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The Second Amendment and the Historiography of the Bill of Rights

by David T. Hardy*

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

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

² See, e.g., Beschle, Reconsidering the Second Amendment: Constitutional Protection For Right of Security, 9 Hamline L. Rev. 69 (1986); Cress, An Armed Community: The Origins and Meaning of the Right to Bear Arms, 71 J. Am. Hist. 22 (1984); Levin, The Right to Bear Arms: The Development of the American Experience, 48 Chi. Kent L. Rev. 148 (1971); Note, The Right to Bear Arms, 19 S.C.L. Rev. 402 (1967).

³ This approach fell into disfavor in the early twentieth century, but its resurgence in recent years has altered constitutional interpretation. While advocates of collective rights approaches have for a decade failed to produce much in the way of original thought or research, the last five years have seen an explosion of original research supporting the individual rights approach. See, e.g., Caplan, The Right of the Individual to Bear Arms: A Recent Judicial Trend, 1982 Det. C.L. Rev. 789; Dowlut, The Right to Arms: Does the Constitution or the Predilection of Judges Reign?, 36 Okla. L. Rev. 65 (1983); Dowlut & Knoop, State Constitutions and the Right to Keep and Bear Arms, 7 Okla. City U.L. Rev. 177 (1982); S. Halbrook, That Every Man Be Armed: The Evolution of a Constitutional Right (1984); Subcomm. on the Constitution of the Sen. Judiciary Comm., The Right to Keep and Bear Arms, 97th Con., 2d Sess. (Comm. Print 1982); Halbrook, The Right to Bear Arms in the First State Bills of Rights: Pennsylvania, North Carolina, Vermont, and Massachusetts, 10 Vt. L. Rev. 255 (1985) [hereinafter *The Right to Bear Arms*]; Halbrook, To Keep and Bear Their Private Arms: The Adoption of the Second Amendment 1787-1791, 10 N. Ky. L. Rev. 13 (1982); Hardy, Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment, 9 Harv. J.L. & Pub. Pol'y 559 (1986) [hereinafter *Armed Citizens*]; D. Hardy, Origins and Development of the Second Amendment (1986); Kates, Handgun Prohibition and the Original Meaning of the Second Amendment, 82 Mich. L. Rev. 204 (1983); Malcolm, The Right of the People to Keep and Bear Arms: The Common Law Tradition, 10 Hastings Const. L.Q. 285 (1983); Shalhope, The Ideological Origins of the Second Amendment, 69 J. Am. Hist. 599 (1982). The author is also informed that Joyce Malcolm, a historian specializing in early modern British history, is in the final drafting of a treatise on the common law right to arms, which alone is likely to double the available original research on the history of that right.

shall not be infringed," and maintains that the preceding description of the militia (i.e., all individuals capable of armsbearing) is a mere explanation of one objective of this guarantee.⁴

The works of neither school entertain the possibility that an "either/or" test may be a gross oversimplification of what are in fact two different sets of constitutional priorities. Yet the fact that prior to 1788 the Framers who proposed protections for individuals' arms did not propose to protect the militia, and those desirous of protecting the militia did not propose safeguards of individual arms, suggests the quixotic nature of previous attempts to demonstrate that the Framers, as a whole, had a single intent. Is it reasonable to assume that John Adams, obsessed with the risk of mob rule, and Thomas Jefferson, who so lightly praised the virtues of frequent revolutions, were of a single mind when it came to popular armaments? When Virginia constitutionalized the principle that a well-regulated militia was necessary to the proper defense of a free state, and Pennsylvania instead guaranteed that the people had a right to bear arms for defense of themselves and the state, was there in fact (pg.3) an identical understanding which motivated each statement? Both existing formulations of the second amendment require us to assume precisely that. As a consequence, no existing analysis of that amendment has attempted a critical examination of the proposals for the second amendment against the varied backgrounds and philosophies of their authors, and none has taken account of recent research demonstrating that the different state conventions were dominated by radically differing political philosophies.

It is the purpose of this article to suggest that in fact *neither* the collective nor individual school of thought is correct insofar as it claims to *entirely* explain the second amendment, and *both* are correct, insofar as they purport to offer partial explanations. The second amendment was not intended to recognize only a single principle; rather, like the first, fourth, fifth, and sixth amendments, it was intended as a composite of constitutional provisions. Its militia component and its right to bear arms recognition have in fact different origins and theoretical underpinnings. One is a legacy of the Renaissance, brought to fruition by the "Classical Republicans;" the other is the creation of seventeenth century English experience, brought to fruition in the Enlightenment. At the time of the framing of our Constitution, the militia statement found its primary constituency among the gentry, particularly that of Virginia. The individual right to bear arms provision was primarily advanced by the Radical movement, particularly in Pennsylvania and Massachusetts. Only after the Constitution had received its crucial ninth ratification were the two precepts joined into a single sentence, thereby creating a constitutional "package" which addressed the demands of both schools of thought. Thus neither the militia nor the right to bear arms provision can be taken in isolation as a sufficient explanation of the second amendment, a fact made obvious by the first Congress' retention of both clauses during its extensive paring of Madison's proposals.⁵ The second amendment therefore has historical (pg.4) interest which extends beyond militia and arms issues. It is, metaphorically speaking, a fault line in the bedrock of the Constitution; the one place where a rough

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

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

joinder of related ideas enables us today to discern a turning point between two entirely different American approaches to statecraft.

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

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

In order to fully understand *both* purposes of the second amendment it will be necessary to examine first the origins of the militia concept, second, the origins of an individual right to bear arms, and third, the eventual merger of the two concepts which led to the present second amendment.^(pg.5)

I. The Militia as Essential to a Free Republic

A. A Digression: Modern Historiography, the Classical Republicans and the Radicals

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

Recent research has forced a reevaluation of this view, suggesting both that Locke's role was overstated⁷ and that eighteenth century American thought was heavily influenced by pre-Lockean

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

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

republican views.⁸ These "Classical Republicans" (largely identified with the Whig Party) contributed greatly to late eighteenth century American political thought. Although largely forgotten today, the names of eminent Republicans such as Sidney, Harrington and Fletcher were commonplace to the Framers and their contemporaries.⁹ Indeed, modern students of this movement maintain that the (pg.6) Framers were immersed in Classical Republican thought:

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

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

To be sure, when we speak of Republicans and Democrats, Conservatives and Radicals, we do so in a quite subjective manner. Few, if any, statesmen of 1787-1791 would have admitted to being anything but a "Republican." Indeed, those whom we would view as "Radicals" today were among the most ardent supporters of "Republicanism." Few would have cared to be called "Radical." These terms of art thus have little relation to how the labelled individuals described themselves at the time. Moreover, to categorize so (pg.7) varied a band of thinkers is to understate the diversity of their thought and impose upon that group a particular perspective. The views of Jefferson, the agrarian Radical, differed subtly from those of Sam Adams, the urban Radical; neither man would have cared for too close an association with the views of Sam's aristocratic cousin, John Adams.

⁸ The works most crucial to this recognition were: Pamphlets of the American Revolution (B. Bailyn ed. 1965); H. Colbourn, *The Lamp of Experience: Whig History and the Intellectual Origins of the American Revolution* (1965); C. Robbins, *The Eighteenth Century Commonwealthman: Studies in the Transmission, Development and Circumstance of English Liberal Thought from the Restoration of Charles II until the War with the Thirteen Colonies* (1959); and G. Wood, *The Creation of the American Republic 1776-1787* (1969). The best historiographical works include Banning, *Republican Ideology and the Triumph of the Constitution, 1789 to 1793*, 31 *Wm. & Mary Q.* (3d Ser.) 167 (1974); Pocock, *Machiavelli, Harrington and English Political Ideologies in the Eighteenth Century*, 22 *Wm. & Mary Q.* (3d Ser.) 549 (1965); Shalhope, *Republicanism and Early American Historiography* 39 *Wm. & Mary Q.* (3d Ser.) 334 (1982); and Shalhope, *supra* note 6.

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

¹⁰ Banning, *supra* note 8, at 178-79.

¹¹ Probably the best treatment of American Radical thought is *The American Revolution: Explorations in the History of American Radicalism* (A. Young ed. 1976). See also Shalhope, *supra* note 8, at 338-39.

Richard Henry Lee and Elbridge Gerry, both ardent Republicans, are to our eyes hardly compatriots of Carter Braxton, the reluctant revolutionary and Monarchist. Yet all these otherwise disparate individuals put their names to the Declaration of Independence, and all (whether Monarchist or Democrat, Conservative or Radical) would have been similarly Radical to a Tory of the time. Recognizing these limitations, it is still plausible to distinguish between "Conservative Revolutionaries" such as George Mason, and their Radical brethren such as Sam Adams, and between those who gave priority to establishing a stable republic and those who gave priority to defining and guaranteeing rights against even such a government.

B. The Free State and a Well Regulated Militia

The existence of an English militia, comprised not of specialized units but of essentially the entire male population, far antedates even the Norman Conquest.¹² By 1181, every English freeman was required annually to prove ownership of arms proportionate to his landholdings.¹³ In 1253, even serfs were required to prove annually that they owned a spear and dagger.¹⁴ Subsequent enactments ordered all healthy Englishmen to own longbows, to train their sons in archery from age seven, and to abstain from a variety of outdoor sports that diverted commoners from the archery ranges.¹⁵ By the fifteenth century, Englishmen already regarded universal armament for national defense as a critical element in their development of "government under law."¹⁶ This perception of citizen armament as (pg.8) a peculiarly English virtue was thereafter reinforced by the rise of royal absolutism on the Continent,¹⁷ with consequent limitation on firearm possession in France and the Empire. Long after her continental counterparts had banned or severely restricted firearms ownership,¹⁸ Elizabeth still struggled to stop her subjects from drawing pistols in church, or firing them in the churchyard.¹⁹

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

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

¹⁴ *Id.* at 155-156.

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

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

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

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

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

For avoiding of divers outrageous and unseemly behaviors... and for the better and speedy reducing of the same

While the results of citizen armament may thus have been annoying to sundry clerics, they did much to restrain excessive royal power. An English king had to remember that his "'gentleman pensioners' and his yeoman of the guard were but a handful, and bills or bows were in every farm and cottage."²⁰ Conversely, a popular monarch could count upon a massive reserve army, maintained at little or no cost to the state: in the 1580s, Elizabeth could maintain (pg.9) 120,000 men on duty throughout the summer.²¹ Such a force was almost entirely for defensive use because, since the twelfth century, English kings had relied upon mercenaries for foreign military service.²² Mercenaries were not tied to a home district; they were better trained and, while on the offensive, could be compensated by plunder. But after the loss of British holdings in France during the mid-fifteenth century, England stood mainly on the defensive, and mercenary forces dwindled to a handful of bodyguards and coastal garrisons.

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

To the early Classical Republicans, the militia concept was more than simple tradition. The belief that such a militia was "necessary to a free State" soon became central to their political thought. They drew inspiration from Nicolo Machiavelli, who had both explained and attempted to implement a national militia centuries before. Writing to an Italy which had seen its city-states and their mercenary armies crushed in detail by French and Spanish professionals, Machiavelli advocated an Italian nation, led by a popular prince and based on a national militia. Such a prince, he explained, would found his state upon: "good laws and good arms. And as there can not be good laws where there are not good arms, and where there (pg.10) are good arms there must be good laws, I will not now discuss the laws, but will speak of the arms."²⁵ Mercenaries were to be categorically condemned; they were "disunited, ambitious, without discipline, faithless, bold amongst friends, cowardly amongst enemies, they have no fear of God, and keep no faith with men."²⁶ These faults were

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

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

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

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

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

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²³ See L. Boynton, supra note 21.

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

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

²⁶ See id. at 44-45.

inherent in all mercenaries; their lack of patriotism left no motivation beyond wages, which were not enough to motivate men to die.²⁷ More fundamentally, any mercenary army powerful enough to defend a state must be more than powerful enough to subjugate it.²⁸ According to Machiavelli, only a nation defended by a militia can escape this dilemma: "Rome and Sparta were for many centuries well armed and free. The Swiss are well armed and enjoy great freedom."²⁹

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

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

Such a militia stabilizes the state, whatever its form:

it is certain that no subjects or citizens, when legally armed and kept in due order by their masters, ever did the least mischief to any state ... Rome remained free for four hundred years and Sparta eight hundred, although their citizens were armed all that time; but many other states that have been disarmed have lost their liberties in less than forty years.³¹ (pg.11)

Knowledge of Machiavelli's writings spread rapidly. An English translation of his *Art of War* went through no fewer than three printings by 1588,³² yet long before the translations his writings were common currency among the English statesmen.³³ Machiavelli's greatest impact upon English thought came, however, through the writings of James Harrington. Harrington applied Machiavelli's *realpolitik* to seventeenth century England, substituting a republic of freeholders for rule by a popular prince. The outcome was a stable republic populated, ruled and defended by a militia of its freeholders.³⁴ Ownership of land gives independence; unlike a feudal landholder, the modern freeholder owns in fee simple, is not obliged as a condition of tenure to fight for a superior, and thus can defend his own rights and interests.

²⁷ See id. at 45.

²⁸ "Mercenary captains are either very capable men or not; if they are, you cannot rely upon them, for they will always aspire to their own greatness, either by oppressing you, their master, or by oppressing others against your intentions; but if the captain is not an able man, he will generally ruin you." Id.

²⁹ Id. at 46.

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

³¹ Id. at 30.

³² Id. at xxx.

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

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

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

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

Harrington's entire theory of monarchy can be reduced to two propositions: first, that the King's agents and servants must be supported either upon the land as a feudal aristocracy, or about his person, as praetorians or janissaries; second, that whichever of these methods is adopted, relations between the military class and the King will be so prone to tensions that monarchy can never be a stable form of government.³⁶ (pg.12)

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

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

Harrington wrote during the Protectorate, when efforts to maintain a standing army were indeed destabilizing the nation. After 1660, the army played a different role, that of maintaining royal power. Harrington's postulate that an army could not be adequately financed and subordinated was compromised. Harrington's followers, particularly Henry Neville, modified his critique. Whereas Harrington had assumed a standing army could not stabilize a government, good or bad, Neville and other post-1675 Harringtonians saw it as all too capable of stabilizing an autocratic one.³⁸ Conversely, by arming the people at large democracies could obtain an incomparable advantage: "democracy is much more powerful than aristocracy, because the latter cannot arm the people for fear they could seize upon the government."³⁹ Harrington's followers also recast his utopia in a conservative light, by arguing that traditional English practices had in fact been republican. "The arming and training of all the freeholders of England, as it is our undoubted (pg.13) ancient

³⁵ Pocock, supra note 34 at 553-554.

³⁶ Id. at 559.

³⁷ Id. at 442-443.

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

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

Constitution, and consequently our Right," argued Robert Molesworth, "so it is the Opinion of most Whigs, that it ought to be out in Practice."⁴⁰ Thus the Classical Republicans ultimately cast the militia not only as part of the republican utopia but also an underpinning of the existing English constitution.

C. The Standing Army Controversy

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

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

English policy makers had to face several other realities, none of which favored reliance on the militia. An invasion, if it came, would be spearheaded by well-trained French troops, at a time when such training was of increasing importance. Technical improvements over the course of the seventeenth century had immensely complicated the role of the average infantryman. At the beginning of the century, the customary infantry weapons of musket or pike (an eighteen-foot spear held by men formed in a dense mass) had required a moderate amount of training; an army of that time (pg.14) maneuvered slowly in "tercios" or "battles" of about 3,000 men. During the first third of the seventeenth century, armies were constructed around a "battalion" of about 500 men trained to execute a multitude of orders: "officers became not merely leaders, but trainers of men; diligent practice in peace-time, and in winter, became essential; and drill, for the first time in modern history became the precondition for the military success...."⁴² Conversely, the financial revolution of the 1690's, which saw the creation of a national bank and acceptance of a national debt, made it possible to fund a large enough standing force.⁴³ Increasing tactical and economic sophistication were paralleled by the realization of political means to guarantee legislative control of the army. Parliament could keep a tight rein on the standing army by limiting appropriations and enacting "Mutiny Acts" of intentionally short duration.⁴⁴

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

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

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

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

⁴⁴ The Mutiny Acts authorized the imposition of martial law on persons enlisted in the military. Absent their sanctions, a deserting soldier could be punished by a civil suit for breach of contract, or at most, prosecution as a runaway apprentice; one who struck an officer might face misdemeanor assault charges in the civilian courts. C. Barnett, *Britain's Army 1503-1970*, at 124 (1970).

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

A Whig is against the raising or keeping up a Standing Army in Time of Peace; but with this Distinction, that if at any time an Army (tho even in Time of Peace) should be necessary to the Support of the very Maxim, a Whig is not for being too hasty to destroy that which is to be the Defender of his Liberty.⁴⁶ (pg.15)

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

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

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

The acceptance of a standing army was paralleled by the atrophy of the militia system in England. Indeed, the rural disorders of the 1760s inspired fear in the gentry of the militia-trained portion of the populace. Lord Barrington, for instance, feared that "a few soldiers, commanded by a weak, ignorant subaltern, might be defeated by a very large mob, full of men lately used to arms in the army and militia."⁴⁹ The general militia in England was steadily supplanted by a select militia which achieved efficiency by a sacrifice of almost every traditional attribute. The 1761 Militia Act, for instance, authorized mustering of only a few hundred men from each county. Those chosen were, if wealthy, able to hire another to serve as a substitute; those actually serving were issued

The post-1688 Mutiny Acts were generally of one year's duration, ensuring that without annual parliamentary reauthorization army discipline would be almost unattainable.

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

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

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

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

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

government arms, stored by the officers under lock and key. The Lieutenant of the county (or his deputies) was authorized "to employ such Person (pg.16) or Persons as he or they shall think fit, to seize and remove the arms, clothes and accoutrements belonging to the militia, whenever [they] shall adjudge it necessary to the peace of the kingdom...."⁵⁰ It thus is no surprise that a few years later the Whig mayor of London would inform Parliament that the militia "could no longer be deemed a constitutional defence, under the immediate controul and direction of the people; for by that bill they were rendered a standing army to all intents and purposes whatever...."⁵¹

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

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

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

In the 1790's, when the Jeffersonian Republicans and Federalists confronted each other, the battle lines had been drawn around opposing conceptions of civil society.⁵² (pg.17)

Although Anglo-Saxon society had long placed particular emphasis on the individual, especially toward property,⁵³ the concept of individual political rights was of relatively late birth. To print a work on politics or religion required a royal permit as late as 1695.⁵⁴ Most colonies retained

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

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

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

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

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

the permit requirement into the 1730's;⁵⁵ even after these measures lapsed, it was illegal to print a work reflecting on an action of Parliament or the person of a member without prior authorization.⁵⁶ The 1661 Act Against Tumultuous Petitioning prohibited petitioning the King or Parliament for changes in the established law, absent a permit from a justice of the peace.⁵⁷ The 1673 Test Act, which generally barred non-Anglicans from civil or military office, remained on the books until 1829;⁵⁸ searches based on general warrants, issued by the executive, were (pg.18) universally accepted until the 1760s.⁵⁹ Most of our Bill of Rights are, in short, of quite recent vintage. It should therefore come as no surprise that the concept of a right to keep and bear arms has a later point of origin than that of the militia. Conversely, a specifically individual right to arms, separate and apart from the militia system, was one of the earliest of the *individual* civil rights to gain acceptance.

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

particular interest, I am a libeller." 2 Lord Campbell, *Lives of the Lord Chief Justices* 362 (7th ed. 1878).

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

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

⁵⁷ J.R. Jones, *Country and Court* 143 (1978). Even authorized petitioners ran a risk; the "Seven Bishops" were prosecuted for seditious libel based upon a petition handed directly to the king. In 1701, the "Kentish Petitioners," who presented a mild petition requesting passage of a spending bill, were imprisoned on the spot for contempt of Parliament. E.N. Williams, *The Eighteenth Century Constitution* 410-11 (1960).

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

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

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

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

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

summary of his order ends: "officers to be numerous, disaffected persons watched and not allowed to assemble, and their arms seized."⁶³

The order was executed so zealously as to antagonize even Charles' supporters. The failure of his attempts to secure a comprehensive (pg.19) militia bill in 1661 is primarily attributable to resentments aroused among members of the royalist Restoration Parliament.⁶⁴ Only after strenuous effort was Charles able in 1662 to secure passage of a suitable Militia Act. The 1662 Act broadly authorized actions which Charles had previously undertaken by prerogative. Rather than draw its membership from the entire body of the people, the militia was to be a limited, organized group of Royalists;⁶⁵ most critically for the purposes of this article, the Lieutenants and their deputies were to "search for And seize all Arms in the custody or possession of any person or persons whom the said Lieutenants or any two or more of their deputies shall judge dangerous to the peace of the Kingdom...."⁶⁶ In support of these provisions, gunsmiths and carriers were ordered by proclamation to file weekly reports on firearms sold and transported.⁶⁷ Furthermore, in 1671, the Hunting Act was amended to restrict arms possession by all but the landed gentry. The Hunting Acts had long barred all but the relatively wealthy from ownership of hunting implements, such as traps, nets and hunting dogs. The 1671 Act added all firearms to the list of contraband, and extended the ban to all persons not owning lands with an annual rental value exceeding 100 pounds sterling.⁶⁸ Anyone possessing property with greater value was authorized to search residences for weapons on his own initiative.⁶⁹ Both Charles and his successor, James II, vigorously implemented these firearms proscriptions.⁷⁰ In December 1686, James issued duplicate orders to six Lords Lieutenant of the militia, stating that he was (pg.20) informed "that a great many persons not qualified by law under pretense of shooting matches keep muskets or other guns in their houses" and that they should instruct their deputies "to cause strict search to be made for such muskets or guns and to seize and safely keep them till further order."⁷¹ The searches were intended to keep the Anti-Royalists under control and on the defensive.⁷²

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

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

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

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

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

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

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

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

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

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

The reconstituted Royalist militia was used for enforcement, and sometimes engaged in mass searches.⁷³

As noted above, neither such disarmaments nor James' personally-financed standing army were sufficient to sustain him in power. James lost his throne but retained his head, for the 1688 Glorious Revolution⁷⁴ was accomplished without a single fatality. Parliament, meeting on its own initiative as a "convention," formulated a "Declaration of Rights" which William and Mary, its nominees, were required to accept prior to taking the throne.⁷⁵ The Declaration was intended to reflect the very core of traditional English rights which must be observed in the future; it embodied only the most indisputable and critical rights.⁷⁶ A century later, an American Congress would use much of the Declaration as a basis for an American bill of rights.⁷⁷(pg.21)

The Parliamentary debates over the Declaration mark the first acceptance of an indisputably individual right to keep and bear arms. The debates in the House of Commons⁷⁸ show that arms confiscations under the Militia Act were a widespread grievance. Sir Richard Temple, for example, criticized the militia bill as containing the power to disarm all England.⁷⁹ Mr. Boscawen's crucial speech focused upon the oppressive acts of Parliament as well as those of the King.⁸⁰ Sergeant

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

⁷⁴ If "revolution" seems a strange term to apply to the actions of a predominantly conservative, thoroughly "establishment" Englishman, it must be remembered that the term was invented to describe this particular event and (being taken from the mechanical arts) was meant to describe a return to the constitutional point of origin. James, the term implied, had reversed constitutional norms: the "revolutionaries" sought to restore them through further action. See J.R. Western, *supra* note 64, at 1.

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

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

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

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

⁷⁹ *Id.* at 416.

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

Maynard⁸¹ complained that "an Act of Parliament was made to disarm all Englishmen, whom the lieutenant should suspect, by day or by night, by force or otherwise."⁸² Others seconded his complaints of oppressive enactments before Maynard returned to the floor:

Some particulars well propounded—Some gross grievances for which we are beholden to a Parliament, who care not what was done, so their pensions were paid.—Militia Act—an abominable thing to disarm the nation, to set up a standing army—Corporation Act carried into execution with a high hand.⁸³ (pg.22)

The House of Commons voted out a Declaration, in the form of a list of grievances and parallel rights. The list of grievances included a statement that "The Acts concerning the militia are grievous to the subjects." Although this would clearly focus upon the rights of the individual, or "subject," Commons clouded the issue in the rights recognitions of its draft: "[T]he Subjects which are Protestants, should provide and keep arms for the common defense; and that the arms which have been seized and taken from them be restored."⁸⁴ The House of Lords found this combination of individual right and remedy with a collective purpose unacceptable. The grievance section of Commons' draft was altered into a general indictment of James' policies. He had endeavored "to subvert and extirpate" the "laws and liberties of this kingdom" by, inter alia, "causing several good subjects, being protestants, to be disarmed, at the same time when papists were both armed and employed contrary to law."⁸⁵ The second passage was even more profoundly altered. The "common defense" proviso was replaced with a recognition that individuals might possess arms "for their defense." The Lords declared: "For the vindicating and asserting their ancient rights and liberties.... [t]hat the subjects, which are protestants, may have arms for their defense suitable to their conditions and as allowed by law."⁸⁶ Lest there be confusion over the "as allowed by law" proviso, Parliament promptly amended the Hunting Acts to delete firearms from the list of contraband.⁸⁷ The House of

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

⁸² P. Yorke, *supra* note 78, at 407.

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

⁸⁴ *Journal of the House of Commons from December 26, 1688 to October 26, 1693*, at 21-22 (London 1742) (Lib. of Congress Rare Books Collection).

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

⁸⁶ 1 W. & M., ch. 2 (1689).

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

Commons paralleled this with an amendment to the Militia Act which (pg.23) repealed all power to seize firearms; unfortunately, the bill was lost in the House of Lords when William dissolved Parliament.⁸⁸ Nevertheless, its provisions were soon incorporated into colonial militia statutes.⁸⁹

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

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

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

In brief, it is apparent that the common law recognized an individual right to keep and bear arms, and that this was separate and apart from the related concept (whether or not it be considered a "collective" or an "individual right") that a militia was an especially appropriate way of defending a free republic. The "collective/individual" (pg.24) distinction was not unknown at this point, but Englishmen approached it by stressing that their system endorsed *both* concepts. As the Recorder of London noted, when called upon to determine the legality of privately-established military reserve units:

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

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

⁸⁹ Maryland's colonial militia code of 1692 paralleled the 1662 Militia Act, but added a proviso that "no pressmaster or any persons whatsoever shall presume at any time to seize, press or carry away from the inhabitant resident in this province any arms or ammunition of any kind whatsoever...any law, statute or usage to the contrary notwithstanding." 13 Archives of Maryland: Proceedings and Acts of the General Assembly of Maryland, April 1684 - June 1692, at 557 (W. Browne ed. 1894).

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

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

III. The Militia and the Rights to Arms in Pre-Revolutionary America

A. Decline of the Militia System

While the militia as an institution declined in Britain during the eighteenth century,⁹² it retained vitality in the colonies. Unlike the mother country, the colonies lacked both the need to project military force beyond their borders, and an economy which could support a significant standing force. The colonists quickly adapted the militia system to Indian conflicts, instituting rapid response units and long-range patrols.⁹³ They also assimilated the views of the English Whigs and Classical Republicans,⁹⁴ with their stress upon the militia's role in a free republic.⁹⁵ To Harrington, an army was too unstable to support any government; to Neville, it was so stable as to support a tyrannical one; to many colonists, it was capable of corrupting a republican government into a tyranny. Had not James Burgh, their favorite Whig,⁹⁶ laid their troubles with the mother (pg.25) country at the feet of the English standing army?⁹⁷ The Revolution's origins reinforced these views. The most critical preparation for the conflict came in 1774, when revolutionaries took over virtually every colony's militia organization. The British attempts to raid militia arsenals at Concord and Williamsburg ensured the alliance of Massachusetts and Virginia and converted local grievances into a continental war.⁹⁸

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

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

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

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

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

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

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

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

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

needed to meet sundry emergencies.¹⁰⁰ As in post-1689 England, the standing army was denounced, (pg.26) derided, and retained.

The parallel Whig view, which stressed the desirability of a true militia, had a longer lease on life. Pre-1789 American political thought had stressed the need to enroll all citizens, or at least all free holders, for militia duty, and had rejected any idea of a "select militia" in which only a portion of the population was enrolled.¹⁰¹ Provisions authorizing Congress to provide for the arming and organizing of the national militia were seen as allowing it to require that all citizens possess arms of uniform caliber and conform to a standard of drill.¹⁰² In practice, while various administrations prepared detailed plans along these lines, Congress refused to enact them.¹⁰³ Washington's first annual address acknowledged: "[a] free people ought not only to be armed, but disciplined; to which end a uniform and well-digested plan is requisite."¹⁰⁴ His second address courteously hinted that the "establishment of a militia" was among the "subjects which I presume you will resume of course, and which (pg.27) are abundantly urged by their own importance."¹⁰⁵ One year later, Washington again listed militia legislation as "a matter of primary importance whether viewed in reference to the national security to the satisfaction of the community or to the preservation of order."¹⁰⁶ In 1792, Congress voted out the first (and, until 1903, the last) national Militia Act.¹⁰⁷ While this Act required all white males of military age to possess a rifle or musket (or, if enrolled in cavalry or artillery units, pistols and a sword), it did nothing to guarantee uniformity of calibers, fixed no standard of national drill, and failed even to provide a penalty for

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

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

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

¹⁰³ Major plans included Steuben's of 1784; Knox's of 1786; and Washington's of 1790. The last, submitted to Congress in January 1790, was drafted, redrafted, debated and, after a year and a half of work, enacted in emasculated form as the Militia Act of 1792. J. Palmer, *Washington, Lincoln, Wilson: Three War Statesmen* 87-89, 104-05, 107-123 (1930). See also L. Cress, *supra* note 96, at 78-93, 116-129.

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

¹⁰⁵ *Id.* at 75.

¹⁰⁶ *Id.* at 99.

¹⁰⁷ Act of May 8, 1792, 1 Stat. 271.

noncompliance. The subsequent presidential calls for detailed organization of a national citizen army¹⁰⁸ went unheeded. The original ideal of the militia thus ultimately went the way of the standing army controversy: "The ideological assumptions of revolutionary republicanism would no longer play an important role in the debate over the republic's military requirements."¹⁰⁹

B. The Dominance of the Right to Arms

Conversely, even as the republican militia concept weakened throughout the eighteenth century, the concept of an individual right to arms became more firmly entrenched in American thought. To a great extent, this was a part of a larger intellectual movement. The primary legacy of the 1689 settlement in England had been the supremacy of Parliament. Bodin's maxim that in every government (pg.28) there must be a single, ultimate repository of sovereignty was accepted,¹¹⁰ and that repository was fixed as Parliament. While Parliament must heed the "Constitution", the Constitution was (with apologies to a later Chief Justice) what Parliament said it was.¹¹¹ The colonists, whose initial conflict was with Parliament and not the King,¹¹² necessarily had to take issue. One counter

¹⁰⁸ 1 Messages, supra note 104, at 132 (Washington, 1793: suggests examination of the Militia Act is "an inquiry which cannot be too solemnly pursued"); id. at 176 (Washington, 1795); id. at 317 (Jefferson, 1801: Congress should "at every session continue to amend the defects which from time to time shew themselves in the laws for regulating the militia"); id. at 333 (Jefferson, 1802: considering the importance of the militia, "you will doubtless think this institution worthy of a review, and give it those improvements of which you find it susceptible"); id. at 360 (Jefferson, 1804: "Should any improvement occur in the militia system, that will be always seasonable"). After all these efforts, Congress still failed to attempt any significant improvements. By 1805, even Jefferson was reduced to asking for a select militia, which had been anathema even to conservatives a few years before: "I can not, then, but earnestly recommend to your early consideration the expediency of so modifying our militia system as, be a separation of the more active part from that which is less so, we may draw from it when necessary an efficient corps fit for real and active service, and to be called to it in regular rotation." Id. at 373.

¹⁰⁹ L. Cress, supra note 96, at 176.

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

¹¹¹ As a modern British writer put it:

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

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

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

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

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

was to amplify the concept of rights which existed somehow beyond the scope of *any* governmental interference.

The most historical approach involved deriving such right from common law. This involved accepting Coke's position that the common law was immemorial and suprahuman, the product not of any one legislator or legislative act, but of the collective intelligence and experience of Englishmen over a millenium or more.¹¹³ Few dicta have had as great an impact on legal history as the equivocal passage Coke slid into *Dr. Bonham's Case*:^(pg.29)

And it appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an act of Parliament is against common right an reason, or repugnant, or impossible to be performed, the common law controul it, and such Act to be void....¹¹⁴

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

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

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

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

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

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

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

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

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

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

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

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

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

But the common law was not the only source of rights theory, (pg.30) particularly when, after 1776, the conflict became one with the entire British system and not merely Parliament.¹²² Some Americans reconciled their views with tradition by claiming that American views were a purified common law which lacked later British corruptions.¹²³ Others went behind the common law, claiming it only declared some natural rights.¹²⁴ The major American thinkers were even bolder. Washington wrote with pride that "the foundation of our empire was not laid in the gloomy age of ignorance and superstition," and Madison calmly explained that our Constitution declined to incorporate the common law because many of its principles were anti-republican.¹²⁵ One source of the new rights theory lay in the various "compact" theories of government, which sought the origins of the state in implicit agreements rather than in divine commands. The civilian jurist Hotman had initially argued for such a view in his 1572 work *Franco Gallia*¹²⁶ which became available in English through Molesworth's 1711 translation.¹²⁷ To Hotman, the compact theory represented liberation from autocracy founded upon "divine right" or supposed tradition: his research sought to trace government among what became the French people to democratic tribal arrangements, which in turn were suppressed by usurping monarchs.¹²⁸

A more abstract (and less democratic) view was taken by Thomas Hobbes in his 1651 *Leviathan*.¹²⁹ To him, government was founded upon a compact of mutual protection. The fundamental rule of nature was "to seek peace and follow it" and, conversely, (pg.31) "the second, the sum of the right of nature" was "by all means we can, to defend ourselves."¹³⁰ This right was so fundamental that it could not be included in the compact: "A Covenant not to defend my selfe from force, by force, is alwayes vod. For (as I have shewd before) no man can transfere, or lay down his Right to save himselfe from Death...."¹³¹ While Hobbes is often seen as laying the foundations for

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

¹²³ *Id.* at 126, 190.

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

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

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

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

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

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

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

¹³¹ *Id.* at 116.

absolute monarchy,¹³² he in fact admits one circumstance under which the monarch may justly be replaced by his subjects:

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

A different rationalist basis for colonial derivations of rights encompassed supernatural origins, whether seen as God or nature. The Anglican church, hamstrung by its acceptance of non-resistance,¹³⁴ was unable to make much contribution here, but the slack was more than taken up by the Congregationalist, Baptist and Presbyterian divines who played so major a role in promoting the patriot (pg.32) cause.¹³⁵ Joel Barlow, a chaplain in Washington's army, thus derived a right to arms:

Only admit the original, unalterable truth, *that all men are equal in their rights*, and the foundation of every thing is laid; to build the superstructure requires no effort but that of natural deduction. The first necessary deduction will be, that the people will form an equal representative government.... Another deduction follows, That the people will be universally armed: they will assume those weapons for security, which the art of war has invented for destruction.¹³⁶

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

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

¹³³ *Id.*, ch. 21 at 117.

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

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

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

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

Nor indeed should it be thought that the law of nature, instituted as it was for the safety of man, favors such a peace as would cause his immediate destruction, and bring about anything but a social life.... Now there are some who would carry this command so far that it could not be abrogated even by civil law, maintaining that the man who allows himself to be killed when he could have defended himself, can be condemned on the same score as if he had killed himself.... To us it seems necessary to consider first of all, whether it is of any great concern to others that the person who is attacked survive, or whether, as a matter of fact, he apparently lives only to himself. We hold that in the former case the man is *obligated* to secure his own protection by every means possible, but, in the latter case we maintain that it is only *permissible*....¹³⁸ (pg.33)

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

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

IV. The American Right to Arms

A. The Prototypes: Virginia, Pennsylvania and Massachusetts

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

The ancestry of the second amendment can be found in the declarations of rights adopted by Virginia, Pennsylvania and Massachusetts. The different approaches taken by each state give insight into (pg.34) the differences of opinion over which component, militia or right to arms, was most deserving of recognition.

1. Virginia and the Well-Regulated Militia

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

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

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

Virginia's Constitution and Bill of Rights were the first adopted after the Declaration of Independence. While records of the actual deliberations are limited, it is known that Thomas Jefferson drafted a document worthy of the Enlightenment. Jefferson's draft would have extended the franchise to any taxpayer, divided state lands among the landless citizens, ended importation of slaves, and banned the establishment of religion. His proposal did not mention the militia or its role in a republic, but did include a clearly individual right to arms: "No freeman shall ever be debarred the use of arms."¹⁴¹

Virginia's legislature chose instead a constitution and bill of rights drafted by committee, and taken predominantly from the proposals of the more conservative George Mason.¹⁴² The prevailing version omitted any mention of individual arms and substituted a recognition that: "A well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State."¹⁴³

It is unlikely that the choice was dictated in this case by a conflict (pg.35) of values. Jefferson, who had served on the committee to organize the Virginia militia,¹⁴⁴ was an unlikely opponent of the militia concept. Mason, who was a firearms collector and George Washington's hunting partner,¹⁴⁵ was an improbable supporter of individual disarmament. The difference is more one of emphasis. The Constitution as adopted looks predominantly to maintenance of the status quo. This was predictable since the members of the committee charged with the initial drafting were predominantly large land-owners.¹⁴⁶ Mason's original draft contained a substantial property requirement for legislators—only citizens owning 1,000 pounds worth of real estate could run for the lower house, while only those with twice that freehold could run for the upper.¹⁴⁷

In more general terms, the primary concern of the 1776 constitution is (as it was with Harrington and his followers) the establishment of a stable republic. Indeed, the original draft did

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

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

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

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

¹⁴⁵ K. Rowland, *Life of George Mason* 104 (1892); 83 *The Diaries of George Washington* 71 (D. Jackson ed. 1978) ("[November] 27. [1771.] Set off before sunrise with John Custis for Colo. Masons and went a driving [deer] in his Neck after breakfast—2 deer killed. [November] 28. Went a driving again with Colo. Mason—killed nothing.").

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

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

not recognize a "right" to freedom of religion, but rather a "toleration of the exercise of religion,"¹⁴⁸ along the lines of the British Toleration Act, which for practical grounds exempted certain faiths from the ban on non-establishment churches.¹⁴⁹ Only the intervention of the novice legislator James Madison¹⁵⁰ enabled an American president to later boast: "It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights."¹⁵¹ The Virginia Declaration (pg.36) thus looks backward to the classical republic and concern for the state; Jefferson's unsuccessful draft, in contrast, looked forward to the form of democracy which would take his name. The gap between the Harringtonian republic and Jeffersonian democracy was clearly demonstrated in Jefferson's explanation of his draft:

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

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

2. Pennsylvania and the Individual Right to Arms

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

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

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

¹⁵⁰ See generally Hunt, supra note 148.

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

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

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

apprentices and "mechanics" (in modern terms, the labor movement) of Philadelphia.¹⁵⁴ (pg.37) As one writer of the last century, himself sympathetic to the aristocracy, phrased it:

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

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

The Radical forces launched a successful assault on the opposition. Following the Continental Congress' call for new state constitutions, the Committees of Safety arranged extralegal elections for representatives to a constitutional convention. Each county would elect an equal number of delegates (thus weighting the convention against the more populous eastern counties) and the property requirement was waived for the militia,¹⁵⁶ who comprised much of those counties' revolutionary element.¹⁵⁷ In the meantime, Radical members of (pg.38) the assembly absented themselves; their departure deprived that body of a quorum and paralyzed any possible counterattack. The aristocratic elements were neatly trapped; to run for the constitutional convention would be to endorse its legitimacy without gaining any reasonable chance of winning its control. Many instead sat out the election, leading to a convention as dominated by the Radicals as Virginia's had been by the gentry.

The convention's product has been described as the "most democratic form of government ever tried by an American State."¹⁵⁸ The fifty pound franchise requirement was replaced with one that enfranchised any taxpayer over the age of twenty-one.¹⁵⁹ It was probably Benjamin Rush, one of the losing aristocrats, who complained of the power placed in the hands of the citizenry: "They

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

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

¹⁵⁶ *Id.* at 374.

¹⁵⁷ One historian noted in a recent work:

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

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

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

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

call it a democracy—a mobocracy in my opinion would be more proper. All our laws breathe the spirit of town meetings and porter shops."¹⁶⁰

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

Pennsylvania clearly departed from the Virginia approach when it deleted the Virginia reference to well regulated militias and added a new recognition: "That the people have a right to bear arms for the defense of themselves and the State...."¹⁶⁴ The "themselves (pg.39) and the State" proviso seems superfluous, but it reinforces the distinction between the Radicals' recognition of an individual right (against, it should be noted, even the government they now dominated) and the Virginia gentry's simple praise of a militia system as necessary to their "republic." The Radicals of the Pennsylvania convention thus repudiated Mason's Harringtonian model (which linked land ownership, political rights, and militia duty) in favor of the Jeffersonian formula of universal suffrage and an individual right to arms.

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

3. North Carolina, Massachusetts and the Unsuccessful Compromise

A third approach deserves mention, not because it was a progenitor of the second amendment, but because it was available as a model in 1791 and was specifically rejected by the first Congress. This approach was taken, only a few months after the Pennsylvania convention, by North Carolina. That state's convention was split between Republican and Democratic elements, and its product reflected the need for compromise.¹⁶⁵ Under the constitution they voted out, all taxpayers could vote for the lower house, while those with fifty acres or more of land could vote for the upper

¹⁶⁰ Harding, *supra* note 155, at 386. Harding himself complains that the supporters of the 1776 document were men of obscure birth, of little education or property, and of the narrowest views, "the party of the democracy—suspicious, bigoted, easily swayed by demagogues" *Id.* at 383-84.

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

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

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

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

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

as well. On the other hand, the actual candidates were subject to stricter requirements; the governor must own 1,000 pounds worth of land, members of the upper and lower houses 300 and 100 acres, respectively.¹⁶⁶ (pg.40) The franchise was thus quite broad, while the privilege of seeking office was considerably narrowed. The convention took a similarly eclectic approach to a bill of rights.

North Carolina took its Declaration of Rights primarily from Virginia. However, it replaced Mason's paean to the militia with a variant of the Pennsylvania approach: "[T]he people have a right to bear arms, for the defense of the state...."¹⁶⁷ The omission of the militia statement on the one hand, and the recognition of an individual right—but only for defense of the State—seems an uneasy balance between the Virginia and the Pennsylvania models. Massachusetts' 1780 Constitution expanded upon this third approach. Its chief author was John Adams, probably the colonies' most devout Harringtonian¹⁶⁸ whose fears that excessive democracy would lead to anarchy¹⁶⁹ gave force to Jefferson's accusations that Adams was a closet Monarchist.¹⁷⁰

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

Adams chose an unusual mode of coping with the question of arms and militia provisions. He took the language of the Pennsylvania convention, expanded it somewhat by recognizing for the first time a right to "keep" as well as to "bear" arms, but then qualified (pg.41) the entire provision by recognizing the resulting right only with regard to the common defense.¹⁷³ Given Adams' outstandingly Harrington viewpoint, the qualifier is hardly a surprise, although how it can be reconciled with his original proposal to recognize a right to "keep" arms is unclear. Possibly, to Adams, the proviso was meant simply as an explanation along the lines of the statements of social duty mentioned above, and not as an operative qualifier. Perhaps Adams simply felt a need to reconcile his creation with his philosophy and thus added a clause tying a radically-conceived right into a Harringtonian set of political values. The most likely explanation lies, however, in Adams' legal background and in his general suspicion of the people and of mobs. To "keep" arms was, after all, a more precise rendition of the 1689 English Declaration than the "to bear" language used in the other state conventions. The 1670 English Hunting Act, prohibiting arms to the poor, had used the phrase "have or keep," and the phrase "keep arms" recurs in post-1692 English case law interpreting

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

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

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

¹⁶⁹ *Id.* at 35-37.

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

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

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

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

the Act as modified after the Declaration of Rights.¹⁷⁴ To this extent, Adams' work was what we would expect from one of the premier attorneys of the colonies. The qualifier "for the common defense" may share similar roots. If Adams was going to recognize, in precise legal terms, a right to own or carry firearms as a citizen pleased, he was going to reserve the power to suppress armed riots. Some seven years later, in his *Defense of the Constitution*, Adams would write:

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

Adams was thus mindful of the uses of arms (i.e., legitimate self-defense (pg.42) and militia duty) and concerned about misuse for mob action or anarchy. With far greater precision than is typical in constitutional processes, he sought both to ensure the breadth of the right he desired and to fix its boundaries.

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

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

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

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

¹⁷⁶ *The Popular Sources of Political Authority: Documents on the Massachusetts Convention of 1780*, at 624 (O. & M. Handlin eds. 1966).

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

models fell into complete disuse,¹⁷⁸ while the Pennsylvania model thrived in the age of Jeffersonian (pg.43) democracy.¹⁷⁹

B. Militia and Individual Armament In the American Bill of Rights

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

1. Ratification Conventions Demand a Federal Bill of Rights

The omission of a bill of rights was a weak point of the proposed Constitution, and soon became the focus of opposition. The early conflicts critical to the gestation of the Bill of Rights came in Pennsylvania, Massachusetts and New Hampshire. These were soon followed by a series of similar demands from Virginia, New York, and North Carolina. Each of these proposals therefore merits consideration.(pg.44)

a. The Pennsylvania Minority

The Pennsylvania convention was the first to consider major criticism of the absence of a federal bill of rights. The criticism did not prevail, and the state ratified the Constitution without reservation. This action seems inconsistent with the same state's 1776 enumeration of rights and

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

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

¹⁸⁰ U.S. Const. art. I, sec. 8.

stress upon protections of the individual.¹⁸¹ The explanation is simple: by 1787, the Philadelphia commercial "empire" had struck back; the ratifying convention was heavily dominated by the eastern counties and their commercial aristocracy which, some three years later, would replace the 1776 Constitution.¹⁸² In the 1790 state convention, the defending minority would include several of the men who in 1787 pressed unsuccessfully for a federal bill of rights—Robert Whitehill, John Smilie and William Findley.¹⁸³

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

Available records of the Pennsylvania convention¹⁸⁶ indicate that (pg.45) the lack of a federal bill of rights was an important issue, and perhaps the most important issue from the outset.¹⁸⁷ The dispute came to a head when Whitehill, seconded by Smilie, moved for a federal bill of rights.¹⁸⁸ The motion failed, 46-23, and the Federalist majority refused even to permit it or the vote to be entered in the convention's journal.¹⁸⁹ Whitehill and Smilie, joined by Findley and other delegates, published a pamphlet setting out their amendments and rationale; the pamphlet was in turn reprinted in Pennsylvania newspapers.¹⁹⁰

The minority's argument was hardly Harringtonian. The limited number of representatives under the new Constitution would, they argued, present the danger that "men of the most elevated rank will be chosen. The other orders in society, such as farmers, traders and mechanics ... shall be

¹⁸¹ See supra notes 154-163 and accompanying text.

¹⁸² See generally Harding, supra note 155.

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

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

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

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

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

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

¹⁸⁹ Id. at vi.

¹⁹⁰ Id. at 454.

totally unrepresented."¹⁹¹ This was not a criticism that would have moved John Adams, or likely George Mason, but Whitehill was a small farmer and a Jeffersonian¹⁹² and Findley had declined appointment to the federal Constitutional Convention out of poverty.¹⁹³

While they considered a standing army objectionable,¹⁹⁴ the Pennsylvania minority had scarcely a good word for the militia. Indeed, to them the danger was not that the Congress would fail to adequately discipline the militia and thereby allow the republican tradition to lapse, but that Congress might endanger individual liberties by too forcefully using its powers. Militia discipline to them posed a danger to the individual:^(pg.46)

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

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

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

That the people have a right to bear arms for the defense of themselves and their own State, or of the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals.^{199 (pg.47)}

¹⁹¹ Id. at 472.

¹⁹² Id. at 756.

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

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

¹⁹⁵ Id.

¹⁹⁶ See *infra* notes 222, 225.

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

¹⁹⁸ Id. at 462-63.

¹⁹⁹ Id. at 462. Their proposals also, remarkably, added a guarantee that "the inhabitants of the several States shall have liberty to fowl and hunt in seasonable time on the lands they hold, and on all other lands in the United States not inclosed, and in like manner to fish in all navigable waters" Id. This provision was adapted from a similar guarantee in the 1776 State constitution, which was defended at the time as barring British-style Hunting Acts which could be used to disarm the populace. See Hardy, *Armed Citizens*, *supra* note 3, at 596-97, 603 n.218.

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

b. Samuel Adams and the Massachusetts Minority

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

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

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

Adams' motion was unsuccessful,²⁰⁵ but it is noteworthy that this (pg.48) Radical, whose constituency was the urban "mechanics" and small tradesmen,²⁰⁶ did not consider the militia worthy of mention, while a clearly individual right to arms merited a detailed guarantee. Even his limitation on standing armies was no more than a statement of the obvious—that they should not be maintained where not necessary to defense. Although Sam Adams had a model in his state constitution, written

²⁰⁰ See E. Dumbauld, *The Bill of Rights and What It Means Today* 11 (1957).

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

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

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

²⁰⁴ *Id.* at 86-87.

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

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

by his aristocratic cousin John, he preferred an unlimited individual right to bear arms to John's citation of arms bearing "for the common defense."²⁰⁷

c. New Hampshire: the Bill of Rights Carries a Majority

The Pennsylvania minority's position and that of Sam Adams were ultimately absorbed into the New Hampshire proposals, attached to that state's crucial ratification.²⁰⁸ We know that the vote in New Hampshire was expected to be close—so close that the Federalists had to obtain a temporary adjournment to muster the votes needed to avoid defeat.²⁰⁹ Unfortunately, we know almost nothing of that state's deliberations.²¹⁰ It is apparent that New Hampshire borrowed "almost verbatim" most of its proposals from those advanced by Hancock in Massachusetts.²¹¹ However, the New Hampshire delegates added three proposals of their own, perhaps taken from Samuel Adams' proposed supplement. The first would have barred standing armies, or their quartering in private homes during peacetime, except with consent of three-fourths of the Congress. (pg.49) New Hampshire's second addition prohibited federal laws affecting religion or infringing rights of conscience. The third provided that: "Congress shall never disarm any Citizen except such as are or have been in Actual Rebellion."²¹² Like the concepts advanced by Sam Adams and by the Pennsylvania minority, the New Hampshire proposals made no mention of a well-regulated militia.

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

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

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

The Federalists' task was complicated by Virginia's unusual, perhaps unique, political alignment on the federal constitutional issues. Leaders in the call for a bill of rights, and in opposition to the unamended Constitution, came from varied backgrounds. Conservative George Mason and Democrat Thomas Jefferson joined forces to promote a bill of rights,²¹⁴ despite their

²⁰⁷ See supra note 173 and accompanying text.

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

²⁰⁹ I B. Schwartz, supra note 142, at 758.

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

²¹¹ *Id.*

²¹² *Id.* at 761.

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

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

earlier differences as to what such a bill ought to contain.²¹⁵ They were joined by the firebrand Patrick Henry and the more staid Richard Henry Lee, both of whom defy simple classification.²¹⁶ (pg.50)

Mason's position is perhaps the most simply stated. To him, the priority was protection of the militia, and the restriction of a standing army. Yet preserving the militia required a delicate balance: a government bent upon destroying it might do so either by too lax a regime, by "neglect[ing] to provide for arming and disciplining the Militia," or by too strict a one, "subjecting them to unnecessary severity of discipline in time of peace, confining them under martial law, and disgusting them so much as to make them cry out, 'give us an army.'"²¹⁷ Patrick Henry shared similar fears. The "militia is our ultimate safety,"²¹⁸ he wrote, yet it might be undermined if either the national government made no provision for the militia or if its provisions added too much to the citizens' burdens. To Henry, the militia ideal involved a good deal of personal freedom to obtain arms. Excessive requirements (e.g., requirement of a special firearm for federal duty) might hinder rather than aid the goal. "The great object is that every man be armed," he argued, asking on the other hand, "but can the people afford to pay for double sets of arms?"²¹⁹ To Lee, the danger was more one-sided. Congress might well create a select militia, "distinct bodies of military men, not having permanent interests and attachments in the community."²²⁰ Having done this, it would naturally neglect the militia proper, so that "the yeomanry of the country [who] possess the lands, the weight of property, possess arms, and are too strong a body of men to be openly offended ... may in twenty or thirty years be by means imperceptible to them, totally deprived of that boasted weight and (pg.51) strength."²²¹

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

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

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

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

²¹⁸ *Id.* at 274.

²¹⁹ *Id.* at 275.

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

²²¹ *Id.* at 21.

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

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

Virginia's ratification was secured, albeit by a close vote of 88-80, and only at the price of simultaneous proposals for a bill of rights.²²⁶ The proposals were drafted by a committee that included (pg.52) Antifederalists Lee and Mason, as well as Federalists James Madison, John Marshall, and John Wythe.²²⁷ Madison had always tended to emphasize individual rights in general and individual armament in particular. At the outset of the Revolution, he had noted his skill with the rifle;²²⁸ in Federalist No. 46 he would praise the "advantage of being armed, which the Americans possess over the people of almost every other nation" and note that European governments "are afraid to trust their people with arms;"²²⁹ nearly half a century later, the former President, legislator and "Father of the Constitution" would attack aristocracy on the ground it could never be safe "without a standing army, an enslaved press and a disarmed populace."²³⁰

The committee took an unusual approach to the militia arms concept. Previous proposals had emphasized either the importance of the militia or recognized an individual right to arms. The Virginia committee chose to do both, and spliced together wide ranging provisions from earlier proposals. From Virginia's Bill of Rights came the militia component; while Mason's presence on the committee made this expected, it is noteworthy because this was the first time a federal ratifying convention had so stressed the need for a militia. The right to arms may have been drawn almost verbatim from the Massachusetts Declaration of Rights, employing its broad reference to rights to keep as well as to bear arms, while deleting its qualifier "for the common defense," or it may have been assembled from the Pennsylvania minority's recognition of a people's right to bear arms, joined

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

²²³ *Id.* at 274-275.

²²⁴ Letters from the Federal Farmer to the Republican, *supra* note 101, at 124.

²²⁵ *Id.* at 22.

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

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

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

²²⁹ The Federalist No. 46, at 310-311 (J. Madison) (Modern Library ed. 1947).

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

to Sam Adams' proposal of a federal right of "keeping their own arms."²³¹ Whatever the origin, it is apparent that Virginia meant to extend broad protections both to militia needs and individual rights when it called for recognition "that the people have the right to keep and bear arms; that a well regulated militia, composed of the body of the people trained to arms, is the proper, natural and safe defence of a free state"²³² (pg.53)

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

V. Drafting of the Federal Bill of Rights

When James Madison found himself cast in the unlikely role of father of the national bill of rights,²³⁴ he was not forced to write upon a clean slate. His first step was to obtain a pamphlet which conveniently listed all state proposals, from the Pennsylvania minority onward.²³⁵ The problem became one of editing; out of hundreds of proposals, many redundant and some questionable, a hard core of usable proposals had to be selected. The barriers to be surmounted required discarding all controversial proposals. As he informed Jefferson, "every thing of a controvertible nature that might endanger the concurrence of two-thirds of each House and three quarters of the States was studiously avoided."²³⁶ After excluding the controversial propositions, Madison still had to single out the most desirable proposal, and then (where several different proposals had been made to a single end) select the specific terms of the guarantee. Finally, he had to decide how to assemble and group the rights into a number of amendments. The last task was to a certain extent governed by Madison's plan (which had been retained in committee) to (pg.54) interweave the amendments into the text of the constitution, in the manner of a modern "pocket part."²³⁷

Madison's decision to include a right to arms in his federal bill of rights is hardly surprising. Such a right had been demanded in virtually every call for a bill of rights; indeed, it had received twice the number of demands accorded freedom of speech.²³⁸ Language praising the militia had received much less support, essentially having been appended to the right to arms clause in Virginia

²³¹ See supra note 204 and accompanying text.

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

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

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

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

²³⁶ Id. at 272.

²³⁷ See 1 Annals of Congress 450-53 (J. Gales ed. 1789).

²³⁸ See 1 B. Schwartz, supra note 142, at 1167.

and the two following conventions.²³⁹ But an adaptation of the Virginia/New York/North Carolina wording combining the two held unusual promise. One of Madison's major objectives was to "bring in" North Carolina.²⁴⁰ He hoped to convince it to ratify the Constitution by offering an acceptable bill of rights. North Carolina could hardly object to a nearly verbatim acceptance of its demand.

A combination of a militia statement with individual right recognition fitted Madison's objectives perfectly. The militia statement, standing alone, would likely be unacceptable to groups typified by the Pennsylvania minority, Sam Adams and his supporters, the New Hampshire majority, and possibly Jefferson himself, all of whom had advocated an individual right to arms clause and none of whose efforts had so much as mentioned the militia. An individual right to arms clause standing alone might well have irritated militia supporters such as George Mason and possibly Richard Henry Lee, both powerful Virginians with whom Madison still had to deal and who would vote on his proposal, Mason in the Virginia legislature and Lee in the federal Senate.²⁴¹

It is doubtful that a militia statement had too much appeal for Madison himself, although he certainly backed the militia concept and its necessity to the republic.²⁴² Madison was somewhat skeptical (pg.55) of bills of rights in general—"parchment barriers," he called them, violated at will by majorities "in every state."²⁴³ How much more skeptical must he have been of an unenforceable declaration that a militia when "well" regulated is "necessary" to a free state? Interestingly, while employing imperative phrasing (i.e., "Congress shall make no law") in the remainder of the Bill of Rights, Madison did not try his handiwork on the militia statement. Instead, he let stand George Mason's original, declaratory form.²⁴⁴

Further, when Madison outlined the improvements at which the Bill of Rights were aimed, he cited freedom of press and conscience, the right to arms, and other liberties; he gave not a word to the militia.²⁴⁵ Whatever its value in Madison's eyes, Mason's proclamation that the militia "is the proper, natural and safe defense of a free state" would stay in, albeit with modification and abbreviation.²⁴⁶

Madison's choice for the right to keep and bear arms component was less complex. Madison knew from experience that the Virginia/New York/North Carolina model had proven acceptable to all factions in Virginia; indeed, the committee that drafted it had included himself and Richard Henry

²³⁹ See supra notes 231-32.

²⁴⁰ 12 Papers of James Madison, supra note 234, at 193 (outline prepared by Madison of a speech on the Bill of Rights).

²⁴¹ Madison was also walking a fine line between the Federalist and Antifederalist camps. He strove to propose amendments which would appease the Antifederalists, thus heading off some of their likely proposals which might impair Federalist aims. The tactic was suggested to him by Henry Lee, Richard Henry Lee's brother.

²⁴² "When Madison became President he did everything in his power to carry a sound militia policy through Congress. In every message he urged establishment of a well regulated militia; as it had been accurately defined by Washington, Hamilton and Jefferson." J. Palmer, supra note 103, at 129.

²⁴³ 11 Papers of James Madison, supra note 234, at 297.

²⁴⁴ Indeed, deciding upon the structure of the federal militia had been one of the most divisive questions of the young republic. It would have been hard for Madison to have made the militia statement specific and enforceable and at the same time avoid controversy. See generally supra notes 93-101.

²⁴⁵ 12 Papers of James Madison, supra note 234, at 193-94. The outline was used for Madison's June 8 speech in the House; in outlining the reasons why the English Declaration of Rights cannot be relied upon as an adequate statement of individual rights, it notes "arms to Prottts," an apparent reference to the Declaration's statement that "the subjects which are protestant" may have arms.

²⁴⁶ The difficulties in wording the militia statement as a command also highlight its unique status: it is the only portion of the bill of rights which essentially calls for government action, rather than prohibiting it.

Lee, one of the Constitution's most prominent opponents. It also had been endorsed by New York and always-vital North Carolina. Moreover, the concise wording of the statement "the people have a right to keep and bear arms," required little editing. A Madisonian touch adding a command that it "shall not be infringed," was all that was needed.

The breadth of this language would likely please the Pennsylvania, Massachusetts, and New Hampshire delegates who had sought (pg.56) an individual right to arms. With any fortune at all, these delegates would view Madison's language as incorporating their ideas.²⁴⁷ The wording of the militia clause was, after all, a combination of the broadest terms employed in the state bills of rights. From Pennsylvania had come the recognition of a popular right to bear arms;²⁴⁸ from Massachusetts had come the right to keep them; yet the controversial Massachusetts limitation to keeping and bearing "for the common defense"²⁴⁹ was conspicuously omitted.²⁵⁰ Merging the militia declaration with an individual arms clause would thus have been expected to please George Mason and Samuel Adams alike, nicely reconciling Harringtonians and Jeffersonians, Conservatives and Radicals.

The related issues were dealt with more quickly. Subjection of the militia to martial law was restricted in what became the fifth amendment by guaranteeing jury trial to militiamen not in actual service during time of war or public danger.²⁵¹ Conscientious objection would be taken care of in an addendum to the militia statement, although that addendum was removed by the Senate.²⁵² Thus (pg.57) four arms and military related concerns raised by the ratifying conventions could be resolved entirely.

Significantly, the one military concern not addressed by Madison was the call for limitations on a standing army. As discussed above, Americans by 1789 had crossed the line the English Whigs had passed a century before: a standing army might be a nuisance, but now it was an American nuisance. Statesmen would still condemn it, but also continue to authorize it. Moreover, unlike the right to arms and need for a militia, the details of limiting the army were eminently "controvertible."

²⁴⁷ This in fact happened. For example, a Massachusetts newspaper described Madison's draft as incorporating Adams' proposals, including that for a right to arms. The Massachusetts articles were reprinted in the Philadelphia Independent Gazetteer, Aug. 20, 1789, at 2, col. 2. See generally Hardy, Origins and Development of the Second Amendment, supra note 3, at 250; Halbrot, Right to Bear Arms, supra note 3, at 309-10. A Pennsylvania newspaper explained that in Madison's draft "the people are confirmed by the next article in the right to keep and bear their private arms." The Federal Gazette & Philadelphia Evening Post, June 18, 1789, at 2, col. 1. The article was written by Tenche Coxe, a friend of Madison. Coxe mailed a copy to Madison on the day of publication; Madison took time from the debates to reply with appreciation and note that it had already appeared "in the Gazette here." Hardy, Armed Citizens, supra note 3, at 610.

²⁴⁸ See supra note 164.

²⁴⁹ See supra note 173.

²⁵⁰ The absence was not inadvertent; the Senate rejected, by voice vote, a proposal to add "for the common defense" to the right to arms clause. Journal of the First Session of the Senate of the United States of America 77 (Washington 1820) ("On motion to amend article the fifth, by inserting these words, 'for the common defense,' next to the words 'bear arms': It passed in the negative.").

²⁵¹ Madison's original proposals would have included the following: "The trial of all crimes (except in cases of impeachments, and cases arising in the land or naval forces, or the militia when on actual service, in time of war or public danger) shall be by an impartial jury of freeholders of the vicinage, with the requisite unanimity ... and in all crimes punishable with loss of life or member, presentment or indictment by a grand jury shall be an essential preliminary...." 1 Journal of Congress 452 (J. Gales ed. 1789). This proposal was ultimately divided into the fifth and sixth amendments, the first of which applies his armed forces and active militia exception to the requirement of indictment by grand jury.

²⁵² Journal of the First Session of the Senate of the United States of America 71 (Washington 1820).

Federalists in the conventions had strongly opposed any limitations²⁵³ and no consensus had developed among the supporters of such limitations.²⁵⁴ Madison wisely avoided inserting such limitations in his draft; when others proposed them in the Senate their motions were uniformly defeated.²⁵⁵ The one objective the future second amendment would *not* seek was a barrier to a standing army.

Having structured his proposals, Madison faced one last choice. While the Constitution provided for the amendment process, it said nothing regarding the form of amendments. Madison planned to offer nine amendments, each containing several paragraphs. Each amendment would be designated for insertion at a different, specific point in the text of the Constitution. The first amendment would add a prefix to the Constitution, recognizing that all power is derived from the people. The second and third (which were ultimately (pg.58) rejected by the states) would expand membership of the House and fix their compensation, and would be added to Article I in sections 2 and 6. The third amendment would have grouped together ten paragraphs and inserted them in Article I, section 9, immediately following the Constitution's existing guarantees of individual rights (viz., restrictions on suspension of habeas corpus, bills of attainder and ex post facto laws).²⁵⁶ Interestingly, Madison intended the future second amendment, also containing individual rights, as a general limitation of legislative power, rather than as a modification to Congress' militia powers under Article I, section 8. While insertion of militia language might have pleased George Mason, there is little doubt that the individual right component predominated in Madison's mind.

Madison's handiwork underwent substantial editings in both House and Senate. The effect was to pare the guarantees to a minimum. Madison's expansive guarantee of freedom of expression, "the people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable,"²⁵⁷ became simply "Congress shall make no law ... abridging the freedom of speech, or of the press."²⁵⁸ Madison's militia and arms provisions fared better. His proposal that "the right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia

²⁵³ See, e.g., 1 B. Schwartz, *supra* note 142, at 455-56; J. McMaster & F. Stone, *supra* note 101, at 409 (James Wilson, in the Pennsylvania convention: "It may be frequently necessary to keep up standing armies in time of peace. The present Congress have ... [gone] farther and raise[d] an army without communicating to the public the purpose When the commotions existed in Massachusetts, they gave orders for enlisting an additional body of two thousand men [O]ught Congress to be deprived of power to prepare for the defense and safety of our country?").

²⁵⁴ Virginia's Bill of Rights, for instance, merely provided that standing armies in time of peace "should be avoided." Maryland's provided that standing armies (presumably in war as in peace) ought not to be kept up "without the consent of the legislature." Massachusetts provided that standing armies in time of peace ought not to be kept up without the consent of the legislature. See 3 F. Thorpe, *supra* note 143, at 3814, 1688, 1892. The Pennsylvania minority desired to ban all standing armies in peacetime, while Sam Adams desired to bar them only when not "necessary." See J. McMaster & F. Stone, *supra* note 101, at 462.

²⁵⁵ A proposal to add to what became the second amendment a recognition that such armies are "dangerous to liberty," should be avoided as far as possible, and would be authorized in peace only upon a two-thirds vote of each house of Congress was lost six to nine. Four days later, an amendment stating more concisely that a two-thirds majority was necessary was lost on a voice vote. *Journal of First Session of the Senate of the United States* 71, 75 (Washington 1820).

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

²⁵⁷ *Id.* at 451.

²⁵⁸ U.S. Const. amend. I.

being the best security of a free country..."²⁵⁹ became "[a] well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms, shall not be infringed," as ultimately passed by the House.²⁶⁰ Although the first casualties of the House's editorial (pg.59) process were Madison's preambles and explanations,²⁶¹ the militia statement and the right to arms guarantee were both retained. The first House apparently did not feel that either portion of the ultimate second amendment was redundant. The Senate did not either, for it emphasized the differing natures of each provision. On the one hand, it refused to add "for the common defense" to the right to arms guarantee,²⁶² which would have suggested that the guarantee's purpose was linked solely to the militia; on the other, it replaced the House's statement that the militia was "the best security" of a free state with a stronger statement that it was "necessary" to that security.²⁶³

VI. Conclusion

The second amendment to the Constitution had two objectives. The first purpose was to recognize in general terms the importance of a militia to a free state. This recognition derives from the very core of Classical Republican thought; its "constituency" among the Framers was found primarily among conservatives, particularly Virginia's landed gentry. Indeed, prior to Virginia's proposal, no federal ratifying convention had called for such recognition. The second purpose was to guarantee an individual right to own and carry arms. This right stemmed both from the English Declaration of Rights and from Enlightenment sources. Its primary supporters came from the Radical-Democratic movement, whether based among the small farmers of western Pennsylvania or the urban mechanics of Massachusetts. Only by incorporating both provisions (pg.60) could the first Congress reconcile the priorities of Sam Adams with those of George Mason, and lessen the "disquietude" both of the Pennsylvania and Massachusetts minorities and those of the Virginia and New York majorities. The dual purpose of the second amendment was recognized by all early

²⁵⁹ Journal of Congress, *supra* note 256, at 451.

²⁶⁰ Journal of the First Session of the Senate of the United States 63, 64 (Washington 1820) (citing bill as passed by the House).

²⁶¹ Lost, for example, were Madison's proposed preamble to the Constitution, stating that "Government is instituted and ought to be exercised for the good of the people; which consists in the enjoyment of life and liberty ..."; his explanation that freedom of the press is "one of the great bulwarks of liberty"; and the explanation that the express guarantees ought not be read to rule out other rights retained by the people, since they were inserted "either as actual limitations of such powers, or as inserted merely for greater caution." 1 Annals of Congress 451 (J. Gales ed. 1789). The House was apparently more interested in stating concisely the limitations upon federal power than in explaining why the limitations were created.

²⁶² Journal of the First Session of the Senate of the United States 77 (Washington 1820) ("On motion to amend article the fifth, by inserting these words: 'for the common defense' next to the words 'to bear arms'; it passed in the negative.").

²⁶³ *Id.* at 77. In the House, Elbridge Gerry had unsuccessfully argued that the "best security" language was inadequate since it admitted that other measures, e.g., a standing army, would be acceptable as secondary securities. 1 Annals of Congress 751 (J. Gales ed. 1789).

constitutional commentators;²⁶⁴ the assumption that the second amendment had but a single objective is in fact an innovation born of historical ignorance.

The distinction between the second amendment's purposes enables us to avoid the pitfalls of the collective rights view, which would hold that the entire amendment was meant solely to protect a "collective right" to have a militia.²⁶⁵ The militia component of the second amendment was not meant as a "right", collective or individual, except in the sense that structural provisions (e.g., requirements that money bills originate in the House, or military appropriations not exceed two years) are considered collective "rights." Indeed, the militia component was meant to invoke the exertion of governmental power over the citizen, to inspire it to require citizens to assume the burdens of militia duty. In this respect it differs radically from any other provision of the Bill of Rights. To read what was a recognition of an individual right, the right to arms, as subsumed within the militia recognition is thus not only permitting the tail to wag the dog, but to annihilate what was intended as a right.²⁶⁶ As the one (pg.61) provision of the Bill of Rights which encourages rather than restricts governmental action, the militia component's terms were necessarily vague and its phrasing a reminder rather than a command.²⁶⁷

²⁶⁴ For example, St. George Tucker, a Revolutionary War veteran who went on to an extraordinary legal and scholarly career, began his discussion of the second amendment with the note that "The right of self defense is the first law of nature," went on to discuss the dangers of standing armies, and closed with a note that the British government had disarmed its citizens under the Hunting Acts. See Blackstone's Commentaries, with Notes of Reference to the Constitution and Laws 300 (St. George Tucker ed. 1803). William Rawle, a noted legal scholar who sat in a State convention which ratified the Bill of Rights, drew a still clearer distinction between the two clauses:

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

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

²⁶⁵ See supra note 2.

²⁶⁶ Acceptance of the collective rights view, moreover, edges us into morass after morass. First, who may raise the issue? The only political "collective rights" with which the author is familiar are those of various Indian tribes, which as sovereigns negotiated treaties with the national government. It has been held that individual members of the tribes have standing to raise these tribal rights as a defense to a criminal action. See, e.g., *United States v. Dion*, 106 U.S. 2216, 2220 n.6 (1886); *United States v. Winans*, 198 U.S. 371, 381 (1905). Second, what does the second amendment bar? Does it repeal by implication the federal power to call forth the militia? Might an individual or a state object to any nationalization of military reserve units? Does it restrict the federal power to maintain an army, or require, as a prerequisite to such maintenance, a finding that militia would not better serve the need? If it does none of these things, then why did so many Americans, and the first Congress, spend so much time advocating it?

²⁶⁷ The militia recognition, examined carefully, thus stands out from the remainder of the Bill of Rights; it is the only such "recognition," the only provision lacking Madison's strongly prohibitory language, the only provision calling for federal action, the only provision phrased in such ambiguous tones. The author frankly suspects that Madison inserted it primarily to appease George Mason and perhaps Richard Henry Lee. Mason's belief in the efficacy of such recognition has been discussed above, as has his tendency to phrase provisions in terms of what "ought" to be done by a free government, rather than what "shall" not be done. Madison was quite familiar with Mason's outlook, having sat with him on the committee which drafted Virginia's proposals for the federal Bill of Rights. Mason was then a man with considerable power among the dominant gentry in Virginia; Madison was more than a bit suspect among that group for his federalist beliefs—in fact, he had been denied a seat in the first Senate by vote of the legislature. Patrick Henry, with characteristic excess, informed the legislature that placing Madison in the Senate would "terminate in producing rivulets of blood through out the land." R. Ketchum, *James Madison: An Autobiography* 275 (1970). Fortunately, his election to the House produced not even a minor insurrection. To entirely omit a clause so close to Mason's heart as this one would hardly have been very wise. Conversely, if the objective was to please Mason, and the issue not one important to Madison himself, there would be no reason to spend time working out details or firming up language with commands. Mason could hardly complain about a slight paraphrase of his own work, and its very vagueness would avoid conflict which might pull down the guarantees of

The right to arms portion of the second amendment, in contrast, was meant to be a prohibition, as fully binding as those in the remainder of the Bill of Rights. Madison intended that the second amendment be read as incorporating the individual rights proposals put forward by the Pennsylvania minority and by Sam Adams and the New Hampshire convention. Judging from contemporary discussion in Massachusetts and Pennsylvania, he succeeded.²⁶⁸ If either clause can be accorded primacy, it is the right to arms clause; only in Virginia, at the eleventh hour of the ratification process, was a militia clause appended to a federal bill of rights proposal.

Reading the entirety of the second amendment as militia-related, based upon some contemporary references to the need for constitutional (pg.62) recognition of the militia concept, confuses the purpose of one provision with the text of another. The second amendment, in short, cannot be explained simply as a last avowal of the classical ideal, as "the last act of the Renaissance."²⁶⁹ Rather, it is a bridge between the decline of that ideal and the rise of the liberal democracy. Part of the second amendment looks backward to the worlds of Polybius and Machiavelli; but part looks forward, to the worlds of Jefferson and Jackson. Only a recognition of the dual nature of the second amendment will enable us to give meaning to the aspirations of Thomas Jefferson and Samuel Adams as well as those of George Mason.²⁷⁰

individual rights for which Madison was so deeply concerned.

²⁶⁸ See supra note 247.

²⁶⁹ During a seminar sponsored by the American Academy of Political and Social Sciences in 1986, Professor Lawrence Cress maintained that the second amendment was purely militia-related and was "the last act of the Renaissance." The author replied that this was true only of its militia component, sponsored by the conservative framers, and not at all of its right to arms component, which was endorsed by radicals. The second amendment was not the last act of the Renaissance, but a bridge between the Renaissance concept of a republic and the Jeffersonian/Jacksonian concept of democracy. Out of that exchange grew the present article.

²⁷⁰ We may be forgiven the suspicion that many advocates of the "collective rights" approach in fact desire the militia statement to subsume the right to arms recognition only because they recognize the militia statement is unenforceable and, ultimately, all but meaningless. It is doubtful that most collective right proponents would react favorably to case law finding an enforceable duty to require all citizens to purchase and stockpile M-14's, M-16's or any other standard military firearm, to force each to participate in basic training, and to organize every adult into a reserve military unit. The supposed endorsement of the militia component thus becomes simply an expedient way of negating every provision of the second amendment, and nullifying both the objectives of the conservatives and those of the radicals.