20, 1788, Madison referred to proposed amendments as "those further guards for private rights . . . ." 4 MADISON PAPERS 60.

the right to keep and bear arms was limited to Protestants and further limited by class: "That the Subjects which are Protestants, may have Arms for their Defence suitable to their Condition, and as are allowed by Law."[180]

On June 8, 1789, in the House of Representatives, James Madison proposed his long-awaited bill of rights. Madison's draft contained both philosophical declarations and substantive restrictions. First, the Constitution would contain a new preamble with fundamental principles from the Virginia Declaration of Rights: "all power is originally vested in, and consequently derived from the people"; "government is instituted . . . for the benefit of the people"; and "the people have an indubitable, unalienable, and indefeasible right to reform or change their government . . . ."[181] The ultimate power is in the people, who would thereby have the right to be armed.

Madison then proposed that the text of the Constitution be amended to limit the powers of Congress. Civil rights could not be abridged on account of religious belief, no national religion could be established, and the rights of conscience could not be "in any manner, or on any pretext infringed."[182] "The people shall not be deprived or abridged of their right to speak," and a free press, "as one of the great bulwarks of liberty," would be inviolable.[183] "The people shall not be restrained from peaceably assembling and consulting for their common good," and petitioning the legislature for redress of grievances.[184] The next

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[180] An Act Declaring the Rights and Liberties of the Subject, 1 W. & M., Sess. 2, c.2 (1689).

[181] 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 9-10 (1986).

[182] Id. at 10.

[183] Id.

[184] Id.

guarantee referred to the same entity with rights--"the people"--and interposed a philosophical declaration between two restrictions: "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."[185]

This provision, which became the Second Amendment, began with a substantive guarantee in the nature of a command that the individual right to keep and bear arms shall not be infringed. Just as "keeping" arms referred to possession of arms by an individual, the terms "bear arms" meant simply to carry arms. Previously, Madison had sponsored a bill in the Virginia legislature under which a person who hunted deer illegally would be on probation for a year and could not "bear a gun out of his inclosed ground, unless whilst performing military duty . . . ."[186] The violator could bear a pistol, but not a shoulder arm except for militia duty.[187]

After the above command that the right shall not be infringed, Madison's proposal made the philosophical declaration that a well armed and regulated militia is the best security of a free country. This declaration did not limit the right, but gave the chief political reason for guaranteeing the right against governmental infringement. Keeping and bearing arms would be protected for all lawful purposes, but self-defense, hunting, shooting at the mark (i.e., target shooting), and other nonpolitical purposes had no place

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[185] Id.

[186] Bill for Preservation of Deer (1785), 2 JEFFERSON, PAPERS 443-44 (Boyd ed. 1951).

[187] "One species of fire-arm, the pistol, is never called a gun." NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) ("gun). Webster, a prominent federalist from 1787, also defined "bear" as "to carry" or "to wear . . . as, to bear a sword, a badge, a name; to bear arms in a coat." Id.

in a federal Constitution which delegated no power to regulate these activities. Since Congress could raise and support armies, the superiority of the militia in securing a "free" country must be declared. For the same reason, conscientious objectors could not be forced to bear arms in military service.

In contrast with the above substantive guarantees, most of the remainder of Madison's resolutions related to procedural guarantees such as double jeopardy, search and seizure, and other criminal matters. A longer version of what became the Ninth Amendment concluded the limitations on the power of Congress:

> The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people; or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.[188]

To the existing prohibitions on state action, Madison would have provided that no state shall "violate" the equal rights of conscience or a free press.[189] An amendment to the judiciary provisions of the Constitution would have asserted that in common law suits, "the trial by jury as one of the best securities to the rights of the people, ought to remain inviolate."[190] Like the "well-regulated-militia" declaration to the arms guarantee, this philosophical statement about "one of the best securities" of the peoples' rights was never intended as a limitation on the guarantee.

Toward the end of the Constitution, Madison would have inserted a version of what became the Tenth Amendment, absent recognition of power in "the people": "The powers not delegated by this constitution,

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[188] 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 11 (1986).

[189] Id.

[190] Id.

nor prohibited by it to the states, are reserved to the states respectively."[191]

Throughout, Madison utilized consistent word choice: governments have "powers," while only "the people" as individuals have "rights," albeit the people also have "powers."[192] At no point did Madison suggest that any of the bill of rights provisions were intended to protect state powers from federal intrusions, that "the people" really meant the state governments, that a state government had "rights" instead of "powers," or that the term "infringe" applied to anything other than governmental violation of individual rights. Madison conceptualized the rights he sought to guarantee as follows:

> The people of many States have thought it necessary to raise barriers against power in all forms and departments of Government, and I am inclined to believe, if once bills of rights are established in all the States, as well as the federal constitution, we shall find that although some of them are rather unimportant yet, upon the whole, they will have a salutary tendency. . . .
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> In some instances they assert those rights which are exercised by the people in forming and establishing a plan of Government. In other instances, they specify those rights which are retained when particular powers are given up to be exercised by the Legislature. In other instances, they specify those positive rights, which may seem to result from the nature of the compact. Trial by jury cannot be considered as a natural right, but a right resulting from a social compact which regulates the action of the community, but is as essential to secure the liberty of the people as any one of the pre-existent rights of nature. In other instances, they lay down dogmatic maxims with respect to the construction of the Government; declaring that the legislative, executive, and judicial branches shall be kept separate and distinct. . . .
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> But whatever may be the form which the several States have adopted in making

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[191] Id. at 12.

[192] As stated in R. Caplan, The History and Meaning of the Ninth Amendment, in THE RIGHTS RETAINED BY THE PEOPLE 278-79 & n.142 (1989):

> Madison's distinction between powers and rights assumed a sharply definable boundary between governmental and individual discretion. For Madison, a power was a delegated capacity allowing the government to perform certain kinds of acts. . . . It is Madison's consistent usage, which eliminated the ambiguous concept of state rights as referring to both governmental and personal rights, replacing it with the clearer power/right dichotomy, that was adopted with the Bill of Rights.

> declarations in favor of particular rights, the great object in view is to limit and qualify the powers of Government, by excepting out of the grant of power those cases in which the Government ought not to act, or to act only in a particular mode.[193]

According to the above analysis, the press, arms and similar substantive guarantees would be "rights which are retained" and among "the pre-existent rights of nature." These are the areas in which the Government "ought not to act." Jury trial and other procedural rights start from the social compact. They specify that the government must "act only in a particular mode."

The bill of rights was conceived to deny exercise of power whether by direct infringement or indirectly through exercise of a delegated power. Opponents of a bill of rights pointed only to the lack of an explicit power over any of the proposed guarantees. For instance, Congressman James Jackson of Georgia argued: "The gentleman endeavors to secure the liberty of the press; pray how is this in danger? There is no power given Congress to regulate this subject as they can commerce, or peace, or war."[194] Madison answered such arguments as follows:

> The General Government has a right to pass all laws which shall be necessary to collect its revenue; the means for enforcing the collection are within the direction of the Legislature: may not general warrants be considered necessary for the purpose, as well as for some purposes which it was supposed at the framing of their constitutions the State Governments had in view? If there was reason for restraining the State Governments from exercising this power, there is like reason for restraining the Federal Government.[195]

In other words, Congress has no delegated power to abridge freedom of the press or to infringe on the right to keep and bear arms. Nor may Congress exercise one of its delegated powers, such as taxation

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[193] 1 ANNALS OF CONGRESS 436-37 (1834).

[194] Id. at 442.

[195] Id. at 438.

or regulation of commerce, in such way as to infringe on the right to posses arms or to violate the right against unreasonable search and seizure.

While he followed the recommendations of several state conventions that a declaration of rights be adopted, Madison did not offer extensive amendments concerning the structure of government. One such amendment Madison neglected was the power of the states to organize militias.

Madison's colleagues clearly understood the arms guarantee to be protective of individual rights. Representative Fisher Ames of Massachusetts wrote: "Mr. Madison has introduced his long expected amendments. . . . It contains a bill of rights . . . the right of the people to bear arms."[196] Ames wrote to another correspondent: "The rights of conscience, of bearing arms, of changing the government, are declared to be inherent in the people."[197] Senator William Grayson of Virginia informed Patrick Henry: "Last Monday a string of amendments were presented to the lower House; these altogether respected personal liberty . . . ."[198] After reading the amendments which Madison sent him, Joseph Jones wrote to Madison that "they are calculated to secure the personal rights of the people . . . ."[199]

Ten days after the Bill of Rights was proposed in the House, Tench Coxe published his "Remarks on

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[196] Ames to Thomas Dwight, June 11, 1789, 1 WORKS OF FISHER AMES 52-53 (1854).

[197] Ames to F.R. Minoe, June 12, 1789, id. at 53-54.

[198] June 12, 1789, in 3 PATRICK HENRY 391 (1951). And see Joseph Jones to Madison, June 24, 1789, 12 MADISON PAPERS 258 (1978) (the amendments are "calculated to secure the personal rights of the people . . . ."); William L. Smith to Edward Rutledge, Aug. 9, 1789, 79 SOUTH CAROLINA HISTORICAL MAGAZINE 14 (1968) (the amendments "will effectually secure private rights . . . .").

[199] CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS, ed. H. Veit et al., 253 (1991).

the First Part of the Amendments to the Federal Constitution," under the pen name "A Pennsylvanian," in the Philadelphia Federal Gazette.[200] Probably the most complete exposition of the Bill of Rights to be published during its ratification period, the "Remarks" included the following: "As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow-citizens, the people are confirmed by the next article in their right to keep and bear their private arms." In short, what is now the Second Amendment was designed to guarantee the right of the people to have "their private arms" to prevent tyranny and to overpower an abusive standing army or select militia.

Coxe sent a copy of his article to Madison along with a letter of the same date. "It has appeared to me that a few well tempered observations on these propositions might have a good effect . . . . It may perhaps be of use in the present turn of the public opinions in New York state that they should be republished there."[201] Madison wrote back, acknowledging "your favor of the 18th instant. The printed remarks inclosed in it are already I find in the Gazettes here [New York]." Madison endorsed Coxe's analysis--including that the amendment protected the possession and use of "private arms"-- with the comment that ratification of the amendments "will however be greatly favored by explanatory strictures of a healing tendency, and is therefore already indebted to the co-operation of your pen."[202]

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[200] Federal Gazette, June 18, 1789, at 2, col. 1. Madison's proposals had been published two days before in the same paper. Federal Gazette, June 16, 1789, at 2, col. 2-3.

[201] Coxe to Madison, June 18, 1789, 12 MADISON PAPERS 239-40 (1978).

[202] Madison to Coxe, June 24, 1789, id. at 257.

Coxe's defense of the amendments was widely reprinted.[203] A search of the literature of the time reveals that no writer disputed or contradicted Coxe's analysis that what became the Second Amendment protected the right of the people to keep and bear "their private arms." The only dispute was over whether a bill of rights was even necessary to protect such fundamental rights. "One of the People" replied to Coxe's article with a response called "On a Bill of Rights," which held "the very idea of a bill of rights" to be "a dishonorable one to freemen." "What should we think of a gentleman, who upon hiring a waiting-man, should say to him 'my friend, please take notice, before we come together, that I shall always claim the liberty of eating when and what I please, of fishing and hunting upon my own ground, of keeping as many horses and hounds as I can maintain, and of speaking and writing any sentiments upon all subjects." As a mere servant, the government had no power to interfere with individual liberties in any manner without a specific delegation. "[A] master reserves to himself . . . everything else which he has not committed to the care of those servants."[204]

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[203] E.g., New York Packet, June 23, 1789 at 2, col. 1-2; Massachusetts Centinel (Boston), July 4, 1789, at 1, col. 2. Coxe's "Remarks on the Second Part of the Amendments," which appeared in the Federal Gazette, June 30, 1789, at 2 col. 1-2, exposited what is now the Ninth Amendment as follows:

> It has been argued by many against a bill of rights, that the omission of some in making the detail would one day draw into question those that should not be particularized. It is therefore provided, that no inference of that kind shall be made, so as to diminish, much less to alienate an ancient tho' unnoticed right, nor shall either of the branches of the Federal Government argue from such omission any increase or extension of their powers.

Three decades later, Coxe was still writing on the right to keep and bear arms. He referred to "the right to own and use arms and consequently of self-defense and of the public militia power . . . ." Democratic Press (Philadelphia), Jan. 23, 1823, at 2, col. 2. "Arms" included muskets, rifles, pistols, and swords. E.g., Democratic Press, Feb. 2, 1811, at 2.

[204] Federal Gazette, July 2, 1789, at 2, col. 1.

Samuel Nasson, a member of the Massachusetts ratification convention who voted against the Constitution, explained the common understanding of the arms guarantee in letter dated July 9 to Representative George Thatcher, a Federalist from that state:

> I find that Amendments are once again on the Carpet. I hope that such may take place as will be for the Best Interest of the whole. A Bill of rights well secured that we the people may know how far we may Proceed in Every Department. Then there will be no Dispute Between the people and rulers in that may be secured the right to keep arms for Common and Extraordinary Occasions such as to secure ourselves against the wild Beast and also to amuse us by fowling and for our Defence against a Common Enemy. You know to learn the Use of arms is all that can Save us from a foreign foe that may attempt to subdue us, for if we keep up the Use of arms and become well acquainted with them, we Shall always be able to look them in the face that arise up against us. For it is impossible to Support a Standing army large Enough to Guard our Lengthy Sea Coast, and now Spare me on the subject of Standing armies in a time of Peace. They always were first or last the downfall of all free Governments. It was by their help Caesar made proud Rome Own a Tyrant and a Traitor for a Master.
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> Only think how fatal they were to the peace of this Country in 1770, what Confusion they Brought on the Fatal 5 of March [the Boston Massacre]. I think the remembrance of that Night is enough to make us Careful how we Introduce them in a free republican Government--I therefore hope they will be Discouraged, for I think the man that Enters as a Soldier in a time of peace only for a living is only a fit tool to enslave his fellows. For this purpose was a Standing Army first introduced in the World. Another that I hope will be Established in the bill is trials by Juries in all Causes Excepting where the parties agree to be without.[205]

The above is the only known correspondence from a constituent to a Congressman which explained the understanding of the proposal that became the Second Amendment. The right to keep arms exists for "common,"i.e., ordinary, occasions and for "extraordinary" occasions, such as hunting beasts and fowl and protection from a common foe. The purpose was a citizenry with experience and knowledge in the use of arms which comes from regular possession of and practice with arms. Only an armed citizenry could

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[205] CREATING THE BILL OF RIGHTS, ed. H. Veit et al., 260-61 (1991) (Emphasis added). Spelling and punctuation corrected. For Nasson's earlier correspondence with Thatcher, see id. at 251.

prevent the oppression of a standing army.

Not all constituent mail favored a bill of rights. A week before Madison had introduced the amendments, federalist and Congregational pastor Jeremy Belknap wrote to Senator Paine Wingate of Massachusetts that Samuel Adams, on taking office as lieutenant governor, expressed

> his "devout & fervent wish" that "the people may enjoy well grounded confidence that their personal & domestic rights are secure." This is the same Language or nearly the same which he used in the Convention when he moved for an addition to the proposed Amendments--by inserting a clause to provide for the Liberty of the press--the right to keep arms--Protection from seizure of person & property & the Rights of Conscience. By which motion he gave an alarm to both sides of the house & had nearly overset the whole business which the Friends of the Constitution had been laboring for several Weeks to obtain. Should a Man tell me that he devoutly wished I might not break into his house & rob his desk--I think I should have a right to suspect that he viewed me in no better light than a Burglar. So if a Man publickly expresses a devout wish that the new Government may not rob him of his personal & domestic rights--I think it not uncharitable to conclude that he has a jealousy of its intentions.[206]

The paster resented Adams' attempt at the Massachusetts convention to recommend a bill of rights, and clearly did not support the impending federal bill of rights. Yet he correctly characterized of bill-of-rights supporters who wished for recognition of the "personal" right to keep arms--they feared that government would become criminal unless restrained.

### B. Action by the House Select Committee

The House select committee to consider amendments appointed on July 21, 1789, included John Vining of Delaware as chairman, Madison, Roger Sherman of Connecticut, and a member from each of the other states.[207] Sherman formulated his own draft of proposed amendments to the Constitution. Seven

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[206] CREATING THE BILL OF RIGHTS, ed. H. Veit et al., 241 (1991).

[207] The other members included Abrahim Baldwin, Aedanus Burke, Nicolas Gilman, George Clymer, Egbert Benson, Benjamin Goodhue, Elias Boudinot, and George Gale. 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 4 (1986).

of the ten amendments in the Sherman draft declared rights of the people, while three concerned the structure and power of government. Sherman's rights guarantees were far more limited than those of Madison: the draft included no declaration of the rights of the people to keep and bear arms, against unreasonable search and seizure, to counsel and to due process of law, and no mandate on separation of church and state (hardly a surprise from a Connecticut representative).[208]

As noted, Virginia and North Carolina proposed (1) a bill of rights, including a guarantee of the right of the people to keep and bear arms, with a declaration that a well regulated militia is necessary for a free state; and (2) a separate body of amendments relating to powers of Congress, including clarification that each state may provide for organizing and arming its own militia when Congress neglects to act. The Pennsylvania antifederalists--including the Dissent of the Minority and the Harrisburg Convention--also proposed an arms-right guarantee and a militia-power clarification. While the Sherman draft deleted the former, it included the latter in the following language:

> The militia shall be under the government of the laws of the respective states, when not in the actual service of the United States but such rules as may be prescribed by Congress for their uniform organization and discipline shall be observed in officering and training them; but military service shall not be required of persons religiously scrupulous of bearing arms.[209]

The last phrase concerning conscientious objectors had appeared in Madison's proposal guaranteeing the right of the people to keep and bear arms. Its placement in the Sherman draft with a state militia power was perhaps more logical, because it concerned not a "right" to bear arms, but an exemption from being "required" to bear arms in military service.

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[208] J. Hutson, The Bill of Rights: The Roger Sherman Draft, THIS CONSTITUTION, No. 18, at 36 (Spring/Summer 1988). The draft was discovered in 1987.

[209] Id.

Although there is no record of the Select Committee's proceedings, Sherman's restrictive notions of freedom raised eyebrows. Senator Richard Henry Lee wrote to Samuel Adams as follows:

> But so wonderfully are mens minds now changed upon the subject of liberty, that it would seem as if the sentiments which universally prevailed in 1774 were antediluvian visions, and not the solid reason of fifteen years ago! Among the many striking instances that daily occur, take the following, communicated to me by an honble. member of the H. of R. here. You well know our former respected, republican friend, old Mr. R-g-r-Sh-n {Roger Sherman} of Con. whose person, manners, and every sentiment appeared formerly to be perfectly republican. This very gentleman, our old republican friend opposed a motion for introducing into a bill of rights, an idea that the Military should be subordinate to the Civil power. His reason as stated was 'that it would make the people insolent!" This was in a committee of the H. of R. for reporting amendments to the Constitution.[210]

While the Committee did not adopt the amendment, subordination of the military to the civil power was already implicit in the text of the Constitution. Nonetheless, Sherman's alleged comment is consistent with his restrictive concept of a bill of rights.

Sherman's draft was not adopted by the House select committee, which instead, on July 28, reported Madison's proposals as amended by the committee. Had the House committee intended to confirm a state militia power, Sherman's proposal or the comparable state proposals would have been appropriate. Instead, the committee reported the following: "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."[211]

The select committee did not change Madison's words that "the right of the people to keep and bear arms shall not be infringed," although it moved the philosophical declaration about a well regulated militia to its position before, rather than after, the substantive guarantee. It also inserted, consistent with the

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[210] Letter dated August 8, 1789. CREATING THE BILL OF RIGHTS, ed. H. Veit, 272 (1991).

[211] 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 28 (1986).

phraseology of the Virginia, New York, and North Carolina convention demands, the definition of such a militia as "composed of the body of the people."

The select committee version used the term "infringed" in three other instances, including two instances in which Madison's original draft had used the terms "violated" or inviolate."[212] The equal rights of conscience, and the freedom of speech, press, assembly, and petition could not be "infringed,"[213] and no state could "infringe" conscience, speech, press, or jury trial in criminal cases.[214]

Meanwhile, debate over the proposed amendments raged in the newspapers. The underlying fear against a government monopoly of arms was expressed thus: "Power should be widely diffused . . . . The monopoly of power, is the most dangerous of all monopolies."[215] The following reflects the understanding that the keeping and bearing of private arms contributed to a well-regulated militia:

> A late writer . . . on the necessity and importance of maintaining a well regulated militia, makes the following remarks:--A citizen, as a militia man is to perform duties which are different from the usual transactions of civil society....[W]e consider the extreme importance of every military duty in time of war, and the necessity of acquiring an habitual exercise of them in time of peace . . . .[216]

The Second Amendment was not intended to protect the citizens having arms only in their militia capacity. Rather, it originated in part from Samuel Adams's proposal (which contained no militia clause)

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[212] Compare id. at 10-11 with 28-29.

[213] Id. at 28.

[214] Id. at 29.

[215] Political Maxims, New York Daily Advertiser, Aug. 15, 1789, at 2, col. 1. And see Patrick Henry to Richard Henry Lee, Aug. 28, 1789, 3 PATRICK HENRY 398 (1951): "For Rights, without having power and might is but a shadow."

[216] Independent Gazetteer (Philadelphia), Aug. 18, 1789, at 3, col. 1.

that Congress could not disarm any peaceable citizens:

> It may well be remembered, that the following "amendments" to the new constitution of these United States, were introduced to the convention of this commonwealth by . . . SAMUEL ADAMS . . . [E]very one of the intended alterations but one [i.e., proscription of standing armies] have been already reported by the committee of the House of Representatives, and most probably will be adopted by the federal legislature. In justice therefore for that long tried Republican, and his numerous friends, you gentlemen, are requested to republish his intended alterations, in the same paper, that exhibits to the public, the amendments which the committee have adopted, in order that they may be compared together. . . .
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> "And that the said constitution be never construed to authorize congress . . . to prevent the people of the United States, who are peaceable citizens, from keeping their own arms. . . ."[217]

C. House Debate

On July 28, Chairman Vining presented the select committee report. The House Committee of the Whole debated the select committee's proposals for over a week.

Just as in the constitutional convention of 1787, Roger Sherman continued to object to Bill of Rights guarantees because Congress had no power over such areas. He thought the amendment that "no religion shall be established by law" to be "altogether unnecessary, inasmuch as Congress had no authority whatever delegated to them by the constitution to make religious establishments; he would, therefore, move to have it struck out."[218]

Once again, Madison responded that delegated powers could not be exercised to infringe on rights, and that explicit guarantees would prevent misconstruction:

> Whether the words are necessary or not, he did not mean to say, but they had been required by some of the State Conventions, who seemed to entertain an opinion that under the clause of the constitution, which gave power to Congress to make all laws necessary and proper to carry into

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[217] From the Boston Independent Chronicle, Independent Gazetteer, Aug. 20, 1789, at 2, col. 2.

[218] 1 ANNALS OF CONGRESS 729-30 (1834).

> execution the constitution, and the laws made under it, enabled them to make such laws of such a nature as might infringe the rights of conscience, and establish a national religion; to prevent these effects he presumed the amendment was intended, and he thought it as well expressed as the nature of the language would admit.[219]

The amendments continued to be viewed as protective of individual rights. On August 9, Representative William L. Smith of South Carolina wrote to fellow federalist Edward Rutledge: "The Committee on amendmts. have reported some, which are thought inoffensive to the federalists & may do some good on the other side . . . . There appears to be a disposition in our house to agree to some, which will more effectually secure private rights, without affecting the structure of the Govt."[220]

The proposals resulting in the Second Amendment were discussed on August 17, 1789. The recorded debates do not include an explanation of the scope of the right to keep and bear arms or any objection to a declaration of that right. Unfortunately, analysis of debate on any of the Bill of Rights provisions must consider that the Annals of Congress reflect "the unreliable shorthand reports of one Thomas Lloyd, the incompetent, often inebriated stenographer who was supposed to have been recording the discussions in the House of Representatives."[221]

In any event, Lloyd's debates appear to reflect accurately the concern that an armed populace as militia contributes to a free state by reducing the need for and danger of a standing army, and the objection that Congress might rely on the conscientious objector clause as a ruse to disarm persons Congress decided are religiously scrupulous.

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[219] Id. at 730.

[220] CREATING THE BILL OF RIGHTS, ed. H. Veit et al., 272-73 (1991).

[221] J. Hutson, The Bill of Rights, THIS CONSTITUTION, No. 18, at 36 (Spring/Summer 1988).

Elbridge Gerry clarified that the purpose of the amendment was protection from oppressive government,[222] and thus the government should not be in a position to exclude the people from bearing arms:

> This declaration of rights, I take it, is intended to secure the people against the mal-administration of the Government; if we could suppose that, in all cases, the rights of the people would be attended to, the occasion for guards of this kind would be removed. Now, I am apprehensive, sir, that this clause would give an opportunity to the people in power to destroy the constitution itself. They can declare who are those religiously scrupulous, and prevent them from bearing arms.
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> What, sir, is the use of militia? It is to prevent the establishment of a standing army, the bane of liberty. Now, it must be evident, that, under this provision, together with their other powers, Congress could take such measures with respect to a militia, as to make a standing army necessary. Whenever Government mean to invade the rights and liberties of the people, they always attempt to destroy the militia, in order to raise an army upon their ruins. This was actually done by Great Britain at the commencement of the late revolution. They used every means in their power to prevent the establishment of an effective militia to the eastward. The Assembly of Massachusetts, seeing the rapid progress that administration were making to divest them of their inherent privileges, endeavored to counteract them by the organization of the militia; but they were always defeated by the influence of the Crown.[223]

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[222] Concerning the proposed preamble phrase, "government being intended for the benefit of the people," Gerry responded:

> This holds up an idea that all the Governments of the earth are intended for the benefit of the people. Now, I am so far from being of this opinion, that I do not believe that one out of fifty is intended for any such purpose. I believe the establishment of most Governments is to gratify the ambition of an individual, who, by fraud, force, or accident, had made himself master of the people. If we contemplate the history of nations, ancient or modern, we shall find they originated either in fraud or force, or both. If this is demonstrable, how can we pretend to say that Governments are intended for the benefit of those who are oppressed by them. 1 ANNALS OF CONGRESS 717-18 (1834).

Given this political realism, the right of the people to keep and bear arms was considered by the founders as necessary to check oppressive government.

[223] 1 ANNALS OF CONGRESS 749-50 (1834).

Gerry argued that the federal government should have no authority to categorize any individual as unqualified under the amendment to bear arms. "Now, if we give a discretionary power to exclude those from militia duty who have religious scruples, we may as well make no provisions on this head.'[224] Gerry therefore moved that the conscientious-objector clause be limited to actual members of religions sects scrupulous of bearing arms.[225] Keeping and bearing arms was a right of "the people," none of whom should thereby be disarmed under any pretense, such as the government's arbitrary determination that they are religiously scrupulous (or perhaps that they are not active members of a select militia).

In reply, James Jackson of Georgia "did not expect that all the people of the United States would turn Quakers or Moravians; consequently, one part would have to defend the other in case of invasion." The reference to "all the people" indicated again the centrality of the armed populace for defense against foreign attack. After further discussion, Gerry objected to the wording of the first part of the proposed amendment:

> A well regulated militia being the best security of a free State, admitted an idea that a standing army was a secondary one. It ought 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.[226]

Gerry's words exhibit again the general sentiment that security rested on the armed populace as a whole, not on specialized bodies of armed men. The lack of a second to his proposal suggests that the keeping and bearing of arms by the citizens at large would constitute a sufficiently well regulated militia to

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[224] Id. at 750.

[225] Id.

[226] Id. at 750-51.

secure a free state, and thus there was no need to make it, in Gerry's words, "the duty of the Government to provide this security."

Aedanus Burke of South Carolina then sought to add to the personal arms guarantee the long-standing antifederalist demand:

> A standing army of regular troops in time of peace is dangerous to public liberty, and such shall not be raised or kept up in time of peace but from necessity, and for the security of the people, nor then without the consent of two-thirds of the members present of both Houses; and in all cases the military shall be subordinate to the civil authority.[227]

The motion was defeated,[228] reflecting unanimity about the right of the people to keep and bear their private arms, but allowance for a limited army.

After further debate, the Committee of the Whole rose and submitted the select committee report to the House with minor changes. On August 20, the House considered what became the Second Amendment.

Debate on the exemption of religiously scrupulous persons from being compelled to bear arms highlights the sentiment that not only bearing, but also merely keeping of arms by the people was considered both a right and a duty to prevent standing armies. Thomas Scott of Pennsylvania objected that the exemption would mean that "a militia can never be depended upon. This would lead to the violation of another article in the constitution, which secures to the people the right of keeping arms, and in this case recourse must be had to a standing army."[229]

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[227] Id. at 751.

[228] Id. at 752.

[229] Id. at 766-67.

"What justice can there be in compelling them to bear arms?" queried Elias Boudinot of New Jersey. "Now, by striking out the clause, people may be led to believe that there is an intention in the General Government to compel all its citizens to bear arms.'[230] The proposed amendment was finally accepted after the insertion of the words "in person" at the end of the clause.[231]

Many of the proposed amendments were subjected to criticism. But the Second Amendment was apparently never attacked, aside from one editorial that argued the inefficiency of the militia clause, never questioning the right-to-bear-arms clause. After quoting the language of the proposal as it was approved by the House, the prominent antifederalist "Centinel" opined:

> It is remarkable that this article only makes the observation, 'that a well regulated militia, composed of the body of the people, is the best security of a free state;' it does not ordain, or constitutionally provide for, the establishment of such a one. The absolute command vested by other sections in Congress over the militia, are not in the least abridged by this amendment. The militia may still be subjected to marital law . . ., may still be marched from state to state and made the unwilling instruments of crushing the last efforts of expiring liberty.[232]

"Centinel" was, of course, Samuel Bryan, author of the Pennsylvania Dissent of the Minority, which demanded recognition of the right to bear arms for defense of self, state, and country, and for hunting. By not objecting to lack of such a list of purposes in the Second Amendment, the antifederalists must have

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[230] Id. at 767. Actually, the opposite may be inferred by the eventual deletion of this part of the amendment, the purpose of which was to guarantee the individual "right" to keep and bear arms rather than to create a "duty" to do so. Arguably, this deletion was meant to preclude any constitutional power of the government to compel any person to bear arms rather than to exempt only the religiously scrupulous. See J. GRAHAM, A CONSTITUTIONAL HISTORY OF THE MILITARY DRAFT 45-50 (1971) (compulsory military service confined to the militia; individual right to keep and bear arms prevents military despotism).

[231] 1 ANNALS OF CONGRESS 767 (1834).

[232] Centinel Revived, No. xxix, Independent Gazetteer, Sept. 9, 1789, at 2, col. 2.

assumed that exercise of the right to keep and bear arms would extend to all lawful purposes. By the same token, Samuel Adams and the drafters of the New Hampshire proposal did not object to the lack of an explicit exclusion of criminals from the right to keep and bear arms, because this too was understood.

Centinel's observations indicate the understanding that the Second Amendment's militia clause was merely declaratory and did not protect state powers to maintain militias to any appreciable degree. That antifederalists never attacked the right-to-bear-arms clause demonstrates that it recognized a full and complete guarantee of individual rights to have and use private arms. Surely a storm of protest would have ensued had anyone hinted that the right only protected a government-armed select militia.

### D. Senate Debate

"The lower house sent up amendments which held out a safeguard to personal liberty in great many instances, but this disgusted the Senate," Senator William Grayson wrote to Patrick Henry when the House transmitted its amendments to the Senate.[233] The amendments were "treated contemptuously" by Senators Gouverneur Morris of New York, Ralph Izard of South Carolina, and John Langdon of New Hampshire, who tried but failed to postpone them until the next session.[234]

The 22-member Senate, which met in secret, began consideration of the amendments on September 3, 1789. It sliced out parts of what became the First Amendment, including the phrase "nor shall the rights of conscience be infringed," but rejected a motion to delete a version of First Amendment altogether.[235] The next day the Senate passed a modified amendment protecting speech, press, and petition, and

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[233] Grayson to Henry, Sept. 29, 1789, 3 PATRICK HENRY 406 (1951).

[234] THE DIARY OF WILLIAM MACLAY 133 (1988).

[235] JOURNAL OF THE FIRST SESSION OF THE SENATE 70 (Washington, D.C. 1820).

recognized "the right of the people peaceably to assemble and consult for their common good . . . ."[236]

The Senate then considered a motion to add the following clauses to the House version of what became the Second Amendment right to keep and bear arms:

> 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 army 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 soldier shall be enlisted for any longer term than the continuance of the war.[237]

This failed by a vote of six to nine. Those favoring the clauses included Virginia Senators Richard Henry Lee and William Grayson, and Senators Pierce Butler (South Carolina), James Gunn (Georgia), John Henry (Maryland), and Paine Wingate (New Hampshire). Association of this standing army prohibition with the right of the people to keep and bear arms did not detract from the personal nature of the right, but reflected Lee's premise that "to preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them . . . ."[238] The individual right to keep and bear arms checks and prevents oppression from a standing army

The Senate's dim view of some amendments is reflected in a letter form Theodorick Bland Randolph to St. George Tucker, antifederalist Virginians and relatives of Congressmen. It stated:

> The house of Representatives have been for some time past engaged on the subject of amendments to the constitution, though in my opinion they have not made one single material one. The senate are at present engaged on that subject; Mr. Richd. H. Lee told me that he proposed to strike out the standing army in time of peace but could not carry it. He also says that it has been proposed, and

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[236] Id. at 71.

[237] Id.

[238] R. Lee, ADDITIONAL LETTERS FROM THE FEDERAL FARMER 170 (1788).

warmly favoured that, liberty of Speech and of the press may be stricken out, as they only tend to promote licenciousness.[239]

The members of the majority who killed the anti-standing-army propositions[240] may have been concerned with its length as well as probably opposed the requirement that two-thirds of the Congress must authorize a standing army. However, the Senate went on to pass the individual guarantee proposed by the House but "amended to read as followeth: 'A well regulated militia, being the best security of a free state, the right of the people to keep and bear arms, shall not be infringed."[241]

In comparing the House version with this Senate version, the House redundantly mentions "the people" twice--once in defining "militia" as the "body of the people," and again as the entity with the right to keep and bear arms. The Senate more succinctly avoided repetition by deleting the well-recognized definition of the militia as "the body of the people."

The Senate also deleted the phrase that "no person religiously scrupulous shall be compelled to bear arms"--perhaps because the amendment depicts the keeping and bearing of arms as an individual "right" (and not as a duty) for both public and private purposes, and perhaps to preclude any constitutional authority of the government to "compel" individuals (even those without religious scruples) to bear arms for any purpose. Deletion of the clause also addressed Congressman Gerry's argument in the House that "this clause would give an opportunity to the people in power to destroy the constitution itself. They can declare

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[239] Letter dated Sept. 9, 1789 (spelling corrected). CREATING THE BILL OF RIGHTS, ed. Veit et al., 293 (1991).

[240] Those voting against the clauses included Senators Carroll, Dalton, Ellsworth, Elmer, Johnson, King, Paterson, Read, and Schuyler. JOURNAL OF THE FIRST SESSION OF THE SENATE 71 (1820).

[241] Id.

who are those religiously scrupulous, and prevent them from bearing arms.'[242]

An additional day of debate resulted in an important phrase being added to the House version of what became the Tenth Amendment: "The powers not delegated to the state by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.'[243] While normally more conservative than the House, the Senate thereby made clear that "the people" have "powers" as well as "rights." By contrast, the state and federal governments have "powers" only and no "rights.'[244] Only individuals have "rights." Moreover, the Senate clearly distinguished between "the states" and "the people." "Rights" of "the people," such as keeping and leaving arms, could pertain only to individual persons, not states. Finally, "powers" are either "delegated" or "reserved," while individual "rights," whether of conscience or keeping arms, cannot be "infringed."

What "powers" do "the people" have in contradistinction to "rights?" Perhaps suffrage would be a power, as would resistance to oppression and armed overthrow of tyranny. The right to keep and bear arms, as the Revolution proved, was the basis for the ultimate exercise of "power" by the people, and would hopefully render exercise of this power of the people unnecessary in the new constitutional republic.

The next day, September 8, the Senate rejected a string of amendments from the Virginia Declaration

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[242] 1 ANNALS OF CONGRESS 750 (Aug. 17, 1789).

[243] JOURNAL OF THE FIRST SESSION OF THE SENATE 73 (1820). Actually, the House voted to insert "or to the people" in the same place, but for some reason the phrase was not included in the final House resolution. 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 31 n.34 (1986).

[244] E.g., U.S. Const., Art. I, §8 ("the Congress shall have power"); Art. II, §1 ("the executive power"); Art. III, §1 ("the judicial power").

of Rights,[245] undoubtedly promoted by Lee and Grayson--the natural rights to life, liberty, and property; that "all power" is vested in "the people"; and that "the doctrine of non-resistance, against arbitrary power and oppression, is absurd, slavish, and destructive of the good and happiness of mankind."[246] Unlike the declaration of specific rights, such as the press and arms, these proposals were perceived perhaps as useless truisms or platitudes. The reservation of "power" in "the people" in the Tenth Amendment may have been intended to abbreviate some of the above principles.

Attention then turned toward amendments to limit the military power of the federal government. Renewed proposals to require two thirds of both Houses of Congress to consent to a standing army, and limits on the terms of enlistment of soldiers, again failed.[247] The Senate then rejected an explicit reservation of the state power to maintain militias incorporating the language of the Harrisburg, Virginia, and North Carolina conventions:

> That each state, respectively, shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same; that the militia shall not be subject to martial law, except when in actual service, in time of war, invasion, or rebellion; and when not in the actual service of the United States, shall be subject only to such fines, penalties, and punishments, as shall be directed or inflicted by the laws of its own state.[248]

The above action highlights the clear distinction between the "right" of "the people" to keep and bear arms, and the "power" of the "state" to arm and provide for militias. Besides the linguistic differences, the

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[245] The Virginia Declaration of Rights (1776) declared the "inherent rights" of individuals to life, liberty, and property (§1), and that "all power is vested in, and consequently derived from, the people" (§2).

[246] JOURNAL OF THE FIRST SESSION OF THE SENATE 74 (1820).

[247] Id. at 75.

[248] Id.

individual right was considered with other individual rights, and the state power was considered with other governmental powers. The two were completely separate proposals. The Senate passed the former and rejected the latter. This demonstrates the absurdity of the argument invented in the twentieth century that by declaring the right of the people to keep and bear arms, Congress actually intended to declare the power of states to maintain militias--the very proposal Congress rejected.

John Randolph commented on the Senate action, apparently from information he received from Senator Richard Henry Lee, as follows: "A majority of the Senate were for not allowing the militia arms & if two thirds had agreed it would have been an amendment to the Constitution. They are afraid that the Citizens will stop their full career to Tyranny & Oppression."[249] In other words, even the state power to provide for arming the militia translated into the encouragement by the states of private citizens arming themselves with standard military weapons. Proponents of this amendment feared that the federal government would neglect the militia and prevent the states from mandating that the people arm themselves, thereby achieving a federal monopoly of power.

On September 9, the Senate again took up what became the Bill of Rights. It passed a form of the First Amendment similar to the final version.[250] The Senate then rejected a proposal to add "for the common defence" after "bear arms" in the Second Amendment.[251] Had it succeeded, recognition of "the

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[249] John Randolph to St. George Tucker, Sept. 11, 1789. CREATING THE BILL OF RIGHTS, ed. H. Veit, 293 (1991). Attribution of this information to Lee is suggested in K. BOWLING, "A TUB TO THE WHALE": THE FOUNDING FATHERS AND ADOPTION OF THE FEDERAL BILL OF RIGHTS 12 ( Va. Com. on Bicent. of U.S. Const., n.d.).

[250] JOURNAL OF THE FIRST SESSION OF THE SENATE 77.

[251] Id. While the minutes do not reflect the makers of motions, and no recorded vote was taken on the above, a recorded vote on another matter the same day reveals the following Senators present: Bassett,

right of the people to keep and bear arms for the common defense" would have still been an individual right to have arms, but could have been interpreted as allowing arms to be kept only for common defense against foreign aggression or domestic tyranny, or that only military arms could be kept. Similarly, the earlier version of the right of the people to assemble "for their common good"[252] could have limited that right to public purposes. Rejection of both expressed an intent that keeping and bearing arms and assembly include private, as well as public, lawful purpose, and that the citizens, not the government, have freedom to choose which arms to keep and for what purposes to assemble.

The Senate then made a change in the precatory clause of the Second Amendment. The declaration that a well regulated militia is "the best security of a free state" was neutralized or perhaps strengthened to state that a well regulated militia is "necessary to the security of a free state."[253] This met the objection made in House debate that "a well regulated militia being the best security of a free State, admitted that a standing army was a secondary one."[254] The Senate then passed its final version: "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."[255]

On September 19 and 21, the House debated and agreed to the Senate amendments. A conference

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Carroll, Dalton, Ellsworth, Grayson, Gunn, Henry, Johnson, Izard, King, Lee, Morris, Paterson, Read, Schuyler, and Wingate.

[252] Id. at 71.

[253] Id. at 77.

[254] ANNALS OF CONGRESS 751 (Aug. 17, 1789) (Congressman Gerry).

[255] JOURNAL OF THE FIRST SESSION OF THE SENATE 77 (1820).

committee, including James Madison, Roger Sherman, and John Vining from the House, and Oliver Ellsworth, Charles Carroll, and William Paterson from the Senate, met and resolved final details.[256]

On September 25, 1789, the Senate agreed to the House resolution approving the final version of the Bill of Rights and recommended it to the states (including North Carolina and Rhode Island, which had not yet ratified the Constitution) with a preamble initiated in the Senate.[257] It stated: "The conventions of a number of the states having, at the time of their adopting the constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added . . . ."[258] The Second Amendment (the fourth article of the amendments submitted to the states) as it finally passed Congress contained a declaratory clause followed by a restrictive clause: "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."

The framers clearly distinguished between the "right[s]" of "the people" and the "powers" of the states. They also knew how to use the term "militia" when they intended to do so, and they did not in some mysterious sense mean only the "militia" when they used the term "the people." The Fifth Amendment provides in part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . ." Thus, "the people" in the Second Amendment does not really mean only "the Militia, when in actual service," terms that appear in the Fifth

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[256] 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 8 (1986).

[257] Id. at 43.

[258] Id. at 45.

Amendment. If keeping and bearing arms was a "right" only of "the militia, when in actual service," the framers certainly would have so stated.

The language of the state power to maintain militias is not the individual-rights vocabulary of the Second Amendment. Congress has "power" to provide for organizing and arming the Militia, 'reserving to the States respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress . . . .'[259] In other words, the "power" and "authority"--not "right"--is "reserved"--not "shall not be infringed"--to "the States respectively"--not "the people." Just as Congress has power "to raise and support armies," "to provide and maintain a navy," and "to provide for calling forth the militia,'[260] the text of the Constitution also provides that "no state shall, without the consent of Congress, . . . keep troops, or ships of war in time of peace, . . . or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.'[261] The contrasting use of the word "keep" is revealing: no state shall "keep troops," but the people have a right to "keep . . . arms." The Second Amendment does not say that "the power of the states to keep militia troops is reserved."

The distinction between the states and the people is clearly made in the Tenth Amendment, which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." The power to raise armies is delegated to the United States and prohibited to the states, while the power over the militia is reserved exclusively to the states, except as delegated to Congress in Article I, §8.

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[259] U.S. Const., Art. I, §8, Cl. 16.

[260] Id., Clauses 12, 13, and 15.

[261] Id., §100, Cl. 3.

Finally, governmental powers are "delegated" or "reserved"; only rights retained by the people may not be "infringed." The words of the substantive guarantee of the Second Amendment apply only to individuals, never to state powers.

### E. Ratification by the States

The adoption of the amendments by the states was by no means a foregone conclusion, and the ratification struggle ensued through 1791. Three positions emerged during the controversy: (1) the proposed amendments were adequate, (2) further guarantees were needed, and (3) freemen had no need of a bill of rights. None of the proponents of these three different positions ever called into question the basic, individual right of keeping and bearing arms. As it was commonly understood, the proposed Bill of Rights sought to guarantee personal and unalienable rights, but the people also retained unenumerated rights.[262] Patrick Henry, Richard Henry Lee, and others were pleased with the Bill of Rights as far as it

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[262] "The whole of that Bill [of Rights] is a declaration of the right of the people at large or considered as individuals . . . . [I]t establishes some rights of the individual as unalienable and which consequently, no majority has a right to deprive them of." (Emphasis added.) Albert Gallatin to Alexander Addison, Oct. 7, 1789, MS. in N.Y. Hist. Soc. --A.G. Papers, 2.

"But there are some rights too essential to be delegated--too sacred to be infringed. These each individual reserves to himself; in the free enjoyment of these the whole society engages to protect him . . . . All these essential and sacred rights, it would be difficult if not impossible, to recount, but some, in every social compact, it is proper to enumerate, as specimens of many others . . . ." An Idea of a Constitution, Independent Gazetteer, Dec. 28, 1789, at 3, col. 3.

And see The Scheme of Amendments, Independent Gazetteer, March 23, 1789, at 2, col. 1: "The project of muffling the press, which was publicly vindicated in this town [Boston], so far as to compel the writers against the government, to leave their names for publication, cannot be too warmly condemned." Registration of persons for exercise of basic freedoms was considered to be infringement.

went, but they wanted guarantees against standing armies and direct taxes.[263] Since these same prominent antifederalists were among the most vocal in calling for a guarantee that would recognize the individual right to have arms, it is inconceivable that they did not object to what become the Second Amendment if anyone understood it to fail to protect personal rights.

The view that the rights of freemen were too numerous to enumerate in a bill of rights was coupled with the argument that the ultimate protection of American liberty would be provided by the armed populace rather than by a paper bill of rights. The pro-amendment view held that both the existence of a bill of rights and an armed populace to enforce it were necessary to provide complementary safeguards. The following editorial assumes that keeping and bearing arms would contribute to a well-regulated militia, and vice versa, that militia exercises would demonstrate the people's strength and dissuade the government from infringing

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[263] Patrick Henry "is pleased with some of the proposed amendments; but still asks for the great desideratum, the destruction of direct taxes." Edmund Randolph to James Madison, Aug. 18, 1789, 12 MADISON PAPERS 345 (1978). Jefferson was dissatisfied with the Bill of Rights, but did not object to the arms-bearing provision. Jefferson to Madison, id. at 363-64. The Bill of Rights was "short of some essentials, as Election interference & Standing Army & C. . . ." Richard Henry Lee to Charles Lee, Aug. 28, 1789, 2 LETTERS OF RICHARD HENRY LEE 499 (1914). Most of those in the Virginia House who opposed the adoption of the amendments "are not dissatisfied with the amendments as far as they go" but wanted delay to prompt an amendment on direct taxes. Hardin Burnley to Madison, Nov. 5, 1789, 12 MADISON PAPERS 460.

In the Virginia Senate, there was extensive criticism of the proposed free speech guarantee and other amendments as too narrow, but no one questioned the right to bear arms provision. Objections to Articles, VA. SEN. J. 61-65 (Dec. 12, 1789). Virginia
forestalled adoption of the Bill of Rights until the end of 1791. Nor did the Massachusetts General Court, which rejected the Bill of Rights, object to the arms-bearing provision in its verbose Report of the Committee of the General Court on Further Amendments of early 1790. However, the report urged an amendment which would have recognized a state power to veto Congressional action establishing a "system for forming the militia" or making an "establishment of troops in a time of peace." MASSACHUSETTS AND THE FIRST TEN AMENDMENTS 28 (D. Myers ed. 1936).

upon the right to keep and bear arms:

> The right of the people to keep and bear arms has been recognized by the General Government; but the best security of that right after all is, the military spirit, that taste for martial exercises, which has always distinguished the free citizens of these States; From various parts of the Continent the most pleasing accounts are published of reviews and parades in large and small assemblies of the militia. . . . Such men form the best barrier to the Liberties of America.[264]

The debate over ratification of the Bill of Rights continued throughout 1790. One writer reiterated that no bill of rights could enumerate the rights of the peaceable citizen, "which are as numerous as sands upon the sea shore. . . ."[265] President Washington reminded members of the House of Representatives that "a free people ought not only to be armed, but disciplined. . . ."[266] Still, right-to-arms provisions were not necessarily associated with the citizen's militia but were also coupled with different provisions. For instance, a widely published proposed bill of rights for Pennsylvania included a militia clause in a separate article from the following: "That the right of the citizens to bear arms in defence of themselves and the State, and to assemble peaceably together. . . shall not be questioned."[267]

During the ratification period, the view prevailed that the armed citizenry would prevent tyranny.

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[264] Gazette of the United States, Oct. 14, 1789, at 211, col. 2.

[265] "A bill of rights for freemen appears to be a contradiction in terms. . . .[I]n a free country, every right of human nature, which are as numerous as sands upon the sea shore, belong to the quiet, peaceable citizen." Federal Gazette, Jan. 5, 1790, at 2, col. 3.

"The absurdity of attempting by a bill of rights to secure to freemen what they never parted with, must be self-evident. No enumeration of rights can secure to the people <u>all</u> their privileges . . . ." Federal Gazette, Jan. 15, 1790, at 3, col.3. This article ridiculed a bill of rights as analogous to conveying a house and lot but excepting out of the grant an enumeration of other houses and lots retained by the seller.

[266] Speech of Jan. 7, 1790, Independent Chronicle (Boston), Jan. 14, 1790, at 3.

[267] Providence Gazette & Country Journal, Jan. 30, 1790, at 1.

Theodorick Bland wrote Patrick Henry that "I have founded my hopes to the single object of securing (in terrorem) the great and essential rights of freemen from the encroachments of Power--so far as to authorize resistance when they should be either openly attacked or insidiously undermined."[268] While the proposed amendments continued to be criticized for the lack of a provision on standing armies,[269] no one questioned the right-to-bear-arms amendment.[270]

F. Rhode Island Assents

The Rhode Island Convention, which ratified the Constitution on May 29, 1790, declared: "That the people have a right to keep and bear arms; that a well-regulated militia, including the body of the people capable of bearing arms, is the proper, natural, and safe defence of a free state. . . ."[271] The section also declared against standing armies and against the quartering of soldiers in houses.[272]

A separate body of amendments concerning the powers of the government did not mention the militia. However, it declared against federal conscription as follows: "that no person shall be compelled to military duty otherwise than by voluntary enlistment, except in cases of general invasion . . . ."[273]

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[268] March 19, 1790. 3 PATRICK HENRY 417-18 (1951).

[269] "A Well regulated militia is the best defence to a free people, a standing army in time of peace are not equal to a well regulated militia." Political Maxims, Independent Gazetteer, July 24, 1790, at 2, col. 1. "Where a standing army is established, the inclinations of the people are but little regarded." Political Maxims, Independent Gazetteer, July 31, 1790, at 2, col. 2.

[270] E.g., Summary of the Principal Amendments Proposed to the Constitution, post May 29, 1790 MSS, College of W. & M., Tucker-Coleman coll., Box 39b notebooks, Notebook VI, at 212-22.

[271] J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS 335 (1836).

[272] Id.

[273] Id. at 336.

Two days before Rhode Island ratified the Bill of Rights, newspapers in that state republished its declaration of natural rights, which had been included in its recent ratification of the Constitution, recognizing "that the people have a right to keep and bear arms" and "that a well-regulated militia, includ[es] the body of the people capable of bearing arms."[274]

As more states adopted the amendments and the great debate dwindled, the opponents of a standing-army prohibition conceded that an armed citizenry, constituted as a well-regulated militia, would prevent oppression from that quarter. As "A Framer" argued in a plea addressed "To The Yeomanry of Pennsylvania":

> Under every government the dernier resort of the people, is an appeal to the sword; whether to defend themselves against the open attacks of a foreign enemy, or to check the insidious encroachments of domestic foes. Whenever a people . . . entrust the defence of their country to a regular, standing army, composed of mercenaries, the power of that country will remain under the direction of the most wealthy citizens. . . .[Y]our liberties will be safe as long as you support a well regulated militia.[275]

## IV. THE FEDERAL MILITIA ACT OF 1792

Following the example of state law, the federal Militia Act of May 8, 1792 required every "free able bodied white male citizen" aged 18 through 45 to "provide himself with a good musket or firelock," bayonet and ammunition. Horsemen were to equip themselves with a pair of pistols, ammunition, and sabre. The bill was originally introduced in the House on December 14, 1790.[276] The debates on the bill explicate the nature of a well regulated militia at a time when the Bill of Rights was still being considered by the states.

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[274] Providence Gazette and Country Journal, June 5, 1790, at 23.

[275] Independent Gazetteer, Jan. 29, 1791, at 2, col. 3.

[276] See 5 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1458-59 (1986).

House debate began on December 16. Congressman Josiah Parker of Virginia objected that the requirement that "every man in the United States shall 'provide himself' with military accoutrements would be found impracticable, as it must be well known that there are many persons who are so poor that it is impossible they should comply with the law."[277] He proposed that the United States should pay the expense of arming such persons.

Several members doubted that every man should be a member of the active militia, but there was a consensus that every man be armed.[278] "As far as the whole body of the people are necessary to the general defence, they ought to be armed," explained Thomas Fitzsimons of Pennsylvania.[279] James Jackson of Georgia argued that "the people of America would never consent to be deprived of the privilege of carrying arms. Though it may prove burdensome to some individuals to be obliged to arm themselves, yet it would not be so considered when the advantages were justly estimated. . . . In a Republic every man ought to be a soldier, and be prepared to resist tyranny and usurpation, as well as invasion, and to prevent the greatest of all evils--a standing army."[280]

The House then debated Parker's motion that the United States would provide arms for persons too poor to purchase them.[281] Roger Sherman analyzed the militia clause of the Constitution in the same manner he had heard it explained in the convention of 1787:

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[277] 2 ANNALS OF CONGRESS 1804 (Dec. 16, 1790)

[278] Id. at 1805-06

[279] Id. at 1806.

[280] Id. at 1806.

[281] Id. at 1807-08.

> What relates to arming and disciplining means nothing more than a general regulation in respect to the arms and accountrements. There are so few freemen in the United States who are not able to provide themselves with arms and accoutrements, that any provision on the part of the United States is unnecessary and improper. He had no doubt that the people, if left to themselves, would provide such arms as are necessary, without inconvenience or complaint; but if they are furnished by the United States, the public arsenals would soon be exhausted; and experience shows that public property of this kind, from the careless manner in which many persons use it, is soon lost.[282]

After a suggestion that the poor, minors, and apprentices be armed by the United States, the ultimate objection to this government-armed populace was expressed by Jeremiah Wadsworth of Connecticut: "Is there a man in this House who would wish to see so large a proportion of the community, perhaps one-third, armed by the United States, and liable to be disarmed by them?"[283] Masters would assist apprentices, and "as to minors, their parents or guardians would prefer furnishing them with arms themselves, to depending on the United States when they knew they were liable to having them reclaimed.'"[284] A vote was then taken, and Parker's motion failed.

Fitzsimons moved to strike the words "provide himself" and amend the bill to read that every citizen "shall be provided" with arms. James Madison and others objected that this "would leave it optional with the States, or individuals, whether the militia shall be armed or not.'"[285] The motion lost.

Considerable debate ensured concerning persons who may be exempted from militia exercises. Under the Constitution, Hugh Williamson of North Carolina noted, "Congress are to provide for arming and

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[282] Id. at 1808.

[283] Id. at 1809.

[284] Id.

[285] Id.

disciplining the militia; but who are the militia? Such men, he presumed, as are declared so to be by the laws of the particular States, and on this principle he was led to suppose that the militia ought to consist of the whole body of citizens without exception."[286]

While the Senate met in secret and no debates were officially recorded, William Maclay's journal contains revealing portions of the debates on the bills for the military establishment and for regulating the militia. Richard Henry Lee gave what must have been familiar speeches against standing armies.[287] Senator Maclay believed that Alexander Hamilton and his faction were promoting war with the Indians and foreign powers as a "Pretext for rasing an Army meant to awe our Citizens into Submission."[288] Army supporters accused the Spaniards of having "supplied the Indians with Arms and Ammunition,"[289] but argued that "it was dangerous to put Arms into the hands of the Frontier People for their defense, least they should use them against the United States."[290]

Maclay protested these allegations as "subterfuges," and wrote:

> The Constitution certainly never contemplated a Standing Army in time of peace. A Well regulated Militia to execute the laws of the Union, quell insurrections and repel Invasions, is the very language of the Constitution. General Knox offers a most exceptionable bill for a General Militia law which excites (as it is most probable he expected) a general Opposition. Thus the Business of the Militia stands still, and the military establishment bill which increases the standing

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[286] Id. at 1821-22 (Dec. 22, 1790).

[287] THE DIARY OF WILLIAM MACLAY 243,250 (1988).

[288] Id. at 385, 395.

[289] Id. at 245.

[290] Id. at 246.

Troops One half is pushed with all the Art & address of ministerial Management.[291]

Two anecdotes by Maclay illustrate the attitudes of the day toward personal arms. It seems that Alexander Hamilton made insulting remarks against the militia, giving rise in the House of Representatives to "a Violent personal Attack on Hamilton By Judge [Aedanus] Burk[e] of South Carolina which the Men of the blade say must produce a duel.'[292]

July 4, 1790 in New York was celebrated a day late because it fell on a Sunday. When Congress adjourned, Maclay saw that "all the Town was in Arms . . . . the firing of cannon and small arms with beating of Drums kept all in uproar.'[293] The Senators went to President Washington's home for wine and cakes, and then to a reading of the Declaration of Independence.[294]

The United States in 1792 reflected the finalization of a unique period which began five years earlier. A constitution with limited, enumerated powers was proposed, but opponents would not allow its passage without a commitment to adopt a declaration of individual rights, including the right to keep and bear arms. This declaration was created and ratified, but attempts to pass amendments to the Constitution's provisions on state and federal governmental powers failed. While the Second Amendment or its equivalent was strongly demanded in state conventions and was then ratified by Congress and passed by the states, a totally separate provision about the right of states to maintain militias failed miserably. Nonetheless, Congress enacted legislation mandating that every man be armed.

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[291] Id. at 246-47.

[292] Id. at 101 n.7, 231.

[293] Id. at 312.

[294] Id.

## CONCLUSION: SUPREME COURT JURISPRUDENCE

### A. The Power of the States

From the earliest interpretations of the Constitution to the present, it has been consistently held that the states have a concurrent power over the militia with the United States and that each state may require its able-bodied citizens to provide themselves with and keep firearms, particularly militia weapons. The position argued by Madison and other federalists in the Virginia ratifying convention of 1788 has been vindicated, despite the failure of a proposed amendment explicitly recognizing the state power to maintain and provide for arming the militia.

In 1803, St. George Tucker cited Article I, §8, clause 16 and the Second Amendment in support of the proposition that "the power of arming the militia, not being prohibited to the states, respectively, by the constitution, is, consequently, reserved to them, concurrently with the federal government."[295]

The states passed militia laws in support of and to enforce the 1792 Act of Congress. For instance, Massachusetts required that every citizen "constantly keep himself furnished and provided with arms and equipments required by the laws of the United States . . . ."[296] Persons were fined for not keeping the arms required by law.[297] United States v. Miller (1939)[298] analyzed early state militia laws and concluded:

> The Militia which the States were expected to maintain and train is set in contrast with

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[295] 1 Tucker, BLACKSTONE'S COMMENTARIES, App., 273 (1803).

[296] Act of Massachusetts, 1809, c. 108.

[297] E.g., Commonwealth v. Annis, 9 Mass. 31 (1812). See Militia, 34 Am. Dig. Cent. Ed. at 2878 ("Arms and Equipments").

[298] 307 U.S. 174, 178-182.

> Troops which they were forbidden to keep without the consent of Congress. The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia--civilians primarily, soldiers on occasion.
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> The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of the Colonies and States, and the writings of approved commentators. These show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense. "A body of citizens enrolled for military discipline." And further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.[299]

The Supreme Court held in Houston v. Moore (1820)[300] that the states have a reserved power to require all able-bodied males to provide themselves with standard military arms. Justice Washington noted that the federal Militia Act of 1792 declared "what arms and accoutrements the officers and privates shall provide themselves with . . . ."[301] The Court added:

> So long as the militia are acting under the military jurisdiction of the state to which they belong, the powers of legislation over them are concurrent in the general and state government. Congress has power to provide for organizing, arming, and disciplining them . . . . But as state militia the power of the state governments to legislate on the same subjects, having existed prior to the formation of the constitution, and not having been prohibited by that instrument, it remains with the states, subordinate nevertheless to the paramount law of the general government, operating upon the same subject.[302]

The court also stated that "if Congress had declined to exercise [its powers], it was competent to the state governments to provide for . . . arming . . . their respective militia, in such manner as they might think

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[299] Id. at 178-179 (emphasis added).

[300] 18 U.S. 1.

[301] Id. at 14.

[302] Id. at 16-17.

proper."[303]

In a separate opinion, Justice Story wrote:

> Nor does it seem necessary to contend that the power "to provide for organizing, arming, and disciplining the militia" is exclusively vested in Congress. . . . It would certainly seem reasonable, that in the absence of all interfering provisions by Congress on the subject, the states should have authority to organize, arm, and discipline their own militia. . . . [W]hat would the militia be without . . . arms . . .?[304]

Relying extensively on the above precedent, the Illinois Supreme Court case Dunne v. People (1879)[305] cited the Tenth Amendment in support of the following: "The power of State governments to legislate concerning the militia existed and was exercised before the adoption of the Constitution of the United States, and as its exercise was not prohibited by that instrument, it is understood to remain with the States, subject only to the paramount authority of acts of Congress enacted in pursuance of the Constitution of the United States."[306] The court also held:

> "A well-regulated militia being necessary to the security of a free State," the States, by an amendment to the Constitution, have imposed a restriction that Congress shall not infringe the right of the "people to keep and bear arms." The chief executive officer of the State is given power by the Constitution to call out the militia, "to execute the laws, suppress insurrection and repeal invasion." This would be a mere barren grant of power unless the State had power to organize its own militia for its own purposes. Unorganized, the militia would be of no practical aid to the executive in maintaining order and in protecting life and property within the limits of the State. These are duties that devolve on the State, and unless these rights

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[303] Id. at 21.

[304] Id. at 51-52.

[305] 94 Ill. 123, 34 Am. Dec. 213, 216.

[306] Also relying on Houston v. Moore for the same proposition is People v. Hill, 126 N.Y. 497, 27 N.E. 789, 790 (1891). See State v. Johnson, 170 Wis. 218, 175 N.W. 589, 597 (1919) (state constitution allowing legislature to define the militia and federal Second Amendment indicate that "certain military policy is reserved to the states.")

are secured to the citizens, of what worth is the State government?[307]

Arising out of the same labor disturbance in Chicago as in Dunne, Presser v. Illinois (1885),[308] decided by the United States Supreme Court, held that prohibitions on unlicensed military parades "do not infringe the right of the people to keep and bear arms," adding:

> It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States, and, in view of this prerogative of the general government, as well as of its general powers, the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government.[309]

By the same token, the United States may not prohibit the possession of militia arms, so as to deprive the states of their final resource for maintaining the public security, or prevent the people from performing their duty to the state governments.[310]

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[307] 34 Am. Dec. at 222.

[308] 116 U.S. 252, 264-65.

[309] Id. at 265.

[310] Local authorities have a traditional power to require citizens to arm themselves and assist in law enforcement. In United States v. Fenwick, 25 Fed. Cas. 1062, 1964 (Cir. Ct. D.C. 1836) the court instructed the jury "that the marshal has a right to take the posse, and to call on all citizens to aid him in arresting the rioters, and that the citizens had a right to arm themselves."

State law may require any person to arm and assist in law enforcement. "The militia are composed of men of military age, whereas the posse comitatus is composed of all able-bodied persons of sound mind and of sufficient ability to assist the sheriff, and may be younger or older than the military age. Worth v. Craven County Com'rs., 24 S.E. 778, 779 (N.C. 1896).

Chapin v. Ferry, 3 Wash. 386, 28 P. 754, 757 (1891) found that a statute authorizing the sheriff or other officials to call out "an armed force" to suppress rioters referred to the posse comitatus and not the National Guard. The court noted that the statute

> is merely the reenactment of the common law. . . . It has always been the duty of magistrates

Justice Cardozo wrote in Babington v. Yellow Taxi Corp. (1928):[311]

> The duty goes back to the days of hue and cry . . . To make pursuit effective, there were statutes in those early days whereby a man was subject to a duty to provide himself with instruments sufficient for the task. A typical illustration is the Statute of Winchester, 13 Edw. I, enacted in 1285. . . . Thus, for fifteen pounds of lands and goods there shall be kept "an Hauberke [a Brestplate] of iron, a Sword, a Knife, and a Horse." . . .
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> . . . Still, as in the days of Edward I, the citizenry may be called upon to enforce the justice of the state . . . with whatever implements and facilities are convenient and at hand.[312]

Justice Cardozo recalled the above in showing "the duty of the able-bodied citizen to aid in suppressing crime" in his concurring opinion in Hamilton v. University of California (1934).[313] The majority opinion upheld mandatory military training, including the use of automatic rifles, of students at a university based on the following:

> Undoubtedly every State has authority to train its able-bodied male citizens of suitable age appropriately to develop fitness, should any such duty be laid upon them, to serve in the United States army or in state militia (always liable to be called forth by federal authority to execute the laws of the Union, suppress insurrection or repel invasion . . .) or as members of local constabulary forces or as officers needed effectively to police the State. . . . So long as its action is within retained powers and not inconsistent with any exertion of the authority of the national government and transgresses no right safeguarded to the citizen by the Federal Constitution, the State is the sole judge of the means to be employed and the amount of training to be exacted for the effective accomplishment of these ends. Second Amendment.[314]

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> and peace officers to preserve the public peace, even to the extent of calling to their aid every person within their jurisdiction . . . . That the force thus called out should be armed in some way would seem to go without saying . . . . Id. at 756.

[311] 250 N.Y. 14, 164 N.E. 726, 727.

[312] Id.

[313] 293 U.S. 245, 265n.1.

[314] Id. Besides the Second Amendment, the court cited as authority Houston v. Moore, 18 U.S. 1, 16-17 (1820), Dunne v. People, 94 Ill. 120, 129, 34 Am. Rep. 213 (1879), and Presser v. Illinois, 116 U.S.

By statutory definition, the National Guard is "that part of the organized militia of the several States" that is "armed . . . wholly or partly at Federal expense" and "is federally recognized."[315] "In addition to its National Guard, if any, a State . . . may, as provided by its laws, organize and maintain defense forces."[316] The U.S. Government issues arms to the National Guard, but not to the states' defense forces.[317] "So far as practicable, the same types of . . . arms as are issued to the Army shall be issued to the Army National Guard . . . ."[318]

The availability of uniform arms to a portion of the state militias pursuant to the National Defense Act of 1916 greatly enhanced defense capabilities. As explained in Maryland for the Use of Levin v. United States (1965):[319]

> From the days of the Minutemen of Lexington and Concord until just before World War I, the various militias embodied the concept of a citizen army, but lacked the equipment and training necessary for their use as an integral part of the reserve force of the United States Armed Forces. . . . Pursuant to power vested in Congress by the Constitution [Art. I, Section 8], the Guard was to be uniformed, equipped, and trained in much the same way as the regular army, subject to federal standards and capable of being "federalized" by units, rather than by drafting individual soldiers. In return, Congress authorized the allocation of federal equipment to the Guard . . . .[320]

The states are entitled to require members of their defense forces and reserve militias to provide

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252 (1885).

[315] 32 U.S.C. Section 101(4), (6).

[316] 32 U.S.C. Section 109(c).

[317] 32 U.S.C. Section 702.

[318] 32 U.S.C. Section 701.

[319] 381 U.S. 41.

[320] Id. at 46-47.

themselves with the same arms which are used by the National Guard. The ideal of a uniformity of arms for all militia members has been recognized since the Constitution was framed.

Based on the above, Congress has no power to prohibit possession of such militia arms as the states are entitled to require that its citizens or a part thereof furnish themselves with and keep in their homes. The states' concurrent power to organize and provide for arming their militias is a reserved power which federal legislation may not contradict.

B. The Right of the People

Traditionally, the Supreme Court has paid little attention to the Second Amendment. It noted in the Dred Scott case that recognition of African Americans as citizens would exempt them from "police regulations" (i.e., slave codes), and allow them "to keep and carry arms wherever they went."[321] During Reconstruction, the Court stated that the rights of the people "peaceably to assemble for lawful purposes" and "of bearing arms for a lawful purpose" were not "granted" by the Constitution because they existed long before its adoption.[322] A later opinion again recognized "the right of the people to keep and bear arms" and repeated that the Second Amendment is a limitation "upon the power of Congress and the National government. . . ."[323]

At the turn of the century, the Court wrote of "the freedom of speech and of the press" and "the right

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[321] Scott v. Sanford, 60 U.S. (19 How.) 393, 417 (1857).

[322] United States v. Cruikshank, 92 U.S. 542, 551, 553 (1876).

[323] Presser v. Illinois, 116 U.S. 252, 265 (1886). Miller v. Texas, 153 U.S. 535, 538 (1894) repeats that "the restriction of" the Second and Fourth Amendments operate "upon the Federal power." In Cruikshank, Presser, and Miller, the Court refused to find First, Second, or Fourth Amendment protection against private conspiracies or state action, but did not consider whether the guarantees are incorporated into the Fourteenth Amendment so as to limit state action.

of the people to keep and bear arms" that "the law is perfectly well settled that the first ten Amendments to the constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we inherited from our English ancestors . . . .'[324]

Only in United States v. Miller (1939)[325] has the high court addressed the Second Amendment, and even then only in rudimentary form. Absent evidence in the trial court that a sawed-off shotgun "at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.'[326] The test was not whether the person in possession of the arm was a member of a formal militia unit, but whether the arm "at this time" is "ordinary military equipment" or its use "could" potentially assist in the common defense.

Referring to the militia clause of the Constitution, the Supreme Court stated that "to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the

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[324] Robertson v. Baldwin, 165 U.S. 275, 281-82 (1897).

[325] 307 U.S. 174 (1939).

[326] 307 U.S. at 178. Since no factual record was made in the trial court that a "sawed-off" shotgun could have militia uses, the Court did not consider whether the tax and related registration requirements of the National Firearms Act violated the Second Amendment. However, the Court has held of a newspaper tax: "It is a license tax--a flat tax imposed on the exercise of a privilege granted by the Bill of Rights. A state may not impose a charge for the enjoyment of a right granted by the federal constitution." Murdock v. Pennsylvania, 319 U.S. 106, 113 (1943). See Thomas v. Collins, 323 U.S. 527, 538-40 (1944) (state may not require registration of persons who exercise First Amendment rights); Minneapolis Star v. Minnesota Comm. of Rev., 460 U.S. 575 (1983) (special tax on only a few newspapers invalid).

Second Amendment were made."[327] The court then surveyed colonial and state militia laws to demonstrate that "the Militia comprised all males physically capable of acting in concert for the common defense" and that "these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time."[328]

The philosophy behind the Second Amendment was well articulated in the commentaries of Justice Joseph Story and Judge Thomas M. Cooley, which Miller approvingly cites.[329] Justice Story stated: "The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of the republic; since it offers a strong moral check against usurpation and arbitrary power of the rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them."[330] Miller's reference to Judge Cooley finds him stating:

> Among the other safeguards to liberty should be mentioned the right of the people to keep and bear arms. . . . The alternative to a standing army is 'a well-regulated militia'; but this cannot exist unless the people are trained to bearing arms. The federal and state constitutions therefore provide that the right of the people to bear arms shall not be infringed . . . .[331]

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[327] 307 U.S. at 178.

[328] Id. at 179.

[329] 307 U.S. at 183 n.3.

[330] 2 J. Story, COMMENTARIES ON THE CONSTITUTION 646 (5th ed. 1891). "One of the ordinary modes, by which tyrants accomplish their purpose without resistance is, by disarming the people, and making it an offense to keep arms . . . ." J. Story, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 264 (1893).

[331] T. Cooley, CONSTITUTIONAL LIMITATIONS 729. T. Cooley, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW 281-282 (2d ed. 1891) states further:

> The right declared was meant to be a strong moral check against the usurpation and arbitrary power of rulers, and as a necessary and efficient means of regaining rights when temporarily overturned by

While it has not discussed the Second Amendment in any detail since Miller, the Supreme Court has recently denied that some Bill of Rights freedoms "are in some way less 'fundamental' than" others. "Each establishes a norm of conduct which the Federal Government is bound to honor--to no greater or lesser extent than any other inscribed in the Constitution. Moreover, we know of no principled basis on which to create a hierarchy of constitutional values . . . ."[332] The Supreme Court has also held that "when we do have evidence that a particular law would have offended the Framers, we have not hesitated to invalidate it on that ground alone."[333]

The two 1990 Supreme Court opinions analyzed at the beginning of this article should lay to rest any

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usurpation.

> The right is General--It may be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent. . . . But the law may make provision for the enrollment of all who are fit to perform military duty, or of a small number only, or it may wholly omit to make any provision at all; and if the right were limited to those enrolled, the purpose of this guaranty might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. The meaning of the provision undoubtedly is that the people from whom the militia must be taken shall have the right to keep and bear arms, and they need no permission or regulation of law for the purpose.

[332] Valley Forge College v. Americans United, 454 U.S. 464, 484 (1982). The Court stated in Ullman v. United States, 350 U.S. 422, 426-29 (1956):

> This constitutional protection must not be interpreted in a hostile or niggardly spirit. . . . Such a view does scant honor to the patriots who sponsored the Bill of Rights as a condition to acceptance of the Constitution by the ratifying States. . . .
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> As no constitutional guarantee enjoys preference, so none should suffer subordination or deletion. . . . To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it. This is to disrespect the Constitution.

[333] Minneapolis Star v. Minnesota Comm. of Rev., 460 U.S. 575, 583-84 n.6 (1983)

lingering doubts about the Second Amendment's applicability. First, the right to keep and bear arms belongs to "the people," the same individuals whose rights are protected by the First, Fourth, and Ninth Amendments. Second, the state power to maintain a militia is defined in the militia clause of the text of the Constitution, and is not substantively protected by the Second Amendment.

Every term in the Second Amendment's substantive guarantee--which is not negated by its philosophical declaration about a well regulated militia--demands an individual rights interpretation. The terms "right," "the people," "keep and bear," and "infringed" apply only to persons, not states. Moreover, the framers, supporters, and opponents of the original Constitution all agreed on the political ideal of an armed populace, and the unanimous interpretation of the Bill of Rights in Congress and by the public was that the Second Amendment guaranteed the right to keep and bear arms. Indeed, the very amendment which would have made explicit the state power to maintain a militia failed completely.

The language and historical intent of the Second Amendment mandates recognition of the individual right to keep and bear firearms and other personal weapons. Like those who oppose flag burning as symbolic protest, opponents of this right have the option of pressing for an amendment to a bill of rights no longer seen as worthwhile.