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## “A WELL REGULATED MILITIA”: THE SECOND AMENDMENT IN HISTORICAL PERSPECTIVE

PAUL FINKELMAN\*

A well regulated Militia, composed of gentlemen freeholders, and other freemen, is the natural strength and only stable security of a free Government.

—George Mason<sup>1</sup>

The history of the Second Amendment is rooted in English conflicts between the king and his people. It involves the relationship between the standing army and the militias during and after the English Civil War. It also involves the struggles of the colonists against the Crown before and during the Revolution.

This English background is useful, and certainly interesting, but the history of the drafting and adoption of the Second Amendment emerges out of far more immediate events. The failure of the national government under the Articles of Confederation prompted the call for a convention to revise the Articles.

While American leaders were contemplating calling a convention to revise the Articles, violent resistance to traditional law enforcement—most notably Shays’s Rebellion in Massachusetts—underscored the sense of crisis that many Americans felt. Farmers led by Captain Daniel Shays marched on local courthouses in western Massachusetts, shutting down the courts and intimidating judges and others. Eventually militia companies from eastern Massachusetts dispersed Shays and his followers.

The delegates to the Philadelphia Convention met with this event fresh in their memories and with the knowledge that the government under the Articles of Confederation would probably be

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1. 1 THE PAPERS OF GEORGE MASON 212 (Robert A. Rutland ed., 1970). Mason delivered this observation to the Fairfax County Committee of Safety on January 17, 1775. See *id.*

helpless in a similar situation. Thus, when he introduced the Virginia Plan at the Philadelphia Convention, Governor Edmund Randolph “commented on the difficulty of the crisis” facing the nation and spoke of “the necessity of preventing the fulfillment of the prophecies of the American downfall.”<sup>2</sup> Randolph “then proceeded to enumerate the defects” in the present government, noting that “the confederation produced no security agai[nst] foreign invasion; congress not being permitted to prevent a war nor to support it by th[eir] own authority” and that “neither militia nor draughts being fit for defence on such occasions, enlistments only could be successful, and these could not be executed without money.”<sup>3</sup> He pointed out that “the federal government could not check the quarrels between states, nor a rebellion.”<sup>4</sup> He expressed his admiration for those who had written the Articles of Confederation, but noted that they had produced that document

when the inefficiency of requisitions was unknown—no commercial discord had arisen among any states—no rebellion had appeared as in Massts.—foreign debts had not become urgent—the havoc of paper money had not been foreseen—treaties had not been violated—and perhaps nothing better could be obtained from the jealousy of the states with regard to their sovereignty.<sup>5</sup>

Most of the Convention delegates agreed with Randolph’s analysis and quickly moved from revising the Articles of Confederation to writing a wholly new Constitution. In the end, they produced a document that strengthened the national government and provided a framework for a viable national defense. Opponents of the new form of government—Antifederalists who feared a strong national government—proposed numerous amendments in the state conventions called to ratify the Constitution. The Antifederalists also expressed their fears of the new Constitution in an enormous amount of public commentary.<sup>6</sup>

Though the public commentary fell into two general classes, the

2. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 18 (Max Farrand ed., rev. ed. 1966).

3. *Id.* at 19.

4. *Id.*

5. *Id.* at 18-19.

6. The best collection of Antifederalist writings is the seven volume THE COMPLETE ANTI-FEDERALIST (Herbert J. Storing ed., 1981). For a critique of that collection, which discusses its limitations, see Paul Finkelman, *Antifederalists: The Loyal Opposition and the American Constitution*, 70 CORNELL L. REV. 182 (1984) (book review). For a discussion of Antifederalist theory, see SAUL CORNELL, THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788-1828 (1999).

bulk of the proposed amendments were designed to remake the Constitution by severely limiting the power of the national government. If the Antifederalists had succeeded, the United States would have reverted to a decentralized collection of sovereign states with a weak national congress, an almost invisible federal judiciary, and a powerless military with virtually no standing army.

Not surprisingly, the Federalists who dominated the First Congress rejected all of these structural changes and did little to alter the power of the national government under the new Constitution. The Federalists did, however, offer a series of amendments that, for the most part, recognized existing limitations on the national government under the new Constitution.

The Bill of Rights confirmed that the national government would not trample on the rights of conscience, deny people due process of law, or impose cruel and unusual punishments on convicted criminals. While some of its provisions actually created new rights—such as the right to counsel in the Sixth Amendment—most of the amendments simply confirmed what the national government could not do under the Constitution. The Second and Tenth Amendments reconfirmed existing relations between the states and the national government but did not create any new rights or structural relationships. In particular, the Second Amendment reconfirmed that even though the national Congress would have the primary responsibility for arming and organizing the state militias, the states could maintain their own militias, if Congress failed to do its job.

## I. THE ANTIFEDERALISTS' GOALS

During the debates over ratification, Governor Patrick Henry of Virginia and many other Antifederalists used the absence of a bill of rights in the Constitution to galvanize opposition to ratification. They persisted, from beginning to end, in claiming that the Constitution would create a tyranny and that the failure to insert a bill of rights was an indication of the desire of the framers to take away the liberties of the American people.

However, for the most dedicated opponents of the Constitution, the demand for a bill of rights was fundamentally a ruse. They truly hoped to defeat the Constitution and thus either leave the Articles of Confederation in place or force a second convention that would have created a substantially weaker national government than the Philadelphia Convention had proposed.

The Antifederalist plan for stopping ratification of course ended in July 1788, when they were outmaneuvered in their two most important strongholds—Virginia and New York. New Hampshire's ratification had supplied the necessary ninth state to have the Constitution go into effect. Ratification in Virginia and New York not only put the Federalists well over the top but, more importantly, brought the most populous state (Virginia) and the state with the nation's most important seaport (New York) into the government.

As they met with defeat in one state after another, the Antifederalists fell back to their secondary position of demanding amendments to alter the nature of the government.<sup>7</sup> Thus, in a number of the states, the defeated Antifederalists proposed amendments that they hoped would be added after ratification. Though this was not an ideal strategy for the Antifederalists, it was their last hope. Some of these amendments contained suggestions that would have created a bill of rights, but most of the Antifederalist proposals were crippling amendments that would have resulted in a weaker Constitution.

The Antifederalists wanted the state ratifying conventions to endorse their proposed amendments. But this support was not always possible since the Antifederalists negotiated from a position of weakness compared to the Federalist majorities in the state conventions.<sup>8</sup> In Pennsylvania, for example, the Federalist majority completely ignored the Antifederalists, who then issued their *Reasons of Dissent* as a pamphlet.<sup>9</sup> In Maryland, the Antifederalists met with the same fate and resorted to a newspaper publication of their proposed amendments.<sup>10</sup> As Herbert Storing notes, the Maryland

7. They continued to call for a second convention, which could be accomplished only if the Antifederalists gained control of nine state legislatures and asked for an Article V convention. "The Congress . . . on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments . . ." U.S. CONST. art. V. This event was unlikely in July 1788 and grew increasingly less likely as the Federalists organized the new government.

8. One exception to this was New York. That state's convention was totally dominated by Antifederalists, but part way through the convention the delegates received news that both New Hampshire and Virginia had ratified the Constitution. This development persuaded some Antifederalists, including their leader, Melancton Smith, to vote for ratification, because they believed they were better off inside the Union than out.

9. *The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents*, PA. PACKET & DAILY ADVERTISER, Dec. 18, 1787, reprinted in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 618, 618 (Merrill Jensen ed., 1976).

10. See *Address of a Minority of the Maryland Ratifying Convention*, MD. GAZETTE, May 6, 1788, reprinted in 5 THE COMPLETE ANTI-FEDERALIST 92, 92-100 (Herbert J. Storing ed., 1981).

Antifederalists tried to get the convention to endorse their amendments in return for a promise that the Antifederalists would support the Constitution. But, having successfully ratified the Constitution, the Maryland Federalists “brushed aside” the deal offered by the Antifederalists who had just been soundly defeated.<sup>11</sup>

On the other hand, in Massachusetts, New Hampshire, and Virginia, the Federalist majorities included the proposed amendments as part of the official proceedings of the ratifying conventions to placate large Antifederalist minorities. This compromise also occurred in New York. Though the Antifederalists were the majority in that state, a substantial minority of them voted to ratify the Constitution because ten states had already done so. In addition, growing support for the Constitution in and around New York City convinced many Antifederalist delegates at the New York convention that their constituents now wanted ratification.<sup>12</sup> John Jay, a Federalist leader, helped bring this about by a preemptive strike: he proposed that the convention delegates attach a list of recommended amendments to its ratification. This arrangement “embarrassed the Antifederalists”<sup>13</sup> by compelling them to admit the weakness of their position and, in a sense, forcing them to accept the best deal they could negotiate with the Federalists. Jay’s move led to a compromise with the more moderate Antifederalists, who agreed to vote for ratification in exchange for Federalist endorsement of recommended amendments. To sweeten the deal, Jay also offered to support a circular letter calling for a second convention; this was a “sham compromise that was in fact a total surrender” by the Antifederalists.<sup>14</sup> In the end, enough Antifederalists voted for ratification to get the document through the New York convention. Appended to the ratification was an absurdly long list of proposed changes that included some thirty-two amendments plus twenty-five statements of principles.<sup>15</sup>

By the end of the ratification process, the conventions in

11. *Id.* at 92 (headnote by Storing).

12. See ROBERT ALLEN RUTLAND, *THE ORDEAL OF THE CONSTITUTION* 255-65 (1966). Even delegates from upstate were “reluctant” to vote against the wishes of New York City. See LINDA GRANT DE PAUW, *THE ELEVENTH PILLAR: NEW YORK STATE AND THE FEDERAL CONSTITUTION* 229 (1966).

13. RUTLAND, *supra* note 12, at 259.

14. *Id.* at 263.

15. New York’s proposed amendments are printed in *CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS* 21-28 (Helen E. Veit et al. eds., 1991) [hereinafter *CREATING THE BILL OF RIGHTS*].

Massachusetts,<sup>16</sup> South Carolina,<sup>17</sup> New Hampshire,<sup>18</sup> Virginia,<sup>19</sup> and New York<sup>20</sup> had appended to their ratification documents various proposed amendments to the Constitution. In addition, the Antifederalists in Pennsylvania<sup>21</sup> and Maryland<sup>22</sup> had published their own recommended amendments. The officially endorsed amendments numbered over one hundred, but many of the separate amendments actually covered many topics. Thus, the total number of proposed amendments was at least two hundred. Many concerned issues we normally think of as Bill of Rights protections. However, the majority of the Antifederalist demands were structural in nature, designed to remake the Constitution by weakening the national government. By eliminating duplications, "[a]bout 100 separate proposals can be distinguished," and a "clear majority" of these called for structural changes.<sup>23</sup>

When Madison proposed what became the Bill of Rights in Congress, he ignored virtually all of the structural proposals, which, not surprisingly, infuriated the hard-core Antifederalists. Indeed, the refusal of Madison and his committee to even consider the long list of structural changes proposed by the Virginia Ratifying Convention led Virginia's two senators, William Grayson and Richard Henry Lee, who were the only Antifederalists in the U.S. Senate, to publicly denounce the proposed amendments.<sup>24</sup> They did not approve of Madison's proposed amendments because they believed the amendments would undermine their cause, prevent the calling of a second convention, and yet leave the structure of the Constitution

16. *See id.* at 14-15.

17. *See id.* at 15-16.

18. *See id.* at 16-17.

19. *See id.* at 17-22.

20. *See id.* at 21-28.

21. *See The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents*, *supra* note 9, at 623; *see also* 2 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 627-73, 729-38 (1971).

22. *See Address of a Minority of the Maryland Ratifying Convention*, *supra* note 10, at 92-100.

23. Kenneth R. Bowling, "A Tub to the Whale": *The Founding Fathers and Adoption of the Federal Bill of Rights*, 8 J. EARLY REPUBLIC 223, 228 (1988); *see also* Richard E. Ellis, *The Persistence of Antifederalism After 1789*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* 295, 297 (Richard Beeman et al. eds., 1987) ("The amendments proposed by the states fall into two categories. The first limited the authority of the central government over individuals. . . . The amendments of the second group were both substantive and structural.").

24. *See Letter from Richard Henry Lee and William Grayson to the Speaker of the House of Representatives of Virginia* (Sept. 28, 1789), in 2 *THE LETTERS OF RICHARD HENRY LEE* 507, 507-08 (James Curtis Ballagh ed., 1914).

intact. As Madison explained to Jefferson, even before the Constitution was ratified, the Antifederalists wanted to “strike at the essence of the System,” and either return to the government of the old Confederation, “or to a partition of the Union into several Confederacies.”<sup>25</sup>

A good example of what the Antifederalists really wanted can be found in the Virginia convention’s list of forty proposed amendments. The first twenty proposals formed “a Declaration or Bill of Rights asserting and securing from encroachment the essential and unalienable Rights of the People.”<sup>26</sup> Only a few proposals were structural in nature, such as a requirement for rotation in office and a prohibition on hereditary offices.<sup>27</sup> Most proposals dealt with the civil liberties that are today protected by the Bill of Rights subsequently adopted in 1791.<sup>28</sup>

After this list of twenty amendments, which would form a “Bill or Declaration of Rights,” the Virginia delegates wrote twenty more proposed changes called “Amendments to the Body of the Constitution.”<sup>29</sup> With the exception of one proposal dealing with juries, this list contained proposals that would have remade the powers of the government and revamped the political process. Many of the proposals would have hamstrung the operations of the national government, weakened all three branches of the government, and rendered the system more cumbersome.

This second list, which was by far the more important list for Antifederalists like Patrick Henry, proposed a wholesale remaking of the system of government. The Virginia Antifederalists wanted super-majorities in Congress for many important government functions, including: (1) a three-fourths majority of both houses for all noncommercial treaties, (2) a two-thirds majority of the Senate for the adoption of all commercial treaties, (3) a two-thirds majority in each house of Congress for all regulations of commerce (which the Antifederalists called navigation laws), and (4) a two-thirds majority in Congress to maintain a peacetime army.<sup>30</sup> They also clamored for mandatory term limits (rotation in office, as they called it) for

25. Letter from James Madison to Thomas Jefferson (Dec. 9, 1787), in 10 THE PAPERS OF JAMES MADISON 310, 312 (Robert A. Rutland et al. eds., 1977).

26. CREATING THE BILL OF RIGHTS, *supra* note 15, at 17-19.

27. *See id.*

28. *See id.*

29. *Id.* at 19.

30. *See id.* at 19-21.



presidents and severely limited federal jurisdiction over what became the District of Columbia.<sup>31</sup> Aside from the Supreme Court, these Antifederalists would have allowed only "courts of Admiralty."<sup>32</sup> They would have permitted impeachment trials of senators by "some Tribunal other than the Senate" and limited the power of the national government to collect taxes in the states.<sup>33</sup>

Antifederalists in other states wanted similar changes that would have cut the heart out of the new Constitution. Virtually all the Antifederalists would have rewritten the judiciary article to the point where the federal court system would have been unrecognizable and our resulting constitutional history would have been altered in unimaginable ways.<sup>34</sup> Delegates to the New York Ratifying Convention, with its large Antifederalist majority, proposed structural changes similar to those the Virginia Antifederalists demanded. A Constitution amended to satisfy these New Yorkers would have limited federal diversity jurisdiction only to cases involving land grants, prohibited any federal treaty from operating against a state constitution (thus undermining the Supremacy Clause), and proscribed Congress from granting monopolies.<sup>35</sup> In addition, the New Yorkers would have limited power with the following requirements: (1) a two-thirds majority in both houses of Congress to borrow money or to declare war, (2) strict temporal limitations on the suspension of habeas corpus, (3) mandatory rotation in office for U.S. senators, and (4) prohibitions on federal capitation taxes and on the creation of intermediate appellate federal courts.<sup>36</sup> The New Yorkers also suggested limitations on the president's pardon power and on the federal power to adopt bankruptcy laws.<sup>37</sup> Antifederalists in Massachusetts and New Hampshire similarly sought to limit federal court jurisdiction, prohibit the federal government from granting monopolies, and restrict the federal government's power to tax.<sup>38</sup>

The fact that the majority of Antifederalist proposals were structural, rather than libertarian, underscores the fact that the most

31. *See id.*

32. *Id.*

33. *Id.*

34. *See* Wythe Holt, "To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts, 1989 DUKE L.J. 1421, 1477, 1493.

35. *See* CREATING THE BILL OF RIGHTS, *supra* note 15, at 21-28.

36. *See id.*

37. *See id.*

38. *See id.* at 14-17.

prominent Antifederalists were only marginally interested in a bill of rights. Indeed, among the hard-core Antifederalists it is clear that the argument about a bill of rights was, for the most part, a stalking horse for their larger goal—to undermine the strength of the new central government. Antifederalist leaders like Henry and Lee really wanted to defeat the Constitution and either go back to the old system or force a second convention where they could rewrite the document along the states' rights lines that interested them. But, having failed to defeat the Constitution, they strove for crippling amendments that went to the very structure of that document. James Madison believed that the Antifederalist leaders were really involved in a "conspiracy agst. direct taxes" which was "the real object of all their zeal in opposing the system."<sup>39</sup> Madison believed their ultimate goal was to destroy the power of the national government to levy any taxes and thus "re-establish the supremacy of the State Legislatures."<sup>40</sup> Thus, they vociferously demanded a bill of rights before the Constitution was ratified in hopes that the purported lack of libertarian protections would persuade more moderate Americans to help them defeat ratification. But, once the Constitution was ratified, they were no longer interested in a bill of rights and instead wanted a wholesale restructuring of the Constitution.

This quick overview of the major Antifederalist demands illustrates how out-of-step they were with the Federalist majorities in the ratifying conventions and how decisively they were defeated in 1787–88, when the Constitution was ratified. Similarly, they were even more out-of-step with the massive Federalist Congressional majority in 1789, which proposed the Bill of Rights. In 1789–91, the hard-core Antifederalists suffered their final defeat, as Federalists and moderate Antifederalists accepted the Bill of Rights, and with it, the victory of the Constitution itself.

The Second Amendment arose out of the conflict between Federalists and Antifederalists over those portions of the Constitution that dealt with the militia and the national army. But it was ultimately tied to the larger Federalist-Antifederalist conflict over the nature of the new government itself.

39. Letter from James Madison to Tench Coxe (July 30, 1788), in 11 THE PAPERS OF JAMES MADISON, *supra* note 25, at 210, 210; *see also* RUTLAND, *supra* note 12, at 301.

40. Letter from James Madison to Tench Coxe, *supra* note 39, at 210.

## II. THE CONSTITUTION, THE MILITIA, AND THE NATIONAL ARMY

The framers in Philadelphia gave Congress and the president shared responsibility for the ultimate control of the militia. They also gave state governments important responsibilities and powers in organizing and training militias, while at the same time taking ultimate authority from the states.

Article I of the Constitution gives Congress power to “declare War,”<sup>41</sup> “to raise and support Armies,”<sup>42</sup> to “maintain a Navy,”<sup>43</sup> to make “Rules for the Government and Regulation of the land and naval Forces,”<sup>44</sup> to “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions,”<sup>45</sup> and “to provide for organizing, arming, and disciplining, the Militia.”<sup>46</sup> Furthermore, Article I declares that the states may not “keep Troops, or Ships of War in time of Peace.”<sup>47</sup> Article II makes the president of the United States the “Commander in Chief of the Army and Navy” and “of the Militia of the several States, when called into the actual Service of the United States.”<sup>48</sup> These provisions also contain two important limitations. Congress can only appropriate money for the military for two years,<sup>49</sup> and the states retain the power to appoint all militia officers and to train the militia, provided this training complies with “the discipline prescribed by Congress.”<sup>50</sup>

Taken together, these provisions contemplated two levels of military protection for the new nation: (1) a national army created and governed solely by Congress and ultimately under the authority of the president in his capacity as commander in chief, and (2) a system of state militias, essentially organized and under control of the states, but subject to regulation by Congress and to “federalization” at the command of the president. Part of that regulation included the idea that the national government had the power—and the obligation—to provide arms for the local militias.<sup>51</sup> As Rufus King

41. U.S. CONST. art. I, § 8, cl. 11.

42. *Id.* cl. 12.

43. *Id.* cl. 13.

44. *Id.* cl. 14.

45. *Id.* cl. 15.

46. *Id.* cl. 16.

47. *Id.* § 10, cl. 3.

48. *Id.* art. II, § 2, cl. 1.

49. *See id.* art. I, § 8, cl. 12.

50. *Id.* cl. 16.

51. “The Congress shall have Power . . . [t]o provide for organizing, arming, and disciplining, the Militia.” U.S. CONST. art. I, § 8, cl. 1, 16.

explained at the Convention, “*arming* meant not only to provide for uniformity of arms, but included authority to regulate the modes of furnishing, either by the militia themselves, the State Governments, or the National Treasury.”<sup>52</sup> Thus, the defense of the United States would rely on both the state militias and the standing army.

For a variety of reasons, most Antifederalists feared these arrangements. They were most concerned about the federal standing army. According to the traditional Whig and Republican ideology of the period, a standing army threatened the liberties of a free people.<sup>53</sup> This argument was rooted in English history, where the army was traditionally a remote mercenary force, disconnected from the people, and under the direct control of a hereditary monarch. The experience of the Revolution also led to hostility for the standing army. For example, in 1770, after Lord Hillsborough sent British troops to American soil, Benjamin Franklin reportedly felt that the British army had been sent to silence the protests of the colonial settlers, rather than cure the problems of which they complained.<sup>54</sup> The Declaration of Independence, which Franklin later helped write, polemically, but accurately, included the standing army in its laundry list of complaints against the king:

He has kept among us, in times of peace, Standing Armies without the Consent of our Legislature.

He has affected to render the Military independent of and superior to the Civil Power.

He has . . . giv[en] . . . his Assent to . . . acts of pretended Legislation:

For quartering large bodies of armed troops among us.<sup>55</sup>

Madison and other Federalists believed that the Constitution directly responded to these issues in several ways. In the Constitution, the military was triply under civilian control: Congress regulated all branches of the military, the president was the ultimate commander in chief of all the military, and the governors controlled the state militias when not under federal authority. Meanwhile, appropriations for the military were limited to two years, thus preventing a true standing army from taking control. The only

52. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 2, at 385.

53. See generally JOHN PHILLIP REID, IN DEFIANCE OF THE LAW: THE STANDING-ARMY CONTROVERSY, THE TWO CONSTITUTIONS, AND THE COMING OF THE AMERICAN REVOLUTION (1981).

54. See REID, *supra* note 53, at 15.

55. THE DECLARATION OF INDEPENDENCE paras. 13-16 (U.S. 1776).

“military” provision of the Declaration not directly addressed by the Constitution was the fear of the “quartering of large Bodies of Troops among us.” Wisely, the framers left that problem to the political process. Given the close proximity to the British in Canada, the Spanish in the west, and Native Americans everywhere, it would have been foolish indeed to prohibit the placement of troops close to population centers.<sup>56</sup> Ironically, of course, modern civic leaders across the nation avidly compete for the location of forts and bases in their communities. The complaint of many communities like Fort Dix, New Jersey, is that Congress, the president, or some faceless base-closing commission has refused to continue to quarter “large Bodies of Troops among us.”

The Antifederalists proposed amendments that would have altered these provisions of the Constitution. Had the Antifederalists succeeded, the United States would have become a fundamentally different, and weaker, nation. However, Madison and his colleagues in Congress soundly rejected the Antifederalist proposals.

### III. ANTIFEDERALIST HOPES: THE CASE OF THE PENNSYLVANIA MINORITY

At the end of the Pennsylvania Ratifying Convention, the Antifederalists were soundly defeated. After that state convention, they published their *Reasons of Dissent*.<sup>57</sup> Part of this document contained a list of fourteen proposed amendments to the Constitution. Some of these proposals—those dealing with the protection of individual libertarian rights and legal due process—were later incorporated, almost word-for-word, into the Bill of Rights. The essence, and in some places the exact language, of the Free Exercise

56. The concept of quartering troops actually evokes two different historical issues. One was the presence of a large standing army in colonial cities. For example, relative to the size of Boston, the British placed huge numbers of troops in that city. Neither the Constitution nor the Bill of Rights prevents Congress from quartering large numbers of troops among us. The second aspect of quartering troops stemmed from the British policy of forcing colonists to provide lodging for soldiers. No one at the Convention contemplated the national government ever doing this, except in an emergency. But, Antifederalists, remembering the British practice and fearful of the new national government, complained that this might occur. Thus the First Congress, in what became the Third Amendment, banned the practice, except in time of war.

57. *The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents*, *supra* note 9, at 618. Near the end of the Pennsylvania Ratifying Convention, delegate Robert Whitehill offered most of these provisions as a series of amendments to the Constitution, but the convention rejected them. See 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 8-11 (John P. Kaminski & Gaspare J. Saladino eds., 1984).

Clause<sup>58</sup> and the Free Press and Speech Clauses<sup>59</sup> of the First Amendment are found in these fourteen proposals, as are the essence and language of the Fourth,<sup>60</sup> Fifth,<sup>61</sup> Sixth,<sup>62</sup> Seventh,<sup>63</sup> and Eighth<sup>64</sup> Amendments. Elements of the Tenth Amendment are also found in the proposals.<sup>65</sup> Congress ignored a number of other proposed amendments on taxation, the size of the House of Representatives, the power of the federal courts, and treaty-making power.

The Pennsylvania Antifederalists also proposed amendments concerning the army, the militia, the right to bear arms, and the right to hunt. These amendments addressed at least six separate issues: (1) the right of self-protection through the ownership of weapons, (2) the right to serve in the militia, (3) the right to hunt and fish, (4) the prevention of a standing army, (5) the power of Congress over the states, and (6) the power of the states to control their own armies or militias.<sup>66</sup> The proposals, which are found in three of the fourteen

58. Number One of the *Reasons of Dissent* declared that “[t]he right of conscience shall be held inviolable.” *The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents*, *supra* note 9, at 623.

59. Number Six of the *Reasons of Dissent* declared “[t]hat the people have a right to the freedom of speech, of writing and publishing their sentiments, therefore, the freedom of the press shall not be restrained by any law of the United States.” *Id.* Curiously, this is one of the very few Antifederalist documents to use the term “freedom of speech.” The fact that Madison included “speech” in the First Amendment may indicate his use of the *Reasons of Dissent*.

60. Number Five of the *Reasons of Dissent* declared

[t]hat warrants unsupported by evidence, whereby any officer or messenger may be commanded or required to search suspected places or to seize any person or persons, his or their property, not particularly described, are grievous and oppressive, and shall not be granted either by the magistrates of the federal government or others.

*Id.*

61. Number Three of the *Reasons of Dissent* declared “[t]hat no man be deprived of his liberty, except by the law of the land or the judgment of his peers.” *Id.*

62. Number Three of the *Reasons of Dissent* declared

[t]hat in all capital and criminal prosecutions, a man has a right to demand the cause and nature of his accusation . . . to be heard by himself and his counsel; to be confronted with the accusers and witnesses; to call for evidence in his favor, and a speedy trial by an impartial jury of his vicinage.

*Id.*

63. Number Two of the *Reasons of Dissent* declared “[t]hat in controversies respecting property, and in suits between man and man, trial by jury shall remain as heretofore, as well in the federal courts, as in those of the several states.” *Id.*

64. Number Four of the *Reasons of Dissent* declared “[t]hat excessive bail ought not to be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted.” *Id.* Except for changing two words, this is the exact wording of what became the Eighth Amendment. See U.S. CONST. amend. VIII.

65. The second paragraph of Number Eleven asserted “[t]hat the sovereignty, freedom, and independency of the several states shall be retained, and every power, jurisdiction, and right which is not by this constitution expressly delegated to the United States in Congress assembled.” *The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents*, *supra* note 9, at 624.

66. See *id.* at 623-24.

amendments offered by the Pennsylvania minority, help us understand the intentions of the framers of the Second Amendment. This understanding, however, is a negative one. By seeing what the framers of the Second Amendment *did not do*, we can better understand what they did do.

Had the proposals of the Pennsylvania Antifederalists on this issue been written into the Bill of Rights, the Second Amendment might be the least controversial of the first ten Amendments. It is of utmost significance, however, that unlike other aspects of the Pennsylvania proposals, which were incorporated into the Bill of Rights almost word-for-word, Madison and his colleagues in the First Congress emphatically rejected the goals and the language of the Pennsylvania Antifederalists on these issues.

Thus, it is useful to consider what Congress might have written, but did not. Number Seven of the amendments listed in the *Reasons of Dissent* provided

[t]hat the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to and be governed by the civil powers.<sup>67</sup>

Number Eight, an entirely separate provision, asserted that:

The inhabitants of the several states shall have liberty to fowl and hunt in seasonable times, on the lands they hold, and on all other lands in the United States not enclosed, and in like manner to fish in all navigable waters, and others not private property, without being restrained therein by any laws to be passed by the legislature of the United States.<sup>68</sup>

Number Eleven from the dissenters' list was the only one that contained two separate paragraphs. At first glance the paragraphs seem entirely separate and oddly juxtaposed. Careful examination suggests a connection. The first paragraph declared

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

67. *Id.*

68. *Id.* at 624.

time only as such state shall agree.<sup>69</sup>

The second paragraph of Number Eleven asserted “[t]hat the sovereignty, freedom, and independency of the several states shall be retained, and every power, jurisdiction, and right which is not by this constitution expressly delegated to the United States in Congress assembled.”<sup>70</sup> This second paragraph, when tied to the previous one, underscores the connection many Antifederalists saw between state sovereignty and the control of the state militia.

If Congress in 1789 had accepted these proposals of the Pennsylvania minority, then one might persuasively argue that the Constitution, as amended, guaranteed a personal and individual right of Americans to own weapons “for the defense of themselves and their own state, or the United States, or for the purpose of killing game.”<sup>71</sup> Both the personal self-defense interests and the “American sportsman” interests of organizations of gun owners would then have been explicitly protected by the Bill of Rights. We might argue today about what sort of weapons are protected. It is not clear that such provisions would today protect the private ownership of Saturday night specials, assault rifles (however Congress might define them), submachine guns, sawed-off shotguns, bazookas, or flamethrowers. But, whatever fell in or out of the protected arena, the constitutional principle of private ownership of weapons would have been clear.

Had Congress added these provisions to the Bill of Rights, we would also have a very different country than we have today, assuming, of course, that we still would have a country. It is entirely possible that the provisions limiting both a standing army and the power of the national government to call up the militia would have long ago led to a destruction of the nation from either outside forces or internal disruptions.

If we contemplate the implications of the Pennsylvania proposals—especially in light of subsequent developments in American history—we immediately see why Congress completely rejected the Pennsylvanians’ demands for state control of the militia and for personal ownership of guns.

Such provisions might have prevented the Washington administration from effectively suppressing the Whiskey Rebellion or the Madison administration from calling out troops to face down the

69. *Id.*

70. *Id.*

71. *Id.* at 623-24.



British in 1812. Without the ability to call up the militia, President Andrew Jackson might not have successfully stood up to the nullificationists in South Carolina.<sup>72</sup> In responding to the Nullification Proclamation in 1832, President Jackson reminded the citizens of South Carolina that “[d]isunion by armed force is *treason*,”<sup>73</sup> and made it clear that this behavior would be met by military force equal to the task of crushing the rebellion. This stance would not have been possible if the states had retained full control of the militias or if the national government had been precluded from disarming rebellious citizens. Similarly, if the Pennsylvania Antifederalists had succeeded, it is unlikely that the Pierce administration could have used the Massachusetts militia to help return the fugitive slave Anthony Burns from Boston in 1854.<sup>74</sup>

Then, of course, there is the war of 1861–65—variously called the Civil War, the War Between the States, the War for Southern Independence—but rarely any more called by its only official name, the War of the Rebellion.<sup>75</sup> Had the restrictive provisions of the Pennsylvania minority been enacted, President Lincoln might have been unable to call out the state militias to suppress the rebellion.

Madison and his colleagues could not have predicted the Whiskey Rebellion, the Nullification crisis, or the Civil War. But they were shrewd enough to know that the lack of national military power—and with it the power to disarm those who are in rebellion or might be in rebellion—would undermine any national state. Having just created a stronger national state in the wake of Shays’s Rebellion and similar rebellions in other states,<sup>76</sup> the Federalists in Congress,

72. In his message to the people of South Carolina during the nullification crisis, President Jackson noted that:

The war into which we were forced to support the dignity of the nation and the rights of our citizens might have ended in defeat and disgrace, instead of victory and honor, if the States who supposed it a ruinous and unconstitutional measure had thought they possessed the right of nullifying the act by which it was declared and denying supplies for its prosecution.

Proclamation by Andrew Jackson, President of the United States (Dec. 10, 1832), in 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1203, 1205 (James D. Richardson ed., 1897). Had the militias been immune from federal control, the states would have been able to prevent the prosecution of the war *without* actually having to nullify the declaration of war.

73. *Id.* at 1217.

74. See generally Paul Finkelman, *Legal Ethics and Fugitive Slaves: The Anthony Burns Case, Judge Loring, and Abolitionist Attorneys*, 17 CARDOZO L. REV. 1793 (1996).

75. See, e.g., U.S. DEP’T OF WAR, *THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES* (1880–1901).

76. See Don Higginbotham, *The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship*, 55 WM. & MARY Q. 39, 43–44 (1998).

many of whom had been in the Philadelphia Convention, the state ratifying conventions, or both, took no steps to undermine the ability of the national government to protect itself from enemies without or rebels and traitors within.

If the Second Amendment had responded to the demands of the Pennsylvania minority and similar demands from other Antifederalists, the national government would have been severely, perhaps fatally, weakened from the beginning. Congress would have been unable to regulate the use, ownership, or display of firearms in those places where it has plenary jurisdiction, such as the District of Columbia, the federal territories, or overseas possessions and lands, such as present day Puerto Rico and the Virgin Islands.

At the time of the drafting of the Constitution, "every state had gun control legislation on its books."<sup>77</sup> But, an amendment along the lines of the Pennsylvania Antifederalists' would have prevented such a law in the federal district.<sup>78</sup> It also might have prevented preemptive strikes against pirates, illegal slave traders (after 1808), filibusters preparing for the illegal invasion of Latin American countries,<sup>79</sup> or others gathering weapons for illegal purposes.

As previously discussed, one of the primary reasons for calling the Constitutional Convention was the fear that without a stronger central government the new nation would be unstable, militarily weak, and might not survive. In 1786, disgruntled farmers in western Massachusetts, led by Captain Daniel Shays, had shut down courts and threatened a full-scale civil war in the Bay State. Some militia units had joined the rebels before militiamen from eastern Massachusetts finally dispersed Shays's followers.<sup>80</sup> Shays's Rebellion had deeply frightened the elected political leaders who governed the nation after the Revolution. As Edmund Randolph noted when he introduced the Virginia Plan at the Philadelphia Convention, the "rebellion [that] had appeared . . . in Massts"<sup>81</sup> underscored the need

77. Michael A. Bellesiles, *Gun Laws In Early America: The Regulation of Firearms Ownership, 1607-1794*, 16 LAW & HIST. REV. 567, 587 (1998). See generally MICHAEL A. BELLESILES, *ARMING AMERICA: THE ORIGINS OF A NATIONAL GUN CULTURE* (2000).

78. So, too, would an individualist reading of the Second Amendment.

79. In the nineteenth century, Americans organized military expeditions against Cuba and Nicaragua. See, e.g., ALBERT Z. CARR, *THE WORLD AND WILLIAM WALKER* (1963). These preparations began with the accumulation of weapons for the invasion. See, e.g., *id.* Such an invasion then, or now, might easily drag the nation into a foreign war. Yet, presumably under the Pennsylvania minority's proposal, the government could not stop the accumulation or export of weapons.

80. See, e.g., Higginbotham, *supra* note 76, at 43-44.

81. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 2, at 18-19.

for a stronger government.

The Federalists at the Philadelphia Convention wanted a government that would have the prestige, organizational apparatus, tax revenue, and military power to suppress such rebellions in the future. Indeed, Shays's Rebellion helped convince many of the need for a new constitution with a strong national military.

The kind of amendments that the Pennsylvania minority wanted would have undermined these powers and the new government itself. Such amendments would have crippled the national government's ability to suppress insurrections, regulate trade with the Indians,<sup>82</sup> fight piracy, or even prevent crime in the federal district (now Washington, D.C.), in the federal territories, and wherever else federal jurisdiction existed. Thus, in drafting the Bill of Rights, James Madison and his Congressional colleagues emphatically rejected the sweeping provisions of the Pennsylvania minority and other Antifederalists relating to the military, the militia, and firearms<sup>83</sup> and instead adopted a much more limited amendment, directed at only one particular issue: the preservation of the organized state militias as a military force. The Congressmen of 1789 were not interested in protecting the rights to "killing game," "to fowl and hunt in seasonable times," "to fish in all navigable waters," or even to guarantee that people should be able to "bear arms for the defense of themselves."<sup>84</sup> Congress was certainly on notice that demands for explicit protections of such rights were on the table and could easily have put such language into the Bill of Rights. Madison, along with the rest of Congress, was well aware of the *Reasons of Dissent*, which was printed in numerous Pennsylvania papers, including the important *Pennsylvania Packet*, and was also published as a broadside.<sup>85</sup> The fact that Madison and Congress did not propose amendments along the lines demanded by the Pennsylvania minority leads to a *prima facie* conclusion that they did not intend to incorporate such protections into the Bill of Rights.

82. It is worth noting that colonies regulated the sale of guns to Indians; it would seem odd that the framers of the Second Amendment might jeopardize such regulation with a sweeping personal right to own weapons. See Bellesiles, *supra* note 77, at 584.

83. As well as on other structural changes and limitations of the national government.

84. *The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents*, *supra* note 9, at 623-24.

85. See 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 10, at 145. Because the Pennsylvania Antifederalists had been unable to get their state convention to endorse their proposed amendments, they were not officially before Congress. Nevertheless, similar amendments, some even more extreme, were before Congress.

#### IV. THE BILL OF RIGHTS: PRESERVING THE CONSTITUTION

Why is it that Madison and his colleagues rejected the demands of the Pennsylvania Antifederalists on the issues of guns, the militia, and the national military? The Second Amendment, like the others in the Bill of Rights, was designed to preserve the Constitution as written in 1787 by adding to the Constitution a bill of rights that did not fundamentally alter the nature of the national government or significantly limit its powers.

In examining what became the Second Amendment, it is also critical to remember that Madison, who proposed the amendments, had, in fact, little enthusiasm for them. His paternity as the father of the Bill of Rights was truly reluctant.<sup>86</sup> When Madison introduced the amendments to the House of Representatives, he did not argue with passion or conviction for his proposal. He told Congress that he had “never considered” a bill of rights “so essential to the federal constitution” that the lack of one should have been allowed to impede ratification.<sup>87</sup> But, with the Constitution ratified, Madison was willing to concede “that in a certain form, and to a certain extent,” a bill of rights “was neither improper nor altogether useless.”<sup>88</sup> While proposing amendments that were neither “improper” nor “useless,” Madison was careful, as he noted in a private letter to Edmund Randolph, to make sure that “the structure & stamina of the Govt. [were] as little touched as possible.”<sup>89</sup> It is this goal of Madison—to protect the “structure & stamina” of the new government—that most illuminates the very limited nature of what became the Second Amendment.

In general, Madison saw the Bill of Rights as clarifying the meaning of the Constitution and not fundamentally changing its nature.<sup>90</sup> He had no problem expressly protecting freedom of religion, for example, because he did not think that the purpose of the Constitution was to allow Congress to regulate religion, even where Congress had plenary jurisdiction.<sup>91</sup> Similarly, he had no desire to deny the right of a jury trial in federal prosecutions and so had no

86. See Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301 (1991).

87. 1 ANNALS OF CONG. 453 (Joseph Gales & William Seaton eds., 1789).

88. *Id.*

89. Letter from James Madison to Edmund Randolph (June 15, 1789), in 12 THE PAPERS OF JAMES MADISON 219, 219 (Charles F. Hobson et al. eds., 1979).

90. See generally Finkelman, *supra* note 86.

91. See *id.* at 326.

problem explicitly protecting that right in the Sixth Amendment.<sup>92</sup> In the same way, Madison did not think that the purpose of the Constitution was to allow the national government to dismantle or disarm the state militias. Since some people feared the Federalists might do this,<sup>93</sup> Madison was willing to put a provision in the Bill of Rights explicitly stating that Congress would not disarm the state militias. At the same time, he had no interest in preventing Congress from regulating weapons in the places where Congress had clear legislative power. Thus, Madison did not accept the sweeping proposed amendments of the Pennsylvania Antifederalists on this issue. Madison had worked for a strong government, with a national army and the power to federalize state militias, at the Philadelphia Convention. He had no interest in undermining this strength in the Bill of Rights either by prohibiting a standing army, removing the power of the national government to control the state militias, or by permitting individual citizens or groups of them to have unfettered access to weapons.<sup>94</sup>

Indeed, given what was accomplished in 1787, it would have been out of character for Congress, dominated as it was by supporters of the new Constitution, to cripple the new government's ability to control dangerous, musket-toting elements of the population like Daniel Shays. Similarly, it would have been out of character to take the citizens' army—the militia—and turn it over to the complete control of state governors, who might not be sympathetic to the policies of the national regime. Not surprisingly, in the Bill of Rights, including what became the Second Amendment, Congress did not take such drastic actions.

## V. THE BILL OF RIGHTS: A GREAT FEDERALIST VICTORY

It is commonplace among some scholars to view the struggle for the Bill of Rights as a victory for the Antifederalists, the original opponents of the Constitution. At first glance, this argument makes a certain sense. Many Antifederalists argued that they feared a strong central government because the Constitution lacked a bill of rights. If the Constitution had a bill of rights, these Antifederalists claimed, they could then support the system of government created in

92. See *id.* at 326-28.

93. See *infra* p. 223 and notes 141-46.

94. See Finkelman, *supra* note 86, at 337. For more detailed information on Madison's life and views, see generally RALPH LOUIS KETCHAM, JAMES MADISON: A BIOGRAPHY (1971).

Philadelphia. Because the Antifederalists asked for a bill of rights, some scholars incorrectly see the adoption of the Bill of Rights as a successful counterattack by the Antifederalists.

This argument is, at best, only half true. Certainly it is unlikely that the Federalists, who completely dominated the new government, would have proposed and passed a bill of rights if the Antifederalists had not called for one. But it is clear that the Bill of Rights adopted by Congress, and sent on to the states, contained only a tiny portion of what the Antifederalists wanted. Moreover, these changes were in many ways the least important in the minds of the Antifederalist leadership, like Patrick Henry and Richard Henry Lee. Hard-core Antifederalists considered the Bill of Rights to be a “tub to the whale,”<sup>95</sup> designed to distract the people away from calling a second convention to substantially rewrite the Constitution.

One insight into the Antifederalist disappointment over the amendments comes from a cursory glance at the order of the states that ratified them. Five of the first six states to ratify the Bill of Rights were Federalist strongholds.<sup>96</sup> Virginia, the state most often associated with the call for a bill of rights, was actually the last state to ratify the ten amendments that became the Bill of Rights.

The story of ratification of the Bill of Rights in Virginia illustrates just how much the Antifederalists’ demand for amendments became a defeat for their cause. Patrick Henry, the most powerful political figure in this Antifederalist stronghold, disliked the proposed amendments. Henry had campaigned against the Constitution because he wanted to defeat it and start all over. He used the lack of a bill of rights as an argument against the Constitution; but when offered the Bill of Rights in 1789, he balked.<sup>97</sup> Henry fully understood that a bill of rights would destroy the possibility of achieving his real goal, which was to destroy or completely undermine and remake the new Constitution. Henry and his cohorts correctly realized that if the lack of a bill of rights were no

95. The “tub to the whale” was a maritime expression. If a whale appeared to be attacking a ship, sailors would throw an empty tub into the ocean hoping to distract the whale, so that it would leave the ship alone. See Bowling, *supra* note 23, at 223.

96. The sixth ratifying state was New York, which had elected an overwhelmingly Antifederalist ratifying convention, but which became strongly Federalist after the adoption of the Constitution. For a history of the ratification of the Constitution in New York, see generally DE PAUW, *supra* note 12. The order of ratification is found in DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF AMERICAN STATES 1065 (Charles C. Tansill ed., 1927).

97. See Brent Tarter, *Virginians and the Bill of Rights*, in THE BILL OF RIGHTS: A LIVELY HERITAGE 3, 13-15 (Jon Kukla ed., 1987).

longer an issue, many of the softer Antifederalists would be satisfied with the Constitution and accept the new government. Thus, in the fall of 1789, Virginia's two U.S. senators, William Grayson and Richard Henry Lee, urged their state to defeat the Bill of Rights and to hold out for more sweeping amendments.<sup>98</sup> Following this plan for more than two years, Patrick Henry prevented the Virginia legislature, which he dominated, from ratifying the new amendments.<sup>99</sup> Henry was hoping that in these two years Americans would come to accept his view that the stronger national government was dangerous to the liberty of the people.<sup>100</sup> But, in Virginia, precisely the opposite happened. Two intervening elections sapped much of Henry's strength in the Virginia Assembly, which finally ratified the Bill of Rights in December 1791.<sup>101</sup>

Ultimately the Antifederalists were triple losers. They failed to prevent ratification of the Constitution, they failed to make ratification conditional on the adoption of a whole series of amendments, and in the end, they failed to gain acceptance of what they considered to be their most important amendments. The Virginia Antifederalists, for example, proposed forty separate amendments to the Constitution, including twenty to the "Body of the Constitution."<sup>102</sup> Congress ignored these twenty and a good number of the other twenty that would have made up a "Declaration or Bill of Rights."<sup>103</sup> New York's proposed amendments take up seven printed pages, with fifty-nine separate paragraphs and scores of proposed changes. New Hampshire modestly proposed only twelve changes, and Massachusetts a paltry eight. But, had Congress accepted all, or most, of the proposals from the ratifying conventions of just these four states, along with the demands of the Pennsylvania minority, it would have effectively rewritten the Constitution, creating an entirely different kind of government.

Again, we should not be surprised that this result did not happen. Most Federalists wanted no changes in the Constitution. They believed a bill of rights was unnecessary because the new national government, as a government of limited and enumerated powers,

98. See Letter from Richard Henry Lee and William Grayson to the Speaker of the House of Representatives of Virginia, *supra* note 24, at 507-08.

99. See Tarter, *supra* note 97, at 13-15.

100. See *id.*

101. See *id.*

102. CREATING THE BILL OF RIGHTS, *supra* note 15, at 19.

103. *Id.* at 17.

could not threaten fundamental rights and individual liberties. Nevertheless, Federalists in the First Congress were willing to accept amendments that enumerated basic civil liberties and procedural rights or explicitly reaffirmed limitations on the national government that they believed were already in the Constitution of 1787. These amendments were neither designed to affect, nor did they affect, the structure of the Constitution or the new national government formed under it. In presenting them to Congress, Madison was unequivocally “unwilling to see a door opened for a re-consideration of the whole structure of the government, for a re-consideration of the principles and the substance of the powers given.”<sup>104</sup> The Bill of Rights was emphatically *neither* a Constitution,<sup>105</sup> nor a significant alteration of the political relationships created by the Constitution. The Bill of Rights did not shift any political power from the national government to either the states or “the people.” It merely clarified the powers, rights, and responsibilities that the national government had under the Constitution.

The hard-core Antifederalists, of course, did not condone Madison’s proposed amendments precisely because they believed that the amendments would undermine their cause, while leaving the structure of the Constitution intact. They wanted to “strike at the essence of the System,” and either return to the government of the old Confederation “or to a partition of the Union into several Confederacies.”<sup>106</sup>

As the “loyal opposition” in the ratification process,<sup>107</sup> the Antifederalists were responsible for placing the demand for a bill of rights on the national agenda. Moreover, their demands forced the Federalists to respond. The accomplishment of the Antifederalists was to pressure the Federalists to add a bill of rights to the Constitution. But in a sense, this “accomplishment” was their failure. The Antifederalists, especially the hard-core opponents of the Constitution led by Patrick Henry, did not want to modify the Constitution with a bill of rights so that it would be more palatable to the people; they wanted to totally undermine the Constitution or

104. Speech of James Madison (June 8, 1789), in *CREATING THE BILL OF RIGHTS*, *supra* note 15, at 77, 79.

105. See Paul Finkelman, *The Ten Amendments As a Declaration of Rights*, 16 S. ILL. U. L.J. 351 (1992). Here I reject the clever, but unpersuasive, arguments found in Akhil Reed Amar, *The Bill of Rights As a Constitution*, 100 YALE L.J. 1131 (1991).

106. Letter from James Madison to Thomas Jefferson, *supra* note 25, at 312.

107. Finkelman, *supra* note 6.



replace it with something else. This, they failed to achieve.

## VI. FEDERAL POWER TO SUPPRESS VIOLENCE

In addition to creating national military powers, the Constitution contains a series of clauses that empowered Congress to suppress the activities of people who threatened the public order. Certainly the framers anticipated that most law enforcement would be at the local level, but they also knew that some would be at the national level.

Thus, Congress had the power to punish counterfeiting,<sup>108</sup> to "punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations,"<sup>109</sup> to "suppress Insurrections and repel Invasions," by employing the militias,<sup>110</sup> and to suppress the African Slave Trade after January 1, 1808.<sup>111</sup> Congress could also "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."<sup>112</sup> The U.S. government also was obligated to "protect" each state from "Invasion" and "domestic Violence."<sup>113</sup>

As previously noted, some of the impetus for the Constitution stemmed from the violence of Shays's Rebellion and the general fear of anarchy. This motivation was clear during the Convention, as Randolph's first speech suggests.<sup>114</sup> Even before the delegates met in Philadelphia, those who would emerge as Federalists argued for a strong and vigorous government to defeat anarchy. In the months before the Convention, Alexander Hamilton declared, "It might be said that too little power is as dangerous as too much, that it leads to anarchy, and from anarchy to despotism."<sup>115</sup> And, just as the Convention began serious work, Henry Knox, who was not a delegate, wrote that "we are verging fast to anarchy and that the present convention is the only means to avoid the most flagitious evils that ever afflicted three millions of freemen."<sup>116</sup>

108. See U.S. CONST. art. I, § 8, cl. 6.

109. *Id.* cl. 9.

110. *Id.* cl. 15.

111. See *id.* § 9, cl. 1.

112. *Id.* § 8, cl. 3.

113. *Id.* art. IV, § 4.

114. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 2, at 19.

115. Alexander Hamilton, First Speech on the Address of the Legislature to Governor George Clinton's Message before the New York Assembly (Jan. 19, 1787), in 4 THE PAPERS OF ALEXANDER HAMILTON 3, 11 (Harold C. Syrett ed., 1962).

116. Letter from Henry Knox to John Sullivan (May 21, 1787), in SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 12, 13 (James H.

At the Convention, delegates picked up on this theme and tied it to the military. Charles Pinckney argued that a strong national government was necessary to create “a real military force.”<sup>117</sup> He noted that “[t]he United States had been making an experiment without” a strong military, “and we see the consequence in their rapid approaches toward anarchy.”<sup>118</sup> James Wilson believed the nation had to worry about “anarchy & tyranny within” but also needed to be strong to avoid “wars” and to make “treaties.”<sup>119</sup> Wilson argued that a weak government would be “liable to anarchy & tyranny.”<sup>120</sup> Hugh Williamson feared that “the probable consequences of anarchy in the U.S.” would be military force against the states, which in turn would lead to tyranny.<sup>121</sup> Thus, the framers wrote a Constitution that made the state militias subordinate to the national government and guaranteed that the national government would have the power to enforce its laws.

After the Convention, Federalists hammered home this theme. Writing as “Publius,” Alexander Hamilton argued that “[a] Firm Union will be of the utmost moment to the peace and liberty of the States” and would prevent “domestic faction and insurrection.”<sup>122</sup> The alternative was a society “kept in a state of perpetual vibration between the extremes of tyranny and anarchy.”<sup>123</sup> Only the Constitution could prevent the recurring “tempestuous waves of sedition and party-rage.”<sup>124</sup> With the Constitution ratified, George Washington could only hope the new system would work as planned:

The business of this convention is as yet too much in embryo to form any opinion of the conclusion. Much is expected from it by some; not much by others; and nothing by a few. That something is necessary, none will deny; for the situation of the general government, if it can be called a government, is shaken to its foundation, and liable to be overturned by every blast. In a word, it is at an end; and, unless a remedy is soon applied, anarchy and confusion will inevitably ensue.<sup>125</sup>

Hutson ed., 1987).

117. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 2, at 332.

118. *Id.*

119. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 2, at 426.

120. *Id.*

121. *Id.* at 532.

122. THE FEDERALIST NO. 9 (Alexander Hamilton), *reprinted in* AMERICAN STATE PAPERS 47, 47 (1980).

123. *Id.*

124. *Id.*

125. Letter from George Washington to Thomas Jefferson (May 30, 1788), *in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 2, at 31, 31.

Madison was not even as hopeful as the great man from Mount Vernon. In private correspondence, Madison argued that the government created by the Constitution was still too weak. Shortly before the Convention ended, he wrote in secret code to Jefferson, who was still in France, that the plan of government "will neither effectually *answer its national object* nor prevent the local *mischiefs* which every where *excite disgusts* agst the *state governments*."<sup>126</sup> In late October, he still bemoaned that the Convention had not adopted his proposal to give Congress a "constitutional negative on the laws of the States."<sup>127</sup>

Clearly, supporters of the Constitution, who thoroughly dominated Congress in 1789 when the Bill of Rights was written, had no intention of undoing their handiwork with a series of debilitating amendments that would weaken the national government. They emphatically rejected attempts to undermine the power of the government to control weapons of war and to suppress a revolution. For example, they rejected a New Hampshire suggestion for an amendment to prohibit the creation of a standing army "in time of Peace unless with the consent of three fourths of the Members of each branch of Congress."<sup>128</sup> Though the New York Antifederalists would have banned standing armies altogether,<sup>129</sup> the First Congress would not accept such a limitation. It refused to compel the nation to wait until the rebellion had actually started before it could organize an army and step in to disarm another Daniel Shays.<sup>130</sup>

Not surprisingly, then, when Madison reluctantly and unenthusiastically<sup>131</sup> proposed his amendments, he wanted to be certain that "the structure & stamina of the Govt. [were] as little touched as possible."<sup>132</sup> He also "limited" his proposed amendments "to points which are important in the eyes of many and can be objectionable in those of none."<sup>133</sup> Thus, Madison tried to avoid controversial political issues affecting the structure of the government and concentrated on

126. Letter from James Madison to Thomas Jefferson (Sept. 6, 1787), in 10 THE PAPERS OF JAMES MADISON, *supra* note 25, at 163, 163-64.

127. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 10 THE PAPERS OF JAMES MADISON, *supra* note 25, at 206, 212.

128. CREATING THE BILL OF RIGHTS, *supra* note 15, at 17.

129. *See id.* at 22.

130. Certainly the Southern framers anticipated the possibility of disarming slave rebels, free blacks, and people who might aid them.

131. *See Finkelman, supra* note 86.

132. Letter from James Madison to Edmund Randolph, *supra* note 89, at 219.

133. *Id.*

alterations that would preserve individual liberty. He thought that “[n]othing of a controvertible nature ought to be hazarded” because that might defeat the amendments and lead to renewed support for a second convention.<sup>134</sup> He told Edmund Randolph that he had avoided anything of a “controvertible nature” because of the “caprice & discord of opinions” in the House and Senate, which had to approve the amendments by a two-thirds vote, and in the state legislatures, three-fourths of which had to approve the amendments.<sup>135</sup> The amendments had a “twofold object of removing the fears of the discontented and of avoiding all such alterations as would either displease the adverse side, or endanger the success of the measure.”<sup>136</sup>

Finally, we must remember that those who created the United States understood the nature of a revolution—they had participated in one. In the Declaration of Independence they certainly asserted the right “to alter or to abolish” any government.<sup>137</sup> But, with a democratic republic created by the Constitution, the need for a violent revolution disappeared. Every two years there would be an opportunity to participate in an orderly process to replace the existing government. Some of the very early state constitutions, written during the Revolution itself, not surprisingly endorsed the right of revolution. However, the framers of 1787 did not endorse such a right. The Constitution does not have a suicide clause in it, and no one intended that it should have such a clause. Indeed, as John Marshall said even before the Convention finished its deliberations, “nothing but the adoption of some efficient plan from the Convention can prevent Anarchy first, & civil Convulsions afterwards.”<sup>138</sup> After the Convention, Oliver Ellsworth, who would precede Marshall as Chief Justice, summed up this position: “Anarchy, or a want of such government as can protect the interests of the subjects against foreign

134. Letter from James Madison to Edmund Pendleton (June 21, 1789), in 12 THE PAPERS OF JAMES MADISON, *supra* note 89, at 251, 253.

135. Letter from James Madison to Edmund Randolph, *supra* note 89, at 219.

136. Letter from James Madison to Samuel Johnston (June 21, 1789), in 12 THE PAPERS OF JAMES MADISON, *supra* note 89, at 249, 250; *see also* Letter from James Madison to Tench Coxe (June 24, 1789), in 12 THE PAPERS OF JAMES MADISON, *supra* note 89, at 257, 257; Letter from James Madison to George Nichols (July 5, 1789), in 12 THE PAPERS OF JAMES MADISON, *supra* note 89, at 279, 282.

137. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

138. Letter from James McClurg to James Madison (Aug. 5, 1787), in SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 116, at 205, 206.

and domestic injustice, is the worst of all conditions.”<sup>139</sup> The goal was to prevent anarchy, violence, and rebellions. This prevention was accomplished by controlling the militias and the army and by retaining the right to limit weapons to those who formed “A well regulated Militia.”

President Jackson made this point clear during the Nullification Crisis, when warning South Carolina to step back from the brink of secession and constitutional disaster. Responding to the Palmetto State’s claim to a Revolutionary-era heritage, Jackson reminded the nullifiers that they were “free members of a flourishing and happy Union,” and that “[t]here [was] no settled design to oppress [them].”<sup>140</sup> Jackson’s point, which Lincoln would reiterate to the South in 1861, was that the Constitution contemplated numerous ways for unhappy citizens, or even states, to protest federal legislation, but that these means did not include nullification, secession, or any other sort of rebellion.

The Constitution provided for a standing army and for the national government to arm and provide rules and regulations for state militias, which could be federalized when necessary. The Second Amendment allows for these state militias, which were “well regulated” under statutes passed by Congress, but the Amendment was clearly not designed to insure some sort of permanent revolutionary potential. Indeed, allowing for armed, unregulated citizens, who could threaten the public order and the national state, was unnecessary, unwise, and utterly in conflict with the “more perfect Union” the framers had created in Philadelphia. The “father of the Constitution,” as Madison is often called, did not draft the Bill of Rights to undo his hard work at Philadelphia.

## VII. ANTIFEDERALIST FEARS OF FEDERAL MILITARY POWER

Antifederalists, of course, thought the Constitution created a government that was *too* strong. Hostile to a strong central government, they feared the concentration of power, including military power, in the hands of the new president and Congress. Among their many fears, they worried that the military clauses in the Constitution

139. A Landholder IX [Oliver Ellsworth], *To the Honorable Gentlemen Chosen to Serve in the State Convention*, CONN. COURANT, Dec. 31, 1787, reprinted in 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 514, 515 (Merrill Jensen ed., 1978).

140. Proclamation by Andrew Jackson, President of the United States, *supra* note 72, at 1216.

might threaten the states in one of two quite contradictory ways.

Some Antifederalists feared that the ability of the new government to nationalize the state militias was the first step towards a military dictatorship. As early as 1783, George Washington had argued for stronger national control over the militias. In his *Sentiments on a Peace Establishment*,<sup>141</sup> Washington argued for drawing a select group of men, either as volunteers or draftees, from the state militias to serve in a national army.<sup>142</sup> As many scholars have noted, and as his own letters show, Washington had little use for the militias and would probably have happily seen them wither away while a trained, professional army maintained the defense of the nation.<sup>143</sup> Henry Knox, the secretary of war under the Articles of Confederation, proposed a less drastic form of nationalized training for the state militias and their removal from the states, when necessary, for no more than a year at a time.<sup>144</sup> However, such proposed reforms were fruitless, because the states rejected them.<sup>145</sup> Virginia tried to institute Washington's modest proposal that militia officers be chosen on the basis of ability, rather than social class and connections, but that reform fell flat on its face.<sup>146</sup>

The Constitution offered a remedy for these proposals by allowing for the nationalization of militia training and rules and by allowing the federalization of the militias under the president's control when necessary "to execute the Laws of the Union, suppress Insurrections and repel Invasions."<sup>147</sup> But such powers truly frightened the Antifederalists.

"Philadelphiensis" feared that the "president general" would be able to "order . . . the militia to exercise, and to march when and where he pleases."<sup>148</sup> In Maryland, an Antifederalist writing as "A Farmer and Planter," worried that with such a provision, the national government would levy oppressive taxes and that when people

141. George Washington, *Sentiments on a Peace Establishment*, in 26 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 374, 374 (John C. Fitzpatrick ed., 1938).

142. See *id.* at 389-90.

143. See Michael A. Bellesiles, *The Origins of Gun Culture in the United States, 1760-1865*, 1996 J. AM. HIST. 425, 429; Higginbotham, *supra* note 76, at 43.

144. See Higginbotham, *supra* note 76, at 42.

145. See *id.*

146. See *id.* at 42-43.

147. U.S. CONST. art. I, § 8, cl. 15.

148. Philadelphiensis IX, PHILADELPHIA FREEMAN'S J., Feb. 6, 1788, reprinted in 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 57, 58 (John P. Kaminski & Gaspare J. Saladino eds., 1986).

refused to pay them, the

great Lords and Masters . . . [would] send the militia of Pennsylvania, Boston, or any other state or place, to cut [their] throats, ravage and destroy [their] plantations, drive away [their] cattle and horses, abuse [their] wives, kill [their] infants, . . . ravish [their] daughters, and live in free quarters, until [they] get into a good humour, and pay all that they may think proper to ask of [the people], and [they] become good and faithful servants and slaves.<sup>149</sup>

The new government would, in effect, be able to federalize the militia of one state and use it against another.<sup>150</sup> The national government might also be able to use a local militia, under federal officers, to attack their neighbors. This ability, the opponents of the Constitution feared, would be the first step to tyranny.

The next step would be to actually take over the state militias, ordering them here and there to suppress liberty. Mercy Otis Warren, writing as "A Columbian Patriot," echoed this fear, complaining that under the Constitution "the militia of the country, the bulwark of defence, and the security of national liberty [would] no longer [be] under the controul of civil authority" but instead would be under the control of the president and the Senate.<sup>151</sup> Warren, carried away by her own rhetoric, referred to the president and Senate as "the Monarch" and "the aristocracy."<sup>152</sup>

While some Antifederalists feared the federalization of the militia, others feared the national government would simply destroy the militia. John DeWitt, writing in Massachusetts, complained that the organizers of the new government "[did] not mean to depend upon the citizens of the States alone to enforce their powers."<sup>153</sup> DeWitt argued that the only protection of a free state against tyranny was "a well regulated militia, composed of the yeomanry of the country" which had always "been considered as the bulwark of a free

149. A Farmer and Planter, *To the Farmers and Planters of Maryland*, MD. J., Apr. 1, 1788, reprinted in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 10, at 74, 76. Arguments like this underscore Madison's belief that the Antifederalists were mostly unwilling to pay national taxes. See Letter from James Madison to Tench Coxe, *supra* note 39, at 210; see also RUTLAND, *supra* note 12, at 301.

150. See Higginbotham, *supra* note 76, at 47, for similar comments by Patrick Henry, John Smilie, and Luther Martin.

151. A COLUMBIAN PATRIOT [MERCY OTIS WARREN], OBSERVATIONS ON THE NEW CONSTITUTION, AND ON THE FEDERAL AND STATE CONVENTIONS, in 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 10, at 270, 277.

152. *Id.*

153. John DeWitt, Letter V: To the Free Citizens of the Commonwealth of Massachusetts, reprinted in 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 10, at 34, 37.

people.”<sup>154</sup> He worried that the national government would “neglect to arm, organize and discipline the men” in the state militias,<sup>155</sup> thus making them weak and ineffective. Then a standing army could easily defeat the state militias and take over the nation. Similarly, Brutus, writing in New York, predicted that men would be “impressed from the militia” and forced into the national army.<sup>156</sup>

Other Antifederalists tied the taxing power to the creation of a national army. Brutus devoted an entire essay to the combined power of the United States “to borrow money . . . and to raise and support armies.”<sup>157</sup> Indeed, a common theme among many Antifederalists was the fear of national taxes that would be collected by military force. One way of accomplishing this end was to cripple the military and thus prevent the national government from having the force to suppress tax rebellions. The Antifederalists could not figure out whether this force would be the federalized militia, as “A Farmer and a Planter” feared, or a standing army that could easily defeat a demoralized and untrained state militia, as DeWitt feared. But, either way, the strong national government, with its strong military, was the enemy. The plans of Washington outlined in his *Sentiments on a Peace Establishment*,<sup>158</sup> or the less drastic suggestions of Secretary of War Knox, only confirmed the dangers imposed by the military clauses of the new constitution. By 1787–88 both men had become ardent Federalists, and everyone assumed that if the Constitution were ratified, Washington would be president. The Antifederalists had strong reasons to fear that the new government might indeed destroy the state militias.

Thus, the opponents of the Constitution proposed amendments to limit the national government, including many changes in the military structure. As we know, these proposals failed to gain any substantial support in Congress.

## VIII. THE DEBATE IN CONGRESS AND THE LANGUAGE OF THE AMENDMENT

There is frustratingly little of the Congressional debates over the

154. *Id.*

155. *Id.*

156. Brutus VIII, N.Y. J., Jan. 10, 1788, reprinted in 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 57, at 335, 336.

157. *Id.* at 335.

158. Washington, *supra* note 141, at 374.



Bill of Rights available to modern scholars. The Senate for this period kept no records of its debates, but only records of bills, motions, and votes. The House spent little time on the drafts that became the Second Amendment. The debate began with Madison's first draft of the proposed amendment, which stated that, "A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms."<sup>159</sup>

The draft language suggests that the framers saw this essentially as an amendment about the militia; any right to own weapons was a collective right, derived from the right of each state to maintain a "well regulated militia." Thus, the amendment talked about "the body of the people." In drafting the proposed amendment, Madison was interested in letting the Antifederalists know that the militias were secure, but also in warning the states not to persecute people on account of their religious beliefs. Congressional debate over the Amendment centered almost entirely on the last clause, providing an exception from militia service for the "religiously scrupulous." In the end Congress scrapped this clause.

Most of the House debate was lead by two Antifederalists, Elbridge Gerry and Aedanus Burke. Burke wanted amendments, but not Madison's, which he asserted in this debate were "frothy and full of wind, formed only to please the palate; or . . . like a tub thrown out to a whale, to secure the freight of the ship and its peaceable voyage."<sup>160</sup> In addition to their concern over conscientious objectors, the Antifederalists in the debate made the usual, almost pro forma, attack on a standing army. Burke, for example, made a futile attempt to require a two-thirds vote in Congress to create a peacetime standing army.<sup>161</sup> In general the Antifederalists showed their deep fear of the national government. The Federalists, with the votes to back them up, said little.

The debaters never sought to clarify the meaning of the words "to keep and bear arms shall not be infringed." But, the

159. 1 ANNALS OF CONG., *supra* note 87, at 778. See the reprint of the House of Representatives debate of August 17, 1789, in 5 THE FOUNDERS' CONSTITUTION 210, 210 (Philip B. Kurland & Ralph Lerner eds., 1987).

160. 1 ANNALS OF CONG., *supra* note 87, at 774. On this issue, see generally Bowling, *supra* note 23. George Mason thought Madison's proposals were "[m]ilk & [w]ater propositions," while Senator Richard Henry Lee dismissed them as "not similar" to the amendments proposed by the Virginia Ratifying Convention. *Id.* at 233.

161. See Bowling, *supra* note 23, at 241.

overwhelming tenor of the debate is that the Congressmen perceived this discussion as concerning only the militia. The last clause, providing an exemption for pacifists, fits with this understanding. Nowhere in the debate is there the slightest hint about a private or individual right to own a weapon. This should not surprise us, for as one of the leading military historians of the period notes, “[i]n all the discussion and debates” over the Second Amendment, “from the Revolution to the eve of the Civil War, there is precious little evidence that advocates of local control of the militia showed an equal or even a secondary concern for gun ownership as a personal right.”<sup>162</sup> The records of the state courts and legislatures for this period reflect this conclusion, as numerous courts accepted the notion that to “bear arms” was a term solely connected to the militia and the military. As the Tennessee Supreme Court noted in 1840,<sup>163</sup> reflecting years of experience in the American colonies and states, “the object, then, for which the right of keeping and bearing arms is secured is the defence of the public.”<sup>164</sup> The term “bear arms” had a “reference to their military use.”<sup>165</sup> The court further noted that

A man in the pursuit of deer, elk, and buffaloes might carry his rifle every day for forty years, and yet it would never be said of him that he had borne arms; much less could it be said that a private citizen bears arms because he has a dirk or pistol concealed under his clothes, or a spear in a cane.<sup>166</sup>

Despite the failure of the House to explore the meaning of the term “bear arms,” this first draft does give us an important insight into the meaning of the term to “bear arms.” Some modern commentators try to separate this term from the first clause of the Second Amendment—“A well regulated Militia, being necessary to the security of a free States”—and argue for an independent federal right to carry (bear) guns. But, the text of the initial draft shows that this is not what the term “bear arms” meant at the time. Rather, the term can only have meaning if it is connected to militia service. Otherwise, the last clause of the proposed amendment—“but no person religiously scrupulous shall be compelled to bear arms”—would have had no meaning at all. Since no states at the time required people to carry weapons for personal use, it would have

162. Higginbotham, *supra* note 76, at 40.

163. *Aymette v. State*, 21 Tenn. 154 (1840).

164. *Id.* at 158.

165. *Id.*

166. *Id.* at 161. See generally Bellesiles, *supra* note 77, at 587.

been absurd to declare that “religiously scrupulous” people could not be “compelled to bear arms,” if “bear arms” only meant carrying weapons. No state at the time, nor any state before, had ever compelled people to carry weapons in their private capacity. Rather, state governments had only compelled people to carry weapons—to bear arms—as part of their militia duty. Thus, the term “bear arms” in the final amendment, if understood as it was at the time of the drafting, could *only* have been seen in the context of military service.<sup>167</sup>

Another insight to this interpretation comes from the New Hampshire convention. In order to placate the Antifederalist minority, the Federalists in the New Hampshire convention endorsed twelve proposed amendments, two of which dealt with military issues.<sup>168</sup> The tenth proposal provided “[t]hat no standing Army shall be Kept up in time of Peace unless with the consent of three fourths of the Members of each branch of Congress, nor shall Soldiers in Time of Peace be Quartered upon private Houses without the consent of the Owners.”<sup>169</sup> Congress ignored the first clause, which would have led to a significant diminution of national power. On the other hand, Congress endorsed the second clause and incorporated it into what became the Third Amendment.

The other military amendment proposed by the New Hampshire Federalists is more interesting. The twelfth, and last, on the New Hampshire list declared that “Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion.”<sup>170</sup> There are two ways we might interpret “disarm,” which of course is the opposite of “keep and bear arms.” If we took this to be an individual

167. The earliest use of “bear arms” supports the notion that the phrase has a military meaning. Thus, in *Beowulf*, we find:

As I am informed that this unlovely one  
Is careless enough to carry no weapon,  
I abjure utterly the bearing of sword.  
With naked hands I shall grapple with the fiend,  
Fight to the death here, hater and hated!

BEOWULF: AN ADAPTATION BY JULIAN GLOVER OF THE VERSE TRANSLATIONS OF MICHAEL ALEXANDER AND EDWIN MORGAN 70 (Magnus Magnusson et al. eds., 1988). References to “taking arms” or “bearing arms” contemporaneous with the adoption of the Bill of Rights are also found in the context of military service. For example, see 1 WILLIAM ROBERTSON, *THE HISTORY OF THE REIGN OF THE EMPEROR CHARLES THE FIFTH* 316 (1857); *THE VOIAGE AND TRAVAILLE OF SIR JOHN MAUNDEVILE, KT.* 65 (J.O. Halliwell ed., Reeves and Turner 1883) (1725).

168. See *CREATING THE BILL OF RIGHTS*, *supra* note 15, at 17.

169. *Id.*

170. *Id.*

right, it would mean that Congress would have been unable to pass a federal law to disarm convicted felons or indeed people in the process of committing a crime. The Constitution gave Congress full legislative power over the national capital, the territories, and other property owned by the United States. Now, it would seem preposterous to believe that the New Hampshire Federalists, who, as “cautious supporters of the Constitution,”<sup>171</sup> had just voted to ratify the Constitution, wanted to strip Congress of all power to prevent crime in its jurisdiction and all power to remove guns from criminals, pirates, or others threatening the public order, unless they were in rebellion. However, if we see the language of “disarm any Citizen” as part of the notion of “bearing arms” for the militia, then the clause is suddenly reasonable and sensible. The New Hampshire Federalists were saying, in effect, that Congress cannot disarm the militias—the civilian based armies of the states—unless they “are or have been in Actual Rebellion.”<sup>172</sup> On another linguistic level this is the only interpretation that makes any sense. Surely New Hampshire could not imagine a single citizen, or even a handful of malcontents, being “in Actual Rebellion.” But, the citizens in the militia could be. Indeed, during Shays’s Rebellion, “Some militia units in the insurgent counties supported the rebels.”<sup>173</sup> Similarly, in New Hampshire “[a] less publicized confrontation had occurred” in which “angry debtors led by militia officers surrounded the building in Exeter where the legislature was in session.”<sup>174</sup> A day later, militia units from eastern New Hampshire “dispersed the insurgents.”<sup>175</sup>

Thus, the people in New Hampshire understood, from their own recent history, that the militia could turn on the government and might have to be disarmed. But surely they did not fear any government that could take weapons out of the hands of criminals, pirates, and the like. Thus, the only plausible understanding of New Hampshire’s use of the term “disarm” is in the context of the militia.

In this context, to “keep and bear arms” is a right that is intrinsically collective—it is the right of the community to “keep and bear arms” for the purposes of maintaining a “well regulated” militia. The final insight to the meaning of the language of the Amendment

171. Lawrence Delbert Cress, *A Well-Regulated Militia: The Origins and Meaning of the Second Amendment*, in *THE BILL OF RIGHTS: A LIVELY HERITAGE*, *supra* note 97, at 55, 62.

172. *CREATING THE BILL OF RIGHTS*, *supra* note 15, at 17.

173. Higginbotham, *supra* note 76, at 43.

174. *Id.* at 44.

175. *Id.*

comes from its structure. No other amendment explains its purpose. The First Amendment, for example, prohibits Congress from "abridging the freedom of speech"<sup>176</sup> but does not contain an explanation, such as "in order to secure open political debate." Nor in the Free Exercise Clause did Congress feel the need to say something like, "in order to prevent religious intolerance, Congress shall make no law . . . prohibiting the free exercise thereof." The Second Amendment is different. There were calls, such as those from the Pennsylvania minority, for protection of a personal right to own weapons for hunting and or other nonmilitary reasons. Congress clearly rejected this concept, limiting the right "to bear arms"—traditionally a phrase tied to military service—to collective service in the "well regulated Militia."

### IX. TO BEAR ARMS: A COLLECTIVE OR INDIVIDUAL RIGHT?

Sanford Levinson, in a provocative article,<sup>177</sup> dismisses the collective interpretation of the language in the Second Amendment with the clever argument that the term "people" must refer to individuals because that is how the term is used in the Fourth Amendment.<sup>178</sup> This analysis is, in the end, not terribly persuasive. He notes that the Fourth Amendment uses the term "people" but that "[i]t is difficult to know how one might plausibly read the Fourth Amendment as other than a protection of individual rights."<sup>179</sup> This surely makes sense. But does it prove that the term "people" in the Second Amendment must also refer to individual rights? We certainly know that words in the Constitution can have multiple meanings.

Consider, for example, the term "people" in the First Amendment—"Congress shall make no law . . . prohibiting . . . the right of the people peaceably to assemble . . ."<sup>180</sup> If it is hard to construe the word "people" in the Fourth Amendment to be anything but a reference to individuals, it is equally difficult to construe the term in the First Amendment as anything but a collective right. Clearly, the idea of the people assembling contemplates a large

176. U.S. CONST. amend. I.

177. Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

178. See *id.* at 645. The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV.

179. Levinson, *supra* note 177, at 645.

180. U.S. CONST. amend. I.

number of people and not a single person assembling.

Thus, linguistically, the term “people” in the Second Amendment might be interpreted “either way.” Standing alone, the phrase “the right of the people to keep and bear arms” could apply to individuals or collectively to “the people.” But, unlike the use of the word in the Fourth Amendment, the Second Amendment ties the term “people” to a collective entity, the “well regulated Militia” which is “necessary to the security of a free State.” This understanding is also supported by the original wording of the Amendment, which referred to the “body” of the people. Linguistically, the Amendment can easily be read to concern the “body” of the people. The Amendment does not say, “individually armed citizens, being necessary to the security of a free state . . . .” The Amendment explicitly refers to the “militia,” a collective organization—and a specific kind of militia at that—one that is “well regulated.” It is hard to imagine individuals being “well regulated” by the government. They are only “regulated” as a group.

Levinson also poses the clever query: “One might ask why the Framers did not simply say something like ‘Congress shall have no power to prohibit state-organized and directed militias.’”<sup>181</sup> But, we might just as cleverly turn Levinson’s question around. One might ask, if they intended to protect the individual right to own weapons, why didn’t the framers simply say something like, “Congress shall have no power to prohibit the private ownership of guns?” Indeed, that provision was what Antifederalists in much of the country asked for in their proposed amendments and truly *wanted* Congress to say. The fact that Madison refused to adopt such language—and that Congress did not amend the proposal to add such language—suggests that the Federalists who were in control of Congress in 1789 did not intend to create an individual right. Indeed, they added the explanatory clause at the beginning of the Amendment—“A well regulated Militia being necessary to the security of a free State”—to make certain that no one would misunderstand their intent.

The internal language of the clause also makes Levinson’s reading, and that of other individual rights proponents, seem absurd. If the right to keep and bear arms “shall not be infringed,” then the national government presumably has no power, in any of its many jurisdictions, to disarm anyone. A comparison with the Pennsylvania state constitution of 1776 illustrates this point. That constitution says

181. Levinson, *supra* note 177, at 645.

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.<sup>182</sup>

Under the Pennsylvania state constitution, the right to bear arms "for defense of themselves" can be seen as an individual right, but it is strictly limited to self-defense.<sup>183</sup> It does not give one the right to use arms to commit crimes, to intimidate others,<sup>184</sup> to hunt, or even for recreational target practice. Presumably, as with most other "rights," the legislature could impose reasonable limitations on what constitutes a weapon of "defense."

Unlike the Pennsylvania Constitution of 1776, the language of the Second Amendment is absolute: "shall not be infringed." If read as an individual right, criminals, convicted felons, pirates, or revolutionaries could all be armed in the District of Columbia or in the federal territories. Pirates could load up their ships on the Potomac River and sail out to sea. Hunters could trample through Yellowstone or some other national park, guns in hand.<sup>185</sup> Anyone might board a plane, gun in hand, or carry a weapon into Congress, the White House, or any other federal building. After all, what better place to exercise your Second Amendment rights, than in front of your representatives or even in the courts of justice? As absurd as this would be, such people could not be "disarmed," at least until they began to commit a crime, if the Second Amendment creates an individual right to bear arms. Taken to its logical extreme, we might argue that just as a federal felon, serving time, has some First Amendment rights to press, petition, and religion, or Eighth Amendment rights not to be subjected to cruel punishment, so too, a prisoner might claim some Second Amendment right. The Fifth Amendment allows the taking of liberty under some circumstances, while the Second, if read as an individual right, does not.

182. PA. CONST. of 1776, A DECLARATION OF RIGHTS OF THE INHABITANTS OF THE COMMONWEALTH, OR STATE OF PENNSYLVANIA art. XIII, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 3082, 3083 (Francis Newton Thorpe ed., 1909).

183. In the context of the clause it might, however, be seen as a collective right to defend the community, against rioters or organized criminals, and thus imply that the militia could be called out for more than defense of the state.

184. Or to frighten a former spouse. *See* United States v. Emerson, 46 F. Supp. 2d 598 (N.D. Tex. 1999).

185. The government could prohibit hunting on federal lands, but, presumably, could not prohibit carrying weapons on federal lands.

But, as we have seen, Madison and the huge Federalist majority in the First Congress rejected any amendments that undermined the power of the national government. Is it conceivable that they failed to follow this philosophy with the Second Amendment? That they meant to implement the demands of the Pennsylvania Antifederalists, and in effect, eviscerate the power of the national government? Such an argument goes against the entire history of the period.

Hence, the Second Amendment prevents Congress from abolishing the organized or “well regulated” state militias. Today such an argument may seem almost silly. Why, modern Americans might ask, would Madison bother to promise not to abolish the state militias, and why would the Antifederalists think this was some sort of victory, or even a “tub” thrown at them? Madison and his colleagues provided for an Amendment dealing with the militia because most of the states that proposed amendments wanted some guarantee that Congress would not destroy their militias. The states understood that the power to regulate might imply the power to destroy. John DeWitt, Luther Martin, and other Antifederalists certainly feared that the national government would indeed abolish the state militias. Washington’s 1783 *Sentiments on a Peace Establishment* did not call for the outright abolition of the militias, but it did call for them to take a clearly secondary role in the defense of the nation.<sup>186</sup> Moreover, Washington proposed skimming the best militiamen for national service and leaving in the state militias only those “who from domestic Circumstances, bodily defects, natural awkwardness or disinclination, can never acquire the habits of Soldiers.”<sup>187</sup>

None of the Federalist framers saw it that way; they had no desire to destroy the state militias, just as they had no desire to impose a national church on the people, institute cruel and unusual punishments, or deny people the right against self-incrimination. Thus, a militia-protecting amendment was completely within the scope of Madison’s desire to add amendments that would not affect “the structure & stamina of the Govt.”<sup>188</sup> He “limited” his proposed amendments “to points which are important in the eyes of many and can be objectionable in those of none.”<sup>189</sup> A guarantee that the states could maintain well-regulated militias—militias which remained

186. Washington, *supra* note 141, at 389.

187. *Id.*

188. Letter from James Madison to Edmund Randolph, *supra* note 89, at 219.

189. *Id.*



subject to congressional control and federal deployment—did not conflict with this goal.

Significantly, Madison also limited his “tub” to the Antifederalists by having the national government only promise not to dismantle the organized, “well regulated” state militias. This phrase, “well regulated” further shows that the Amendment does not apply to just anyone. It does not apply to the “unorganized” militia, because that militia is certainly not “well regulated.” Nor can it apply to individual citizens who might choose to keep and bear arms “for the defense of themselves.” The Pennsylvania dissenters had wanted this right, but did not get it. A new mob, led by a new Daniel Shays, could be disarmed by the national government. Nor does the Amendment apply to the hunter and sportsman. The majority in the First Congress intended to reassure the Antifederalists that the national government would not disarm those who are trained by the state militia and in that body—the “well regulated Militia.”

Supporters of an individual right interpretation of the Amendment place great emphasis on the term “keep and bear arms.” However, this is clearly a term of art, applied to militias in England and America, just as criminal indictments at the time used the term of art “with force and arms.” Beyond that, Madison wanted to reassure the states that their militias would be armed at all times. Without such a clause, Congress might allow the militias to continue, but nevertheless disarm them, thus rendering them impotent. This is what Great Britain had sought in 1775. The British government did not ban the colonial militias—after all, they were necessary in case of an invasion, Indian war, or rebellion. But if the militias were disarmed, as the lobster backs tried to do at Concord, they would be unable to resist British policy; yet they could nevertheless be called out, and armed, to protect the empire. The battle on Lexington Green was fought to prevent the *disarming* of the local militias, not their elimination.

The phrase “keep and bear arms” may also reflect the contemporary disputes over who would provide arms for the state militias. As noted above, at the Convention, Federalists like Rufus King argued that Congress had the power to prescribe the kind of weapons the militia might use and even to buy the weapons for the militia. As Michael Bellesiles has shown, the militias at this time were often poorly armed, most white American men did not own arms, and

there was great resistance among the people to having to arm themselves.<sup>190</sup> Bellesiles has exposed and undermined the myth that most Americans owned a firearm. Another indication of the lack of arms in private hands was a law adopted by Virginia, as the Revolution was winding down, to require that those mustered out of service return their weapons to the state.<sup>191</sup>

During the ratification debates, the proponents of the Constitution reiterated the point that Congress would become the supplier of weapons for the states. Noah Webster, for example, pointed out that Congress had the “power to provide for the organizing, arming, and disciplining the militia,” although he also noted that Congress could only call out the militia under certain well-defined circumstances.<sup>192</sup> Presumably, the power to “arm” the militia also included the power not to “arm” the militia. Thus, the Second Amendment guaranteed that the militias would be armed to head off the exaggerated fears of some Antifederalists, who believed the Constitution was the prelude to a military takeover by a standing army led by the Senate and the president. Not only did Congress lack the power to disarm the “well regulated” state militias, but if Congress failed to provide arms for them, presumably the states could appropriate money for their own arms or even order militia members to provide their own weapons.

## X. MODERN POLICY AND THE SECOND AMENDMENT

Neither in 1787 nor in 1789 did Madison and the Federalists have any interest in disarming the state militias, just as they had no interest in imposing a national religion on the American people or denying accused criminals the right to a jury trial. Thus, when the Antifederalists demanded explicit protections on these and other points, Madison was willing to comply. He was not, however, interested in changing the power relations created at the Philadelphia Convention, or in undermining the nation’s ability to defend itself from enemies and criminals, foreign or domestic.

Thus, the Second Amendment protected the right of the states to

190. See Bellesiles, *supra* note 143, at 428-30.

191. See An act for the recovery of arms and accoutrements belonging to the state, Act of Oct. 21, 1782, ch. XII, 1782 Va. Acts 132.

192. NOAH WEBSTER, AN EXAMINATION INTO THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION PROPOSED BY THE LATE CONVENTION HELD AT PHILADELPHIA (1787), reprinted in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, at 29, 52 (Paul Leicester Ford ed., 1888).

maintain and arm their own militias, as long as they were "well regulated" and ultimately under federal control. The Amendment was not a suicide clause allowing revolutionaries to create private militias to overthrow the national government or even to impede the faithful execution of the law. The Amendment prevented Congress from abolishing the organized, well-regulated militias of the states.

The Second Amendment does not protect the individual right to hunt deer, collect antique weapons, go to the firing range, or even own a licensed pistol. Proponents of the private ownership of hunting rifles, fishing rods, skinning knives or pistols need not fear this analysis of the Second Amendment. Such a constitutional protection was not needed then, and it is not needed today.

Oliver Ellsworth, who would later be Chief Justice of the United States, found the whole notion of specific protections of liberties silly. Frustrated by the constant demands for an endless laundry list of amendments, he argued that

*There is no declaration of any kind to preserve the liberty of the press, etc. Nor is liberty of conscience, or of matrimony, or of burial of the dead; it is enough that Congress have no power to prohibit either, and can have no temptation. This objection is answered in that the states have all the power originally, and Congress have only what the states grant them.*<sup>193</sup>

Could Congress ban hunting rifles? It would be politically impossible and constitutionally absurd, although it would be possible and reasonable to ban hunting, and hunting rifles, in national parks. May Congress regulate the ownership, sale, use, and interstate transportation of firearms? Surely it can within the constitutional limits of general federal police and commerce powers, just as the states or the national government (where it has regulatory or police power) can regulate burial, marriage, or child custody. But, just as regulations of marriage or burial must be reasonable,<sup>194</sup> so too would regulations of firearms.

193. A Landholder VI, [Oliver Ellsworth], *To The Landholders and Farmers*, CONN. COURANT, Dec. 10, 1787, reprinted in 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 139, at 487, 490.

194. See *Loving v. Virginia*, 388 U.S. 1 (1967).