

ARTICLES

The Janus-Faced Second Amendment: *Looking Backward to the Renaissance, Forward to the Enlightenment*

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ABSTRACT

The present debate over interpretation of the Second Amendment focuses on whether it was intended to guarantee the existence of the militia as a system or to guarantee an individual right to arms. The purpose of this Article is to demonstrate this is a false dichotomy: the Second Amendment was meant to guarantee both. There were those of the Framing generation who feared a standing army and valued the militia as an institution, and those who feared that the new government would disarm the people and valued an individual right to arms. The Second Amendment has two clauses because it was meant to assure both groups. This understanding meets a standard test of science: it explains all observed data, and is inconsistent with none.

The practical significance of this is that we cannot interpret the right to arms as limited to the militia, or as an exclusively militia-centric right.

Further, this Article will suggest that the modern National Guard is not, and was not intended to be, the militia referenced in the Constitution. The militia of the Constitution were intended as a state-officered and controlled force, subject to certain protections (chiefly that they could not be deployed outside the United States). The modern National Guard was created under the Army, not the Militia, Clause of the Constitution, as a reserve component of the Army, federally officered and controlled, and subject to service overseas.

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INTRODUCTION

“A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.”¹

The core interpretational debate over the Second Amendment is whether its second clause—protecting the right to keep and bear arms—should or should not be qualified by its first clause, which proclaims the importance of a well-regulated

1. There is no authoritative count of the number of commas in the Second Amendment: surviving State ratification notices use zero, one, two, and three commas. Ross E. Davies, *Which is the Constitution?*, 11 GREEN BAG 2D 209 (2008). In an era before photocopies and pdf files, copyists punctuated as they thought best.

militia. That is, the issue is whether the right to arms exists only to the extent necessary to serve in such a militia. This dispute lay at the heart of *District of Columbia v. Heller*,² where a 5-4 Court recognized an individual right to arms not linked to militia service.

This conceptualization of the issue is, incidentally, of very recent vintage. The Stevens dissent in *Heller* introduced its position with, “The question presented by this case is not whether the Second Amendment protects a ‘collective right’ or an ‘individual right.’ Surely it protects a right that can be enforced by individuals.”³ Yet, prior to that statement, the militia-centric view had *very much* denied that Second Amendment rights could be enforced by individuals, arguing that the Second Amendment protected only a right of states.⁴ The Ninth Circuit had gone so far as to rule that individuals lacked standing to raise a Second Amendment objection: “Because the right to keep an armed militia is a right held by the states alone, Hickman has failed to show ‘injury’ as required by constitutional standing doctrine. Accordingly, we have no jurisdiction to hear his appeal.”⁵

The distinction between the militia-centric view and the purely individual view was at the center of *Heller*, where the dissenters argued that the right to arms was tightly bound to militia service, and was solely “a right to have arms available and ready for military service, and to use them for military purposes when necessary.”⁶ They saw the Amendment’s Militia Clause as proving that the “Framers’ single-minded focus in crafting the constitutional guarantee ‘to keep and bear arms’ was on military uses of firearms, which they viewed in the context of service in state militias.”⁷ The majority, in contrast, saw only a weak link between the two clauses; the Militia Clause merely identifies the reason why the right to arms was so important as to merit constitutionalization:

The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause. The former does not limit the latter grammatically, but rather announces a purpose. The Amendment could be rephrased, “Because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.”⁸

2. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

3. *Heller*, 554 U.S. at 636 (Stevens, J., dissenting).

4. *See, e.g.*, *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971); *United States v. Warin*, 530 F.2d 103, 105 (6th Cir.), *cert. denied*, 426 U.S. 948 (1976); *United States v. Johnson*, 497 F.2d 548 (4th Cir. 1974); *United States v. Kozerski*, 518 F. Supp. 1082, 1090 (D.N.H. 1981). That position became untenable because the Framers uniformly used “right of the people” to describe individual rights—the First Amendment’s right of assembly, the Fourth Amendment’s right against unreasonable search and seizure, the Ninth Amendment’s general reservation of rights, and the Tenth Amendment’s distinction between the people and the states.

5. *Hickman v. Block*, 81 F.3d 98, 102 (9th Cir. 1996). The Court went on to hold that the defendant could not argue that the State had unconstitutionally failed to create a militia: such claims were non-justiciable. *Id.* at 103.

6. 554 U.S. at 650 n.12 (Stevens, J., dissenting).

7. *Id.* at 643 (Stevens, J., dissenting).

8. *Id.* at 577.

The purpose of this Article is to suggest a third possibility—one raised by Justice Kennedy’s questions during the *Heller* argument—the Second Amendment’s praise of the militia and its guarantee of an individual right to arms were understood by the Framers as separate concepts.⁹ The two clauses had independent historical origins, centuries apart, and in the Framing period had separate constituencies, bodies of concerned Americans whom the Bill of Rights was meant to assure. Both were worried that the new and experimental Congress might be tempted toward tyranny. But one body was concerned that Congress might undermine the militia as a system, while the other was concerned that it might disarm individuals.¹⁰

At the outset, this explanation seems obvious. The Framers were among the most articulate men in our history. If they meant only to say either, “A well-regulated militia is essential to a free state,” or, “The right of the people to keep and bear arms shall not be infringed,” they were capable of doing so. For that matter, they were perfectly capable of choosing to protect “the right of the people to keep and bear arms in a well-regulated militia,” if that was their desire.¹¹ They had a more elegant model for the last before them, the Massachusetts Constitution of 1780, which guaranteed the people’s right “to keep and bear arms for the common defense.”¹² In fact, such wording was proposed for the Second Amendment in the First Senate—an amendment to insert “for the common defense”—and was voted down.¹³ The Framers rejected the opportunity to create a true militia-centric right to arms.

I. DID THE SECOND AMENDMENT HAVE ONE PURPOSE, OR TWO?

A careful look at the relevant history shows a reason for the rejection. The Second Amendment has two clauses because it has two purposes and was meant to satisfy two different constituencies. In 1789–1791 there were Americans who sought the guarantee of an individual right to arms, and there were Americans who sought to protect the militia as an institution. Only at the Virginia ratifying

9. Justice Kennedy proposed an interpretation “that conforms the two clauses and in effect de-links them.” In this view, the Second Amendment’s militia clause underscores the importance of the Constitution’s militia clauses, “And so in effect the amendment says, we reaffirm the right to have a militia, we’ve established it, but in addition, there is a right to bear arms.” Transcript of oral argument, *District of Columbia v. Heller*, at 5–6, https://www.supremecourt.gov/oral_arguments/argument_transcripts/2007/07-290.pdf [<https://perma.cc/NR4J-FWF3>].

10. This is not to deny that there was some overlap, i.e., individuals who feared both. As we shall see, there were some who feared that Congress might disarm the people in order to disable the militia system, and others who feared that Congress might neglect the militia system so as to more easily disarm the people.

11. The Framers of the Second Amendment took care in its wording. In the first House, for example, Elbridge Gerry objected to describing the militia as the “best security” of a free state because “best” implied there were other good securities. 1 ANNALS OF CONGRESS 751 (J. Gales ed. 1789). The first Senate voted down a proposal to add “for the common defense” to the right to arms clause. JOURNAL OF THE FIRST SESSION OF THE SENATE 77 (1820).

12. MASS. CONST. pt. I, art. 17 (1780).

13. JOURNAL OF THE FIRST SESSION OF THE SENATE 77 (1820).

convention—the Eleventh Hour of the framing, after the required nine states had already ratified—did it occur to any Framers that both provisions could be recognized in a single amendment, much as six different rights were embodied in the First Amendment. The core of the First Amendment was protection of rights of the intellect and spirit; the core of the Second Amendment was the allocation of physical power between the national government, individuals, and the states.

A. Historical Background: Classical Republicanism vs. Jeffersonianism

Late eighteenth-century American political thought was dominated by two approaches, which differed in emphasis. The older of the two is today identified as the Classical Republican, whose roots lay in the Florentine Renaissance. This approach drew upon Nicolo Machiavelli's pro-republican writings, as imported into English political thought by James Harrington.

To Machiavelli, a republic (a "free state," in Second Amendment terms) could not safely be defended by a hired, full-time army. Any army strong enough to defend a government would be strong enough to topple it and take political power and wealth for its own troops because "[m]ercenary 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. . . . But if the captain is not an able man, he will generally ruin you."¹⁴ To Machiavelli, defense of the state by a mercenary army posed an inescapable dilemma: an army that was strong enough to repel an invasion was strong enough to take over, an army weak enough to be safe would be too weak to protect against invasion.

Machiavelli's solution involved defending the republic by a militia of its armed and trained citizens. (Even in his most cynical work, *The Prince*, Machiavelli required the prince to be popular, a Charlemagne or a Caesar. A prince would have to be loved by the citizenry if wanted to defend his state with militia).¹⁵

In the seventeenth century, Machiavelli's approach was imported into English thought by John Harrington. Harrington argued that a republic is virtually unconquerable because its citizens, "being all soldiers or trained up unto their arms, which they use not for the defense of slavery but of liberty" cannot be subdued: "Men accustomed to their arms and their liberties will never endure the yoke."¹⁶

Harrington sought to escape Machiavelli's dilemma by envisioning a republic defended by a militia of freeholders, who also held the electoral franchise. No matter how powerful such a militia, it could not seek to topple the government

14. NICCOLO MACHIAVELLI, *THE PRINCE AND THE DISCOURSES* ch. 12 (1513).

15. I owe this observation to William Wittels, *Populism and Machiavelli's Citizen Militia – A Reconsideration of The Prince*, <https://williamwittels.files.wordpress.com/2013/09/wwittelsprincereconsidered.pdf> [<https://perma.cc/6SZF-34FX>]. A careful reader of Machiavelli will be struck by how often he stresses a ruler's need for popular support. He counsels, for example, against controlling a city by building a citadel: it will tempt the prince to become oppressive, whereas without it he will constantly aware that his rule rests upon the favor of the people. NICCOLO MACHIAVELLI, *DISCOURSES ON LIVY* ch. 24 (1517).

16. James Harrington, *The Prerogative of Popular Government*, in *THE POLITICAL WORKS OF JAMES HARRINGTON* 442 (J.G.A. Pocock ed. 1977).

to seize political power—as voters, its members already had it—nor to seize wealth—as freeholders, its members had that as well. Harrington’s militia of landowners and voters could be powerful yet pose no threat to political stability.

Harrington’s innovation, however, lay in joining land ownership with the possession of arms as the twin bases of virtuous citizenship. Because he was both armed and landed, Harrington’s virtuous citizen had the necessary independence to maintain his life, liberty, and property against all who would deprive him of them. From Harrington, libertarians came to conceptualize civic virtue in terms of the armed freeholder: upstanding, courageous, self-reliant, individually able to repulse outlaws and oppressive officials, and collectively able to overthrow domestic tyrants and defeat foreign invaders.¹⁷

This Classical Republican approach thus saw property ownership, the franchise, and militia duty as identical and coextensive; only this triple relationship could give stability and freedom. Stability and collective freedom were its goal, not individual rights.

Late eighteenth century America came to see the rise of a second political worldview, which was at the time identified as “Radical” thought, and which today is identified as Jeffersonian or, perhaps we might say, proto-Jeffersonian.

Between these two points [American independence and the drafting of the first state constitutions] was a continuous, unbroken line of intellectual development and political experience. It bridged two intellectual worlds: the mid-eighteenth-century world—still vitally concerned with a set of ideas derived ultimately from classical antiquity, from Aristotelian, Polybian, Machiavellian, and seventeenth-century English sources—and the quite different world of Madison and Tocqueville.¹⁸

The new “radical” or “Jeffersonian” movement saw things differently than the Classical Republicans did. The electoral franchise was not to be limited to landowners: everyone who contributed to the state, or was willing to fight for it, should have a voice in its affairs. The militia system was a tool, not the sole key to stability. Thomas Paine, the Americans’ greatest propagandist, did not hesitate to write in late 1776 that “a summer’s experience” had sufficed to show the militia’s weakness and that, “I always considered militia as the best troops in the

17. Robert Shalhope, *The Armed Citizen in the Early Republic*, 49 LAW & CONTEMP. PROBS. 125, 128 (1986). Many English political writers of the time echoed Harrington. Henry Neville argued that “democracy is much more powerful than aristocracy, because the latter cannot arm the people for fear they should seize upon the government.” See CHRISTOPHER HILL, SOME INTELLECTUAL CONSEQUENCES OF THE ENGLISH REVOLUTION 27 (1980). In the eighteenth century, James Burgh—whose works were popular in the American colonies—devoted an entire chapter of his *Political Disquisitions* to the Militia-Army issue. “No kingdom can be secured otherwise than by arming the people,” Burgh wrote, adding, “The possession of arms is the distinction between a freeman and a slave.” 2 JAMES BURGH, POLITICAL DISQUISITIONS: AN ENQUIREY INTO PUBLIC ERRORS, DEFECTS AND ABUSES 345, 390, 476 (London 1774, reprinted 1971).

18. BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 285 (1977).

world for a sudden exertion, but they will not do for a long campaign.”¹⁹ Paine’s language would have been political heresy to a classical republican. A new political age was dawning.

B. The Right to Arms vs. the Militia in Early American Statecraft

In 1776, with the colonies preparing to declare their independence, several colonies chose to replace their Royal charters with written constitutions. The first two colonies to so act were Virginia and Pennsylvania, and both chose to preface their constitutions with a bill or declaration of rights.²⁰

It swiftly became apparent that Americans, at this stage of history, saw something of a binary choice between praising the militia (a tenet of Classical Republicanism), and recognizing an individual right to arms (reflecting, as we shall see, Radical/Jeffersonian values). The concept that, since the two provisions were not inconsistent, a state might adopt both, does not seem to have occurred to the framers of early constitutions.

The framing process in Virginia and in Pennsylvania came in dramatically different political settings. Virginia’s gentry ruling class supported independence, and its 1776 constitution took a conservative course:

In order “to prevent Disorders in each colony,” John Page wrote in April 1776, “A Constitution should be formed as nearly resembling the old one as Circumstances, and the Merit of that Constitution will admit of . . .” The Virginia convention did precisely what he advised. The constitution that the fifth convention adopted at the end of June 1776 made almost no changes to the structure or operations of the government . . .²¹

Among the structures retained was the militia, which in a gentry society played both a military and a civilian function:

From their earliest appearance, militia units also filled an important social function. Everyone knew who “Col. Mason” and “Col. Taylor” (not “Senator Taylor”) were; militia ranks were important social markers, and military service would continue to play a significant role in elite Virginians’ view of themselves.²²

Pennsylvania’s experience was the polar opposite. Its ruling class was dominated by Quakers, German pietists, and coastal mercantile interests. The first two opposed conflict in general, and the last were horrified at the threat that

19. THOMAS PAINE, *THE AMERICAN CRISIS*, No. I (1776).

20. See *THE VIRGINIA DECLARATION OF RIGHTS* (1776); PA. CONST. §6 (1776).

21. BRENT TARTER, *THE GRANDEES OF GOVERNMENT: THE ORIGIN AND PERSISTENCE OF UNDEMOCRATIC GOVERNMENT IN VIRGINIA*, 111–137 (2013) (ebook). The more significant changes consisted of stripping the Commonwealth Secretary of some patronage powers and transferring power from the governor to the General Assembly.

22. KEVIN R. C. GUTZMAN, *VIRGINIA’S AMERICAN REVOLUTION* 140 (2007).

independence posed to trade with Britain. Quakers petitioned the legislature to avoid measures “as are likely to widen or perpetuate the Breach with our Parent States,” while merchant Joseph Shippen, Jr., pronounced himself “shocked with the thought” of independence.²³

Pennsylvanians who supported independence responded with a political purge. A constitutional convention was called, and in the election of delegates the voting franchise was both narrowed and broadened. Voting was limited to those who would take a loyalty oath (thus excluding Quakers), and broadened to include any adult member of the State’s voluntary militia (the “Associators”) who had been assessed for taxes—a classification that included numerous poor who had been excused their actual payment.²⁴

The result was a State constitution that has been described as the “most democratic form of government ever tried by an American State,”²⁵ one that “represented the fears, hopes, experiences, and dreams of Pennsylvania’s small producers and the Philadelphia popular movement, especially the men of ‘smallest property.’”²⁶ It provided for a unicameral legislature, annually elected, with term limits. Its governor would share power with an elected council, and an elected Council of Censors would assess the legislature’s compliance with the constitution.²⁷ The Pennsylvania result was thus a sharp contrast to that of Virginia. Virginia sought to protect the status quo; Pennsylvania sought to challenge it.

1. The Initial Contrast: Thomas Jefferson vs. George Mason

Virginia’s Constitution and Declaration of Rights were the first adopted after independence. Thomas Jefferson (then serving in the Continental Congress) drafted a constitution and submitted it for consideration. Portions of his draft were incorporated into the final document.²⁸

Jefferson’s draft was a reflection of proto-Jeffersonianism. He would have extended the franchise to any taxpayer, divided state lands among landless citizens, stopped importation of slaves, and ended Virginia’s establishment of religion. He explained his views on the first: “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 Whoever intends to live in a country must wish that country well, and has a natural right of assisting in the preservation of it.”²⁹ This was, of course, a rejection of the Classical Republican view of the franchise.

23. STEVEN ROSSWURM, *ARMS, COUNTRY, AND CLASS: THE PHILADELPHIA MILITIA AND “LOWER SORT” DURING THE AMERICAN REVOLUTION* 59–64 (1987).

24. *Id.* at 100.

25. Samuel Bannister Harding, *Party Struggles Over the First Pennsylvania Constitution*, ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION 376 (1895); see generally J. PAUL SELSAM, *THE PENNSYLVANIA CONSTITUTION OF 1776: A STUDY IN REVOLUTIONARY DEMOCRACY* ## (1936).

26. ROSSWURM, *supra* note 23, at 107–08.

27. Harding, *supra* note 25, at 188–200.

28. See 1 THOMAS JEFFERSON, *PAPERS OF THOMAS JEFFERSON* 337 (Julian P. Boyd et al. eds., 1950).

29. *Id.* at 504.

Jefferson's draft of a declaration of rights did not even mention the militia but did include a clearly individual right to arms: "No freeman shall ever be debarred the use of arms."³⁰

Virginia's legislature chose instead a constitution and bill of rights drafted by committee and taken predominantly from the proposals of the more conservative (i.e., Classical Republican) George Mason. (Edmund Randolph, a member of the legislature, wrote that Mason's plan "swallowed up all the rest.")³¹

The resulting Declaration omitted any mention of individual arms rights but contained 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."³² In accord with the tenets of Classical Republicanism, the constitution left undisturbed Virginia's requirement of real property ownership for voting.³³

2. The Sequel: Virginia vs. Pennsylvania

Two months later, Pennsylvania became the second state to adopt a constitution and declaration of rights. As we have seen, its convention acted against a background that radically differed from that of Virginia. Its gentry had opposed rather than supported independence and were overthrown in a popular purge.

The drafters had Virginia's Declaration as a model, and John Adams wrote that Pennsylvania's "bill of rights is almost verbatim from that of Virginia."³⁴ Note the qualifier, "almost," when comparing its product to that of Virginia. To take three sample provisions:

Section One of Each Declaration, its Preamble:

[Virginia] That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.³⁵

30. *Id.* at 344. In his second and third drafts, Jefferson added "[within his own lands or tenements]." *Id.* at 353, 363. Jefferson used brackets to indicate language that was tentative or optional. *Id.* at 347 n.10. He, like many large landowners, may have worried about poaching.

31. Edmond Randolph, *Edmund Randolph's Essay on the Revolutionary History of Virginia*, 44 *VIRGINIA MAGAZINE OF HISTORY AND BIOGRAPHY* 35, 44 (1936).

32. THE VIRGINIA DECLARATION OF RIGHTS, §13 (1776).

33. See 8 HENING'S LAWS OF VIRGINIA 306 (1769). ("That every person shall have a right to vote at any election of Burgesses, for any county, who hath an estate of freehold, for his own life, or the life of another, or other greater estate, in at least fifty acres of land, if no settlement be made upon it, or twenty-five acres, with a plantation and house thereon at least twelve feet square, in his possession, or in the possession of his tenant or tenants, for term of years, at will or sufferance, in the same county where he gives such vote")

34. JOHN ADAMS, *DIARY AND AUTOBIOGRAPHY* 391 (L. H. Butterfield ed. 1964).

35. THE VIRGINIA DECLARATION OF RIGHTS, § 1 (1776).

[Pennsylvania] That all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.³⁶

The Pennsylvania provision copies that of Virginia, with a few edits for brevity.

Section 12, Freedom of Expression:

[Virginia] That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments.³⁷

[Pennsylvania] That the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained.³⁸

Again, some modest editing, to include of freedom of speech, and describing speech and press as rights. But the next section was treated *very* differently in Virginia and in Pennsylvania:

Section 13:

[Virginia] That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power.³⁹

[Pennsylvania] That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power.⁴⁰

No mere editorial change here! The Pennsylvanians deleted the Virginia militia provision entirely and substituted a guarantee of a clearly individual right to arms. Indeed, the word “militia” is not to be found anywhere in the Pennsylvania Declaration of Rights, and only once in its 1776 Constitution (§ 7: legislators may not hold executive office, other than in the militia).

We can also compare its extension of the franchise. Unlike Virginia, Pennsylvania enfranchised any taxpayer over the age of twenty-one.⁴¹ This

36. PA. CONST. § 1 (1776)

37. THE VIRGINIA DECLARATION OF RIGHTS, § 12 (1776).

38. PA. CONST. § 12 (1776).

39. THE VIRGINIA DECLARATION OF RIGHTS, § 13 (1776).

40. PA. CONST. § 13 (1776).

41. *Id.* at § 6.

violated the Classical Republican view that property owners, voters, and militia members, must be identical classes of people.

The contrast between Jefferson's and Mason's proposals, and between those of Virginia and Pennsylvania, illustrate how in 1776 militia/arms provisions were seen as involving a binary choice: a constitution either recognized one or the other, but not both, and the choice reflected whether the drafters leaned toward Classical Republicanism (freehold-only suffrage) or Jeffersonianism (universal manhood suffrage). The Virginia model was adopted by Maryland,⁴² and the Pennsylvania model by Vermont.⁴³ It is noteworthy also that Maryland limited the franchise to property owners, and Vermont did not.⁴⁴

At this point, no one seems to have sensed that a state could both praise the militia and guarantee an individual right to arms. To be sure, there was a third model, which can fairly be called a militia-centric individual right. This approach was typified by Massachusetts, which protected a right to keep and bear arms, "for the common defense."⁴⁵ We need not examine its history in detail, since "for the common defense" met with objection,⁴⁶ and a proposal to add that phrase to the Second Amendment was voted down in the First Senate: "On motion to amend article the fifth, by inserting the words 'for the common defense next to the words 'bear arms:' it passed in the negative."⁴⁷

3. Proposals for a Federal Bill of Rights in the State Ratifying Conventions, 1787–88

There were three relevant calls for a bill of rights in the state conventions that ratified the new federal Constitution. The dominance of the individual right to arms model was here complete. All three called for an individual right to arms; the militia as an institution was mentioned only by way of criticism.

The Pennsylvania minority⁴⁸ report was drafted by delegates who were scarcely supporters of the militia as an institution. One of their complaints was that

the personal liberty of every man, probably from sixteen to sixty years of age, may be destroyed by the power Congress have in organizing and governing of the militia. As militia they may be subjected to fines 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.⁴⁹

42. THE MARYLAND DECLARATION OF RIGHTS, § XXV (1776)

43. VT. CONST. ch. I, art. 16 (1777).

44. MD. CONST. § II (1776) (franchise for those owning 50 acres of land or \$30 of property); VT. CONST. ch. III §§ 6–7 (1777) (franchise for all males over age of 21).

45. MASS. CONST. pt. I, art. 17 (1780).

46. See Shalhope, *supra* note 17, at 134–35.

47. JOURNAL OF THE FIRST SESSION OF THE SENATE 77 (1820).

48. Minority, because Pennsylvania's traditional power bases had recovered power since being purged in 1776.

49. JOHN B. MCMASTER & FREDERICK D. STONE, PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787–1788, 480 (1888).

The Pennsylvania minority called for an amendment to the proposed constitution, guaranteeing

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.⁵⁰

They made no mention of the militia, but sought a clearly individual right to arms.

In the Massachusetts ratifying convention, Samuel Adams called unsuccessfully for a guarantee that “the said Constitution be never construed to authorize Congress to infringe the just liberty of the press, or the rights of conscience; or to prevent the people of the United States, who are peaceable citizens, from keeping their own arms.”⁵¹

In New Hampshire’s ratifying convention, proponents of a bill of rights for the first time won a majority vote, with the convention ratifying but calling for a guarantee that “Congress shall never disarm any Citizen except such as are or have been in Actual Rebellion.”⁵²

With New Hampshire’s vote, the proposed constitution had the nine ratifications required for it to bind those states that had signed on. Thus, at the Eleventh Hour of the Constitution’s history, no one had yet proposed a federal bill of rights that said anything about the militia as a system. The 1776 Pennsylvania guarantee of an individual right, not its Virginia rival regarding a militia, was the exclusive model for those Americans calling for a bill of rights.

4. Virginia Proposes Supplementing the Right to Arms Clause with a Militia Clause

The scene then shifted to Virginia, which twelve years earlier had adopted a constitution that praised “a well-regulated militia,” and had no right to arms clause. George Mason, the probable source of that provision, told the ratifying convention that

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.⁵³

50. *Id.* at 462.

51. DEB. AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MA. HELD IN THE YEAR 1788, at 86–87 (Bos. 1856).

52. 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 761 (1971).

53. DAVID ROBERTSON, DEBATES AND OTHER PROCEEDINGS OF THE CONVENTION OF VIRGINIA 270 (2d ed. 1805).

Note how Mason's argument reflected a shift from the worldview of 1776. Mason's (and Virginia's) 1776 view had been that the militia as an institution was essential to freedom. Mason's 1788 argument was that *individual disarmament* was a precondition to the destruction of liberty and that neglecting the militia was merely a preliminary step to that disarmament. Perhaps as a result of this changed outlook, the Virginia delegates achieved an insight that had escaped those who had drafted all prior guarantees of rights. The choice was no longer either-or: there was nothing inconsistent in both protecting an individual right to arms and also praising the militia as an institution. In short, they could satisfy both the Classical Republicans and the Jeffersonians.

The Virginia proposal called for a guarantee "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."⁵⁴ Before the Virginia proposals, all calls for a federal bill of rights—those of the Pennsylvania minority, Sam Adams, and New Hampshire—had focused exclusively on an individual right to arms; the Virginians merely appended a clause praising the militia. The Virginia approach was subsequently adopted by the New York ratifying convention⁵⁵ and formed the basis of James Madison's draft of what eventually become the Bill of Rights.⁵⁶

In this draft, Madison was willing to allow a phrase praising the militia, but not the parts of the Virginia proposals that would have given substantial guarantees to the militia as a system. Madison also omitted a part of the Virginia proposal that called for a state power to organize and arm its militia should Congress fail to do so.⁵⁷ Thus, the right to arms would receive a substantive guarantee; the militia concept would receive only lip service.

Madison left a further indication that, in his mind, the right-to-arms clause of his draft took primacy over its militia clause. We are, of course, familiar with the Bill of Rights as ten numbered amendments, separate from the Constitution itself, but this was not Madison's initial plan. His proposal (rejected late in the House deliberations) was to designate the amendments as inserts between specific sections of the existing Constitution.⁵⁸ His amendment affecting the size of the House of Representatives was to be placed in Article I, Section 2, Clause 3, which apportioned Representatives. His amendment limiting changes in Congressional salaries would have gone after Article I, Section 2, Clause 1, which established the House. His amendment regarding criminal trial rights would have gone after

54. SCHWARTZ, *supra* note 52, at 842.

55. DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, H.R. Doc. No. 398, at 1035 (Charles Tansill ed., 1927).

56. JAMES MADISON, 12 PAPERS OF JAMES MADISON 58 (Robert Rutland & Charles Hobson, eds., 1964).

57. 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 660 (2d ed. 1836), *reprinted* 1966 in 5 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (2d ed. 1968).

58. 1 ANNALS OF CONG. 451-03 (J. Gales ed. 1789).

Article III, Section 2, Clause 2, placing it immediately preceding the clause that recognized a right to jury trial in criminal cases.

Madison did *not* propose that the future Second Amendment be placed adjacent to Article I, Section 8, which establishes Congressional power over the militia. Instead, he placed it as part of a group of guarantees (e.g., freedom of religion and the press) to be inserted in “Article 1st, Section 9, between Clauses 3 and 4.”⁵⁹ This would have placed it immediately following the designation of the few individual rights protected in the original Constitution, relating to suspension of habeas corpus, bills of attainder and ex post facto laws. Madison viewed the amendment he was proposing as primarily linked to individual rights, as opposed to congressional power over the militia.

In sum, the history of the Second Amendment indicates that it had two purposes: to satisfy Americans who were concerned about the militia as a system, and to satisfy those—apparently the more numerous of the two groups, judging by the number of proposals and the fact that no one proposed a stand-alone militia guarantee—who were concerned that Congress might disarm individual citizens. To view one clause as constraining the other is to overlook their historical context.

C. Treatment of the Second Amendment’s Two Clauses by Early Constitutional Commentators

Commentaries by early American legal scholars also shed light on how the two clauses were seen by the Framing generation. The first such commentary was authored by St. George Tucker, then a professor of law at the College of William and Mary, and later a justice of the Virginia Supreme Court. Tucker had been one of the delegates to the Annapolis Convention, which led to the calling of the Constitutional Convention.⁶⁰ His brother, Thomas, was a senator in the First Congress and often visited him during recesses, and Tucker’s closest friend, John Page, represented Virginia in the House of Representatives.⁶¹

Early in the nineteenth century, Tucker published a five-volume edition of Blackstone’s *Commentaries*. Tucker sought to adapt Blackstone to the American experience. The first four volumes contained footnotes comparing American law to each passage, and the final volume was an appendix devoted to American law. Tucker’s work remained the primary American commentary on Blackstone for half a century, and the treatise most frequently cited by the Supreme Court during its first thirty years.⁶²

Tucker’s commentaries on American law are noteworthy in that he treats the two clauses of the Second Amendment as utterly different propositions. In his appendix discussing the Constitution, he initially cites the Second Amendment

59. *Id.* at 452.

60. MARY COLEMAN, ST. GEORGE TUCKER: CITIZEN OF NO MEAN CITY 87 (1938).

61. *Id.* at 35, 61, 113–14.

62. WILLIAM BRYSON, LEGAL EDUCATION IN VIRGINIA 682 (1982).

under his discussion of Congressional power over the militia. As we have seen, the Virginia ratifying convention had proposed not only an analog to the Second Amendment, but also a structural change providing that states might arm and discipline their militias should Congress fail to do so. Tucker cites the Second Amendment as removing “all room for doubt, or uneasiness” on that subject.⁶³ He notes with concern that the Fifth Congress had provided for a volunteer militia, with officers appointed by the president, whose members are exempted from all state militia duties. To Tucker this was an “unconstitutional act” created to give “the president powers, which the constitution expressly denied him, and an influence the most dangerous that can be conceived.”⁶⁴

Tucker also, and separately, discusses the right to arms portion of the Second Amendment (which he identifies as the Fourth, its original numbering). To Blackstone’s listing of the “fifth and last auxiliary right of the subject . . . that of having arms suitable to their condition and degree and such as are allowed by law,” Tucker added a footnote to the effect that “The right of the people to keep and bear arms shall not be infringed. Amendments to C., U.S., art. 4, and this without any qualification to their condition or degree, as is the case in the British government.”⁶⁵ In the appendix, he expanded upon the advantages of the American Bill of Rights over the English common law:

The right of self defence is the first law of nature; in most governments it has been the study of rulers to confine this right within the narrowest limits possible. Whenever standing armies are kept up, and the right of the people to keep and bear arms is, under any color or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction. In England, the people have been disarmed, generally under the specious pretext of preserving the game; a never-failing lure to bring over the landed aristocracy to support any measure . . . True it is, their Bill of Rights seems at first view to counteract this policy; but their right of bearing arms is confined to Protestants, and the words “suitable to their condition or degree” have been interpreted to authorize the prohibition of keeping a gun or other engine for the destruction of game, to any farmer, or inferior tradesman, or other person not qualified to kill game.⁶⁶

Tucker clearly regarded the Second Amendment’s two clauses as having two independent effects. One restricts Congressional action or inaction that undermines the militia as a system, the other forbids Congressional action that disarms citizens.

63. COLEMAN, *supra* note 60, Appendix 273.

64. *Id.* at 274–75.

65. *Id.* at 143 n.40.

66. COLEMAN, *supra* note 60, at 300. Tucker’s reference is to the British Game Acts and is a little dated. These statutes had provisions outlawing the possession of certain poaching tools, such as traps and nets, by any but the wealthiest landowners. The 1671 Game Act had included “guns” on the list of forbidden tools, but this was repealed in 1692. JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* 69–71, 126–27 (1994).

Nor was Tucker the only contemporary authority with this view. The second commentary we will consider was written by William Rawle, a Philadelphia attorney who had informally met with many of the delegates to the Constitutional Convention. As secretary of the city's Library Company, Rawle invited Convention members to use its facilities, and with George Washington and others, he belonged to Ben Franklin's "Society for Political Inquiries."⁶⁷ He later served in the Pennsylvania Assembly when it ratified the Bill of Rights.⁶⁸ In 1825, he published his *View of the Constitution*, which was soon "adopted as a textbook in many of the institutions of learning in the United States."⁶⁹

Rawle divided the Second Amendment into its two clauses and discussed each separately:

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 while peace prevails, and in the commencement of a war before a regular force can be raised, 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 to Congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretence by a state legislature. But if in some blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both.⁷⁰

Rawle, therefore, sees at best a weak connection between the two clauses; one is corollary to the other. But the arms clause, in his view, has independent—and indeed absolute—effect, unrelated to militia service.

The two earliest commentaries on the Constitution, written by authors with exceptional access to indicia of original intent and understanding, thus reflect understandings that the Second Amendment contained two independent provisions. One discourages undermining the militia as a system; the other forbids disarmament of the individual.

D. The Right to Arms Clause vs. the Militia Clause in the Framing of the 14th Amendment

The decades after the Framing saw the militia system known to the Framers (i.e., universal or near-universal, and mandatory) rapidly fade. The 1792 Militia

67. EDWARD BAUER, COMMENTARIES ON THE CONSTITUTION 1790–1960 346 (1965).

68. *Id.* at 61.

69. DAVID BROWN, EULOGIUM UPON WILLIAM RAWLE 938 (1837).

70. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 125–126 (2d ed. 1829).

Act broadly empowered the states to exempt persons from militia duty.⁷¹ As we shall see,⁷² many states, particularly in the North, took advantage of the power given, and exempted everyone from compulsory militia duty. The universal militia was supplanted by smaller volunteer units given more training.

Following the Civil War, even voluntary militia units faded out in the North; their membership had largely served in the Union armies during the war, and after four years of fighting, had little interest in additional military service.⁷³ By 1866, the universal militia of the early republic was long gone. With this, the Second Amendment came to be seen as focused exclusively upon an individual right, as was demonstrated by the Reconstruction Congress when, in 1867, it voted to order dissolution of the southern militias,⁷⁴ while refraining from disarming their members out of concern that this would violate the Second Amendment.

The dissolution bill, which began as a proposal by Senator Wilson, would have commanded that the southern militias (which he denounced as bands of former rebels bent upon terrorizing the freedmen) “be forthwith disarmed and disbanded.”⁷⁵ On the floor, Senator Willey objected: “It strikes me also that there may be some constitutional objection against depriving men of the right to bear arms and the total disarming of men in time of peace.”⁷⁶

Senator Wilson responded that he was willing to “modify the amendment by striking out the word ‘disarmed.’ Then it will provide simply for disbanding these organizations.”⁷⁷ Senator Willey found the amended bill, which dissolved militia units but preserved the individual right to arms for these former enemies, “much more acceptable to me than it was previously,”⁷⁸ and in that form it was enacted.⁷⁹

Thus, to the Framing generation of 1866–1868, the Second Amendment was *entirely* about an individual right to arms. Any belief that it was meant to protect the militia as an institution—an institution then dead for decades—had vanished with it.

In sum, in 1789–1791 there were Americans who wanted to protect the militia as an institution, and those who wanted to protect an individual right to arms; the first clause of the Second Amendment was meant to reassure the first, and its second clause to satisfy the second. Neither clause should be taken to restrict or limit the other. If we were to rank the importance of the two clauses in 1789–1791, the right to arms clause would be considered first among equals. By 1866–1868,

71. Act of May 8, 1792, ch. 33, § 2, 1 Stat. 271-72 (exempting “all persons who now are or may hereafter be exempted by the laws of the respective states”).

72. See notes ___, *infra*, and associated text.

73. MICHAEL D. DOUBLER, *CIVILIAN IN PEACE, SOLDIER IN WAR* 110 (2003).

74. Act of March 2, 1867, §6, 14 Stat. 487 (1867).

75. CONG. GLOBE, 39th Cong., 2d Sess. 1848 (Feb. 26, 1867).

76. *Id.*

77. *Id.* at 1849.

78. *Id.*

79. See generally STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* 135–42 (1984).

however, the predominance of the right to arms was total: the Second Amendment was seen as protecting individual rights to arms, and not as protecting the militia as an institution.

Whether viewed from the standpoint of the Framing generation of 1789 or that of 1866, a militia-centric view of the right to arms (a view which was actually rejected by the First Senate) is completely ahistoric. The Second Amendment had two clauses because it had two purposes, meant to satisfy two different groups of critics of the new Constitution. One group wanted a guarantee the new government would never disarm its citizens; the other wanted insurance against the possibility that it would neglect the militia as a system.

II. IS THE MODERN NATIONAL GUARD THE “WELL REGULATED MILITIA” OF THE SECOND AMENDMENT?

In considering this question, we should keep in mind two considerations. First, the Classical Republican view required that a militia be composed of all, or nearly all, freeholders. As Virginia’s 1776 Declaration of Rights put it, “composed of the body of the people, trained to arms.” What was envisioned was something along the lines of the Swiss military, where almost all adult males were armed, with firearms of the same type, trained, and organized into units. That this system was never actually created in America⁸⁰ does not affect the fact that it was envisioned, and desired, in 1787–1792.

Second, “well-regulated” at the time had a specific meaning: orderly, not out of control, functional. It did not imply control imposed from without. One might belong to a “well-regulated family,” and participate in “well-regulated conversations.”⁸¹ A “well-regulated church” would follow sound doctrines and keep “well-regulated accounts.”⁸² A good hospital’s heating system would have “well-regulated” flues and vents.⁸³ The United States might hope for a “well-regulated paper currency.”⁸⁴ The Oxford English Dictionary lists usages spanning 1709 to 1894, in which persons, minds, appetites, and governments are described as “well-regulated.”⁸⁵

A. *The Constitutional Context*

The Constitution makes two references to the militia. Article I, Section 8, gives Congress the power to provide for calling forth the militia in three specific

80. “No one will maintain that we have ever had a well-regulated militia, or any thing [sic] approaching it, and we are farther from it to-day than we ever were.” William T. Sherman, *The Militia*, 6 JOURNAL OF THE MILITARY SERVICE INSTITUTION OF THE UNITED STATES 1, 20 (1885).

81. *The Well-Regulated Family*, THE FAMILY VISITER; AND SUNDAY SCHOOL MAGAZINE 217, 219 (1829) [spelling of the magazine title is original].

82. JOHN BANE, RECIPROCAL DUTIES, OR A WELL-REGULATED CHURCH 38 (1831).

83. Dr. Elmore, *On the Injuries to the Health Occasioned by Breathing Impure Air in Close Apartments*, 2 THE LANCET 438 (1841).

84. Daniel Webster, 10 REGISTER OF DEBATES IN CONGRESS 641 (Feb. 22, 1834).

85. 2 THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 3738 (1971).

instances: “to execute the laws of the Union, suppress insurrections, and repel invasions.” It also gives Congress the power to

provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.⁸⁶

In the debates over ratification, the topic of the militia arose with some frequency. Two aspects gained particular prominence. One involved concerns that Congress, by some subterfuge, would neglect or sabotage the militia and create a standing army by way of a substitute. In the Virginia ratifying convention, for example, George Mason argued

[i]f ever they attempt to harass and abuse the militia, they may abolish them, and raise a standing army in their stead. There are various ways of destroying the militia. A standing army may be perpetually established in their stead The militia may here be destroyed by that method which has been practiced in other parts of the world before; that is, by rendering them useless—by disarming them. Under various pretences, Congress may neglect to provide for arming and disciplining the militia

They may effect the destruction of the militia, by rendering the service odious to the people themselves, by harassing them from one end of the continent to the other, and by keeping them under martial law.⁸⁷

James Madison responded that he agreed a standing army was “one of the greatest mischiefs that can possibly happen,” but that the power to arm and organize the militia was concurrent rather than exclusive. Moreover, he noted that if Congress were to abuse the militia, they would be abusing their own constituents while incurring “the general hatred and detestation of their county.”⁸⁸

During the ratification debates, the question of a “select militia”—one not comprising the entire people (more or less) but composed of a much smaller number of volunteers—had also arisen. This idea was met with a mixed, and generally hostile, reception. Proposals for such a select militia had already been advanced by individuals such as Baron Von Steuben, Washington’s Inspector General, who proposed retaining the general militia, but supplementing it with a force of 21,000 men given government-issued arms and special training.⁸⁹

86. U.S. CONST. art. I, § 8

87. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 379–80 (Jonathan Elliot ed., 1836).

88. *Id.* at 381–82.

89. See LARRY CRESS, *CITIZENS IN ARMS: THE ARMY AND THE MILITIA IN AMERICAN SOCIETY TO THE WAR OF 1812* 78–92 (1982); JOHN K. MAHON, *THE AMERICAN MILITIA: DECADE OF DECISION 1789–1800*, at 6–8 (1960). Washington himself proposed a similar idea. DOUBLER, *supra* note 73, at 63.

In Pennsylvania, John Smiley told the ratifying convention, “Congress may give us a select militia which will in fact be a standing army,” and worried that, with this force in hand, “the people in general may be disarmed.”⁹⁰ A widely-read pamphlet, *Letters from the Federal Farmer to the Republican*, warned that liberties might be undermined by the creation of a select militia that would “answer to all the purposes of an army.”⁹¹ It concluded that “the Constitution ought to secure a genuine and guard against a select militia by providing that the militia shall always be kept well organized, armed, and disciplined, and include, according to the past and general usage of the states, all men capable of bearing arms.”⁹²

The principle defender of a select militia was Alexander Hamilton, who argued that military training took more time than the citizens at large could spare. Military skills were not learned in a day or a week; to take the entire citizenry from their work, long enough to achieve and preserve those skills, “would be a real grievance to them and a serious public inconvenience and loss.” Thus, he argued, “[l]ittle more can reasonably be aimed at, with respect to the people at large, than to have them properly armed and equipped; and in order to see that this be not neglected, it will be necessary to assemble them once or twice in the course of a year.” To this would be added “a select corps of moderate extent, upon such principles as will really fit them for service in case of need . . . ready to take the field whenever the defense of the State shall require it.”⁹³ At this, it should be noted, Hamilton proposed that the select militia supplement, rather than replace, the general militia.

B. *The Antebellum Militia*

Congress eventually settled upon a near-universal, mandatory-militia system. First, it enacted a measure authorizing the president to call out the militia in case of invasion, insurrection (if the state involved requested it), or if the execution of federal law was obstructed (and a federal judge requested it).⁹⁴ Six days later, it enacted the Militia Law of 1792.⁹⁵

The statute began by defining who was to be enrolled in the militia:

[E]ach and every free able-bodied white male citizen of the respective States, resident therein, who is or shall be of age of eighteen years, and under the age of forty-five years (except as is herein after excepted) shall severally and respectively be enrolled in the militia.⁹⁶

90. 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 509 (Merrill Jenson ed., 1976).

91. LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN 22 (Walter Hartwell ed., 1978). Authorship of the pamphlet is disputed: originally attributed to Richard Henry Lee, most current scholarship leans toward Melancton Smith.

92. *Id.* at 124.

93. THE FEDERALIST No. 29. (Alexander Hamilton).

94. Act of May 2, 1792, ch. 28, 1 Stat. 264.

95. Act of May 8, 1792, ch. 33 1 Stat. 271.

96. *Id.*

Excepted from enrollment were several officials and essential occupations, plus any person “exempted by the laws of the respective states.”⁹⁷

In an effort at uniformity of supply (ammunition supply problems during the Revolution had likely been unspeakable: the colonists fielded muskets ranging from .50 to .80 inches in bore size),⁹⁸ each militiaman was required to have a musket taking eighteen balls to the pound, or about .64 caliber.⁹⁹ He was also to equip himself with a bayonet, cartridge box and 24 rounds of ammunition, a knapsack, and other military equipment.¹⁰⁰ Riflemen were subject to less uniformity: each was to have a rifle, “twenty balls suited to the bore of his rifle,” and a quarter-pound of gunpowder, while cavalry of various types were to have horses, swords, and pistols.¹⁰¹ The Act also prescribed the standards for organization and drill.

The 1792 Act thus sought to create a militia along the lines envisioned by the Constitution: a large reserve force with national standards of armament and drill. It would be primarily governed by the States, but available for Federal use and command on the occurrence of any of three defined events—invasion, insurrection, or inability to enforce federal law.

The universal militia concept did not long survive. In Federalist 46, James Madison had estimated the nation could muster about 600,000 militiamen; thirty years later the number had grown to between 1.5 and 2 million.¹⁰² Any of these numbers was far beyond the capacity of the country to train, let alone supply in the field. Numerous proposals were made to reform the system to make it more practical: none met with the approval of Congress.¹⁰³

The states, however, did reform the system. The Militia Act of 1792 empowered states to exempt anyone they desired from militia enrollment.¹⁰⁴ In the 1830s, states began to issue wholesale exemptions and to replace the mandatory militia with volunteer units:

In 1831, Delaware abolished its system altogether. Massachusetts eliminated compulsory service in 1840, followed by Maine, Ohio, and Vermont in 1844, Connecticut and New York in 1846, Missouri in 1847, and New Hampshire in 1851. Indiana classified its militia according to age in 1840, and exempted all but the young men from service. New Jersey withdrew the right to imprison a

97. *Id.* at 272.

98. GEORGE C. NEUMANN, *THE HISTORY OF WEAPONS OF THE AMERICAN REVOLUTION* 36 (1967). The American’s principal muskets were British (of .75 and .65 caliber) and French (of .69 and .67 caliber). *Id.* at 36–37. To these were added American-made muskets in a variety of bore sizes.

99. JAMES N. GIBSON, *A WAR WITHOUT RIFLES: THE 1792 MILITIA ACT AND THE WAR OF 1812*, at 62 (2016). This would also have fit the French .65 caliber muskets; musket balls were expected to have a loose fit for ease in loading and because musket barrels were hand-made and not very uniform.

100. 1 Stat. at 271.

101. *Id.* at 271–72.

102. JOHN A. MAHON, *THE HISTORY OF THE MILITIA AND THE NATIONAL GUARD* 80 (1983).

103. *Id.* at 80–81.

104. *See supra* text accompanying note 93.

man for failure to pay a militia fine in 1844; Iowa did the same in 1846, Michigan in 1850, and California in 1856.¹⁰⁵

Over this period, the volunteer militia acquired a new name. In 1824, the Marquis de Lafayette made a heavily-publicized tour of the United States. In revolutionary France, Lafayette had organized Parisian militia units known as the *Garde Nationale*, and American militia units began to call themselves the National Guard of their state.¹⁰⁶

C. *The Militia and the National Guard, 1865–1933*

With the outbreak of the Civil War in 1861, volunteer militia units on both sides enlisted *en masse* in the newly formed armies. When the war ended in 1865, volunteer militia units went into steep decline.¹⁰⁷ At the same time, it was obvious that, should the nation go to war in the future, the regular army, numbering about 25,000 men over this period, would be hopelessly insufficient. The United States plainly needed a large reserve military force.

That consideration led to a lengthy public debate between two schools of thought. One, headed by military thinker General Emory Upton, held that the only sufficient reserve force would be composed of soldiers who had finished their enlistments, were organized into reserve (federal) Army units, led by career officers, and directly subject to federal command.¹⁰⁸ The opposing view, championed by General John McAuley Palmer, held that such a reserve would be too small, and supported the National Guard instead.¹⁰⁹

In 1898 came foreign entanglements, the Spanish-American War, and the following insurgency in the Philippines that went on for three years. Congress responded with an enactment that authorized the President to enlist a volunteer army, with terms of service of no more than two years.¹¹⁰ The National Guard Association successfully lobbied for a proviso stating that any Guard units volunteering “in a body” would be led by officers appointed by their state’s governor—meaning, in practice, that they would retain their present officers.¹¹¹

That proviso won a mention during the Senate debates on the legislation. Senator George Hoar asked whether the Guard units that thus volunteered would be volunteers or militia. If volunteers, “how can you get the authority under the Constitution for the governor of a State to appoint United States officers?” On the other hand, he noted, “If they are to be sent out of the country, they cannot be militia any longer, because the Constitution only gives the Congress power to

105. MAHON, *supra* note 101, at 83.

106. DOUBLER, *supra* note 73, at 95.

107. See DOUBLER, *supra* note 73, at 110 (“The volunteer militia’s lowest ebb occurred during 1865–1877. At first, the militia in the northern States all but ceased to exist.”).

108. RUSSELL E. WEIGLEY, *HISTORY OF THE UNITED STATES ARMY: ENLARGED EDITION* 276–81, 397–99 (1984).

109. Doubler, *supra* note 73, at 184–85.

110. Act of Apr. 22, 1898, ch. 187, 30 Stat. 361, § 4.

111. *Id.* § 6.

‘provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions.’”¹¹² The Senate chose to ignore the dilemma. The problem Hoar raised—that, if the National Guard were militia, it could not be used for duty overseas—would remain for the future.

It is strange to reflect that, at the dawn of the 20th century, the reserve military of the United States was still legally organized under the Militia Act of 1792. “Organized” is, of course, an overstatement. Not many males aged 18–45 owned muskets firing 18 balls to the pound of lead.

In 1903, Rep. Charles Dick persuaded Congress to repeal and replace the 1792 Act.¹¹³ The new legislation came to be known as the Dick Act. Its major provisions can be summarized as follows:

- It defined the militia to include all male citizens between the ages of 18 and 45.¹¹⁴
- It divided the militia into two classes: the “organized militia, to be known as the National Guard,” and the “unorganized militia,” consisting of everyone else. It retained a provision allowing states to exempt persons from militia duty.¹¹⁵
- It authorized the President to call forth the militia (and not just the organized portion of it) to repel invasion, suppress rebellion, and to execute the laws of the Union.¹¹⁶
- It provided for the issuance of arms, ammunition, and equipment to the organized militia, and established a “Militia Bureau” in the Department of War to coordinate matters.¹¹⁷

A 1908 amendment provided that the president would call forth the militia through orders to governors, that the militia could be called up during “danger of invasion” as well as after it, and, most critically, that the militia might be called up for service “either within or without the territory of the United States.”¹¹⁸

Throughout this period the debate continued over whether the organized reserve forces of the United States should be the National Guard or a purely federal reserve army composed of persons who had completed their Army enlistments.¹¹⁹ Most regular Army leaders argued for the latter, with little success. The first heads of the Militia Bureau were regular Army officers, and all backed a federal reserve force in preference to the National Guard. As a historian summarized their views:

112. 31 Cong. Record 4163 (1898).

113. Act of Jan. 1, 1903., Pub. L. 57-33, 32 Stat. 775.

114. *Id.* § 1.

115. *Id.*

116. *Id.* §§ 4, 5, 6, 7.

117. *Id.* § 13.

118. Act of May 27, 1908, Pub. L. 60-145, 35 Stat. 399, §§ 4, 5.

119. MAHON, *supra* note 101, at 146–49.

The first, Colonel Erasmus M. Weaver, stated in his annual reports that only a reserve controlled exclusively by the War Department could assure national security. Such a reserve, Weaver said, would operate not under the militia clauses of the Constitution but under the Army clause. The second chief, Brigadier General Robert K. Evans, concurred with Weaver, while the third, Major General Albert L. Mills, referred to the National Guard . . . as forty-eight little state armies, energized by a love of states' rights.¹²⁰

Then came a legal bombshell. In 1912 (probably anticipating the answer he would get), the Secretary of War asked the Army's Judge Advocate to determine whether the Constitution allowed him to use the National Guard overseas, pursuant to the 1908 Act. The Judge Advocate advised that it did not.¹²¹ The Secretary of War then requested an opinion on the subject from the Attorney General.

The Attorney General concurred with the Judge Advocate. He ruled that (1) the National Guard was organized under the Militias Clause of the Constitution; (2) the militia can only be called out for three designated purposes—to repel invasion, suppress insurrection, and enforce the laws of the Union—all of which involve action within the boundaries of the United States; hence (3) the Constitution did not authorize the deployment of the National Guard outside the borders of the United States.¹²² He concluded: “These three occasions representing necessities of a strictly domestic character, plainly indicate that the services required of the militia can be rendered only upon the soil of the United States or its Territories”¹²³

The National Guard, as then constituted under the Militia Clauses, could not be used outside the territory of the United States. This would not have dismayed the Framing generation for whom the main military problem was defending against invasion, not the ability to project force overseas. But by 1912, the United States had become a nascent world power.

The outbreak of World War I required a solution to the problem, and Congress found a rough solution in the National Defense Act of 1916,¹²⁴ which essentially turned the National Guard into a federal organization with limited state ties. It retained the 1903 Act's definition of the militia but repealed the states' power to grant exemptions from militia duties.¹²⁵ States were forbidden to disband National Guard units that had received federal assistance.¹²⁶ National Guard enlistments were fixed at six years, and the enlistment oath required obedience to

120. *Id.* at 143.

121. DOUBLER, *supra* note 73, at 154.

122. 29 Op. Att'y Gen. 322 (1912). The Attorney General allowed one exception: the Guard could be sent over the border in hot pursuit of a retreating invader.

123. *Id.* 327 (quoting a treatise). The Attorney General rejected an inventive argument that a Congressional declaration of war was a law, and thus the militia could be called out to execute it.

124. An Act for Making Further and More Effectual Provision for the National Defense, 39 Stat. 166 (1916).

125. *Id.* §§ 57, 59.

126. *Id.* § 68.

the orders of the President, as well as to those of the governor.¹²⁷ A National Guard officer was to meet “such tests as to his physical, moral, and professional fitness as the President shall prescribe.”¹²⁸ All Guard units were to meet federal training standards unless excused by the Secretary of War.¹²⁹

None of this addressed the core problem that, created as it was under the militia clause, the Guard could not be called up for foreign service. Congress tried to improvise a solution by giving the President the power to draft members of the National Guard. Section 111 of the statute provided: “All persons so drafted shall, from the date of their draft, stand discharged from the militia, and shall from said date be subject to such laws and regulations for the government of the Army of the United States as may be applicable to members of the Volunteer Army”¹³⁰

The President used this power, and from the standpoint of the Guard, the result was chaos. Guardsmen were drafted as individuals, and many Guard units were broken up. Infantry and cavalry Guardsmen became members of Regular Army supply units.¹³¹ “The draft of the individual members of the National Guard into the Army during World War I virtually destroyed the Guard as an effective organization.”¹³²

Postwar, the National Guard Association committed itself to ensuring there would be no repetition of the World War I experience. The result was the enactment of the 1933 amendments to the National Defense Act.¹³³ Under that Act, the National Guard of the United States (as distinguished from the Guard of a state) was defined as part of the Army of the United States.¹³⁴ “National Guard of the United States’ means a reserve component of the Army of the United States”¹³⁵

Conversely, the National Guard of a State had to be federally recognized:

The National Guard of each State . . . shall consist of members of the militia voluntarily enlisted therein . . . organized, armed, equipped and federally recognized as hereinafter provided¹³⁶

127. *Id.* §§ 69, 70. Previously, the Federal oath had only been given if and when a militia unit was called out for Federal service.

128. *Id.* § 75.

129. *Id.* § 92.

130. *Id.* § 111. A few weeks later, Congress passed a Joint Resolution requesting that the president exercise his powers under this section. Joint Resolution to Authorize the President to Draft Members of the National Guard, 39 Stat. 339 (1916).

131. Frederick Bernays Weiner, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181, 204–05 (1940); DOUBLER, *supra* note 73, at 172–73.

132. *Perpich v. Dep’t of Def.*, 496 U.S. 334, 345 (1990).

133. Act of June 15, 1933, 48 Stat. 153.

134. *Id.* § 1.

135. *Id.* § 9

136. *Id.* § 5

The 1933 Act slightly changed the oath of office. Men enlisting in the National Guard of a State were required to take an oath recognizing that they were also enlisting in the National Guard of the United States and swearing to obey orders from the President; the governor was left unmentioned.¹³⁷ As before, a Guard officer was required to pass “such tests as to his physical, moral, and professional fitness as the President may prescribe.”¹³⁸

As one commentator noted, the 1933 Amendment:

[C]onfer[ed] a new status on the Guard, by constituting it a reserve component of the Army, to be known as the National Guard of the United States. In its militia capacity, the National Guard was organized and administered under the Militia Clause of the Constitution, and available only for limited duties The purpose of the 1933 Act was to obviate this in the future; there was to be no more drafting of national guardsmen. The National Guard of the United States, in its capacity as a reserve Component of the Army, was organized and was to be administered under the Army clause.¹³⁹

D. Is the Post-1933 National Guard the “Militia” of the Second Amendment?

The Constitution briefly addresses, and to an extent defines the militia. Article I authorizes Congress to provide for calling forth the militia “to execute the laws of the Union, suppress insurrections and repel invasions.” It also empowers Congress to provide for organizing, arming and disciplining the militia, “reserving to the States, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress.”¹⁴⁰

Thus, the Constitution defines the militia as a body that (1) can only be called forth for three specified purposes, none of which involve conduct of an overseas operation or a strategic offensive; (2) whose officers are appointed by the states; and (3) whose training is conducted by the states, according to Congressional standards.¹⁴¹

137. *Id.* §§ 8, 11.

138. *Id.* § 75.

139. WEINER, *supra* note 130, at 208; *see also* MAHON, *supra* note 101, at 175 (“Although noting in the amendment said so, the National Guard of the United States must stand upon the army clause of the Constitution rather than the militia clauses.”).

140. U.S. CONST., art. I, § 8.

141. It must be remembered that in 1789–1792, close-order drill was not merely a parade-ground activity. Infantrymen operated primarily as regiments, groups of about 500 men, with muskets firing about three rounds per minute. A 500-man regiment could thus put out about 1,500 rounds per minute, about the firepower of two to three modern machine gunners. Thus, in place of moving and turning a couple of machine guns, the eighteenth century regimental commander had to move and turn a line of 500 men two to three deep, spanning about 750 feet. Brigade and higher commanders had to move and re-orient many such regiments.

It was vital to enable such units to form a column that could move down a road, quickly form into a firing line, quickly convert into a square that could resist cavalry, and quickly reform into a column for movement. These were only a few of the movements expected of infantry, and in the days before radio,

The Federal government specifically created the National Guard system to get around (1), using the Army Clause to create a body of reserves that can be used for any purpose, including overseas duty and offensive action. As to (2), its officers must be federally approved. As to (3), while states are free to train their Guardsmen, in practice training is federal. The present-day National Guard meets none of the Article I criteria for a militia.

In terms of function, the state-controlled militia was seen as a counterbalance to a federally controlled standing army during the Framing period. The Antifederalists contended that the unlimited power to raise armies would enable Congress to raise a standing army and played to fears of what that army would do. The federalist response was that the militia, led by state-chosen officers, would ensure that the army could not be misused. In *Federalist 46*, James Madison stated this most clearly.¹⁴² First, he estimated that the new nation could at most fund an army of 25,000 men.¹⁴³ He continued:

To these would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence. It may well be doubted, whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops. Those who are best acquainted with the last successful resistance of this country against the British arms, will be most inclined to deny the possibility of it.

Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of. Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms. And it is not certain, that with this aid alone they would not be able to shake off their yokes. But were the people to possess the additional advantages of local governments chosen by themselves, who could collect the national will and direct the national force, and of officers appointed out of the militia, by these governments, and attached both to them and to the militia, it may be affirmed with the greatest assurance, that the throne of every tyranny in Europe would be speedily overturned in spite of the legions which surround it.¹⁴⁴

commands were sent by bugle. Congress saw it as essential that all militia infantry be trained to know and obey the same commands.

142. THE FEDERALIST NO. 46 (James Madison).

143. *Id.*

144. *Id.*

Madison's argument is twofold: the "advantage of being armed" is sufficient to *maintain* a free state, even one with a large standing army, but the formation of armed citizens into a state-controlled militia will result in a system so powerful that it could *overthrow* a pre-existing tyranny. State control of the militia is the key to the second consideration.¹⁴⁵

Of course, in the modern National Guard, officers are not chosen by the states, nor do the states have a monopoly over training. The Federal government can order the Guard into overseas service and training, even over the state's objection.¹⁴⁶ The power of state governors, "even in peacetime, is largely ceremonial."¹⁴⁷

In short, in the early nineteenth century, the militia (increasingly denominated the National Guard) was converted into a select militia, the form of militia rejected by many Framers. Twentieth-century statutory changes, in turn, federalized this select militia, precisely to get around the constitutional limitations on the militia, in terms both of how the militia could be used and how much state control was retained. The National Guard remained a reserve military force, but it lost the attributes which were critical to the Framers' concept of the "militia," and which they sought to constitutionalize. The states do not choose its officers, nor provide its training, and it can be used for military functions (and even Federal training) outside the United States.

CONCLUSION

Theory: The Second Amendment has two clauses because it was meant to assure two (largely) different bodies of Americans who had concerns about the new Constitution. One body was concerned that Congress might neglect or undermine the militia *as a system*; the other was concerned that Congress might disarm the people *as individuals*.

Test: Does this theory explain all known facts? Is it contradicted by none of them? Yes, it explains all known facts. It does not require us to assume that in 1776, when Virginians spoke of a "well-regulated" militia, they were thinking solely of armed citizens and not of an institution, or that when the Pennsylvanians in that year spoke of the people's right to bear arms "for the defence of

145. *Id.*

146. *Perpich v. Dep't of Def.*, 496 U.S. 234 (1990); *Dukakis v. U.S. Department of Defense*, 686 F. Supp. 30 (D. Mass. 1988). *Perpich* was authored by Justice Stevens and can be contrasted with the descriptions of the militia's constitutional function in his *Heller* dissent. In his *Heller* dissent he contends that states have the plenary right to define who is in their militia, *District of Columbia v. Heller*, 554 U.S. 570, 655. n.20 (2008). He further stated that "[t]he history of the adoption of the Amendment thus describes an overriding concern about the potential threat to state sovereignty that a federal standing army would pose, and a desire to protect the States' militias as the means by which to guard against that danger." *Id.* at 661, n. 26.

147. Nathan Zerula, *The BRAC Act, the State Militia Charade, and the Disregard of Original Intent*, 27 PACE L. REV. 365, 367-68 (2007) (pointing out that Federal authorities dictate how many Guard units each state can muster, the units' training is "so controlled by the federal government" as to be a Federal function, and the state power to appoint officers is "subject to federal review.").

themselves and the state,” they really did not mean “of themselves.” Both groups knew what they wanted and explained themselves clearly.

This theory is not inconsistent with any historical data. No one of the Framing era said anything like “an armed people is sufficient without a militia organization” or “the people have a right to arms, to the extent necessary to their militia function.”¹⁴⁸

As to the militia concept, when the term “militia” is today employed, it commonly brings to mind the National Guard. But the Guard is not the militia of the Constitution, controlled by the States and meant as a counterpoise to Congress’s plenary power to raise armies. Changes over the last century have converted the Guard into a reserve military force under Congressional control. While these did make it an organization suited to serve a world power, they converted it into one that fulfills neither the constitutional, nor the functional, definition of “militia.”

148. The closest approaches to either would probably be Hamilton, in *Federalist No. 29*, suggesting that all that can be expected of the people at large is that they be armed and show up for drill once or twice a year. For the argument that Americans’ “advantage of being armed” ensures their freedom, but that their organization into a militia system makes this security absolute, see *supra* note 92 and *supra* note 141.