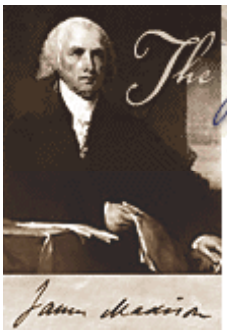

The James Madison Research Library and Information Center

Bill of Rights

- History
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History: A Drafting and Ratification of the Bill of Rights in the Colonial Period

As heirs to the majestic constitutional history of England, the intellectual and political leaders of the new Colonies intended nothing less than to incorporate into their new government the laws and liberties of Englishmen, including the well-established right of the law-abiding citizen to keep and bear arms.

Yet, while engaged in bringing about one of the most radical political changes in the history of the Western world, the Founding Fathers remained conservative republicans who valued tradition and their English heritage — the dynasties of the Angles, Saxons, Picts, and Jutes; 1066 and the Norman Conquest; the Magna Carta; the reigns of the Norman, Lancastrian, Plantagenet, Tudor, Stuart, and Hanoverian kings, the Civil Wars; the Restoration; the Glorious Revolution; and, most particularly, the Age of Enlightenment and the Whig philosophies that came to dominate English political thought during the hundred years preceding the American Revolution.

They revered English customs and law. Chief Justice Howard Taft observed that:

> "[t]he Framers of our Constitution were born and brought up in the atmosphere of the common law, and thought and spoke its vocabulary. They were familiar with other forms of government, recent and ancient, and indicated in their discussions earnest study and consideration of many of them; but, when they came to put their conclusions into the form of fundamental law in a compact draft, they expressed themselves in terms of the common law, confident that they could be shortly and easily understood."

This analysis by Chief Justice Taft explains, in part, the confusion that has developed, especially in this century, over the interpretation of the language of the Second Amendment. The meaning of such words as "militia," "keep arms," "bear arms," "discipline," "well regulated," and "the people" was the meaning of these words as they were used in the English common law of the sixteenth through the eighteenth centuries — not as they are used today. As Chief Justice Taft further commented:

> "The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted."

Thomas Jefferson, by no means an imprecise thinker, was well aware of this consideration. In commenting upon how the Constitution should properly be read, he said:

> "On every question of construction let us carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning can be squeezed out of the text, or invented against it, conform to the probable one which was passed."

Yet despite this clear evidence, gun control and prohibition proponents attempt to squeeze out of the text of the Second Amendment the meaning that only a "collective" — not an individual — right is guaranteed by the amendment. They argue that the words of the amendment allegedly apply only to the group in our society that is "well regulated" and "keeps and bears arms," the National Guard. But they are wrong.

David I. Caplan, who has examined this issue in depth, provides this analysis:

> "In colonial times the term 'well regulated' meant 'well functioning' — for

> this was the meaning of those words at that time, as demonstrated by the following passage from the original 1789 charter of the University of North Carolina: 'Whereas in all well regulated governments it is the indispensable duty of every Legislatures to consult the happiness of a rising generation…' Moreover the Oxford English Dictionary defines 'regulated' among other things as 'properly disciplined;' and it defines 'discipline' among other things as 'a trained condition.'"

Privately kept firearms and training with them apart from formal militia mustering thus was encompassed by the Second Amendment, in order to enable able-bodied citizens to be trained by being familiar in advance with the functioning of firearms. In that way, when organized the militia would be able to function well when the need arose to muster and be deployed for sudden military emergencies.

Therefore, even if the opening words of the Amendment, "A well regulated militia…" somehow would be interpreted as strictly limiting "the right of the people to keep…arms"; nevertheless, a properly functioning militia fundamentally presupposes that the individual citizen be allowed to keep, practice, and train himself in the use of firearms.

The National Guard cannot possibly be interpreted as the whole constitutional militia encompassed by the Second Amendment; if for no other reason, the fact that guardsmen are prohibited by law from keeping their own military arms. Instead, these firearms are owned and annually inventoried by the Federal government, and are kept in armories under lock and key.

With this preliminary understanding, let's examine how the Amendment came into being and was then ratified into the U.S. Congress.

The First Continental Congress, which convened at Carpenters' Hall in Philadelphia on September 5, 1774, was the first major political gathering of the American Colonies. This Congress was to become the *de facto* revolutionary government that directed the war for independence.

The principal outcome of this first meeting was the issuance of a petition called the Declaration of Rights and Grievances, an appeal to King George III to restore harmony between Britain and the Colonies. At that time, there was considerable discord between them, chiefly because of the passage by the British Parliament in March 1774 of the so-called Intolerable Acts, a series of punitive measures directed against the Colony of Massachusetts for its rebellious conduct, which had been recently evidenced by the Boston Tea Party. Before adjourning, the First Continental Congress also arranged for a second Congress to take place in Philadelphia if the king failed to respond favorably to their petition.

As it turned out, not only did George III fail to respond favorably, he began preparations for war. In August 1775 he issued a proclamation "for suppressing rebellion and sedition" in the Colonies and hired 20,000 Hessian mercenaries, who were soon sent to America.

The Second Continental Congress convened on May 10, 1775. Delegates to this meeting — including George Washington, Benjamin Franklin, and Thomas Jefferson — began to organize the colonies for war. George Washington was commissioned to organize a continental army, and the Congress formulated regulations for foreign trade, issued paper money, and sent emissaries abroad to negotiate with foreign powers for financial, diplomatic, and military assistance. Jefferson, aided especially by John Adams, drafted and Congress adopted the Declaration of Independence on July 4, 1776; and on November 15, 1777, Congress drafted and adopted the Articles of Confederation, which were ratified by the thirteen colonies in 1781.

> During much of this period, armed combat had been taking place between the colonists and the British army and its mercenaries. The conflict ended with the surrender of the British forces at Yorktown on October 19, 1781.
>
> Subsequently, the states recognized that the Articles of Confederation were flawed, impractical, and urgently in need of amendment, Therefore, the States sent delegates to a convention that convened at the State House in Philadelphia on May 25, 1787.
>
> The Convention was attended by 55 delegates from twelve states, all prominent political figures of the time, including such luminaries as James Madison, George Mason, Benjamin Franklin, and Alexander Hamilton. (John Jay and Thomas Jefferson did not attend, as they were on diplomatic missions abroad; nor did Patrick Henry or Samuel Adams, both of whom opposed the formation of a strong central government for the new nation.) The delegates soon realized that merely amending the Articles of Confederation would not solve the problems facing the States and that a new governing document was required.
>
> After four months of debate, the Constitution was drafted, signed, and then sent to the individual states for ratification, as required by its Article VII. This Article provided that the Constitution could become effective only after ratification by at

least two-thirds of the states.

In the months before and after the Constitutional Convention, including the ratification period that lasted until June 21, 1788 (when New Hampshire became the ninth state to ratify, fulfilling the two-thirds majority ratification requirement), numerous constitutional debates took place in all the states, accompanied by a steady stream of commentary in the popular press about the issues being debated.

It came as no surprise that with all these politicians at work, literally thousands of pages of debate proceedings, records, and suggested amendments were produced.

Reading their words, one tries to imagine what it would be like to be in their company and share in what they must have been feeling. Surely they must have been proud of their stunning victory over the British and full of optimism for their future as free people in a free country. But at the same time, they must have felt humbled, uncertain, and fearful of the momentous task that lay before them. One also begins to realize that even though only fourteen years had gone by, for these most determined men it was likely that the smell of gunpowder from Lexington and Concord was still in their noses.

THE FEAR OF STANDING ARMIES

Of all the powerful memories and emotions the Founding Fathers brought to the constitutional debates, apparently none was stronger than their fear of standing armies. As David Young has observed: "The necessity of an armed populace, protection against disarming of the citizenry, and the need to guard against a select militia and assure a real militia which could defend liberty against any standing forces the government might raise were topics interspersed throughout the ratification period."

Yet, in the absence of a standing army, how was the nation to defend itself from external or internal aggression? The Founding Fathers understood this would be accomplished by a *militia*. But what kind of militia?

Here is a typical Anti-federalist view, expressed by Richard Henry Lee (writing under the pseudonym "The Federal Farmer"):

> "A militia when properly formed, are in fact the people themselves, and render regular troops in great measure unnecessary. The powers to form and arm the militia, to appoint their officers, and to command their services, are very important; nor ought they in a confederated republic to be lodged, solely, in any one member of the government. First, the constitution ought to secure a genuine [ ] and guard against a select militia, by providing that the militia shall always be kept well organized, armed, and disciplined, and include, according to the past and general usage of the states, all men capable of bearing arms; and that all regulations tending to render this general militia — useless and defenceless, by establishing select corps of militia, or distinct bodies of military men, not having permament interests and attachments in the community is to be avoided. …To preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them…."

Regarding the freedom to keep and bear arms, of particular concern to the Anti-federalists was that a central government would, over time, convert and model from the corpus of the general militia (traditionally meaning all able-bodied men between the ages of roughly 16 and 60) a "select" militia (men typically between the ages of 18 and 21, say, who would receive more training and be better equipped than the rest of the people).

As far as the Anti-federalists were concerned, such a skilled and select militia would, for all practical purposes, be the same as the standing army that they so feared and detested. They were aware that in 1783 George Washington, and a year later Baron Von Steuben (the Prussian expatriate who had served as Washington's inspector general), had proposed a "peace establishment," which at that time would have been the equivalent of a select militia; and that Alexander Hamilton, one of the leading Federalists, had advocated a select militia in The Federalist Papers, No. 29. (It is interesting to note, however, that Hamilton's proposal assumed that the general population would be armed.)

But if the people were not to maintain a standing army, whence would come their defense against armed aggression? It would come, the Anti-federalists understood, through the existence in each state of a general militia, in which every able-bodied man aged 16 to 60, keeping his own arms and ammunition and trained (e.g., well regulated or disciplined) in their use, could answer the call to muster in defense of life and property.

Don B. Kates, one of our leading Second Amendment scholars, observes:

> "The 'militia' was the entire adult male citizenry, who were not simply allowed to keep their own arms, but affirmatively required to do so.… With slight variations, the different colonies imposed a duty to keep arms and to muster occasionally for drill upon virtually every able-bodied white man between the age of majority and a designated cut-off age. Moreover, the duty to keep arms applied to every household, not just to those containing persons subject to militia service. Thus the over-aged and seamen, who were exempt from militia service, were required to keep arms for law enforcement and for the defense of their homes."

THE REAL CONTROVERSY BETWEEN THE FEDERALISTS AND ANTI-FEDERALISTS

I initially concluded that the composition of the militia was soon to become the major issue in the struggle that would take place during the ratification period between the Federalists and the Antifederalists over whether the new Constitution should include a Bill of Rights. That appears to be a reasonable conclusion to reach, particularly as one reads the powerful and memorable rhetoric of the Anti-federalists such as that of Richard Henry Lee reprinted above.

But I soon discovered my initial impression was wrong. I had fallen into the trap that has ensnared so many who have misunderstood the nature of the struggle between the Federalists and the Anti-federalists — and that number includes those who believe in the "collective right" or "states right" interpretation of what the Second Amendment means; those who believe that the Second Amendment was drafted solely to satisfy the demands of the Anti-federalists for a general militia instead of a standing army.

The Anti-federalists — among them Richard Henry Lee, Elbridge Gerry, George Mason, Patrick Henry, and Samuel Adams — were militant advocates of the inclusion of a bill of rights in the Constitution. They were suspicious of the extraordinary powers that were to be granted to the federal government by a Constitution that lacked a bill of rights that could clearly and unequivocally protect certain freedoms.

Don Kates gave me a clearer appreciation of what the controversy between the Federalists and the Anti-federalists was all about:

> "While none of the Founders *liked* the idea of a standing army, the majority (Madison strongly included) believed it to be necessary. The Second Amendment was not a response to Anti-federalist criticism of the standing army. *All* the Bill of Rights were added because of a desire to disarm what Madison and the other Federalists saw as an Anti-federalist quibble, a strawman objection to the lack of a Bill of Rights which was intended to excite the fear and passion of the masses but which statesmen on both sides viewed as negligible. Madison just wrote up a set of principles — of truisms — in which *everybody* believed, and the Congress duly passed it as the Bill of Rights. Two of these truisms that got cobbled into one article were: that there is a natural right to be armed; and that militias are a good thing, a much better thing than a standing army, however necessary it may be."

The Federalists, whose early leaders in addition to Hamilton included John Jay, James Madison, and George Washington, were no less fearful of standing armies than were the Anti-federalists. However, the Federalists believed that the strong national government that the Constitution provided would be sufficient protection against the evil of a standing army and therefore advocated that it be ratified without change. In fact, some Federalists, of course, did support adding a bill of rights, but unfortunately the rules under which the proposed Constitution had been signed in Philadelphia prohibited any amendment to the document before ratification.

The Federalists' opposition to the inclusion of a bill of rights in the Constitution was founded, as David E. Young explains, upon their belief that "under the Constitution the people gave Congress only certain defined powers. It has no other powers. The powers given by the people were not intended for the purpose of violating any of the individual rights protected by the states' bill of rights. In fact, the powers being given to the federal government were being taken from the state governments where their rights were already protected. The total sum of powers of the new federal government and the state government would be exactly the same as the sum of the powers of the old government and the state government. Therefore a bill of rights in the federal Constitution would serve no useful purpose as Congress was given no powers to violate the individual rights of the citizens."

Don Kates continues this line of thought:

> "[Today] both sides in the modern Second Amendment debate recognize that Madison proposed, and the Federalist First Congress passed, the Bill of

> Rights in response to Anti-federalist criticism of the Constitution. Unlike the individual right view [the view of those who believe the Second Amendment protects an "individual" right to keep and bear arms], however, the states' right view presupposes the Amendment's hostility to parts of the Constitution to which the Anti-federalists were deeply opposed. The Anti-federalists had opposed ratification of the Constitution on two very different kinds of grounds. One involved deep suspicion about specific provisions, particularly those allowing a standing army and providing for federal supervision of the militia. Entirely independent of those specifics, the Anti-federalists, and many other Americans, were critical of the failure to append to the Constitution a charter of basic human rights that the federal government could not infringe under any circumstances.
>
> "The individual right view sees the Second Amendment, and the Bill of Rights in general, as responding to this second kind of criticism. During the ratification debate, the Federalists vehemently denied that the federal government would have the power to infringe freedom of expression, religion, and other basic rights – expressly including the right to arms. In this context, Madison secured ratification by his commitment to support the addition by amendment of a charter that would guarantee basic rights. But that commitment extended only to safeguarding the fundamental rights that all agreed should never be infringed. It did not involve conceding any issue on which the Federalists and Anti-federalists disagreed, i.e., the latters' opposition to specific provisions of the Constitution. Indeed, a few days after their submission, Madison said that he had 'deliberately proposed amendments that would not detract from federal powers, among them a right for the citizenry to be armed.'
>
> "The Second Amendment, then, was a response to the perceived lack of individual rights guarantees, not, as states' right proponents contend, a reaction to the standing army and militia control provisions of [the original Constitution]. The latter source of Anti-federalist wrath was simply not addressed by the Second Amendment. Nothing on the face of the Amendment deals with [those] concerns; certainly Madison did not see it as changing those portions of the Constitution. The Anti-federalists were not placated by the Amendment; when the proposed Bill of Rights reached the Senate, they unsuccessfully attempted to amend or repeal the offending clauses of [the original Constitution]."

It is revealing that in the thousands of pages of proceedings that were published in the course of the debates that took place in the state and federal legislatures before the drafting of the bill of rights and throughout the ratification period, little mention is made of the individual right to keep and bear arms. This indicates, I think it is fair to say, that whatever their disagreements about the inclusion of a bill of rights in the Constitution, the Federalists and Anti-federalists were unanimous in their support of an individual right to keep and bear arms. They were also unanimous in assuming that "the right of the people to keep…arms" included the individual right to keep ordinary personal arms for armed self- and community-defense, especially against burglars, robbers, and rapists.

This lack of understanding of the nature of the controversy between the Federalists and the Anti-federalists is one of the two principal reasons, I believe, why the proponents of gun control have reached the erroneous conclusion that the Second Amendment guarantees only a "collective right" or "states' right" to keep and bear arms.

Whatever the merits of the Anti-federalists' cause, we know now that the Federalists persevered in the controversy and the Bill of Rights was added to the Constitution. When the first U.S. Congress convened on March 4, 1789, 103 proposed amendments had been submitted by the states to be considered for inclusion in a bill of rights. Congress reduced that number to twelve, and these were sent back to the states for ratification. Two amendments failed to be ratified, and the remaining ten, now called the Bill of Rights, were ratified on December 15, 1791.

THE RIGHT OF SELF-PROTECTION

The second principal reason that the intent of the framers of the Second Amendment is misunderstood in some quarters today, I think, is the failure to appreciate how vitally important to them was the right to possess arms, not only for service in the militia, but for *self-protection*.

To understand how the duty and right of self-protection were viewed by the Founding Fathers — as well as the general population — of the American Colonies in the late eighteenth century, it may be helpful to take a look at some of the realities of life at that time. First. as David Young reports,

> "Most Americans were accustomed to having their individual rights protected from violation from the government because approximately two-thirds of the population of the United States lived in states with constitutional bills of rights. In most of the other States some individual rights were protected in the state constitutions…. An armed populace was guaranteed in one way or another in every bill of rights of the original states [of those seven states — Virginia, Maryland, Delaware, New Hampshire, Pennsylvania, North Carolina, Massachusetts (and later Vermont, after it was recognized as a separate state in 1791) — that chose to draft one]. These provisions were the early progenitors of the Second Amendment, since it was the state bills of rights which were cited when the necessity of adding a bill of rights limiting the federal government was discussed later during the controversy over ratification of the United States Constitution."

Second, whether for frontier engagements with hostiles, for hunting, or for duty in the militia, practically the entire adult male population was armed. We know that many of the Founding Fathers, including George Washington, Thomas Jefferson, and George Mason, were gun collectors. Many had served in armed combat during the Revolution and presumably had brought their weapons home upon the cessation of hostilities; a large number, of course, were hunters; and some were even marksmen. James Madison, for example, boasted that he could hit a small target at 100 yards...but he admitted that he was far from the best marksman.

Third, there were no police. just as in England at the time (which had no police force until 1829), America had no police during the colonial period (the first American police force was not organized until 1845). As Don Kates points out, "Even then [in England and America] the police were forbidden arms, under the view that if these were needed they could call armed citizens to their aid." (Ironically, the only gun control in nineteenth century England was the policy of forbidding police to have arms while on duty.)

Fourth, Americans (and their English cousins) were keenly aware of what could befall an unarmed populace. The historical example probably most familiar to eighteenth-century Englishmen and Americans was the persecution that drove thousands of Huguenots to the shores of both countries. As the historian Barbara Tuchman has noted:

> "Among the numerous tribulations visited in the 1690s upon the [unarmed] Huguenots in order to compel them to convert [to Catholicism], the most atrocious – and effective — were the dragonades, or billeting of dragoons on Huguenot families with encouragement to behave as viciously as they wished. Notoriously rough and undisciplined, the enlisted troops of the dragoons spread carnage, beating and robbing the householders, raping the women, smashing and wrecking and leaving filth…."

This Huguenot lesson was reinforced in the Colonies with the licentious and outrageous behavior of the military sent among them by the British during the decade of protest and turmoil that preceded the Revolution.

Papers throughout the Colonies began printing a regular series called the "Journal of Occurrences," which detailed outrages alleged to have been committed by British troops in Boston:

> "Dec. 12, 1768. A Married Lady of this Town was the other Evening, when passing from one House to another, taken hold of by a Soldier; who other ways behaved to her with great rudeness…. Another Woman was pursued by a Soldier into a House near the North End, who dared to enter the same, and behave with great insolence…."

In fact, "throughout the eighteenth century, criminal offenses by English soldiers, sailors, and hired foreign mercenaries in the Colonies were a constant occurrence and a subject of constant antagonism between Americans and the English military, who refused to punish their men or to turn them over to local justice. As a result of these experiences, in the Anglo-American legal tradition, as the Founding Fathers understood it [even though there was no police force] the very idea of empowering government to place an armed force in constant watch over the populace was vehemently rejected as being a model of French Catholic despotism" [Tuchman].

Fifth, they had learned their law from the English common law, Particularly from the writings of one of their principal mentors, William Blackstone. According to Kates,

> "[Blackstone] placed the right to arms among the 'absolute rights of individuals at common law,' those rights he saw as preserving to England its free government and to Englishmen their liberties. Yet, unquestionobly, what Blackstone was referring to was the individuals' rights to have and use arms for self-protection. He describes the right to bear arms as being 'for self-preservation and defence,' and self-defense as being 'the primary law of

> nature [which cannot be taken away by the law of society] — the natural right of resistance and self-preservation, when the sanctions, of society and laws are found insufficient to restrain the violence of oppression.'
>
> "This background suggests why Blackstone saw political overtones in the right to arms, coupling his discussion of it to rights that are plainly political in nature. It helps to explain why in the Bill of Rights the right of arms [of the Second Amendment] is preceded by the rights of religion, expression, press and petition [of the First Amendment], then followed by the guarantee against quartering soldiers [of the Third Amendment], and then followed, in turn, by protection against unreasonable searches and seizures [of the Fourth Amendment]."

Consider how these first four amendments join together to form an umbrella of individual protection. As Kates concludes, "Not only are these rights phrased in substantially identical terms (the First, Second and Fourth Amendments all speak in terms of rights of 'the people'), but their roots [in the constitutional and common law of England], and the situations in which they were visualized as operating, are closely identified."

Thus we see that as a result of several powerful influences — their Anglo-American philosophical heritage, their education in the English common law, and the impact of the realities of colonial life upon the daily conduct of their lives — "[t]o the Founders and their intellectual progenitors, being prepared for self-defense was a moral imperative as well as a pragmatic necessity."

> "In the tradition from which the Second Amendment derives it was not only the unquestioned right, but a crucial element in the moral character of every free man that he be armed and willing to defend his family and community against crime. This duty included both individual acts and joining with his fellows in hunting criminals down when the hue and cry went up, as well as the more formally organized posse comitatus [literally, the power or authority of the county] — a body of persons summoned by the sheriff to assist in preserving the public peace.

And this leads, rather logically and naturally, I think, to the clear and unequivocal words of the Second Amendment. The Founding Fathers intended that the people possess a right to be armed for duty in the general militia, as well as a right to keep and bear arms for their self-protection. In other words, for their generation and all succeeding generations of free Americans, they intended that every man should be armed.

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That's Not What They Meant by Wayne LaPierre

[excerpts from *Guns, Crime & Freedom*, by Wayne LaPierre (Regnery, 1994)]

> *"[The NRA] should either put up or admit there is no Second Amendment guarantee... We are confident in our challenge because there is no confusion in the law on this issue."*
>
> R.William Ide III
> *PresidentAmerican Bar Association*
> *April* 15, 1994
>
> *"A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."*
>
> SecondAmendment
> U.S. Constitution

A common claim of the anti-gun lobby is that the Founding Fathers never meant that *individuals* should be armed; they *only* intended for the Second Amendment to apply to a *militia,* such as the National Guard.

These self-proclaimed interpreters of the Constitution also ignore the

Second Amendment's specific reference to "the right of the people." The fact that the "rights of the people" appears in the Fourth, Ninth, and Tenth Amendments as well--and that the courts have ruled repeatedly that these rights belong to individuals--matters little to them. They retreat to their standard charge that the Founding Fathers never intended for the people to have the right to keep and bear arms.

Even a casual reading of our Founding Father's works would prove these foes of the Second Amendment wrong. Volumes upon volumes of articles, pamphlets, speeches, and documents that laid the foundation for the Bill of Rights clearly define the founders' purpose, including what they intended with the Second Amendment.

In pre-revolution America, the threats posed by a standing British army loomed large in the minds of the colonists. Resistance was widespread. In response to the dissent, the British increased their military presence. Two years later, in 1770, unarmed citizens were gunned down in the streets of Boston, in what became known as the Boston Massacre.

The Boston Massacre was the fuse that lit the powder keg of debate over the right of the people to be armed. ironically enough, the colonists did in fact have the right to be armed under English common law. John Adams, then serving as a defense counsel for one of the British soldiers who participated in the shooting, acknowledged this in his opening argument:

> Here, every private person is authorized to arm himself, and on the strength of this authority, I do not deny the inhabitants had a right to arm themselves at that time, for their defense, not for offense ....

With the courts of the time affirming the colonists' right to keep and bear arms, the British oppressors were placed between the proverbial "rock and a hard place." From that point on, quelling dissent would involve the denial of a basic right afforded all British citizens.

Nonetheless, the British proceeded down a path that could only lead to revolution. Not only did the British strengthen their military chokehold on Boston, they instituted a program of arms confiscation. Citizens could leave the city only upon "depositing their arms with their own magistrates."

British confiscation of arms focused the attention of our Founding Fathers on the threats posed by a standing army quartered among the people, and the necessity of having an armed citizenry to prevent the tyranny of such an occupying force.

No doubt inspired by the Boston arms confiscations, George Mason, the subsequent co-author of the Second Amendment, wrote in his Fairfax County Militia Plan:

> ... A well-regulated Militia, composed of the Gentlemen, Freeholders, and other Freemen was necessary to protect our ancient laws and liberty from the standing army ... And we do each of us, for ourselves respectively, promise and engage to keep a good Fire-lock in proper order & to furnish Ourselves as soon as possible with, & always keep by us, one Pound of Gunpowder, four Pounds of Lead, one

> Dozen Gun Flints, and a pair of Bullet Moulds, with a Cartouch Box, or powder horn, and Bag for Balls.

The anti-gun lobby devotes considerable intellectual energy to the definition of "militia" as it appears in Mason's writings. Mason, however, made a very clear distinction between a "standing army," such as a guard unit, and a "militia," composed of private citizens. The anti-gunners nevertheless claim that the militia refers to a national guard, not to the citizenry at large. To eliminate any doubt, however, Mason made his point clear in other writings as, for example, when he said, "To disarm the people [is] the best and most effectual way to enslave them."

Mason's sentiments were echoed by Samuel Adams who admonished the uneasy colonists that:

> ... It is always dangerous to the liberties of the people to have an army stationed among them, over which they have no control ... The Militia is composed of free Citizens. There is therefore no Danger of their making use of their power to the destruction of their own Rights, or suffering others to invade them.

In this passage, Samuel Adams further clarified Mason's thinking on the power of government in respect to the armed citizen: rights are sacred when the beneficiaries of those rights are entrusted with their safekeeping*, and have the means to do so.*

Our Founding Fathers clearly understood that, once armed, Americans would defend their freedoms to the last breath. Nowhere was this notion more evident than in Patrick Henry's "Give me liberty, or give me death" speech. The context of that oration – the importance of an armed population – has unfortunately been lost in today's "politically correct" anti-gun climate. Yet, Henry's words are there to defend the embattled Second Amendment. When speaking of revolution, Henry proclaimed:

> They tell us … that we are weak--unable to cope with so formidable an adversary. But when shall we be stronger? ... Will it be when we are totally disarmed, and when a British guard shall be stationed in every house? ... Three million people, armed in the holy cause of liberty ... are invincible by any force which our enemy can send against US.

Patrick Henry not only issued this warning, he acted upon it. Following the British attempt to seize arms and ammunition in Boston, and the subsequent historic skirmish at Lexington, the British seized gunpowder at Williamsburg, Virginia. The Hanover Independent Militia, led by Patrick Henry, was unable to retake the powder, but they forced the British to pay restitution. At this point, the British denial of the colonists' right to keep and bear arms became the driving force behind the armed resistance.

This fundamental right--the importance of an American's ability to defend his liberties--became the principal argument of our Founding Fathers for independence. Following the "shot heard round the world" at Lexington, Thomas Jefferson penned these words in the Virginia Constitution of 1776: "... No free man shall be debarred the use of

arms within his own land."

Nowhere are Jefferson's thoughts about the rights and powers of the citizenry more explicit than in the Declaration of Independence, which he had such a hand in writing: "Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it."

Certainly Jefferson, and his co-authors of the Declaration, preferred peaceful changes in government. But those four words – "the Right of the People" – state in plain language that the people have the right, must have the right, to take whatever measures necessary, including force, to abolish oppressive government.

Jefferson was not alone in sounding the call to arms. Henry, Adams, Washington all called upon the colonists to arm themselves. And the call was issued to all Americans, not only landowners and freemen. Thomas Paine, renowned for his treatise, *Common Sense*, urged religious pacifists to take up arms in his pamphlet *Thoughts on Defensive War:*

> ... The balance of power is the scale of peace. The same balance would be preserved were all the world not destitute of arms, for all would be alike; but since some will not, others dare not lay them aside ... Horrid mischief would ensue were one half the world deprived of the use of them ... the weak will become a prey to the strong.

In the case of the American Revolution, however, it was the strong that became the prey of the weak. Indeed, seasoned British troops were beleaguered by the armed and resolute citizens of the colonies.

Our Founding Fathers wasted no time in attributing this victory to the right of the people to keep and bear arms. James Madison, the father of the Second Amendment, congratulated his countrymen:

> Americans [have] the right and advantage of being armed – unlike citizens of other countries whose governments are afraid to trust the people with arms.

Indeed, it was President George Washington who urged the first Congress to pass an act enrolling the entire adult male citizenry in a general militia. The father of our country further urged that "A free people ought not only to be armed, but disciplined."

Washington's sentiments about the militia, and who should be included in the militia in the infant United States, were echoed by George Mason in the debate on the ratification of the Constitution before the Virginia Assembly: "I ask, sir, what is the militia? It is the whole people, except for a few public officials."

"Except for a few public officials." With these six words, George Mason made explicit his deep-set belief that the individual armed citizen was the key to protection against government excesses and in defense of freedom.

James Madison expanded on this point in *The Federalist Paper*s, number 46, where he downplayed the threat of seizure of authority by a federal army, because such a move would be opposed by "a militia

amounting to half a million men."

In 1790, since the population of the United States was about 800,000, Madison wasn't referring to state reserves. By militia, Madison obviously meant every able-bodied man capable of bearing arms. This, undoubtedly, was also the meaning of "militia" when the Second Amendment was written.

Across the nation, Federalists echoed our Founding Fathers' insistence that the right to keep and bear arms become part of the Constitution. In a pamphlet advocating Pennsylvania's ratification of the Constitution, patriot and statesman Noah Webster declared:

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

Not only did our Founding Fathers focus their debate on the right of the people to keep and bear arms, they devoted considerable energy to issuing a warning to future generations that the battle to defend these freedoms will take precedence over all other work.

It was Patrick Henry at the Virginia convention on the ratification of the Constitution who articulated the necessity of guarding the rights of an armed citizenry.

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

And James Madison, in the National *Gazette, January* 19, 1792:

> Liberty and order will never be perfectly safe until a trespass on the Constitutional provisions for either, shall be felt with the same keenness that resents an invasion of the dearest rights.

Unfortunately, the invasion of our dearest rights is taking place today. As this book goes to press, there are sixteen gun-ban bills before the United States Congress, and hundreds more before the state legislatures and city councils. The politicians, in the name of fighting crime, are attacking the sacred constitutional rights of law-abiding American citizens. Today, it is politically correct to ignore the Founding Fathers and their clear intent. For the sake of political expediency, the anti-gun lobby, the anti-gun media, and the anti-gun politicians, including the [former] president [Clinton], have twisted, tangled, and reinterpreted their words. The anti-gunners would do well to pay heed to the words of Benjamin Franklin:

> They that can give up essential liberty to purchase a little temporary safety, deserve neither liberty not safety.

Unfortunately, a large part of this tragedy-the wanton disregard of our essential liberties-can be laid at the feet of Americans who have not taken action to protect their freedoms. To quote C.S. Lewis: "We laugh

at honor and are shocked to find traitors in our midst."

Every American must leap to the defense of his or her liberties. We must answer, word for word, the vicious attacks that pour out from the TV screen and newspaper pages around the country. We must attend town meetings in protest and we must hold our elected officials accountable. We must not allow them to misinterpret our Founding Fathers' directives. Then, and only then, will freedom be safe for future generations.

In the words of Dwight D. Eisenhower, "Freedom has its life in the hearts, the actions, the spirit of men and so it must be daily earned and refreshed-else like a flower cut from its lifegiving roots, it will wither and die."

The Right of the People to Keep and Bear Arms

Columnist Don Shoemaker dismisses as "idiocy" the belief that the Second Amendment prevents government from banning guns.

Leonard Larsen of Scripps-Howard News Service says "only gun nut simpletons [and] NRA propagandists ... defend against gun controls on constitutional grounds."

Such rhetoric, including the suggestion that the constitutional right to keep and bear arms applies only to the state militia and National Guard, is commonly heard in the media's anti-gun campaign.

Some columnists, however, are willing to concede that their views on the Second Amendment don't square with scholarship on the issue. In a column in the *Washington Post,* March 21,1991, George Will wrote concerning Sanford Levinson's *Yale Law Journal* article, "The Embarrassing Second Amendment":

> The National Rifle Association is perhaps correct and certainly is plausible in its "strong" reading of the Second Amendment protection of private gun ownership. Therefore gun control advocates who want to square their policy preferences Constitution should squarely face the need to deconstitutionalize the subject by repealing the embarrassing amendment.

Anti-gun lawyer-activist Michael Kinsley, co-host on CNN's "Crossfire" and formerly editor-in-chief of the *New Republic,* regularly calls for gun control and proudly holds membership in Handgun Control, Inc. But in an op-ed article in the *Washington Post*, January 8, 1990, Kinsley wrote:

> Unfortunately, there is the Second Amendment to the Constitution.
>
> The purpose of the First Amendment's free-speech guarantee was pretty clearly to protect political discourse. But liberals reject the notion that free speech is therefore limited to political topics, even broadly defined. True, that purpose is not inscribed in the amendment itself. But why leap to the conclusion that a broadly worded constitutional freedom ("the right of the people to keep and bear arms") is narrowly limited by its stated purpose, unless you're trying to explain it away? My *New Republic* colleague

> Mickey Kaus says that *if liberals interpreted the Second Amendment the* way *they interpret the rest of the Bill of Rights, there would be law professors arguing that gun ownership is mandatory*. [Emphasis added.]

Despite an occasional admission that the Second Amendment means what it says, many columnists, with little or no understanding of the roots of the Constitution, rush to embrace a view that finds virtually no support among high-ranking constitutional scholars.

According to an article in the *Encyclopedia of the American Constitution* summarizing Second Amendment literature in 1986, of the thirty-six law review articles published since 1980, only four support the anti-gun position, while thirty-two articles support the individual right position advocated by the National Rifle Association.

The individual rights authors include leading constitutional scholars who don't own guns and who "never expected or desired the evidence to crush the anti-gun position."

Professor Sanford Levinson of the University of Texas Law School, co-author of the standard law school text on the Constitution, *Processes of Constitutional Decision Making*, is a ACLU stalwart. In his 1989 *Yale Law Journal* article, cited by George Will*,* Professor Levinson admits his own embarrassment at having to conclude from his research that private gun ownership cannot be prohibited – he must have hoped to find the opposite.

Like Levinson, Yale Law Professor Akhil Amar, a visiting professor of constitutional law at Columbia University, is held in high repute by liberal constitutional scholars. Yet Amar trounces the anti-gun states' right theory, emphasizing again and again that the Second Amendment guarantees the right to arms to "the people," not "the states":

> [W]hen the Constitution means "states" it says so.… The ultimate right to keep and bear arms belongs to "the people," not the "states,".... Thus the "people" at the core of the Second Amendment [a]re [the] Citizens – the same "We the People" who "ordain and establish" the Constitution and whose right to assemble...[is] at the core of the First Amendment.... Nowadays, it is quite common to speak loosely of the National Guard as "the state militia," but [when the Second Amendment was written]…"the militia" referred to all Citizens capable of bearing arms. [Thus] "the militia" is identical to "the people".…

Are these eminent constitutional scholars "gun nut simpletons, [and] NRA propagandists"? Activist Michael Kinsley doesn't think so.

After reviewing a *Michigan LawReview article* by Professor Don Kates, Kinsley wrote in an op-ed piece, February 8,1990, in the *Washington Post*:

> If there is a reply, the [gun] controllers haven't made it.... Establishing that a flat ban on handguns would be [unconstitutional,] Kates builds a *distressingly* good case.

Kinsley is distressed because "a flat ban on handguns," preferably all

guns, is precisely what he wants. His article concludes:

> Gun rants are unconvincing (at least to me) in their attempts to argue that the individual right to bear arms is still as vital to freedom as it was in 1792. *But the right is still there*. [Emphasis added.]

Two major contributors to constitutional scholarship are neutral historians with no personal interest in the "gun control" debate. One is Professor Joyce Malcolm, a political historian whose work on the English and American origins of the right to arms has been underwritten by the American Bar Foundation, Harvard Law School, and the National Endowment for the Humanities. In *To Keep* and *Bear Arms: The Origins of an Anglo-American Right* (Harvard University Press, 1994), Professor Malcolm writes:

> The Second Amendment was meant to accomplish two distinct goals.... First, it was meant to *guarantee the individual's right to have arms for self-defense and self-preservation.... These privately owned* arms [emphasis added] were meant to serve a larger purpose [militia service] as well...and it is the coupling of these two objectives that has caused the most confusion. The customary American militia necessitated an armed public...the militia [being]…the body of the people.… The argument that today's National Guardsmen, members of a select militia, would constitute the *only* [emphasis hers] persons entitled to keep and bear arms has no historical foundation.

Professor Robert Shalhope, a non-gun-owning intellectual historian, whose interest is the philosophy of the Founding Fathers, agrees. In the 1982 edition of the *Journal of American History*, Professor Shalhope writes:

> When James Madison and his colleagues drafted the Bill of Rights they ..firmly believed in two distinct principles: (1) *Individuals had the right to possess arms to defend themselves and their property;* and (2) states retained the right to maintain militias *composed of these individually armed citiz*en.… Clearly, these men believed that the perpetuation of a republican spirit and character in their society depended upon *the freeman's possession of arms* as well as his ability and willingness to defend *both himself* and *his society.* [Emphasis added.]

As Professor Kates put it, "Historical research shows that our Founding Fathers out NRAed the NRA."

Thomas Paine believed it would be better for "all the world to lay [arms] aside...and settle matters by negotiation" – "but unless the whole will, the matter ends, and I take up my musket and thank Heaven He has put it in my power."

Paine clearly doubted that criminals could be disarmed and deemed it important that decent people be armed against them:

> The peaceable part of mankind will be continually overrun by the vile and abandoned while they neglect the means of

> self—defense..... [Weakness] allures the ruffian [but] arms like laws discourage and *keep the* invader and plunderer in awe and preserve order in the world.... Horrid mischief would ensue were [the good] deprived of the use of them...[and] the weak will become a prey to the strong.

Or, simply stated – criminals prefer unarmed victims. Consider the similar views of the great eighteenth-century Italian criminologist Cesare Beccaria, which could be described as an older rendition of today's slogan "when guns are outlawed only outlaws will have guns."

Thomas Jefferson translated the following from Beccaria's Italian and laboriously copied it in longhand into his own personal compilation of great quotations:

> False is the idea of utility that sacrifices a thousand real advantages for one imaginary or trifling inconvenience; that would take fire from men because it burns, and water because one may drown in it; that has no remedy for evils, except destruction. The laws that forbid the carrying of arms are laws of such a nature. They disarm those only who are neither inclined nor determined to commit crimes. Can it be supposed that those who have the courage to violate the most sacred laws of humanity, the most important of the code, will respect the less important and arbitrary ones, which can be violated with case and impunity, and which, if strictly obeyed, would put an end to personal liberty-so dear to men, so dear to the enlightened legislator-and subject innocent persons to all the vexations that the quality alone ought to suffer? Such laws make things worse for the assaulted and better for the assailants; they serve rather to encourage than to prevent homicides, for an unarmed man may be attacked with greater confidence than an armed man. They ought to be designated as laws not preventive but fearful of crimes, produced by the tumultuous impression of a few isolated facts, and not by thoughtful consideration of the inconveniences and advantages of a universal decree.

The Founders unanimously agreed. "The great object," thundered Anti-Federalist Patrick Henry, "is that every man be armed." James Madison, Federalist author of the Bill of Rights, reviled tyrants for being "afraid to trust the people with arms" and extolled "the advantage of being armed, which the Americans possess over the people of almost every other nation."

The Anti-Federalists endorsed Madison's Bill of Rights while claiming it was their own idea. They characterized the Second Amendment as a mere rewording of their Sam Adams' proposal "that the [federal] Constitution be never construed to prevent the people who are peaceable citizens from keeping *their own* arms." The Federalist analysis said the amendment confirmed to the people "their private arms."

Limitations on the Right to Arms

Are there any limits on either the kinds of arms the Second Amendment guarantees or the kinds of people it protects?

Neither felons nor children under eighteen, of course, have the right to own arms – any more than they have the right to vote. This restriction is based on solid historical reasons. The National Rifle Association, moreover, has for over seventy years supported laws to prohibit gun ownership by these who have been convicted of violent felonies. By the same token, the NRA has for decades supported and helped pass tough penalties to keep those who misuse guns in prison where they belong. The NRA was among the earliest and strongest proponents of "Three Strikes and You're Out" laws which would put repeat violent offenders in jail *permanently*.

Yet the anti-individual rights crowd accuse the NRA of claiming the Second Amendment guarantees guns for all including criminals-and all weapons-including weapons of war like bazookas and bombs. Such has never been the case, and there is no reason for anyone to believe otherwise-the facts have been available to all. Prominent constitutional scholar Professor Stephen Halbrook has summed it up:

> "[A]rtillery pieces, tanks, nuclear devices and other heavy ordinances," he said, "are not constitutionally protected" arms which civilians have a Second Amendment right to possess; neither are "grenades, bombs, bazookas and other devices...which have never been commonly possessed for self-defense...."

But the right to arms does protect ordinary small arms handguns, rifles, and shotguns – including "assault weapons." Indeed, "assault weapons" are just ordinary semiautomatic firearms like those that have existed in this country for over a century. They fire no faster than revolvers or pump action rifles and shotguns. As Rutgers law professor Robert Cottrol notes:

> It has been argued that "assault weapons" are far more deadly than 18th Century arms. Actually, modern medical technology makes them far less deadly than blunderbusses were in the 18th Century. (In fact, "assault weapons" are less deadly – and far less often used in crime – than ordinary shotguns or hunting rifles.)

Professors Cottrol and Don Kates agree that if the many changes in conditions since 1792 when the Second Amendment was enacted could justify ignoring it, other rights protected by the Bill of Rights would also be endangered: "*changing times affect many constitutional rights, not just the right to arms*."

Take, for instance, radio, TV, and the movies. These didn't exist when the Bill of Rights was written, yet all three are now embraced by its free speech and press clauses. The Supreme Court enforces that stand. The media's First Amendment rights we soundly defended even though it is widely accepted that they may exert far more influence than a book or newspaper-even prompting some suggestible people to commit violent acts.

By the same token, sensationalized national network coverage can spread new crimes. Car-jacking, first confined to Michigan, caught on nationwide as other criminals picked up on the idea. Freedom of the press in our modern era has many other drawbacks, but we continue to expand our constitutional free press protections to cover new forms of disseminating news and opinion.

To quote Professors Cottrol and Kates:

> If the Bill of Rights is to continue, we must apply its spirit even as conditions change. That is the nub of the Second Amendment controversy: Modern intellectuals who tend to feel self-defense is barbaric-that government should have a monopoly of arms with the people being dependent on it for protection have difficulty accepting the Founders' diametrically opposite views.

The Warren Court had this to say when its decisions vindicating the privilege against self-incrimination were assailed as inconsistent with the government's need to detect modern criminals and subversives:

> If it be thought that the privilege is outmoded in the conditions of this modern age, then the thing to do is to [amend] it out of the Constitution, not to) whittle it down by the subtle encroachments of judicial opinion. [Ulmann , United States, 350 U.S. 422, 427-8 (1956)]

Can an Armed People Resist Tyranny?

Those who claim that the *only* purpose of the right to arms is to enable citizens to resist a military takeover of our government sometimes argue that the Second Amendment is obsolete since a populace armed with only small arms cannot defeat a modern army. That is doubly wrong. Even if overthrowing tyranny were the amendment's only purpose, the claim that an armed populace cannot successfully resist assault stems from an unproved theory.

The twentieth century provides *no example* of a determined populace with access to small arms having been defeated by a modern army. The Russians lost in Afghanistan, the United States lost in Vietnam, and the French lost in Indo-China. In each case, it was the poorly armed populace that beat the "modern" army. In China, Cuba, and Nicaragua, the established leaders, Chiang Kai-shek, Battista, and Somoza lost. Modern nations like Algeria, Angola, Ireland, Israel, Mozambique, and Zimbabwe only exist because guerrilla warfare can triumph over modern armies. While we may not approve of all the resulting governments, each of these triumphs tells a simple truth: a determined people who have the means to maintain prolonged war against a modern army can battle it to a standstill, subverting major portions of the army or defeating it themselves or with major arms supplied by outside forces.

The Founders' purpose in guaranteeing the right to *keep and* bear arms was not merely to overthrow tyrants. They saw the right to arms as crucial to what they believed was a prime natural right-self-defense.

Those who claim that the right to arms is outmoded tend to think of armed personal self-defense as does former Attorney General Ramsey Clark, who described it as "anarchy, not order under law – a jungle where each relies on himself for survival."

Handgun Control, Inc. (HCI) chairperson Sarah Brady claims that "the only reason for guns in civilian hands is for sporting purposes," i.e., not self-defense. "Pete" Shields, Brady's predecessor as HCI head, in the book titled *Guns Don't Die*, advised victims never to resist rape or robbery: "give them what they want or run."

Not surprisingly, HCI has proposed a national licensing law confining gun ownership to sportsmen-self-defense not being considered proper grounds for ownership. In an October 22, 1993, editorial, the *Los Angeles Times* agreed. But author Jeff Snyder points out in his essay, "A Nation of Cowards," *in Public Interest Quarterly*/Fall 1993:

> As the Founding Fathers knew well, a government that does not trust its honest, law-abiding, taxpaying citizens with the means of self-defense is not itself worthy of trust. Laws disarming honest citizens proclaim that the government is the master, not the servant of the people....
>
> The Bill of Rights does not *grant* rights to the people, such that its repeal would legitimately confer upon government the powers otherwise proscribed. The Bill of Rights is the list of the fundamental, inalienable rights, endowed in man by his Creator, that define what it means to be a free and independent people, the rights which must exist to ensure that government governs only with the consent of the people.

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