

THE HISTORY OF THE SECOND AMENDMENT

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*A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.*¹

I. INTRODUCTION

Long overlooked or ignored, the Second Amendment has become the object of some study and much debate. One issue being discussed is whether the Second Amendment recognizes the right of each citizen to keep and bear arms,² or whether the right belongs solely to state governments and empowers each state to maintain a military force.³

The debate has resulted in odd political alignments which in turn have caused the Second Amendment to be described recently as the most embarrassing provision of the Bill of Rights.⁴ Embarrassment results from the politics associated with determining whether the language creates a state's right or an individual right. Civil libertarians support the individual rights recognized in the First, Fourth, Fifth, and Sixth Amendments and defend these rights against governmental abuse. Civil libertarians insist that each citizen be accorded the right to free speech, even if the citizen is a Nazi hatemonger. Similarly, criminals can count on a vigorous defense of the fourth amendment right to be free from unreasonable searches as well as the fifth amendment right not to incriminate oneself. All of this is true even though most of us would (pg.1008) agree that Nazi hate language is of no utility, and a criminal's confession, absent coercion, and the fruits of a search of his or her house are among the best indicators of actual guilt or innocence. Yet, we zealously defend these rights on the premise that governmental abuse of power is a greater evil than that posed by individual hatemongers or criminals.

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¹ U.S. CONST. amend II.

² See generally David I. Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 FORDHAM URB. L.J. 31, 40-41 (1976) (arguing that the first Congress stated that a well-regulated militia was "necessary" to the security of a free state, not just "sufficient," and that Congress recognized that the ordinary processes of law may be insufficient to protect the people at all times).

³ See generally Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5, 57 (1989) (arguing that the Framers' intent behind the Second Amendment was to assure the states that they would retain the right to an organized and effective militia, not to create broad individual rights); Peter B. Feller & Karl L. Gotting, *The Second Amendment: A Second Look*, 61 NW. U. L. REV. 46, 67-70 (1966) (asserting that the Second Amendment refers to the collective right of the body politic of every state to be protected by an independent state militia).

⁴ See Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103 (1987); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

In the context of the Second Amendment, civil libertarian instincts are overcome by our fear of one another. As a consequence, we find civil libertarian organizations, such as the American Civil Liberties Union (ACLU), acting as participants in such groups as the National Coalition to Ban Handguns.⁵ Indeed, the ACLU, typically at the forefront of defending individual rights against an encroaching government, takes the position that the Second Amendment protects only the state's right to an organized military—a well-regulated militia. It rejects any suggestion that the Second Amendment protects an individual right.

While this phenomenon is interesting, it is not the subject of this Article. My purpose is much narrower. I will address the history of the Second Amendment and attempt to define its original intent. I will not suggest that original intent is controlling. On this point, I am reminded that George Washington once suggested, "Individuals entering into society, must give up a share of liberty to preserve the rest. The magnitude of the sacrifice must (pg.1009) depend as well on situation and circumstance, as on the object to be obtained."⁶

The purpose of this Article is only to define those shares of liberty the Framers intended to retain and those given up in the context of the Second Amendment. By way of preview, this Article will contend that the original intent of the Second Amendment was to protect each individual's right to keep and bear arms, and to guarantee that individuals acting collectively could throw off the yokes of any oppressive government which might arise. Thus, the right envisioned was not only the right to be armed, but to be armed at a level equal to the government.

To determine the original intent of the Second Amendment, this Article will examine the history of armed citizens in England, the Federalist and Antifederalist debates, the meaning of the word "militia," the constitutional ratification process, and the various state constitutions in existence at the time.

⁵ See Don P. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 207 (1983). The ACLU's summary of its national board's action at the June 14-15, 1980, meeting sets out the following policy considerations:

The setting in which the Second Amendment was proposed and adopted demonstrates that the right to bear arms is a collective one existing only in the collective population of each state for the purpose of maintaining an effective state militia.

The ACLU agrees with the Supreme Court's long-standing interpretation of the Second Amendment that the individual's right to bear arms applies only to the preservation of efficiency of a well regulated militia. Except for lawful police and military purposes, the possession of weapons by individuals is not constitutionally protected. Therefore there is no constitutional impediment to the regulation of firearms.

Nor does the ACLU believe that there is a significant civil liberties value, apart from the Second Amendment, in an individual right to own or use firearms. Interests of privacy and self expression may be involved in any individual's choice of activities or possessions, but these interests are attenuated when the activity, or the object sought [sic] to be possessed is inherently dangerous to others. With respect to firearms, the ACLU believes that this quality of dangerousness justifies legal regulation which substantially restricts the individual's interest in freedom of choice.

Id. at 207 n.15. At the same meeting, the board approved the following clarification: "It is the sense of this body that the word 'justifies' in the policy means we will affirmatively support gun control legislation." *Id.*

⁶ George Washington further stated, "It is at all times difficult to draw with precision the line between those rights which must be surrendered, and those which may be preserved" See Letter from George Washington to the President of Congress (Sept. 17, 1787) in 1 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 305 (John P. Kaminski et al. eds., 1983).

II. THE RIGHTS OF ENGLISHMEN

Eighteenth-century commentators frequently discussed the evils of standing armies.⁷ Blackstone observed that professional soldiers endangered liberty.⁸ In free states, the defense of the realm was considered best left to citizens who took up arms only when necessary and who returned to their communities and occupations when the danger passed.⁹ Standing armies were viewed as instruments of fear intended to preserve the prince.¹⁰

A. *The Establishment of the English Citizen Army*

Blackstone credits King Alfred, who ruled England from 871 to 901 A.D., as establishing the principle that all subjects of his dominion were the realm's soldiers.¹¹ Other commentators trace the obligation of Englishmen to serve in (pg.1010) the people's army to 690 A.D.¹² Regardless of the beginning date, an Englishman's obligation to serve in a citizen army is an old proposition. Coupled with this obligation to defend the realm was the obligation to provide oneself with weapons for this purpose.¹³

King Henry II formalized his subjects' duties in 1181 by issuing the Assize of Arms.¹⁴ The arms required varied depending on the subjects' wealth, with the poorest freemen obligated to provide the least—an iron helmet and a lance.¹⁵ The Assize required not only arms to be possessed, but precluded the possessor from selling, pledging, or in any other way alienating the weapons.¹⁶ In 1253, the armed population was expanded beyond freemen to include serfs, individuals bound to the land and the land's owner.¹⁷ Serfs were required to procure a spear and dagger.¹⁸

Inclusion of serfs in the citizen army was related to the mustering of men and arms which occurred early in 1253 for purposes of crossing the sea to Gascavy and supporting the realm against

⁷ See JOHN P. REID, IN *DEFIANCE OF THE LAW: THE STANDING-ARMY CONTROVERSY, THE TWO CONSTITUTIONS, AND THE COMING OF THE AMERICAN REVOLUTION* 79-85 (1981).

⁸ 1 WILLIAM BLACKSTONE, *COMMENTARIES* *320 [hereinafter *COMMENTARIES*].

⁹ See generally Leon Friedman, *Conscription and the Constitution: The Original Understanding*, 67 *MICH. L. REV.* 1493 (1969) (explaining that the existence of a standing army during peacetime was widely condemned as a threat to liberties).

¹⁰ *Id.*

¹¹ *COMMENTARIES*, *supra* note 8, at *321.

¹² David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 *HARV. J.L. & PUB. POL'Y* 559, 562 (1986) [hereinafter Hardy, *Armed Citizens*].

¹³ William S. Fields & David T. Hardy, *The Militia and the Constitution: A Legal History*, 136 *MIL. L. REV.* 1, 8 (1992).

¹⁴ See Arthur Allen Leff, *The Leff Dictionary of Law: A Fragment*, 94 *YALE L.J.* 1855, 2078 (1985).

¹⁵ 2 *ENGLISH HISTORICAL DOCUMENTS* 416 (David C. Douglas & George W. Greenaway eds., 1953) [hereinafter *ENGLISH*].

¹⁶ See 1 *FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 421-42, 565 (1968).

¹⁷ David T. Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 *J.L. & POL.* 1, 7 (1987) [hereinafter Hardy, *Historiography*].

¹⁸ *Id.*

the King of Castile.¹⁹ Another general levy occurred in 1297, which directed all men possessing land to a value of twenty pounds to provide themselves with horses and arms and to come to London for purposes of service in France.²⁰

B. *The Tudor Period*

The citizen-army concept continued to develop through the Tudor period. Henry VIII decreed that fathers must purchase longbows for sons between seven and fourteen years of age and teach them to shoot.²¹ Each citizen between the age of fourteen and forty years was required to own and use a longbow unless (pg.1011) disabled.²² Queen Elizabeth I formalized the process by issuing instructions for general musters of the citizen army in each county.²³ Commissions were issued to various knights to take charge of such musters.²⁴ The purpose of the musters was to enable Queen Elizabeth to know the "numbers, qualities, abilities and sufficiency of all her subjects in that county ..., from the age of sixteen years upward, that may be found able to bear armour or to use weapons on horseback or on foot."²⁵ The citizen army, during Queen Elizabeth's reign, acquired the name "militia."²⁶

By the end of the Tudor period, the citizen army or militia concept had become a fixed component in English life. The period's commentators attributed English military successes to the universal armament practice prevalent in England but absent on the continent.²⁷ Visitors from the continent even noticed the stark difference.²⁸ Historians suggested that English universal armament caused a moderation of monarchical rule and fostered individual liberties because the populace had in reserve a check which soon brought the fiercest and proudest King to reason: the check of physical force.²⁹ However, the virtues of universal armament and the effect of universal armament on monarchical rule had not escaped Parliament's notice.

C. *The Stuart Period*

¹⁹ SOURCES OF ENGLISH CONSTITUTIONAL HISTORY 141 (Carl Stephenson & Frederick G. Marcham eds., 1937) [hereinafter SOURCES].

²⁰ *Id.* at 163.

²¹ 3 Hen. 8, ch. 13 (1511).

²² *Id.*

²³ SOURCES, *supra* note 19, at 397.

²⁴ *See, e.g.*, SOURCES, *supra* note 19, at 396 (Records Concerning the Militia (1539-1577)).

²⁵ *Id.* at 397 (Instructions for General Musters (1572)).

²⁶ *Id.* at 396.

²⁷ JOHN FORTESCUE, THE GOVERNANCE OF ENGLAND, otherwise called THE DIFFERENCE BETWEEN AN ABSOLUTE AND A LIMITED MONARCHY 114-15 (C. Plummer ed., rev. ed. 1885). Fortescue saw Englishmen as healthy, wealthy, and well armed, "wherefore thai ben myghty, and able to resiste the adversaries of this realme, and to beet oper reumes that do, or woldee do them wronge. Lo, this is the fruty of Jus polliticum et regale, under which we live." *Id.*

²⁸ In 1539, the French ambassador reported that "in Canterbury, and the other towns upon the road, I found every English subject in arms who was capable of serving. Boys of 17 and 18 have been called out without exception of place or person" L. BOYNTON, THE ELIZABETHAN MILITIA 8-9 (1967).

²⁹ *See generally* 3 THOMAS BABBINGTON MACAULAY, THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES THE SECOND 47 (1900) (1st ed. 1849) (discussing English acceptance of a standing army by the end of the Tudor period).

The early Stuart period was the single most important period in English history in terms of shaping the political theory of the American revolutionary leaders.³⁰ During this period, civil war occurred between Parliament and the crown, a King was executed, another King fled to France, a military dictatorship (pg.1012) ruled, supremacy of the English Parliament over the crown was established, and Parliament installed a new King and Queen and forced them to accede to a Declaration of Rights.³¹ Throughout this period, various factions sought to control the militia and intermittently to disarm opposing factions.³²

James I, the first Stuart monarch, took the Crown in 1603.³³ An agitated House of Commons immediately confronted him.³⁴ James had proclaimed that individuals elected to Parliament could be seated only if certified by the chancery; only proper men could be certified.³⁵

Parliament took the position that it would determine who should be seated.³⁶ The relationship deteriorated, with James frequently asserting that Kings hold their thrones by the will of God, not Parliament, and that to dispute the King is blasphemy.³⁷ James's position was that the King was the law and all rights flowed from the King. Consequently, in 1621, James advised Parliament that it existed only by the grace of the King.³⁸

Legal commentators and Parliament assessed the question of the King's power differently. Lord Coke argued that the King's prerogative was limited to what the law of land allowed him.³⁹ Coke's view was that the law of England was composed of only three parts: common law, statute, and custom.⁴⁰ Consequently, the King had no power outside of these. Parliament pointed out that its powers and liberties were "the ancient and undoubted birthright and inheritance of the subjects of England"⁴¹ James I tore the page containing these words from the Journal of the Commons.⁴²

³⁰ See H. LASKI, *THE RISE OF EUROPEAN LIBERALISM* (1936); John V. Orth, *North Carolina Constitutional History*, 70 N.C. L. REV. 1759, 1765 (1992).

³¹ See *THE PARLIAMENT OF WONDERS: COMMON DEBATES 1628* (Robert C. Johnson et al. eds., 1977) [hereinafter *PARLIAMENT*].

³² *Id.*

³³ For a general discussion of this area, see 8 SAMUEL R. GARDINER, *HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES I TO THE OUTBREAK OF THE CIVIL WAR 1603-1642* (1965).

³⁴ *Id.*

³⁵ SOURCES, *supra* note 19, at 406-07.

³⁶ SOURCES, *supra* note 19, at 412-13.

³⁷ Roy G. Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 HASTINGS CONST. L.Q. 961, 966-67 (1975) (citing KING JAMES I, *THE WORKES OF THE MOST HIGH AND MIGHTIE PRINCE JAMES* 529, 531 (1616)).

³⁸ Weatherup, *supra* note 37, at 967.

³⁹ SOURCES, *supra* note 19, at 441.

⁴⁰ *Id.*

⁴¹ *Id.* at 429.

⁴² *Id.*

James's son Charles fared no better in his relations with Parliament. In (pg.1013) 1628, Parliament enacted the Petition of Right.⁴³ This petition enumerated Charles's violations of the rights of his subjects, including forced loans to the Crown, imprisonment without process, quartering of soldiers in English homes without the consent of the owner, and the execution of persons pursuant to martial law.⁴⁴ The King agreed to acknowledge his excesses because he needed Parliament's assistance in raising revenues.⁴⁵ Charles I thereafter dissolved Parliament and refused to call new Parliaments for eleven years.

Charles I began developing his own army.⁴⁶ Charles attempted to raise funds for additional military forces by writs or assessments on each individual.⁴⁷ In addition, ecclesiastical canons were added which advised subjects that bearing arms against the King would result in damnation.⁴⁸ Scotland went into open rebellion.

Charles I was forced to call Parliament to session in 1640 for purposes of raising additional taxes because of the rebellion.⁴⁹ The new Parliament, frequently called the Long Parliament because of its extended tenure,⁵⁰ seized the opportunity to assert its influence to the detriment of the monarchy. Parliament secured for itself the power of dissolving and eliminating the King's prerogative courts.⁵¹ Additionally, Parliament demanded that Lord Strafford, the King's leading minister, be removed from his post on the grounds that Strafford had raised a standing army in Ireland.⁵² The King complied; Strafford was executed; and Ireland revolted.

Swelled with its success in outmaneuvering the King, the Long Parliament moved to seize control of the militia.⁵³ The King balked and refused to accede to this demand. Parliament moved forward and appointed its own officers to (pg.1014) take charge of the militia by passing the bill the King had refused to sign as an Ordinance of Parliament in 1642.⁵⁴ Parliament called out the militia

⁴³ See Joyce A. McCray Pearson, *The Federal and State Bill of Rights: A Historical look at the Relationship Between America's Documents of Individual Freedom*, 1993 HOW. L.J. 43, 46 (discussing the second antecedent of the federal bill of rights).

⁴⁴ SOURCES, *supra* note 19, at 450-52.

⁴⁵ 2 HISTORICAL COLLECTIONS 257 (J. Rushworth ed., 1721).

⁴⁶ References to this army appear at SOURCES, *supra* note 19, at 490 (The Nineteen Propositions, June 1, 1642, in which Parliament insisted on removal and discharge of the same).

⁴⁷ SOURCES, *supra* note 19, at 455-56.

⁴⁸ Weatherup, *supra* note 37, at 968.

⁴⁹ Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part I)*, 53 OHIO ST. L.J. 101, 136 (1992) (discussing Charles's reconvening Parliament in order to get an appropriation of money).

⁵⁰ See Daniel R. Coquillette, *Ideology and Incorporation III: Reason Regulated—The Post-Restoration English Civilians, 1653-1735*, 67 B.U. L. REV. 289, 301 (1987) (discussing the Long Parliament).

⁵¹ SOURCES, *supra* note 19, at 479-81.

⁵² *Id.* at 477-78.

⁵³ *Id.* at 486-87.

⁵⁴ *Id.*

and warned that militia units mustered under authority other than that of Parliament would be punished.⁵⁵ The King did the same, and civil war ensued.⁵⁶

The actual ability of Parliament or the King to muster the militia is unclear. Charles attempted to disarm many militia units by confiscating public magazines and seizing the weapons of residents.⁵⁷ In addition, Charles sought to arm Catholics he had previously disarmed to secure their assistance.⁵⁸ These acts could be considered as evidence that Parliament was more successful at securing the support of local militias than was Charles I. In any event, Parliament's forces prevailed. Charles I was executed in 1649 and the Kingship and the House of Lords were abolished. England was declared a free state.⁵⁹

Parliament's declaration notwithstanding, England was not a free state. The militia, mustered in 1642, became standing armies by 1649. After a period of years, the citizen-soldiers no longer served as the need arose. Many were unwilling to follow the dictates of Parliament. Parliament created its own army, known as the "New Model Army" in 1645.⁶⁰ True to its roots, a large portion of the army perceived that its loyalties lay with the people, not Parliament. Several events fostered this perception. One event was Parliament's failure to pay the soldiers. Other events included Parliament's favoring a national Presbyterian church.⁶¹

Many army leaders, including Oliver Cromwell, were advocates of religious freedom. Those army leaders took the position that the English people's freedom of worship was a right over which Parliament had no control. Thus, part of the army, initially raised by Parliament, saw itself as an independent political force empowered to act in the name of the people. The army, increasingly subject to Cromwell's control, proposed an "Agreement of the People," which excluded Parliament's power over religion, impressing men into the army or navy, or requiring accused persons to incriminate themselves.⁶² Parliament rejected the "Agreement."⁶³ (pg.1015)

Consequently, soldiers took an oath, called a "Solemn Engagement," to remain together until their demands for back pay and political changes were met.⁶⁴ The army defined Parliament's authority and dictated when it would meet.⁶⁵ Subsequently, Parliament attempted to disband the

⁵⁵ SOURCES, *supra* note 19, at 488.

⁵⁶ *Id.* at 487.

⁵⁷ JOYCE LEE MALCOLM, THE RIGHT OF THE PEOPLE TO KEEP AND BEAR ARMS: THE ORIGINS OF THE SECOND AMENDMENT 8-9 (1981).

⁵⁸ *Id.* at 393-94.

⁵⁹ SOURCES, *supra* note 19, at 523.

⁶⁰ EDMUND S. MORGAN, INVENTING THE PEOPLE 73 (1988).

⁶¹ *Id.* at 67.

⁶² *Id.* at 72.

⁶³ *Id.* at 73 (citing 7 JOHN RUSHWORTH, HISTORICAL COLLECTIONS 867-68 (1721)).

⁶⁴ MORGAN, *supra* note 60, at 74.

⁶⁵ SOURCES, *supra* note 19, at 507 (citing THE HEADS OF THE PROPOSALS (1647)).

army. The army declined and eventually took over the government, installing the Rump Parliament.⁶⁶ When a subsequent Parliament attempted to disband the army, it was dissolved.⁶⁷ Ultimately, another Parliament bestowed on Cromwell the role of Lord Protector.⁶⁸ This Parliament also attempted to reduce the army's size and revitalize the militia.⁶⁹ Cromwell, however, dissolved Parliament and created a military government. Segments of the army, paid regularly by the government, were assigned to each of eleven military districts.⁷⁰ Cromwell's army was authorized to disarm all Catholics, opponents of the government, and anyone else judged dangerous.⁷¹ When Cromwell died in 1659, the Rump Parliament met again and enacted laws that empowered government officials to confiscate arms from landowners to protect the Commonwealth.⁷² Shortly thereafter, legislation was passed authorizing the seizure of arms from Catholics, anyone who had borne arms against Parliament, or anyone else judged to be dangerous to the State.⁷³

In 1660, the army intervened and General George Monk reinstated members of Parliament who had been purged in 1648 because they favored the monarchy.⁷⁴ Parliament then restored the monarchy by placing Charles II, the executed King's son, on the throne. Charles II was in an uncomfortable position. He had no army. His father was executed after the Civil War. Because of the policy of universal armament and the Civil War, the English people were heavily armed. Cromwell's army of 60,000 was mingled with the rest of the population. Consequently, Charles II decided to develop his own army and to disarm the population.⁷⁵ (pg.1016)

Charles II disbanded the army except for troops he believed would be loyal to his government.⁷⁶ Parliament assisted by enacting the Militia Act of 1661 which vested control over the militia in the King.⁷⁷ Charles II began molding a militia loyal to the throne by directing that his officer corp assemble volunteers for separate training and "disaffected persons ... not allowed to assemble and their arms seized."⁷⁸ In 1662, the more select militia was authorized to seize arms of

⁶⁶ Hardy, *Historiography*, *supra* note 17 [errata: *Armed Citizens*, note 12], at 573.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* 45 (1984); DAVID T. HARDY, *ORIGINS AND DEVELOPMENT OF THE SECOND AMENDMENT* (1986).

⁷² Hardy, *Historiography*, *supra* note 17 [errata: *Armed Citizens*, note 12], at 574 (Citing *ORDINANCES AND ACTS OF THE COMMONWEALTH AND PROTECTORATE* 1317 (London 1911)).

⁷³ *Id.*

⁷⁴ MORGAN, *supra* note 60, at 94.

⁷⁵ Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 321 (1991).

⁷⁶ Hardy, *Historiography*, *supra* note 17 [errata: *Armed Citizens*, note 12], at 574.

⁷⁷ SOURCES, *supra* note 19, at 541.

⁷⁸ 8 CALENDAR OF STATE PAPERS (DOMESTIC), Charles II, No. 188, at 150 (July 1660).

anyone judged dangerous to the Kingdom.⁷⁹ In addition, gunsmiths were ordered to report weekly on the number of guns made and sold; importation of firearms was banned.⁸⁰

A move toward total disarmament occurred with passage of the Game Act of 1671.⁸¹ The Game Act dramatically limited the right to hunt to those persons who earned over £100 annual income from the land.⁸² More importantly, and unlike any prior game act, it made possession of a firearm by other than those qualified to hunt illegal and provided for confiscation of those arms.⁸³

Charles II's successor, his brother James, pursued the disarmament. James, however, was the object of suspicion because he was Catholic. As King, James was also the official head of the Anglican Church. He sat on the throne of a country that barred Catholics from holding appointed office.⁸⁴

James was challenged only a few months after taking the throne by Charles II's illegitimate son, the Duke of Monmouth, who proclaimed himself as the Savior of Anglicanism.⁸⁵ James crushed the rebellion and, in doing so, doubled his standing army to 30,000 men.⁸⁶ He used his kingly "dispensing power," which permits kings to make an occasional exception to the law, to appoint Catholic officers to enter his army. James quartered his new troops in private homes in violation of Parliamentary enactments. The populace thus became suspicious of whether James might plan to impose his religion on (pg.1017) England.⁸⁷

James continued disarmament by enforcing it in Ireland. The common perception was that James was disarming Protestants in Ireland and the new Whig party that opposed him. James then asked Parliament to repeal the test acts that precluded Catholics from holding office, to suspend the Habeas Corpus Act, and to abandon the militia concept in favor of standing armies.⁸⁸ Parliament refused.

James responded by having his Judges find that the laws of England were the King's laws and the King could dispense with them.⁸⁹ The King replaced Protestants with Catholics at high

⁷⁹ See J.R. WESTERN, *THE ENGLISH MILITIA IN THE EIGHTEENTH CENTURY* 10 (1965).

⁸⁰ Joyce Lee Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HAST. CONST. L.Q. 285, 299-300 (1983) [hereinafter Malcolm, *Tradition*].

⁸¹ 22 & 23 Car. 2, ch. 25 (1671).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ SOURCES, *supra* note 19, at 555.

⁸⁵ Hardy, *Historiography*, *supra* note 17 [errata: *Armed Citizens*, note 12], at 577.

⁸⁶ Weatherup, *supra* note 37, at 140 [ed: reference is to 1982 Senate Report pagination.].

⁸⁷ For example, King James II tried to force the Church of England's clergy to support his policy of religious tolerance and to read his Declaration of Indulgence from their pulpits. The Archbishop of Canterbury and six other bishops petitioned the King against the use of his dispensing power. King James had them charged with seditious libel. The jury acquitted, and the public endorsed the result. Edith G. Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 330-31 (1966).

⁸⁸ *Id.*

⁸⁹ See SOURCES, *supra* note 19, at 583; *Godden v. Hales*, 89 Eng. Rep. 1050 (K.B. 1686).

government posts, including the military; he then placed 13,000 men of his army outside London.⁹⁰ In 1688, James's son-in-law, William of Orange, a Protestant, landed in England with a large Dutch army. James's army deserted him and he fled to France.

William and Mary became sovereigns in 1689. Parliament restricted their powers by adopting the Declaration of Rights.⁹¹ William and Mary were required to accept the rights enumerated in the Declaration as the rights of their subjects and to rule in accordance with Parliament's statutes.⁹² The Declaration recited the abuses by James, including the raising and keeping of a standing army without Parliament's consent, quartering of troops in private homes, and disarming Protestant subjects. The declaration set forth the positive right of Protestant subjects to have arms for their defense, suitable to their conditions, and as allowed by law.⁹³

The Declaration did not create a new right. The English had been able to possess individual arms for centuries and at times were required to keep them. Nevertheless, the debates attending the Declaration make clear that Parliament thought the right should be recognized as a right of individuals. The Whigs in the Convention Parliament were the most outspoken in favor of the right to (pg.1018) possess arms to resist tyranny.⁹⁴ The members were aggrieved that the King and a prior Parliament had attempted to, and did, disarm some of the English subjects.⁹⁵ An early draft of the grievance portion of the Declaration recited that "the Acts concerning the militia are grievous to the subjects,"⁹⁶ a reference to those portions of the civil war era militia acts that permitted the militia to disarm those suspected of disloyalty.

To address this grievance, the draft stating the positive right first provided: "[I]t is necessary for the Publick Safety, that the Subjects which are Protestants, should provide and keep Arms for their common Defence. And that the Arms which have been seized, and taken from them, be restored."⁹⁷ This version stated a collective purpose for the right, public safety, and common defense. A second version followed that deleted the reference to the public safety but retained the collective purpose language: common defense. It altered the "should keep" language to "may keep." This version read, "[T]hat the Subjects, which are Protestants, *may* provide and keep Arms, for their common Defence."⁹⁸

⁹⁰ Weatherup, *supra* note 37, at 141 [ed: reference is to 1982 Senate Report pagination.].

⁹¹ SOURCES, *supra* note 19, at 599.

⁹² *Id.* at 606.

⁹³ *Id.* at 601.

⁹⁴ Malcolm, *Tradition*, *supra* note 80, at 307.

⁹⁵ The Declaration of Rights contained as its fifth and sixth charges against James II the assertion that he had attempted "to subvert" the "[l]aws and [l]iberties" by "raising and keeping a Standing army ... in time of peace" and "[b]y causing several good Subjects, being Protestants, to be disarmed at the same Time when Papists were both armed and employed contrary to Law." *The Bill of Rights*, 1 W. & M., sess. 2, ch. 2 (1689).

⁹⁶ JOURNAL OF THE HOUSE OF COMMONS FROM DEC. 26, 1688 TO OCT. 26, 1693, at 21-22 (London 1742) (Lib. of Congress Rare Books Collection).

⁹⁷ Malcolm, *Tradition*, *supra* note 80, at 307 (citing 10 H.C. JOUR., 1688-93, at 21-22).

⁹⁸ *Id.* (emphasis added).

The final version came after a compromise with the House of Lords. A prior Parliament, during the civil war era, had not only permitted its militia, a collective organization, to disarm others, but had also abolished the House of Lords. The House of Lords apparently objected to the "collective purpose" language in the Commons draft. It secured new language that completely eliminated the collective purpose—common defense language.⁹⁹ The complete text, on this point, as adopted, reads "[T]hat the subjects which are Protestants may have arms for their defense suitable to their conditions and as allowed by law."¹⁰⁰

Several other points are important regarding this article of the declaration. First, the language that Protestant subjects may have arms "as allowed by law" was not construed as a limitation on possession, but rather a limitation on (pg.1019) use.¹⁰¹ Parliament enacted a new game or hunting act that deleted firearms from the list of hunting equipment that could not be possessed except by the wealthy.¹⁰² Arms could be confiscated if used to poach game, but possession of arms was protected as a matter of right.¹⁰³ However, the phrase "as allowed by law" highlights that what Parliament giveth, Parliament could take away. With or without the phrase, Parliament's Declaration of Rights only protected those rights from abuse by the monarchy. In 1689, like today, the non-constitutional English system permits the current Parliament to abrogate the rights granted by a prior Parliament.

Second, the English Declaration of Rights states "that the subjects which are Protestants may have arms."¹⁰⁴ However, contemporaneous legislation in 1689 made clear that while Catholics were not permitted to stockpile weapons, they were allowed to possess arms for defense of their house or person.¹⁰⁵ Last, although the Declaration speaks solely in terms of an individual right to bear arms, a review of eighteenth-century literature indicates that the intended purpose was to provide both an individual and a collective right with the collective right being the more important.¹⁰⁶ A true collective right, however, could only be protected by guaranteeing the individual right.

Two points should be addressed on this issue. First, during the civil war era and thereafter, both Parliament and the monarchy had proclaimed themselves, to the exclusion of the other, as the protector of the subjects' well-being. To facilitate the collective rights of the subjects, each had attempted to disarm the others' supporters. Thus, the collective organization intended to protect all subjects' liberty, the militia, became an instrument of governmental tyranny. The collective rights of all subjects could not be guaranteed if the government had the power to vest enforcement in one collective organization because the government controlled the organization. Accordingly, the government's power to appoint the officers of the militia and select its membership meant that the militia could become an instrument of the government, not the people. Thus, the people's collective

⁹⁹ 1 W. & M., sess. 2, ch. 2 (1689).

¹⁰⁰ SOURCES, *supra* note 19, at 601.

¹⁰¹ 1 W. & M., Sess. 2, ch. 2 (1689).

¹⁰² Malcolm, *Tradition*, *supra* note 80, at 309 (citing 4 & 5 W. & M., ch. 23 (1692)).

¹⁰³ *Id.* at 311 (citing *Rex v. Gardner, Strange*, 2 REPORTS 1098, 93 Eng. Rep. 1056 (K.B. 1739)).

¹⁰⁴ SOURCES, *supra* note 19, at 601 ("Bill of Rights").

¹⁰⁵ Malcolm, *Tradition*, *supra* note 80, at 309 (citing 1 W. & M., ch. 15 (1689)).

¹⁰⁶ See HALBROOK, *supra* note 71.

rights were enforceable only if the power of enforcement, force of arms, was universally dispersed.^(pg.1020)

III. THE ENGLISH THEORISTS

Accordingly, when Blackstone spoke of the rights of persons, he defined such rights as being either: 1) absolute, that is belonging to the person whether out of society or in it; or 2) relative, meaning the right is an incident of membership in society.¹⁰⁷ Blackstone described the right to keep arms as absolute or belonging to the individual, but ascribed both public and private purposes to the right. The public purpose was resistance to restrain the violence of oppression; the private was self-preservation.¹⁰⁸ Blackstone described this right as necessary to secure the actual enjoyment of other rights which would otherwise be in vain if protected only by the dead letter of the laws.¹⁰⁹

In addition to Blackstone, the views of other seventeenth- and eighteenth-century English political theorists clearly influenced the political views of the colonists who ultimately would revolt and establish a new nation.¹¹⁰ American political thought was strongly linked to "republican" thought in England.¹¹¹ The essence of republican thought was that a citizenry could rule itself without the paternal guiding hand of a monarch.¹¹²

One of the leading republican theorists was James Harrington.¹¹³ Harrington's beliefs were simple and direct. He believed that ownership of land gave people independence.¹¹⁴ This independence would cultivate rights now ^(pg.1021) considered fundamental, including the right of self-government. Harrington also believed that the actual independence attained would be a function of the citizen's ability to bear arms and use them to defend his rights.¹¹⁵ He sought support from the

¹⁰⁷ COMMENTARIES, *supra* note 8, at *88.

¹⁰⁸ *Id.* at *144.

¹⁰⁹ *Id.* at *140-41.

¹¹⁰ See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).

¹¹¹ See JOHN G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 462-552 (1975); CAROLINE ROBBINS, *THE EIGHTEENTH-CENTURY COMMONWEALTHMAN: STUDIES IN THE TRANSMISSION, DEVELOPMENT, AND CIRCUMSTANCES OF ENGLISH LIBERAL THOUGHT FROM THE RESTORATION OF CHARLES II UNTIL THE WAR WITH THE THIRTEEN COLONIES* 385 (1959); Robert E. Shalhope, *Republicanism and Early American Historiography*, 39 WM. & MARY Q. 334, 334-37 (1982).

¹¹² See WILLIAM M. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* 18-19 (1972).

¹¹³ See generally POCOCK, *supra* note 111 (tracing republican thought from Aristotle to Machiavelli and Florentine political theory, to James Harrington and the English civic humanists, to the eighteenth century's Radical Whigs, and, ultimately to the American Founders). For an in-depth analysis of Harrington's political thought, see *THE POLITICAL WORKS OF JAMES HARRINGTON* (John G.A. Pocock ed., 1977).

¹¹⁴ See generally JAMES HARRINGTON, *The Commonwealth of Oceana*, in *THE POLITICAL WORKS OF JAMES HARRINGTON*, *supra* note 113, at 170 (explaining that the way to mediate security of property with widespread civic participation was to redistribute property, especially non-feudal, "allodial" interest in land, broadly within society so that citizenship, and the opportunity to participate, would be widely available). Not all republicans, however, held egalitarian property distribution notions. For a discussion of elitist aspects of republicanism, see, e.g., Hendrick Hartog, *Imposing Constitutional Traditions*, 29 WM. & MARY L. REV. 75 (1987); Frank I. Michelman, *Possession v. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319 (1987).

¹¹⁵ *THE POLITICAL WORKS OF JAMES HARRINGTON*, *supra* note 113.

works of Machiavelli, who proclaimed that there was a direct relationship between good arms and good laws.¹¹⁶

A central thesis of Harrington's republican theory is that an armed population is a popular government's best protection against its enemies, both foreign and domestic.¹¹⁷ While Harrington and subsequent republicans argued the virtue of armed citizenry, they warned that standing armies were to be avoided at almost all cost because such armies become the government's instrument to retain power.¹¹⁸ Rather, a populace that possessed the land and arms inevitably would retain political power as well as serving as the best defense against the popular government's enemies.

These views became tenets of early republican or whig political theorists during the eighteenth century.¹¹⁹ Henry Neville argued that by arming the people, democracies could obtain incomparable advantage over neighboring aristocracies because the aristocracies could not arm their populace for fear they would seize the government.¹²⁰ Robert Molesworth praised the armed and free Swiss, as well as his own brethren, the English, as examples of the virtue of arming the people as individuals.¹²¹ (pg.1022)

IV. THE POLITICS OF THE FOUNDING FATHERS

The English republican views on the relationship between arms and democracy profoundly influenced the views of the founding fathers.¹²² Both the Federalists, those promoting a strong central government, and the Antifederalists, those believing that liberties including the right of self-rule would be protected best by preservation of local autonomy, agreed that arms and liberty were inextricably linked.¹²³

The first discussion in which these views were articulated occurred in the context of Article 1, section 8 of the Constitution concerning the powers of Congress to raise a standing army and its

¹¹⁶ NICCOLO MACHIAVELLI, *THE PRINCE AND THE DISCOURSES* 44 (Luigi Ricci trans., Mod. Lib. ed. 1950) (1513).

¹¹⁷ See JAMES HARRINGTON, *THE POLITICAL WRITINGS OF JAMES HARRINGTON: REPRESENTATIVE SELECTIONS* 74 (Charles Blitzer ed., 1955).

¹¹⁸ MORGAN, *supra* note 60, at 157.

¹¹⁹ See, e.g., BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); POCOCK, *supra* note 111, at 462-552; ROBBINS, *supra* note 109, at 385. Although these historians are all part of a common movement, there do exist significant differences in the ways they view republicanism. See Shalhope, *supra* note 111, at 334-37.

¹²⁰ Hardy, *Historiography*, *supra* note 17 [errata: *Armed Citizens*, note 12], at 585 (citing CRISTOPHER HILL, *SOME INTELLECTUAL ORIGINS OF THE ENGLISH REVOLUTION* 27 (1980)).

¹²¹ Hardy, *Historiography*, *supra* note 17 [errata: *Armed Citizens*, note 12], at 589 (citing FRANCOIS HOTMAN, *FRANCOR CALLIA* at iv (R. Molesworth trans., London 1711)).

¹²² The Founding Fathers were influenced by the fact that the entire body of republican philosophy known to them was based on English and classical history, which taught that popular possession of arms was vital to the preservation of liberty and a republican form of government. See Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599 (1982).

¹²³ The unanimity with which Federalists and Antifederalists supported an individual right to bear arms is a reflection of their shared philosophical and historical heritage. The unanimity in the contemporary understanding of the Second Amendment helps explain the relative absence of recorded debate over it. What little debate there is appears at 1 ANNALS OF CONG. 778-80 (J. Gales ed., 1834) and relates to James Madison's proposal that the amendment provide that "no person religiously scrupulous shall be compelled to bear arms." *Id.*

power over the militia. As initially proposed, Congress was to be provided the power to raise armies.¹²⁴ Objections were raised that there was no check against standing armies in time of peace.¹²⁵ The debate focused on how to avoid the dangers of a standing army; there was no dispute that a standing army posed a significant threat to the liberty of the people.¹²⁶ The dilemma was that some type of national army would be necessary in time of war, but the results of waiting until war occurred to raise a national army could be disastrous.¹²⁷

The solution adopted was two-fold. First, Congress would have the power to raise an army but no appropriation of money for that use could be for more (pg.1023) than two years.¹²⁸ Because the people controlled the House of Representatives and the Senate, and Congress controlled the purse, the people were given an effective check against the dangers of a standing army. The second check against the dangers of a standing army was provided by the existence of the militia. Again, however, the necessity of providing for the common defense had to be satisfied while guarding against the national government's abuse of power.

If the danger of a standing army was to be limited, the militia, which was then under the control of the states, must be available to meet national emergencies until an adequate standing army could be raised. Thus, the national government needed the power to call upon the militia. Conversely, the existence of a militia independent of federal control was deemed necessary as a check on the standing army which Congress was authorized to raise.¹²⁹ The resolution was to provide Congress with the power to organize, arm, and discipline the militia and to govern such parts as may be called into federal service, but to reserve to the states the appointment of officers and actual training of the militia.¹³⁰ The drafters of this particular language hastened to point out that the power to organize, arm, and discipline was intended only to allow Congress to prescribe the proportion of men to officers, specify the kind and size of arms, ensure that men were armed in fact either by themselves, the states, or by Congress, and to prescribe exercises.¹³¹ The States were to be in control

¹²⁴ U.S. CONST. art. I, § 8, cl. 11-16. In these clauses, Congress may "declare War, ... raise and support Armies, ... provide and maintain a Navy; ... make Rules for the Government and Regulation of the land and naval Forces; ... provide for calling forth the Militia ... provide for organizing, arming, and disciplining, the Militia" *See also* Chappell v. Wallace, 462 U.S. 296, 301 (1983) (stating that the framers of the Constitution clearly contemplated that Congress have plenary authority over creation and maintenance of military).

¹²⁵ DOCUMENTARY HISTORY OF THE CONSTITUTION 560 (Dept. of State, 1900), *reprinted in* 3 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 1786-1870, at 560 (Johnson Reprint Corp. 1965).

¹²⁶ *Id.* at 560, 599, 677, 746.

¹²⁷ For a discussion of the debate concerning the military at the Constitutional Convention, see SAMUEL P. HUNTINGTON, *THE SOLDIER AND THE STATE* 80-97, 345-46 (1957).

¹²⁸ *See* U.S. CONST. art. I, § 8, cl. 12.

¹²⁹ Akhil Amar argues that the Second Amendment also provides a linguistic gloss on Congress's Article I military powers. An army constituted hired soldiers, unlike a militia that consisted of the general public. Consequently, Congress's power to raise an "army" involves authority to enlist soldiers, not conscript them. *See* Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 *YALE L.J.* 1131 (1991).

¹³⁰ U.S. CONST. art. I, § 8, cl. 15 reserves to the states "the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."

¹³¹ *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 386 (Max Farrand ed., 1911) [hereinafter RECORDS].

of the militia by reason of the power to appoint officers and provide for the actual training.¹³² The national government would be in control of the militia only when the militia was called out for national service and, even then, would have to rely on the State appointed officers to execute its orders.

A. *The Antifederalist View*

Additional views on the relationship between freedom and arms were expressed when the Constitution was being submitted to the states for ratification. The Antifederalist views were stated in pamphlets entitled *Letters (pg.1024) from the Federal Farmer to the Republican*.¹³³ Richard Henry Lee is credited with authorship.¹³⁴ The self-styled federal farmer thought of himself as a supporter of federalism and republicanism.¹³⁵ His view of federalism was not that set forth in the proposed Constitution of 1787. The federal farmer argued that a distant national government was antithetical to freedom:

[T]he general government, far removed from the people, and none of its members elected oftener than once in two years, will be forgot or neglected, and its laws in many cases disregarded, unless a multitude of officers and military force be continually kept in view, and employed to enforce the execution of the laws and to make the government feared and respected. No position can be truer than this, that in this country either neglected laws, or a military execution of them, must lead to revolution, and to the destruction of freedom. Neglected laws must first lead to anarchy and confusion; and a military execution of laws is only a shorter way to the same point—despotic government.¹³⁶

The federal farmer also saw evil in Congress's power to raise an army, despite the two-year limit on money appropriations and the states' control over the militia via the appointment of officers.¹³⁷ He understood the need to provide for the common defense but believed an additional check was necessary. He proposed requiring two-thirds consent in Congress before a standing army could be raised or the militia could be pressed into service by the national government.¹³⁸ Additionally, the federal farmer argued that a select militia composed of less than all the people

¹³² U.S. CONST. art. I, § 8, cl. 16 reserves "to the States respectively" the power to appoint the officers of any militia for which Congress might provide and to conduct the "training [of] the militia according to the discipline prescribed by Congress."

¹³³ LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN (W. Bennett ed., 1978) [hereinafter FEDERAL FARMER].

¹³⁴ The true author of the *Letters from the Federal Farmer to the Republican* is unknown. The traditional view is that Richard Henry Lee of Virginia was the author. Steven R. Boyd argues that the overwhelming contemporary opinion was that Lee was indeed the "Federal Farmer." See Steven R. Boyd, *Impact of the Constitution on State Politics: New York as a Test Case*, in THE HUMAN DIMENSIONS OF NATION MAKING 270, 276 n.14 (J. Martin ed., 1976).

¹³⁵ *Letter from the Federal Farmer* (Oct. 13, 1787), reprinted in 2 THE COMPLETE ANTI-FEDERALIST 251 (H. Storing ed., 1981).

¹³⁶ FEDERAL FARMER, *supra* note 133, at 13.

¹³⁷ For Antifederalist attacks on standing armies, see, e.g., *Essays by a [Maryland] Farmer*, in 5 HERBERT J. STORING, THE COMPLETE ANTI-FEDERALIST 22-28 (1981).

¹³⁸ *Id.* at 21-22.

ought to be avoided. The farmer argued 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.¹³⁹

Another Antifederalist, George Mason, spoke on the relationship between (pg.1025) arms and liberty. Mason asserted that history had demonstrated that the most effective way to enslave a people is to disarm them.¹⁴⁰ Mason suggested that divine providence had given every individual the right of self-defense, clearly including the right to defend one's political liberty within that term.¹⁴¹

Patrick Henry argued against ratification of the Constitution by Virginia, in part because the Constitution permitted a standing army and gave the federal government some control over the militia.¹⁴² Henry objected to the lack of any clause forbidding disarmament of individual citizens; "the great object is that every man be armed Everyone who is able may have a gun."¹⁴³ The Antifederalists believed that governmental tyranny was the primary evil against which the people had to defend in creating a new Constitution. To preserve individual rights against such tyranny, the Antifederalists argued for the addition of a Bill of Rights which included, among other rights, the right to keep and bear arms.¹⁴⁴

B. *The Federalist View*

The Federalists, those supporting the Constitution as drafted, did not dispute the premise that governmental tyranny was the primary evil that people had to guard against.¹⁴⁵ Nor did the Federalists dispute the nexus between (pg.1026) arms and freedom.¹⁴⁶ In one of the first Federalist pamphlets, Noah Webster argued that the proposed Constitution provided adequate guarantees to

¹³⁹ *Id.* at 124.

¹⁴⁰ 3 THE PAPERS OF GEORGE MASON 1725-1792, at 1075 (Robert A. Rutland ed., 1970).

¹⁴¹ *Id.* at 1075, 1076.

¹⁴² Speeches by Patrick Henry Before the Virginia Ratifying Convention (June 5 & 7, 1788), reprinted in THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 199-216 (Ralph L. Ketcham ed., 1986).

¹⁴³ Don B. Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 229 (1983).

¹⁴⁴ See David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991).

¹⁴⁵ Madison warned that the greatest danger to the constitutional order and to the liberty of the citizen was not the possibility of a tyrant President, which he regarded as slight, but the risk that Congress would take over the powers of the other two branches of government. "The accumulation of all powers, legislative, executive, and judiciary, in the same hands," Madison wrote, "may justly be pronounced the very definition of tyranny." THE FEDERALIST No. 47, at 329 James Madison) (Tudor Publishing Co. 1937). Power "is of an encroaching nature," and something more than "parchment barriers" is required to restrict it "from passing the limit assigned to it." *Id.*, No. 48, at 321. The risk of congressional power is great, far greater than the risk from the President or the courts. Congress "alone has access to the pockets of the people." *Id.* at 321, 323. Its supposed influence over the people is an inducement to act, and it can expand its power in many ways, masking its encroachments "under complicated and indirect measures." *Id.* at 323. Madison concluded that "it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions." *Id.*

¹⁴⁶ WILLIAM H. RAWLE, A VIEW OF THE CONSTITUTION 125-26 (2d ed. 1829). Alexander Hamilton saw the people's possession of arms as guaranteeing freedom from state as well as from federal tyranny. The armed populace, "by throwing themselves into either scale, will infallibly make it preponderate" against either a federal or a state invasion of popular rights. THE FEDERALIST No. 28, at 228 (Alexander Hamilton) (John C. Hamilton ed., 1864).

check the dangers of any standing army.¹⁴⁷ His reasoning acknowledged checks and balances, but did not rely on the same. Rather, Webster argued:

Before a standing army can rule, the people must be disarmed; as they are in almost every Kingdom of Europe. The Supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any bands of regular troops that can be, on any pretense, raised in the United States.¹⁴⁸

Similarly, James Madison made clear that, although the proposed Constitution offered sufficient guarantees against despotism by its checks and balances, the real deterrent to governmental abuse was the armed population.¹⁴⁹ To the Antifederalist criticism of the standing army as a threat to liberty, Madison replied:

To these [the standing army] would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from amongst themselves, fighting for their common liberties, and united and conducted by government possessing their affections and confidence. It may well be doubted, whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops Besides the advantage of being armed, which Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are (pg.1027) attached, and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of.¹⁵⁰

Another leading Federalist, Alexander Hamilton, voiced a similar view.¹⁵¹ Hamilton suggested that if the representations of the people, elected under the proposed Constitution, betrayed their constituents, the people retained the right to defend their political rights and possessed the means to do so.¹⁵²

In summary, both Federalists and Antifederalists believed that the main danger to the republic was tyrannical government and the ultimate check on tyrannical government was an armed

¹⁴⁷ See STAFF OF SENATE SUBCOMM. ON THE CONSTITUTION, COMM. ON THE JUDICIARY, 97TH CONG., 2D SESS., REPORT ON THE RIGHT TO KEEP AND BEAR ARMS 27 (Comm. Print 1982).

¹⁴⁸ NOAH WEBSTER, AN EXAMINATION INTO THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION PROPOSED BY THE LATE CONVENTION HELD AT PHILADELPHIA 43 (Philadelphia 1787), reprinted in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE: 1787-1788, at 5 (Paul L. Ford ed., 1888).

¹⁴⁹ At the convention, James Madison remarked:
As the greatest danger is that of disunion of the States, it is necessary to guard [against] it by sufficient powers to the Common Govt. and 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.
JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 600 (Gouverneur Morris) (Ohio Univ. Press rev. ed. 1984).

¹⁵⁰ THE FEDERALIST No. 46, at 310, 311 (James Madison) (Modern Library ed., 1937).

¹⁵¹ See ALEXANDER HAMILTON AND THE FOUNDING OF THE NATION (Richard B. Morris ed., 1957).

¹⁵² THE FEDERALIST No. 28 (Alexander Hamilton).

population.¹⁵³ Federalists and Antifederalists disagreed, however, on several issues. First, they disagreed as to whether sufficient checks and balances had been placed on the proposed national government to control the danger of oppression.¹⁵⁴ Second, the Antifederalists believed a bill of rights should be incorporated into the Constitution to guarantee certain rights.¹⁵⁵ The Federalists argued that such a bill of rights was unnecessary because the power of the federal government was restricted to the grant of authority provided by the Constitution.¹⁵⁶ There was no need to (pg.1028) provide exceptions to powers not granted.¹⁵⁷ Further, the Federalists argued that providing exceptions to powers not granted was dangerous because it could encourage a claim that powers not expressly stated had been granted.¹⁵⁸ Again, both sides not only agreed that the people had a right to be armed, both sides assumed the existence of an armed population as an essential element to preserving liberty. The framers quite clearly had adopted James Harrington's political theory that the measure of liberty attained and retained was a direct function of an armed citizenry's ability to claim and hold those rights from domestic and foreign enemies.¹⁵⁹

V. THE RATIFICATION PROCESS

The Federalist and Antifederalist pamphlets were written to influence the ratification process by which the proposed Constitution would become effective.¹⁶⁰ In addition to revealing the drafters' political philosophy, the pamphlets and other documents intended to influence ratification reveal additional concerns with the right to bear arms.¹⁶¹ Antifederalists rejected the claim that the militia

¹⁵³ See *supra* notes 133-52 and accompanying text.

¹⁵⁴ The Antifederalist warnings of inevitable doom, which would follow granting the central government an army power, were neutralized by a Federalist-proposed system of checks and balances that would prevent the army from usurping the power of the elected government and oppressing the people. See *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to their Constituents* (Dec. 18, 1787), reprinted in *THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES* 254-56 (R. Ketcham ed., 1986). The minority feared that:

A standing army in the hands of a government placed so independent of the people, may be a fatal instrument to overturn the public liberties; it may be employed to enforce the collection of the most oppressive taxes, and to carry into execution the most arbitrary measures. An ambitious man who may have the army at his devotion, may step up into the throne, and seize upon absolute power.

Id. at 254.

The Federalists advanced the contrary view, including Alexander Hamilton who argued that if the central government was denied an army power then future generations would be unable to adequately protect themselves. *THE FEDERALIST* No. 23 (Alexander Hamilton).

¹⁵⁵ See 1 HERBERT J. STORING, *THE COMPLETE ANTI-FEDERALIST: WHAT THE ANTI-FEDERALISTS WERE FOR* 64-70, 72 (1981) (discussing the debate between Federalists and Anti-federalists over whether a constitution that based government on republican principles needed a bill of rights to protect individual liberties).

¹⁵⁶ *Id.*

¹⁵⁷ Washington advised Lafayette: "There was not a member of the Convention, I believe, who had the least objection to what is contended for by the Advocates for a Bill of Rights" 3 *RECORDS*, *supra* note 131, at 297-98.

¹⁵⁸ *THE FEDERALIST* No. 84 (Alexander Hamilton).

¹⁵⁹ See *supra* notes 113-21.

¹⁶⁰ See PHILIP B. KURLAND & RALPH LERNER, *THE FOUNDERS' CONSTITUTION* (1987).

¹⁶¹ *Reid v. Covert*, 354 U.S. 1, 24 (1957) ("Their fears were rooted in history. They knew that ancient republics had been overthrown by their military leaders.").

would serve as a deterrent to the threat posed by a standing army.¹⁶² The responsive argument widely made was that Congress might be able to confine the existing militia force, all armed citizens, to a select militia made up of a small segment of the population.¹⁶³ Baron Von Steuben, (pg.1029) Washington's Inspector General, had already proposed such a force.¹⁶⁴ The fear was that creation of a select militia, armed by and loyal to the federal government, would be accompanied by disarmament of the people in general.

A. *The State Conventions*

All of the arguments for and against ratification came to bear in the state conventions.¹⁶⁵ In New York, Hamilton advocated adopting the Constitution and amending it, if necessary.¹⁶⁶ Hamilton's argument was that if amendments were to be made, they ought to be made after adoption since an alteration would constitute a new proposal and must undergo a new decision in each state.¹⁶⁷

Hamilton's argument prevailed. New York ratified the Constitution, but it included with the ratification statement a declaration of rights and a statement that ratification was made with the assumption that the rights enumerated in the declaration could not be abridged or violated and were consistent with the Constitution.¹⁶⁸ Accordingly, New York ratified, but made clear that the people had a right to keep and bear arms and that the militia was to include all the people capable of bearing arms, not just a select few.

Similarly, New Hampshire ratified the Constitution but stated:

¹⁶² Instead of a standing army providing for the nation's defense, the Antifederalists advocated the use of a well-regulated militia maintained by each state. These militia would be under the state governor's control but subject to requisition by the national government in time of need. The prevailing sentiment was that:

The standing army with its upper-class officers and lower-class enlisted men was basically an aristocratic institution. It was associated with the British Crown and with European despotism. It was quite unnecessary in the eyes of many Americans. The distance of the United States from Europe meant that it required no permanent military force with the possible exception of small frontier garrisons to deal with the Indians. Consequently, it was generally agreed that primary reliance must be put on a citizen militia composed of part-time officers and enlisted men.

HUNTINGTON, *supra* note 127, at 166-67.

¹⁶³ Virginia's Richard Henry Lee argued that select militia might be used to disarm the population and that, in any event, it would pose more of a danger to individual liberty than a militia composed of the whole population. He charged that a select militia "commit[s] the many to the mercy [and the] prudence of the few." Richard Henry Lee, LETTERS FROM THE FEDERAL FARMER: LETTER III (Oct. 10, 1787), reprinted in THE ANTIFEDERALISTS 229 (Cecelia M. Kenyon ed., 1966).

¹⁶⁴ See RUDOLF CRONAU, THE ARMY OF THE AMERICAN REVOLUTION AND ITS ORGANIZER (1923).

¹⁶⁵ See MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES (1913).

¹⁶⁶ *The Federalist Papers*, a collection of some 85 newspaper essays, was written between October 1787 and May 1788 by Alexander Hamilton, James Madison, and John Jay to persuade the New York state ratifying convention to adopt the Constitution. A standard critical edition in use today is THE FEDERALIST PAPERS (Clinton Rossiter ed., 1961).

¹⁶⁷ For example, in THE FEDERALIST No. 23, Publius addressed the need to adopt a constitution "at least equally energetic with the one proposed," relying upon the "[d]efective" nature of the Articles of Confederation. THE FEDERALIST No. 23, at 143, 146 (Alexander Hamilton) (Modern Library ed. 1941). The argument was frequently reiterated. See *id.* No. 15, at 93 (Alexander Hamilton); *id.* No. 22, at 140 (Alexander Hamilton); *id.* No. 26, at 164-65 (Alexander Hamilton).

¹⁶⁸ See 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 327-31 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter STATE DEBATES].

It is the Opinion of this Convention that certain amendments & alteration in the said Constitution would remove the fears and quiet the apprehensions of many of the good people of this State & more effectually guard against an undue Administration of the Federal Government—The Convention do therefore recommend that the (pg.1030) following alterations & provisions be introduced into the said Constitution.

...

Twelfth

Congress shall never disarm any citizen unless such as are or have been in Actual Rebellion.¹⁶⁹

In Pennsylvania, James Wilson argued against adding a bill of rights on grounds already offered by Madison,¹⁷⁰ that such an enumeration was unnecessary and indeed dangerous since no person could enumerate all the rights of men.¹⁷¹ Pennsylvania ratified, but a substantial minority drafted a series of proposed amendments that included 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 disarming the people or any of them unless for crimes committed, or real danger of public injury from individuals.¹⁷²

It is doubtful that the Pennsylvania minority was attempting to constitutionalize hunting as a sport.¹⁷³ Rather, the delegates were attempting to eliminate the possibility that game laws, used effectively in England at different points to disarm the population, would not produce a similar result in America.

Samuel Adams made similar arguments in Massachusetts.¹⁷⁴ The argument that adoption must precede amendment prevailed.¹⁷⁵ In Virginia, Madison secured ratification, but George Mason, Patrick Henry, and Richard Henry Lee were successful in having the convention adopt a Declaration of Rights which was to be recommended to the First Congress for adoption as constitutional amendments.¹⁷⁶ The right of the people to keep and bear arms (pg.1031) was included as was the

¹⁶⁹ See DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, H.R. DOC. NO. 398, 69th Cong., 1st Sess. 1007 (1927).

¹⁷⁰ 3 STATE DEBATES, *supra* note 168, at 626-27; 2 STATE DEBATES, *supra* note 168, at 436.

¹⁷¹ The classic formulations of the mischief feared by inclusion of a bill of rights are found in the speech by James Wilson before the Pennsylvania ratifying convention. LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 270-72 (1988).

¹⁷² PA. CONST. of 1776, Declaration of Rights, art. XIII.

¹⁷³ See 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 665 (1975).

¹⁷⁴ *Id.* at 675.

¹⁷⁵ *Id.*

¹⁷⁶ See William S. Fields & David T. Hardy, *The Militia and the Constitution: A Legal History*, 136 MIL. L. REV. 1, 36 (1992) (discussing the unusual alignment in Virginia where liberals like Thomas Jefferson, Patrick Henry, and Richard Henry Lee joined forces with conservatives like George Mason to promote a bill of rights). The Virginia Proposals for a bill of rights were drafted by a committee that included Antifederalists Lee and Mason, as well as Federalists James Madison, John Marshall, and George Wythe.

statement that a militia composed of the body of the people was the natural and safe defense of a free state.¹⁷⁷

North Carolina's convention proposed that a declaration of rights be added to the Constitution which explicitly identified the right of people to keep and bear arms as a natural right and one of the means necessary to the pursuit and obtainment of happiness and safety.¹⁷⁸ Identification of the right was accompanied by the statement that the militia, composed of the body of the people, trained to arms, is the natural and safe defense of a free state.¹⁷⁹ The North Carolina convention refused to ratify the Constitution until the document included this and other rights.¹⁸⁰ North Carolina did not ratify the Constitution until the Bill of Rights was drafted and submitted to the States.¹⁸¹ Rhode Island followed an identical course by identifying the right of the people to keep and bear arms as a natural right, among others, and declining to ratify the Constitution until after the Bill of Rights had been drafted and submitted.¹⁸²

To summarize the state ratification process, three states, New York, New Hampshire, and Virginia, ratified while expressing their understanding that the people had a right to bear arms and that Congress would never disarm law abiding citizens.¹⁸³ Two states, North Carolina and Rhode Island, refused to ratify until individual rights, including the people's right to keep and bear arms, (pg.1032) were recognized by amendments.¹⁸⁴ In Pennsylvania and Massachusetts, an effort was made to amend or condition ratification on amendment to include, among others, the right to keep and bear arms.¹⁸⁵ Efforts to amend were defeated but not on the merits. There is no evidence from any state convention that any speaker suggested that the proposed Constitution would permit disarming the public.

B. *The Framers' Views of the States and Their Role*

¹⁷⁷ The Virginia convention urged the adoption of the following language:

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 for 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.

3 STATE DEBATES, *supra* note 168, at 659.

¹⁷⁸ N.C. Proposal for a Declaration of Rights, § 19, in 4 STATE DEBATES, *supra* note 168, at 244.

¹⁷⁹ N.C. CONST. of 1776, Declaration of Rights, art. XVII.

¹⁸⁰ In August 1788, the North Carolina Convention refused to ratify the Constitution by a greater than two to one majority. The vote is recorded in 4 STATE DEBATES, *supra* note 151, at 250-51. North Carolina did not ratify until November 1789. ROBERT A. RUTLAND, *THE ORDEAL OF THE CONSTITUTION: THE ANTIFEDERALISTS AND THE RATIFICATION STRUGGLE OF 1787-88*, at 250-51 (1966).

¹⁸¹ *Id.*

¹⁸² See 1 STATE DEBATES, *supra* note 168, at 331-37.

¹⁸³ See Lawrence D. Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. AM. HIST. 22, 31 (1984).

¹⁸⁴ See Patrick Conley, *First in War, Last in Peace: Rhode Island and the Constitution, 1786-1790*, in *THE CONSTITUTION AND THE STATES: THE ROLE OF THE ORIGINAL THIRTEEN IN THE FRAMING AND ADOPTION OF THE FEDERAL CONSTITUTION* 276-85 (Patrick Conley & John P. Kaminsky eds., 1988).

¹⁸⁵ See Stephen P. Halbrook, *The Right to Bear Arms in the First State Bills of Rights: Pennsylvania, North Carolina, Vermont, and Massachusetts*, 10 VT. L. REV. 255 (1985).

As discussed earlier, one of the disputes between the Federalists and Antifederalists related to the relative strength that ought to be given to the central government. Prior to adoption of the Constitution, the country was ruled by the Articles of Confederation.¹⁸⁶ These articles preserved the autonomy of the individual states and provided little power to the central government.¹⁸⁷ The proposed Constitution altered this balance in favor of the central government. The proposed change provoked substantial discourse.¹⁸⁸ In recent times, the Antifederalists have been called states' rights proponents as a consequence of their position that the proposed Constitution provided too much power to the central government, with too few checks, at the expense of the states.¹⁸⁹

This label—states' rights proponents—is inaccurate and misleading. Federalists and Antifederalists feared governmental tyranny by all governments—state and federal. The framers of the Constitution, particularly the Antifederalists, were not attempting to preserve states' rights. They were attempting to preserve the people's rights by maintaining local autonomy in the form of the various state governments.

The Antifederalists relied extensively on the works of Baron de (pg.1033) Montesquieu to support the proposition that the geographic size of an area strongly influenced its form of government.¹⁹⁰ Montesquieu had written democracy could survive only in a small-sized state, small enough to permit the actual participation of the people in government and small enough so that each citizen understands that promoting the public good directly promotes the individual.¹⁹¹ A middle-sized territory, as Montesquieu terms it, would inevitably become a monarchy; to an extensive territory, a despotic form of government was best adapted. In large republics, the public good is sacrificed to a multiplicity of views and the citizens do not perceive the nexus between promoting the public good and their individual welfare.

According to Montesquieu, a middle-sized territory would tend to become a monarchy because ambitious persons who do not perceive the public good as beneficial to them seek grandeur by imposing their will on others. One person eventually prevails and assumes the role as prince. The monarchy then exists through a system of honor established by giving perks and titles. If the territory is too large, one person cannot command sufficient allegiance on honor of enough of the populace to control the territory. Ruling a large territory requires more than a system of titles and perks. Order can be maintained only by immediate, passive obedience to the rules; passive obedience can be achieved only by an instilling fear. The multiplicity of views, the dissents, are stifled by fear.

¹⁸⁶ The United States expanded its rulers' powers when it adopted the Constitution in place of the Articles of Confederation. See GERALD GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 77 (12th ed. 1991).

¹⁸⁷ See Harold G. Maier, *The United States Constitution in its Third Century: Foreign Affairs: Distribution of Constitutional Authority: Preemption of State Law: A Recommended Analysis*, 83 AM. J. INT'L L. 832, 832 (1989).

¹⁸⁸ JACKSON T. MAIN, *THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION, 1781-1788* (1961).

¹⁸⁹ See, e.g., Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1452 (1987).

¹⁹⁰ Baron de Montesquieu (1689-1755) was a French political philosopher who classified various forms of government and their attributes. His ideas were well-regarded by the Americans; Jefferson once wrote that in economics, Adam Smith is generally recommended, in politics and government, Montesquieu's treatises held equal stature. "To Mr. Thomas Mann Randolph, New York, May 30, 1790," in 8 *THE WRITINGS OF THOMAS JEFFERSON* 31 (Memorial ed. 1903).

¹⁹¹ MONTESQUIEU, *THE SPIRIT OF LAWS*, bk. VIII, ch. 16, at 176 (David W. Carrithers ed., 1977).

According to Montesquieu, rule by fear, despotism, was a logical incident of the government of a large territory. Montesquieu's theory continued that while a small republic could internally maintain its republican character, it would be destroyed by foreign forces.¹⁹² The dilemma could be resolved only by a confederate republic, a form of government in which small states become individual members of an association which is able to provide security for the whole body.¹⁹³

The Antifederalists used Montesquieu's well-known works to argue for a less powerful central government and more autonomy for the individual states, a government which would more closely resemble the Articles of Confederation model and Montesquieu's confederate republic rather than that proposed by the Constitution. Antifederalist publications confirm that preserving the autonomy of the states was a means to the end of protecting the people's rights, not an end (pg.1034) in itself. In arguing against the new Constitution, the Pennsylvania Minority framed the question—"Is it probable that the dissolution of the state governments, and the establishment of one consolidated empire would be eligible in its nature, and satisfactory to the people in its administration?"¹⁹⁴

The answer— "I think not, as ... so extensive a territory could not be governed, connected and preserved, but by the supremacy of despotic power."¹⁹⁵

The reason— Being "satiated with the blessings of liberty" after "asserting their inalienable rights against foreign despots at the expense of so much blood and treasure," the people will spurn the shackles prepared for them under the new Constitution and confirm their liberties.¹⁹⁶

Although the complaint was the dissolution of state governments, the problem was viewed as a loss of the people's rights.

In another publication, an unidentified Pennsylvania Antifederalist, writing under the pen name Montezuma, purported to be an advocate of the Constitution and to give the "inside story" of the dark designs of the proponents. Montezuma suggested:

We have taken pains to leave the legislatures of each free and independent state, as they now call themselves, in such a situation that they will eventually be absorbed by our grand continental vortex, or dwindle into petty corporations, and have power over little else than yoking logs, of determining the width of cart wheels.¹⁹⁷

Montezuma continued that state legislatures would be powerless when the national government exercised exclusive control over commerce and the power to wage war, make peace, coin money,

¹⁹² *Id.* at bk. IX, ch. 1, p. 183.

¹⁹³ *Id.*

¹⁹⁴ THE ANTIFEDERALISTS 40 (Cecelia M. Kenyon ed., 1966).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 40-41.

¹⁹⁷ *Id.* at 63.

borrow money, organize the militia and call them forth to crush insurrections.¹⁹⁸ By eliminating the powers of the states, the clouds of popular insurrection would likewise be broken.¹⁹⁹

Another Antifederalist writer, using the name John DeWitt, posed similar arguments to the people of Massachusetts to influence the ratification convention (pg.1035) in that state. The writer, whose true identity is unknown, argued that the strong national government would swallow up the state governments in a hasty stride to a Universal Empire in the Western World. The predicted result was a loss of the people's liberty.²⁰⁰ Again, the Antifederalist argument was that retention of power by the states was necessary to secure the rights of the people.²⁰¹

The Antifederalists, while believing the people's rights would be protected best by strong state governments, did not trust those governments. Federalists also distrusted state governments. Both groups distrusted any government because, as George Mason stated, "considering the natural lust of power so inherent in man, I fear the thirst of power will prevail to oppress the people."²⁰² James Madison similarly distrusted not only man's ambition for pre-eminence and power but also the factionalism posed by groups of men organized and pursuing narrow interests under the banner of state government.²⁰³

The Revolutionary era and state constitutions illustrate the distrust of the states' power. It should not be surprising that Americans in the midst of a revolution against tyranny would be suspicious of government, particularly when dealing with plans for their own government. As a consequence, most of the state constitutions of the era vested primary governing authority in a popularly elected legislative branch of government, not the executive,²⁰⁴ and contained a statement for a bill of rights.²⁰⁵ All contained a statement that all power originally rests in the people.²⁰⁶ The state constitutions of Massachusetts, North Carolina, and Pennsylvania contained an explicit provision concerning the right to bear arms. The constitutions of Maryland, New Hampshire, New York, and Virginia identified the necessity of maintaining the militia to preserve the free state. New York's constitution, while providing for a militia but not a right to bear arms, also noted that Quakers could not be compelled to bear arms. (pg.1036) Similarly, Maryland, New Hampshire, and Virginia provided for a militia but not explicitly for the right to bear arms. They also provided for popular

¹⁹⁸ *Id.* at 64.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 104-05.

²⁰¹ One leading Antifederalist shared and advocated this view. Mason argued that the people's political happiness rested on the state governments because the states, as smaller political units, provided more direct representation of the people. THE ANTIFEDERALISTS, *supra* note 194, at 272.

²⁰² 3 THE PAPERS OF GEORGE MASON 1052 (Robert A. Rutland ed., 1970).

²⁰³ THE FEDERALIST No. 10 (James Madison).

²⁰⁴ FEDERAL & STATE CONSTITUTIONS OF THE UNITED STATES (Ben Poore Perley ed., 1924); Maryland, 817; Massachusetts, 956; New Hampshire, 1279; New Jersey, 1310 (religion); New York, 1329; North Carolina, 1409; Pennsylvania, 1540; South Carolina, 1640; Virginia, 1910.

²⁰⁵ *Id.*; Maryland, 817; Massachusetts, 956; New Hampshire, 1279 (Bill of Rights added 1784); New Jersey religion; New York, 1329 (militia, religion); North Carolina, 409; Pennsylvania, 1540; Virginia, 1910.

²⁰⁶ *Id.*; Massachusetts, 956; Maryland, 817; New Hampshire, 1279; New Jersey, 1310; New York, 1329; North Carolina, 1409; Virginia, 1910.

revolt by giving the people the right to reform the government and the right to defend their life and liberty²⁰⁷ and by providing that the doctrine of non-resistance against arbitrary power is slavish, absurd, and destructive.²⁰⁸ In context, providing for the militia, defined at this time as the body of people all bearing arms, appears to be the functional equivalent of providing each individual with the right to bear arms.

VI. THE BILL OF RIGHTS

With ratification complete and the First Congress assembled, James Madison introduced amendments setting forth what would eventually become the Bill of Rights. The ratification process had produced a call for such a declaration. Madison and Hamilton had argued that ratification must precede amendment and now the time had come to honor the implied promise that amendments would be made. Madison campaigned for a seat in the first Congress on the pledge that he favored amendments.²⁰⁹

Madison's first proposal was made on June 8, 1789, to the House of Representatives. It embodied nineteen substantive items and appeared to track the suggestions made by the various state conventions. Madison's first proposal was not in the form of a separate Bill of Rights. Instead, he proposed amendment by interlineation, placement of the individual amendments in the text of the Constitution. One of the proposed amendments was "that the right of the people to keep and bear arms shall not be infringed, a well-armed and well-regulated militia being the best security of a free *country*; but no conscientious objector shall be compelled to render military service in person."²¹⁰ Madison's proposal called for this right and the right to freedom of the press, religion, and speech, to be inserted in Article 1, Section 9, between clauses 3 and 4. Article 1, Section 9 concerns limitations on Congress's power over citizens, namely, no suspension of habeas corpus, no ex post facto laws, and no bills of attainder. Madison's suggested placement of this amendment demonstrates that he understood the right to bear arms to be an individual right. Had Madison viewed the right as the states' right, the more logical placement of the right would have been in Article 1, Section 8, clause 16, which reserves to the states the power to appoint the officers of the militia and provides authority to train the same.^(pg.1037)

In addition, Madison's notes regarding the introduction of his proposals contain an outline which suggests he should read the amendments and explain that they first relate to private rights. He then instructed himself to explain the deficiencies of the English Declaration of Rights. Among the deficiencies was that the declaration was a mere act of Parliament and that guarantees were not sufficiently broad, namely, no freedom of press or conscience and the restriction of arms to Protestants.²¹¹

²⁰⁷ *Id.*; New Hampshire, 1279.

²⁰⁸ *Id.*; Maryland, 818; Virginia, 1909.

²⁰⁹ EDWARD DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 33 (1957).

²¹⁰ Hardy, *Armed Citizens*, *supra* note 12, at 609.

²¹¹ *Id.*

Madison's proposals were referred to a select committee that reported to the House sitting as a committee of the whole. When the proposal left the select committee, it read:

A well regulated Militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms.²¹²

In the House, the debate focused on the last clause. The argument was as follows:

Mr. Gerry — This declaration of rights, I take it, is intended to secure the people against the maladministration 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 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.²¹³

An amendment to remove the "religiously scrupulous" language failed.²¹⁴ Madison yielded to pressure to set forth amendments at the end of the Constitution. Seventeen articles of amendment were sent to the Senate.²¹⁵

The Senate streamlined the package by combining some amendments and simplifying others. On the right to bear arms, the Senate omitted the words "composed of the body of the people" and deleted the provision exempting (pg.1038) conscientious objectors from service.²¹⁶ The Senate rejected language that would have added the words, "for the common defense" as part of the phrase "the right of the people to keep and bear arms (for the common defense) shall not be infringed."²¹⁷ Ultimately twelve articles were sent to the states for ratification. The first two failed, but the other ten were ratified.²¹⁸ The language of the Second Amendment, as adopted, read:

A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.²¹⁹

VI. CONCLUSION

²¹² THE FOUNDERS CONSTITUTION 211 (Philip B. Kurland & Ralph Lerner eds., 1987).

²¹³ *Id.*

²¹⁴ See WILLIAM MILLER, THE FIRST LIBERTY 123 (1986).

²¹⁵ The House labeled its sections of what became the Bill of Rights as "articles." See Mark P. Denbeaux, *The First Word of the First Amendment*, 80 NW. U. L. REV. 1156, 1166 (1986).

²¹⁶ DUMBAULD, *supra* note 209, at 46.

²¹⁷ The Senate did so without explanation. See Hardy, *Armed Citizens*, *supra* note 12, at 611.

²¹⁸ Of the two amendments that were defeated, one concerned the apportionment of representatives, and the other would have prevented congressional salary increases from taking effect until after the next election of representatives. Peter Suber, *Population Changes and Constitutional Amendments: Federalism Versus Democracy*, 20 U. MICH. J. L. 409, 440 (1987). The ten amendments that were ratified became the Bill of Rights in 1791. Maeva Marcus, *The Adoption of the Bill of Rights*, 1 WM. & MARY BILL OF RIGHTS J. 115, 118 (1992).

²¹⁹ U.S. CONST. amend II.

English history made two things clear to the American revolutionaries: force of arms was the only effective check on government, and standing armies threatened liberty. Recognition of these premises meant that the force of arms necessary to check government had to be placed in the hands of citizens. The English theorists Blackstone and Harrington advocated these tenants. Because the public purpose of the right to keep arms was to check government, the right necessarily belonged to the individual and, as a matter of theory, was thought to be absolute in that it could not be abrogated by the prevailing rulers.

These views were adopted by the framers, both Federalists and Antifederalists. Neither group trusted government. Both believed the greatest danger to the new republic was tyrannical government and that the ultimate check on tyranny was an armed population. It is beyond dispute that the second amendment right was to serve the same public purpose as advocated by the English theorists. The check on all government, not simply the federal government, was the armed population, the militia. Government would not be accorded the power to create a select militia since such a body would become the government's instrument. The whole of the population would comprise the militia. As the constitutional debates prove, the framers recognized that the common public purpose of preserving freedom would be served by protecting each individual's right to arms, thus empowering the people to resist tyranny and preserve the republic. The intent was not to create a right for other ^(pg.1039) governments, the individual states; it was to preserve the people's right to a *free* state, just as it says.