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THE SECOND AMENDMENT IN ACTION

MICHAEL A. BELLESILES*

INTRODUCTION

What follows may be entirely irrelevant. There are those who argue that historical inquiry offers nothing to our understanding of the Second Amendment. This postmodernist position is well represented by Charlton Heston, who has dismissed historical scholarship as not in the least bit relevant and called for historians to stop wasting their time in the archives.1 Akhil Amar recently stated that current understandings of the original meaning of the Second Amendment “might be false as a matter of historical fact but [are] nonetheless true as a matter of constitutional law.”2 William Van Alstyne insists that historical research into the context of the Second Amendment “doesn’t seem to me to make a very great deal of difference against the background of Bunker Hill, and the minutemen, and the imagery that this is the nature of things.”3 Postmodernism denies the value and even the validity of historical context, emphasizing instead language and image; truth itself is a rhetorical social construct, it is the critic’s representation of the past that matters. The adversarial approach to the past, such as is demonstrated by the self-proclaimed “standard model” of the Second Amendment,4 usually takes a nonhistorical perspective, preferring to hunt for supportive quotations while subjecting well-known statements to excruciating linguistic deconstruction rather than

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3. Id. (quoting William Van Alstyne).
4. The “standard model” asserts that the Second Amendment protects both an individual and a collective right of the people to bear arms. The standard model was initially proposed in Sanford Levinson, The Embarrassing Second Amendment, 99 YALE L.J. 637 (1989).
undertaking the hard and time-consuming task of archival research.\(^5\) Another feature of postmodern scholarship that is evident in the supposed standard model is an assertion of an intellectual monopoly. Thus Don Kates and Randy Barnett declare "virtual unanimity" among scholars "that there is no tenable textual or historical argument against a broad individual right view of the Second Amendment,"\(^6\) and Joyce Lee Malcolm insists "there is no one for me to argue against anymore."\(^7\) They proclaim themselves victorious in a match without competitors.

The postmodernist perspective is, of course, blasphemy to a historian. When people say that facts do not matter or exist we tend to lose our sense of humor, look very stern, and warn that the next stop is Holocaust denial. However, this Article is not concerned with the recent debate over the meaning of the Second Amendment, which has been well and hotly discussed elsewhere.\(^8\) This Article is concerned with capturing the social, legal, and military context of the Second Amendment. The continuing efforts of states to control access to and use of guns once the Second Amendment was part of the Constitution seemingly indicate a lack of concern for an individual right to own a gun. The absence of notable opposition to such state action, even when it extended to disarming a portion of the population, speaks to popular attitudes that failed to see gun ownership as a protected individual right. At the same time, the federal government came to see public indifference to firearms ownership as a major threat to national security, and responded by slowly building a standing army and beginning a program to provide guns directly to members of the militia at no cost.\(^9\) But popular disinterest undermined both efforts, with government censuses repeatedly revealing a surprising dearth of firearms.\(^10\) In brief, those

\(^5\) See id.


\(^8\) See, e.g., A Second Amendment Symposium Issue, 62 TENN. L. REV. 443 (1995); Saul Cornell, Commonplace or Anachronism: The Standard Model, the Second Amendment and the Problem of History in Contemporary Constitutional Theory, 16 CONST. COMMENTARY 221, 221-46 (1999).


\(^10\) See Letter from Thomas Jefferson to the House of Representatives (Mar. 1, 1803), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS 163, 163-67 (Walter Lowrie & Matthew Clarke eds., 1832); Letter from Thomas Jefferson to the Senate and the House of Representatives (Mar. 22, 1804), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, supra, at 168, 168-72;
responsible for its ratification never saw the Second Amendment as a hindrance to government regulation of firearms or to efforts by the federal government to arm specific groups of citizens.11

I. THE CONSTITUTIONAL BACKGROUND

There were a great number of guns in North America in 1783 as a result of the Revolutionary War.12 Lacking any gun manufactories, the United States had been lucky to acquire thousands of arms from Europe; many of the firearms used by American troops during the Revolution came from France and the Netherlands.13 Those who led the Continental army to victory understood that the United States put itself in a precarious diplomatic and defensive position by depending on European sources for firearms.14 They also appreciated that the thousands of French, Dutch, and British guns in American hands would quickly decay and rot if not collected and maintained in government arsenals.15 They knew full well that no reliance could be placed on the militia to provide for the new nation’s security, internal or external.16 The efforts of these nationalists to find and then create a stable source of firearms for the United States began a long process on the part of the federal government to arm its white male citizens.17 On the other hand, many in the elite held the belief that more guns equaled more to fear. Poor whites might put such weapons to an incorrect, class-based use that could disrupt or destroy the new nation. Senator Rufus King warned his colleagues in 1790 that “it

15. See, e.g., Letter from Henry Knox to Congress (Jan. 3, 1784), supra note 12, at 123.
was dangerous to put Arms into the hands of the Frontier People for their defense, least they should Use them against the United States.\textsuperscript{18} Nationalists found ample justification for their fears in Shays's Rebellion.\textsuperscript{19}

The uprising in western Massachusetts in 1786 and 1787 presented an obvious indication of the dangers facing the country. The Shaysites themselves kept insisting that their political protest followed Revolutionary traditions.\textsuperscript{20} Facing serious economic adversity and an unresponsive state government that used the courts to aggressively pursue those who could not meet their debts, hundreds of poor farmers acted as crowds often had in the colonial period to close the courts and harass tax collectors.\textsuperscript{21} These insurgents considered their protests legitimate, presenting petitions to the General Court and holding county conventions when these petitions failed to receive a response.\textsuperscript{22}

The Massachusetts government felt differently, acting with energy in crushing what they saw as a rebellion; a challenge to legitimate authority. As during many colonial conflicts, the Shaysite crowd was the militia, limiting the state's ability to call on those forces for support.\textsuperscript{23} Uninterested in compromise or negotiation, the Massachusetts General Court declared the uprising an "open, unnatural, unprovoked, and wicked rebellion."\textsuperscript{24} The first clash came at the Springfield arsenal, where Shays's followers, many of them veterans, hoped to acquire the guns they needed to effectively resist the state's army.\textsuperscript{25} The state's forces were well armed from the arsenal's stores, which included muskets with bayonets, barrels of powder, and a large quantity of shot and shell.\textsuperscript{26} The only shots fired were fourteen or fifteen rounds of grape from that artillery, which killed four of the farmers and sent Shays's forces fleeing in terror.\textsuperscript{27} A

\begin{itemize}
\item \textsuperscript{19} For a discussion of Shays's Rebellion, see CRESS, \textit{supra} note 17, at 95-98.
\item \textsuperscript{20} See DAVID P. SZATMARY, \textit{SHAYS' REBELLION: THE MAKING OF AN AGRARIAN INSURRECTION} 39-40 (1980).
\item \textsuperscript{21} See \textit{id}.
\item \textsuperscript{22} See ROBERT J. TAYLOR, \textit{Western Massachusetts in the Revolution} 103-27 (1954).
\item \textsuperscript{23} See SZATMARY, \textit{supra} note 20, at 37-55.
\item \textsuperscript{24} \textit{Id}. at 106.
\item \textsuperscript{25} See \textit{id}. at 98-114.
\item \textsuperscript{26} See \textit{id}. at 99.
\item \textsuperscript{27} See \textit{id}. at 102.
\end{itemize}
week later, General Benjamin Lincoln routed the remaining insurgents without firing a shot, effectively ending Shays's Rebellion.28

Though the rebels had not exactly distinguished themselves in the martial arts, their uprising had far-reaching consequences. George Washington wrote to James Madison that "[w]e are fast verging to anarchy and confusion!"29 The crisis in Massachusetts was but a local variant of a national problem requiring a federal solution.30 The political elite unified around the notion that there was no room for such insurrections in the new nation. George Washington wrote Benjamin Lincoln, Jr., that the insurgents "had by their repeated outrages forfeited all right to Citizenship."31 Even Samuel Adams, one of America's leading democrats, rejected pardon for the Shaysites: "[T]he man who dares to rebel against the laws of a republic ought to die."32 It would be very difficult to find an American political leader who favored a right to insurrection against duly-elected governments.

To those favoring a stronger national government, the American Revolution had clearly demonstrated the flaws in the militia when faced with a foreign invader, while the rebellion in Massachusetts indicated the unreliability of the militia when confronted with internal disorder. From Edmund Randolph's opening speech, the Constitutional Convention of 1787 returned often to militia reform.33 The majority of those present hoped that the constitution they were writing would prevent further disorder by bringing the militia under more direct federal control.34 In justifying writing an entirely new government compact to supercede the Articles of Confederation, Randolph gave as his first reason "that the confederation produced no security agai[nst] foreign invasion . . . and that neither militia nor draughts being fit for defence on such occasions, enlistments only

28. See id. at 104-05.
30. For a discussion of the impact of Shays's Rebellion on the militia's reputation, see CRESS, supra note 17, at 95-98.
32. 1 WESTERN MASSACHUSETTS: A HISTORY, 1636-1925, at 183 (John Lockwood et al. eds., 1926).
34. See id.
could be successful." The "common defence" required some sort of national army. The Revolution demonstrated that "[v]olunteers [are] not to be depended on" in case of war; while "[m]ilitia [are] difficult to be collected and almost impossible to be kept in the field. . . . Nothing short of a regular military force will answer . . . ." Randolph did not seek to terminate the militia; rather, in Alexander Hamilton's words, "[T]he Militia of all the States [are] to be under the sole and exclusive direction of the United States." A few delegates worried that the states would lose their sovereignty if the militia came under federal control, while Rufus King and Gouverneur Morris feared that Northern militia would be called upon to put down slave insurrections. General Charles Pinckney, who held that "[u]niformity was essential" in the militia as "[t]he States would never keep up a proper discipline of their militia," dismissed all these objections as pointless "distrust of the Genl. Govt." John Langdon agreed, finding "no more reason to be afraid of the Genl. Govt than of the State Govts." The overriding sense of the Convention was that the militia could not be expected to, as Randolph put it, "suppress domestic commotions" and required federal supervision. The alternative was disorder.

Historians have amply demonstrated the difficulty of ascribing to the framers of the Constitution a consensus on their original intention. The Constitutional Convention hammered out a document

35. Id. at 19.
36. Id. at 25.
37. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION 139 (1966).
39. Id.
40. Id. at 331.
41. Id.
42. James Madison, Madison's Notes (July 18, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 33, at 47.
full of compromises and barely obtained concessions.\textsuperscript{44} One point at least won complete agreement: Congress should arm the militia. Some delegates called for the states to organize and discipline the militia, but no one stated that any state could keep its militia well armed; everyone agreed with the need for federal guidance.\textsuperscript{45} Luther Martin, a member of the Philadelphia Convention who turned Antifederalist, told the Maryland Assembly that “As to giving such a power [to regulate the militia], there was no objection; but it was thought by some, that this power ought to be given with certain restrictions.”\textsuperscript{46} Martin had hoped for a limitation on the president’s power to order a militia beyond the borders of its home state.\textsuperscript{47} The Convention brushed aside this proposal and agreed with James Madison that the whole purpose of federal regulation “is to secure an effectual discipline of the Militia.”\textsuperscript{48} The states had repeatedly proven their inability to arm, discipline, and deliver their militia when called upon. Madison stated, “The States neglect their Militia now, and the more they are consolidated into one nation, the less each will rely on its own interior provisions for its safety . . . . The Discipline of the Militia is evidently a National concern, and ought to be provided for in the National Constitution.”\textsuperscript{49}

Madison had his way, as Article 1, Section 8 of the Constitution made Congress responsible for “organizing, arming, and disciplining, the Militia.”\textsuperscript{50} Some modern observers argue that the framers perceived the militia as a check on governmental power; yet the Constitution accomplishes the exact opposite goal, making the militia a potential tool of the central government for the repression of any challenge to federal authority.\textsuperscript{51} Congress had the authority to call forth the Militia to execute the laws of the Union, suppress


\textsuperscript{45} See sources cited supra note 44.

\textsuperscript{46} Martin’s Genuine Information, December 28, 1787, in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 33, at 172, 207.

\textsuperscript{47} See id. at 207-09.

\textsuperscript{48} James Madison, Madison's Notes (Aug. 23, 1787), supra note 43, at 384, 386.

\textsuperscript{49} Id. at 387.

\textsuperscript{50} U.S. CONST. art. 1, § 8, cl. 15.

insurrections, and repel invasions.\textsuperscript{52}

Under the Constitution, the new federal government held the traditional political power of controlling the supply of and access to firearms.\textsuperscript{53} Colonial American governments had followed the British precedent in maintaining authority over firearms.\textsuperscript{54} Guns were used and owned at sufferance, the state reserving the right to limit, regulate, or impress those arms at its discretion. Under common law this "reserved right of the sovereign"\textsuperscript{55} differed from eminent domain, lacking a requirement for just compensation.\textsuperscript{56} Since firearms were always seen as in the service of the monarch, impressing guns did not require a special act of parliament.\textsuperscript{57} The American Revolution did not change that English heritage, as the loyalists discovered when their firearms were confiscated.\textsuperscript{58} State legislatures needed no further argument than public safety, or in constitutional terms, the states police powers, to justify gun regulation. In this regard they adhered to the English common-law heritage and the practice of every European nation.\textsuperscript{59} Gun regulation in the Revolutionary period, and after, aroused amazingly little debate beyond accusations that they were not stringent enough or rigorously enforced. The authority of the state to regulate gun ownership was repeatedly framed by the need to arm the militia.\textsuperscript{60}

\textsuperscript{52} See id.
\textsuperscript{54} See Bellesiles, \textit{supra} note 11, at 567-89.
\textsuperscript{55} Id. at 586.
\textsuperscript{56} See id.
\textsuperscript{57} See id.
\textsuperscript{58} The precise concept of eminent domain was not known under English common law; until the 1770s the taking of property by the sovereign required a special act of parliament. See 1 WILLIAM BLACKSTONE, \textit{Commentaries} *138-39, *222, *290-96.
\textsuperscript{60} See, e.g., By the Council in Assembly (Oct. 26, 1711), in 29 ARCHIVES OF MARYLAND: PROCEEDINGS AND ACTS OF THE GENERAL ASSEMBLY OF MARYLAND 10-11 (William Hand Brown ed., 1909) [hereinafter ARCHIVES OF MARYLAND]; By the President and Council in Assembly (Oct. 27, 1711), in 29 ARCHIVES OF MARYLAND, supra, at 47; By the House of Delegates (Nov. 7, 1712), in 29 ARCHIVES OF MARYLAND, supra, at 98; By the President and Council in Assembly (Nov. 6, 1712), in 29 ARCHIVES OF MARYLAND, supra, at 153-54; By the House of Delegates (Nov. 10, 1793), in 29 ARCHIVES OF MARYLAND, supra, at 237-39; By the House of Delegates (July 2, 1714), in 29 ARCHIVES OF MARYLAND, supra, at 376-78. For a discussion of federal attempts to isolate loyalists from the militia, see, for example, ROBERT MCCLUER CALHOON, \textit{The Loyalists in Revolutionary America} 295-304, 397-414, 439-78 (1973); ALEXANDER CLARENCE FLICK, \textit{Loyalism in New York During the American Revolution} 58-94 (1969); ROBERT STANSBURY LAMBERT, \textit{South Carolina Loyalists in the American Revolution} 33-58 (1987).
The Constitution’s treatment of the militia was in keeping with the Articles of Confederation and the several state constitutions that aimed to craft a workable militia structure. The Articles, passed by Congress in 1777, though not approved by the states until 1781, made the states responsible for the arming and regulation of the militia.\textsuperscript{61} Article 6 stated that “every State shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition and camp equipage.”\textsuperscript{62} The first state constitutions included a range of militia-and gun-related articles. The Virginia Declaration of Rights of 1776 stated that “a well-regulated militia, composed of the body of the people trained to arms, is the proper, natural and safe defence of a free state . . . and that in all cases, the military should be under strict subordination to, and governed by, the civil power.”\textsuperscript{63} It is hard to miss those opening words, in which Virginia declared the necessity of a state-directed militia, trained in the use of firearms.\textsuperscript{64}

The Massachusetts Constitution of 1780 proclaimed that “[t]he people have a right to keep and to bear arms for the common defence.”\textsuperscript{65} That right did not place the individual beyond the discipline of the state, for the next sentence stated that “[a]nd as in time of peace armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in exact subordination to the civil authority, and be governed by it.”\textsuperscript{66} Article 4, Section 1 of the Massachusetts Constitution granted the legislature authority to pass laws for the support and regulation of the state’s militia, while Article 12 required all militia officers to report to the governor every three months on the number of arms and other military equipment held in his unit.\textsuperscript{67} Even privately owned guns were held at state sufferance.

\textsuperscript{61.} See Articles of Confederation (Nov. 15, 1777), in \textit{SELECT DOCUMENTS ILLUSTRATIVE OF THE HISTORY OF THE UNITED STATES, 1776-1861}, at 9 (William MacDonald ed., 1898).

\textsuperscript{62.} Id.


\textsuperscript{64.} See id.

\textsuperscript{65.} MASS. CONST. pt. I, art. XVII.

\textsuperscript{66.} Id.

\textsuperscript{67.} See Extracts from the Constitution of Massachusetts, \textit{reprinted in MILITIA LAWS OF THE UNITED STATES AND MASSACHUSETTS} 1-2 (Henry A.S. Dearborn ed., 1836).
The notion that an individual should be allowed to use a firearm without regard to state regulation appeared ludicrous to Massachusetts's political leadership. John Adams clarified that such an unhindered right to gun ownership would "demolish every constitution, and lay the laws prostrate, so that liberty can be enjoyed by no man—it is a dissolution of the government."  

The most seemingly individualist renderings of gun rights must be matched against the actions of those responsible for these statements. For instance, the 1776 Pennsylvania Constitution declared that

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

Again, it is the state's authority that stands out in this declaration. The state of Pennsylvania did not hesitate to exercise that authority, disarming loyalists and anyone else who refused to take an oath of allegiance to the government. Gun ownership in Pennsylvania was premised on the notion that the individual would use that weapon in the state's defense when called upon. To make the point completely clear, the state required an oath to that effect. The Test Act mandated the disarming of those who would not take the oath of allegiance. As Don Higginbotham points out, "In all the discussions and debates, 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."  

The militia provisions of the Constitution outraged the Antifederalists, who insisted on state control. The Antifederalists sought limits on the powers of the central government rather than an enhancement of individual rights. After the Philadelphia

68. John Adams, A Defence of the Constitutions of Government of the United States 475 (1787).
70. See Cornell, supra note 8, at 228.
71. See id.
72. Higginbotham, supra note 51, at 40.
73. See, e.g., Philadelphia County Petition to Pennsylvania Convention (Dec. 11, 1787), in 2 The Documentary History of the Ratification of the Constitution 316, 316-19 (Merrill Jensen ed., 1976); Plain Citizen, To the Honorable Convention of the State of Pennsylvania (Nov. 22, 1787), in 2 The Documentary History of the Ratification of
Convention, Luther Martin and other Antifederalists imagined every possible scenario of federal tyranny rendering the states impotent. Under the Constitution, Martin charged, Congress could decide not to arm the militia, with the result that the militia would have few, if any, guns. Patrick Henry pursued this reasoning, suggesting that Congress could render the states defenseless.⁷⁴ A militia abandoned by the federal government registered as a substantial threat to states that actively repressed and enslaved a large minority, or in South Carolina, a majority of their population. Henry asked, “Of what service would militia be to you, when most probably you will not have a single musket in the State; for as arms are to be provided by Congress, they may or may not furnish them.”⁷⁵ Apparently Martin and Henry believed that the people were incapable of acquiring their own firearms. As Henry explained, if the federal government “neglect[s] or refuse[s] to discipline or arm our militia, they will be useless: the states can do neither.”⁷⁶ To not arm the militia was to leave them unarmed. While Henry feared what Congress would not do, others suspected that the federal government would use its control over the militia to oppress the states.⁷⁷

Not surprisingly, Federalists found it absurd that anyone would think that the central government would either send the militia into one state at a time to attain supremacy or disarm the militia through inaction. After all, it was Congress, with representatives drawn from those very states, that would pass the necessary legislation. In his reply to Martin, Oliver Ellsworth charged that “[o]ne hour you sported the opinion that Congress, afraid of the militia resisting their measures, would neither arm nor organize them, and the next, as if men required no time to breathe between such contradictions, that they would harass them by long and unnecessary marches . . . .”⁷⁸ It seemed to Ellsworth that the Antifederalists wanted both sides of the argument, fearing that the federal government would both arm and


⁷⁷. See CRESS, supra note 17, at 98-102.

⁷⁸. Letter from Landholder to Luther Martin, in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 33, at 272.
fail to arm the militia. 79

Federalists found an additional flaw in Antifederalist logic: the Constitution left the militia under the direct control of the states when not in national service. 80 As Edmund Randolph observed, militia officers were all appointed by the state governments and were therefore unlikely to act contrary to their own states' interests. 81 For the Federalists, the Constitution's Militia Clauses operated within their understanding of concurrent power. The state and federal governments shared authority over the militia. The Constitution made Congress responsible for organizing and arming the militia, but nothing in that wording contradicted the states' ability to use the militia as they saw fit when not in active federal service. Any state could act to correct flaws in its militia, such as a paucity of firearms. The militia, Federalists argued, would neither be so strong as to become a standing army, nor so weak as to be ineffectual against domestic insurrection. 82 Most Federalists followed the lead of Madison and Randolph at the Virginia Ratifying Convention in maintaining that a federally regulated militia was the best way of avoiding a standing army. 83

However, the Federalists were a bit disingenuous in insisting that a well-regulated militia would allow the United States to avoid a standing army. They had every expectation that the new constitutional government would build a more powerful army. Certainly most Federalists would have agreed with Gouverneur Morris's later assessment that "[a]n overweening vanity leads the many, each man against the conviction of his own heart, to believe or affect to believe, that militia can beat veteran troops in the open field." 84 At the Constitutional Convention, Morris wrote, "this idle notion, fed by vaunting demagogues, alarmed us" into giving support

79. For Martin's response, see 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 33, at 286-95.

80. See, e.g., Francis Corbin, Debates at the Virginia Convention (June 7, 1788), in 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, supra note 74, at 1006, 1006-14; Henry Lee, Debates at the Virginia Convention (June 9, 1788), in 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, supra note 74, at 1072, 1074; Edmund Randolph, Debates at the Virginia Convention (June 10, 1788), in 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, supra note 74, at 1092, 1102.

81. See Higginbotham, supra note 51, at 49.

82. See id. at 50.

83. See Philadelphia County Petition to the Pennsylvania Convention (Dec. 11, 1787), supra note 73, at 318-19.

84. Letter from Gouverneur Morris to Moss Kent (Jan. 12, 1815), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 33, at 420.
They should have recalled better the American Revolution, which taught that "to rely on militia was to lean on a broken reed." Alexander Hamilton was more succinct:

I expect we shall be told that the militia of the country is its natural bulwark, and would be at all times equal to the national defence. This doctrine, in substance, had like to have lost us our independence. . . . The facts which, from our own experience, forbid a reliance of this kind, are too recent to permit us to be dupes of such a suggestion.

The only politically rational alternative was to bring the militia under federal control while also building a real American army.

II. THE SECOND AMENDMENT

James Madison had promised during the ratification process to consider amendments to the Constitution. Madison kept his word, an amazing political action. Several of the recommended amendments addressed the structure of the militia, including limitations on the number of militia under federal control, specifics of their training, the nature and duration of martial law, the use of militia beyond a state's borders, the status of conscientious objectors, and the degree of state control over the militia. None became part of the Second Amendment.

Madison rejected all changes to the Constitution that he thought would weaken the federal government, including its control over the militia. As he rhetorically asked, "For whose benefit is the militia organized, armed and disciplined? for the benefit of the United States." He was willing to respond to the fears of the Antifederalists by granting the states, in Carl Bogus's words, "a concurrent authority

85. Id.
86. Id.
87. THE FEDERALIST NO. 25, at 156-57 (Alexander Hamilton) (Modern Library College ed.).
88. See RAKOVE, ORIGINAL MEANINGS, supra note 44, at 325-36.
90. See Higginbotham, supra note 51, at 48.
to arm their militia." The result was a single sentence with a clarifying preamble: "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."

Madison stated his own understanding of the Second Amendment when he presented it to the House of Representatives. Madison stated, "In our government it is, perhaps, less necessary to guard against the abuse in the executive department than any other; because it is not the stronger branch of the system, but the weaker." The people had no need to fear their national government, for it had few means that it could exert its authority. The real danger was closer to home, in a tyrannical majority lacking checks on its democratic power. Madison explained:

[I]n a government modified like this of the United States, the great danger lies rather in the abuse of the community than in the legislative body. The prescriptions in favor of liberty, ought to be levelled against that quarter where the greatest danger lies, namely, that which possesses the highest prerogative of power: But this [is] not found in either the executive or legislative departments of government, but in the body of the people, operating by the majority against the minority.

Madison feared an unrestrained citizenry, and the Bill of Rights, he thought, should protect the minority against the majority's transgressions.

The Second Amendment's purpose may be fairly indicated by the ensuing debate and legislation. The House debate focused on two issues: the use of the militia in preventing the establishment of a standing army, and the wisdom of allowing religious exemptions for service in the militia. The congressional legislation that followed uniformly sought to regulate the militia, starting with the Uniform

93. U.S. CONST. amend. II.
94. James Madison, Speech to the House of Representatives (June 8, 1789), reprinted in RAKOVE, DECLARING RIGHTS, supra note 44, at 176.
95. *Id.* at 177.
96. See *id*.
Militia Act of 1792. Meanwhile, legislatures in every state further revealed their understanding of gun rights in the limitations they imposed on gun ownership, whether in denying that right to blacks, Catholics, Indians, or the foreign born. The leaders of the new nation followed Washington’s lead in calling for a standing army backed by a smaller, organized, and better armed militia. The Constitution provided the framework for such a structure. The first Congress set about giving it shape.

III. GUN OWNERSHIP UNDER THE SECOND AMENDMENT

The Second Amendment was part of the Constitution in 1794 when the Whiskey Rebellion broke out in western Pennsylvania. As Saul Cornell has shown, even leading Antifederalists supported suppressing this threat to internal security. With congressional support, President Washington moved quickly to exercise his constitutional authority to call out the militia to put down a domestic insurrection. In the process, Washington became more convinced than ever that little or no reliance was to be placed on the militia.

Washington issued a call for 13,000 militiamen from Pennsylvania, Maryland, Virginia, and New Jersey. Ironically, one of the prime demands of the Whiskey Rebels was a stronger standing army. While Pennsylvania’s Governor Thomas Mifflin successfully kept firearms out of the hands of the western militia, Washington opened the federal repositories to arm the troops he led into the field against the Whiskey Rebels. The rebellion simply evaporated before Washington’s show of force; the only deaths came from a

99. See Bellesiles, supra note 11, at 589.
102. See Cornell, supra note 8, at 231.
103. See id.
104. See id.
106. See CRESS, supra note 17, at 121-27.
107. See id.
pistol going off accidentally and a drunken brawl that ended with a fatal bayonet wound. One can only speculate whether the Whiskey Rebels would have behaved differently had they known that Washington's troops were so ignorant of firearm use. Hardly a disciplined force, the militia looted, drank heavily, and beat civilians randomly. It was neither well trained nor well armed. General Samuel Smith, commander of the Maryland militia, reported to the House of Representatives that the majority of the Virginia and Maryland troops was ignorant of the use of arms. Many did not know how to load a musket. Even young gentlemen like Meriwether Lewis reported for duty without a gun. Secretary of War Henry Knox reported that only one-third of the militia called up to respond to the Whiskey Rebellion bore arms. The rest had to be supplied from federal stockpiles.

Such reports on the inadequacies of the militia in the Whiskey Rebellion led to renewed calls for a select militia and a stronger standing army. Lawrence Delbert Cress has written, "The militia had only reluctantly taken up arms, and then only after the infusion of a large number of substitutes and volunteers." Even many of the administration's opponents, soon to be known as Democratic Republicans, now doubted the worth of the militia; and former Antifederalists joined in supporting the disarming of the Whiskey Rebels, despite the Second Amendment. One of these men, William Findley, who had sympathized with the rebels, was appalled by the militia's conduct. The first necessity of any republic had to be public order; if the militia could not handle it, Findley stated, then a standing army would. Federalists and Republicans agreed that the task of the militia was to enforce social order; they also agreed

109. See id. at 205-06.
110. See id. at 206-21.
112. See id.
113. See Letter from Meriwether Lewis to Lucy Marks (Oct. 4, 1794) (on file with Missouri State Historical Society).
115. See id.
116. CRESS, supra note 17, at 128.
117. See Cornell, supra note 8, at 231-37, 242-46.
118. See WILLIAM FINDLEY, HISTORY OF THE INSURRECTION IN THE FOUR WESTERN COUNTIES OF PENNSYLVANIA 165-68 (1796).
119. See id.
that there was a great deal of room for improvement.\textsuperscript{120}

Washington and Knox used the Whiskey Rebellion to keep the army fully supplied.\textsuperscript{121} The army, however, had to content itself with weapons from the American Revolution cleaned and repaired at West Point, an inadequate situation in Washington's eyes.\textsuperscript{122} Two problems therefore faced the American defensive establishment in the 1790s: the unorganized and untrained condition of the militia, and the impending shortage of usable firearms. The Federalists proposed two obvious solutions: a select militia, and federal support for a domestic firearms industry.\textsuperscript{123}

Debates over the militia dominated the first federal Congress.\textsuperscript{124} These carefully considered discussions even addressed the exact bore of the muskets to be used by the militia.\textsuperscript{125} The representatives returned repeatedly to just how much authority the federal government should have in exercising its constitutional mandate of regulating the militia.\textsuperscript{126} Several representatives noted that every increase in federal power came at the expense of the states while others doubted the value of the militia.\textsuperscript{127} Thomas Fitzsimmons rejected the need for militia training as "a great tax on the community, productive of little instruction or edification, either in regard to military tactics, or the morals of a civilized nation."\textsuperscript{128} Most members, however, agreed with Roger Sherman of Connecticut that "the different states had certainly an inherent right to arm and protect the lives and property of the citizens."\textsuperscript{129} But to "[m]ore effectively . . . exercise this right . . . [the states needed] to give up to the general government the power of fixing what arms the militia should use, by what discipline they should be regulated,"\textsuperscript{130} and

\textsuperscript{120} See Letter from George Washington to the Secretary of State (Oct. 16, 1794), in 34 \textit{The Writings of George Washington}, 1745–1799, \textit{supra} note 29, at 1, 2-3.
\textsuperscript{122} See \textit{id}.
\textsuperscript{123} See \textit{Bellesiles, supra} note 17, at 219-46.
\textsuperscript{125} See \textit{id}.
\textsuperscript{126} See \textit{id}.
\textsuperscript{127} See \textit{id}.
\textsuperscript{130} \textit{Id}.
various other forms of ordering the nature of the militia. The only power left to the states in this formulation was "the right to say what descriptions of persons should compose the militia, and to appoint the officers that were to command it." 131 Joshua Seney of Maryland thought even this latter qualification granted the states power that they could easily abuse.132

While Congress was quite willing to grant the president control over the militia, it did not support his pet plan for a select militia. Washington agreed completely with Baron De Steuben's dismissal of the "flattering but . . . mistaken idea—that every Citizen should be a Soldier." 133 The Revolution had made clear that "the use of arms is as [much] a trade as shoe or boot making." 134 Every year, Secretary of War Knox proposed to Congress that they create an active, highly trained (ten to thirty days per year), and well-armed reserve that could be called into service by a state or the federal government.135 As in all of the militia proposals of the antebellum years, the federal government would supply guns to those serving in the select militia.136 The "universal militia" would become nothing more than a way of registering all those eligible to carry arms in time of war.137

Knox's proposal was logical, legal, and necessary, and would have aided the nation enormously in a range of future crises. Congress, however, would have nothing to do with it. The people's representatives may have shared the view of former Antifederalist John Smilie of Pennsylvania, who warned that "[w]hen a select militia is formed; the people in general may be disarmed."138 But Smilie, like most Antifederalists, had no problem granting the state the authority to decide who should be allowed to serve in the militia, or to limit

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131. Id.
132. See id.
133. BARON DE STEUBEN, A LETTER ON THE SUBJECT OF AN ESTABLISHED MILITIA, AND MILITARY ARRANGEMENTS, ADDRESSED TO THE UNITED STATES 7 (1784).
134. Id.
136. See Letter from George Washington to Alexander Hamilton (May 2, 1783), in 2 THE WRITINGS OF GEORGE WASHINGTON, 1745-1799, supra note 29, at 374, 388-89. For a discussion of Washington's proposals, see CRESS, supra note 17, at 84-85; for Knox's proposals, see id. at 90-92.
those ineligible from owning guns. Nor did most Antifederalists want to see the propertyless carrying arms in or out of the militia.

The debate over the future of the militia demonstrated an ideological fissure in America. Federalists looked to Europe and saw that warfare was changing fast, with massive armies and well-trained corps of light infantry sweeping away the last remnants of medieval warfare. Harrison Gray Otis insisted that at least a few men must be trained in modern methods of warfare, if only to advise the militia when war came. To prevent disaster, the country needed a larger army staffed by professional soldiers and a centralized select militia subject to extended training. Federalist support for volunteer militia companies appeared to republicans an obvious assault on the ideal of a universal militia. The fact that the universal militia had never existed and that the current militia showed no signs of life remained irrelevant to this ideological absolute.

A curious side effect of these heated debates over the militia was a brief militia revival—a resurgence born of political fears. In 1798 and 1799, faced with the threat of war with France, Federalists called for a stronger army and more centralized militia. Wild rumors circulated widely, including that Republicans were hoarding arms and that Hamilton was going to lead the army against domestic opponents. Federalist John Nicholas published a letter accusing the Virginia legislature of storing arms in the capitol for use in a rebellion against the federal government. He found evidence in the legislature’s recent reorganization of the militia and its appropriation of funds to buy arms for the militia and to build an armory in Richmond. Federalists in Richmond and Petersburg responded by organizing the first private militia companies. Shortly thereafter,
Republicans in Philadelphia organized their first private militia company, the Republican Blues, "in order to defend the country against foreign and domestic enemies and [to] support the laws."\(^{148}\) Pressured by the states, Congress passed a new militia act, but Maryland's Governor Stone refused to cooperate until the federal government reimbursed the state for the arms it lost during the Whiskey Rebellion.\(^{149}\) Along with the threat, Stone sent a request for new arms for the militia, reporting that the state was dangerously under-equipped.\(^{150}\) The next governor repeated these entreaties and was also ignored.\(^{151}\)

The private, volunteer companies were generally better armed and far more enthusiastic than their state-sponsored counterparts. For instance, the Washington artillery of Washington, D.C., which started during this crisis, maintained its exclusivity by requiring the election of new members.\(^{152}\) Recruits were expected to supply their complete uniform as a sign of seriousness, but guns came from the company's private supply, which was sufficient for the entire troop.\(^{153}\) A new member of the company did not have to own a gun, but he did need a tailor. In comparison, during the war scare of 1798, the nearby Alexandria militia regiment frantically turned to the Virginia government for additional muskets.\(^{154}\) The governor offered 250 muskets, noting that requests for arms were coming in from militia companies all over Virginia.\(^{155}\) The Fairfax County militia was in slightly better shape, needing only 250 guns to finish arming their 563 militiamen.\(^{156}\) The regular militia seemed a lost cause to many. In 1800, Secretary of War James McHenry wrote the chair of the House Committee on Defense that "even in times of the greatest danger, we cannot give to our militia that degree of discipline ... upon which a nation may safely hazard its fate."\(^{157}\)

148. SHARP, supra note 144, at 252.
149. See Letter from J.H. Stone to James McHenry (Aug. 7, 1797) (on file with the Maryland State Archives).
150. See id.
152. See id.
153. See id. at 36-37.
156. See Letter from Roger West to James Wood (June 6, 1798), in 8 CALENDAR OF VIRGINIA STATE PAPERS AND OTHER MANUSCRIPTS 487-88 (1890).
In the midst of these military preparations, the Fries Rebellion temporarily disrupted southeast Pennsylvania.\(^{158}\) Outraged by the new direct federal tax on houses, lands, and slaves, as well as by the Alien and Sedition Acts, groups of citizens defied federal authority.\(^{159}\) In the first months of 1799, the rebels—most members of the militia—threatened tax assessors, forcing one to "dance around" a liberty pole, while another was "committed to an old stable and . . . fed rotten corn."\(^{160}\) But the insurgents' greatest crime came when John Fries, a local militia commander, led men armed with swords, clubs, and muskets to free some prisoners.\(^{161}\) No shots were fired in this traditional effort to protest corrupt authority in what Fries's attorney Alexander Dallas called a "system of intimidation."\(^{162}\) To President John Adams, this system was treasonous, and he ordered five hundred federal troops under General William MacPherson to put down the uprising.\(^{163}\) There was no resistance and no violence as this little army disarmed the rebels and rounded up their leaders.\(^{164}\) Fries and two others were arrested, tried, convicted, and pardoned, and that was the end of it.\(^{165}\) As with the Whiskey Rebellion, the insurgents found little support once the government acted. Even ardent Jeffersonians, while objecting to the use of federal troops instead of the state militia, agreed that anyone challenging federal authority should be brought to justice.\(^{166}\) There was no reference to the Second Amendment when Fries's supporters were disarmed by the state.

Following on the heels of the war scare and "rebellion" in Pennsylvania came the closely contested national election of 1800.\(^{167}\) It briefly looked as though the "Revolution of 1800" would be just that. But the poorly prepared state of the participants suggests that it would have been a relatively bloodless affair.\(^{168}\) As rumors spread that the Federalists might prevent Thomas Jefferson from taking

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158. See SHARP, supra note 144, at 209-10.
159. See id.
161. See THOMAS CARPENTER, THE TWO TRIALS OF JOHN FRIES ON AN INDICTMENT OF TREASON 21, 75 (1800); see also SHARP, supra note 144, at 209-10.
162. Levine, supra note 160, at 249.
163. See id. at 250-54.
164. See id.
165. See SHARP, supra note 144, at 210.
166. See Levine, supra note 160, at 249-50.
167. See SHARP, supra note 144, at 209.
168. See id.
office in 1801, republican John Beckley of Pennsylvania charged that Federalists had removed "several hundred stand of arms and 18 pieces of cannon, heretofore in the hands of the Militia, . . . into the public arsenals of the U.S." Fearing a showdown, Governor Monroe of Virginia planned for the Virginia militia to block any effort by federal troops to remove the federal arms stored in Virginia by seizing them for state use. Monroe even sent a spy to check the quality of these arms. Major T.M. Randolph reported that these "4000 excellent muskets and bayonets" had been captured from the British at Yorktown. Governor Thomas McKean of Pennsylvania was even more emphatic in his preparations, informing Jefferson that "arms for upwards to twenty thousand were secured" by his government for the militia in case their service was required. He did not expect them to bring their own arms, but planned to supply the militia with state and federal arms. But as the crisis passed with the temporary resolution of the conflict with France and the peaceful inauguration of Thomas Jefferson, military enthusiasm waned, and militia companies throughout the country died a peaceful death.

IV. THE SEARCH FOR GUNS

In some ways the militia debates of the 1790s skirted a far more important issue. Real political independence required military independence, which in turn necessitated a domestic arms industry. Every state saw it as the government's responsibility to, in the words of Georgia's militia law, "Arm and Array" the militia "for suppressing all such insurrections, as may happen." But no state was able to meet this goal on its own, even when faced with insurrection. At such times of crisis the states turned to the federal government, which would frantically attempt to find sufficient guns for the militia. But most national leaders agreed that such an approach posed dangers to the nation. Washington raised this question in his first annual message to Congress in 1790, clearly

169. Id. at 268.
170. See id. at 268-69.
171. See id. at 270.
173. SHARP, supra note 144, at 269.
174. See id.
175. See Gordon, supra note 151, at 84.
stating the lessons he had learned in the war: "A free people ought not only be armed, but disciplined . . . and their safety and interest require that they should promote such manufactures as tend to render them independent of others for essential, particularly military supplies."177 Over the ensuing seventy years, the federal government worked to make the United States self-sufficient in arms production.178

Washington, Secretary of War Knox, Treasury Secretary Alexander Hamilton, and every member of Congress who had participated in the American Revolution knew that most Americans did not own guns and had no interest in buying them. As Hamilton said, guns were not "objects of ordinary and indispensable private consumption or use."179 It was evident to Hamilton that private demand for firearms would never lead to a sufficient supply for the military, and, since guns were most important as military weapons, domestic production should be encouraged by the government.180 Eighteenth- and twentieth-century experts agree that firearms used by professionals, soldiers, and hunters had a life expectancy between three and twelve years.181 At that point they needed serious maintenance and repair, or to be replaced.182 The British army, which required the regular cleaning and inspection of all its guns, replaced roughly one-tenth of its well-made Brown Besses every year before the Napoleonic Wars.183 Using this replacement rate, and taking no account of population growth, means that Americans, if indeed every adult white male used a gun regularly to hunt, needed to purchase some 50,000 guns a year by 1800.184 Where were they to find this many guns?

The first Militia Act in 1792 amply demonstrated the problems inherent in any effort to arm the militia or army. Congress, trying to

178. See BELLESILES, supra note 17, at 208-429.
180. See id.
182. See HOULDING, supra note 181, at 140.
183. See id.
184. See id.
keep the militia alive, passed “An Act More effectually to provide for the National Defence.” This act declared that “every free able-bodied white male citizen” between the ages of eighteen and forty-five should be enrolled in the militia and must appear “when called out to exercise.” Further, “every citizen so enrolled and notified, shall . . . provide himself with a good musket or firelock” and other accoutrements. Despite this call for each individual to supply his own gun, Congress intended to take over the responsibility of providing firearms, specifying that within five years all muskets “shall be of bores sufficient for balls of the eighteenth-part of a pound.” All arms and ammunition intended for militia use remained exempt from attachment in any civil suit. To keep track of its arms, each company was to make regular returns of arms and ammunition to each state’s adjutant general, who in turn reported directly to the president. To begin this process, Congress ordered the purchase of 7,000 muskets. Over the next two years the government was able to purchase only 480 “rifle guns.”

The experience of individual states matched warnings from the executive branch. Late in 1792, during a brief conflict with the Creeks, Charles Pinckney reported to the South Carolina assembly that the frontier militia was dangerously under-armed. The western counties “if properly supplied by Government with the means, [are] well disposed to exert themselves in defence of their possessions,” but the state lacked sufficient stores to arm them. Governor Moultrie added his voice in alarm over “the defenceless Situation of the Frontier Inhabitants for want of Arms and Ammunition.”

185. Act of May 8, 1792, ch. 33, 1 Stat. 271 (repealed 1903).
186. Id. § 1, 1 Stat. at 271.
187. Id.
188. Id.
189. Id.
190. See id.
192. See id. at 8-10.
193. 1 Captain James E. Hicks, Notes on United States Ordnance 14 (1940).
legislature ordered that the two hundred stands of arms stored in the state house should be sent west and authorized the governor to purchase six hundred more muskets for public use.\textsuperscript{197} It took a year to acquire these guns, by which time the state government determined that it needed even more guns, which it attempted to acquire in Philadelphia.\textsuperscript{198} To insure that these state guns were better cared for, the legislature ordered the building of an arsenal capable of holding arms for 5,000 men at Abbeville.\textsuperscript{199} This arsenal was finished in December 1793, and the state then tried, unsuccessfully, to get the national government to pay for it.\textsuperscript{200} Whenever even a limited frontier war broke out, state governments had to request the aid of other states and the federal government, empty the public storehouses of guns for the frontier, and seek to purchase ever more arms.\textsuperscript{201}

Such experiences persuaded the state governments that they could not possibly arm their militia without federal help. The Militia Act had not clarified the most important questions: Where would the states acquire guns and who would pay for them? Maryland took the unique path of allowing its militia system to collapse in hopes of forcing the federal government to do something.\textsuperscript{202}

Henry Knox thought he had the solution in his effort to federalize arms production. In 1794 Knox reported to Congress on the condition of the American militia.\textsuperscript{203} By Knox's estimate, the nation could field 450,000 militia members, of whom no more than 100,000 either owned or could be supplied with guns.\textsuperscript{204} The remaining 350,000 muskets, plus replacements for unusable weapons among the remaining 100,000, could not be bought in Europe, given the war there, even if the United States could afford such a purchase.\textsuperscript{205} Nor could American gunmakers hope to supply more

\begin{enumerate}
\item See Letter from Governor Moultrie to the House of Representatives (Nov. 30, 1792), in JOURNALS OF THE HOUSE OF REPRESENTATIVES, 1792–1794, supra note 194, at 285.
\item See Gordon, supra note 151, at 21-22.
\item See Letter from Henry Knox to the House of Representatives (Dec. 10, 1794), supra note 114, at 69-71.
\item See id.
\item See id.
\end{enumerate}
than some 3,000 guns per year. Knox saw only one choice: government arsenals. Knox stated, "The only solid resource to obtain a supply, is the establishment of manufactories within each state." Despite initial fears of granting the central government too much power, Congress agreed with Washington, Knox, and Hamilton on the importance of arming the militia and army. If war broke out against a European power, the United States would be in no position to offer an adequate defense, and it could no longer expect to receive arms from France, as it had during the American Revolution. America had to create domestic sources of firearms. Congress therefore appropriated the funds to purchase 14,000 muskets and to build three armories to make firearms. The first of these national armories was built in Springfield, Massachusetts, and the second at Harpers Ferry, Virginia—the third was never built. The United States government was now in the gunmaking business, an enterprise it would dominate and direct through the 1860s.

Congress knew that American gunmakers could not collectively produce the 14,000 arms they hoped to buy. They did seek to confine the market by forbidding the export of American-made arms, the idea being that the government needed all the guns produced in the United States—not that there was any market for the more expensive and inferior American-made guns outside the United States. In return for that limitation on production, Congress indicated its willingness to buy whatever American gunsmiths could make. Based on Hamilton’s and Knox’s estimates of maximum production, they expected that production level to be 7,000 muskets in two years. To meet the shortfall, Congress appropriated $100,000 to buy British firearms and awarded the British firm of Ketland a contract to make the locks for the American-made muskets and rifles, a trade they maintained until 1812. Thus, the United States’s first

206. See id.
207. Id. at 70.
208. See CRESS, supra note 17, at 75-93.
210. See id.
212. See HICKS, supra note 193, at 14-18.
213. See id.
214. See id.
215. See id.
216. See id.
large purchase of firearms after the winning of independence came from England, and American gunmakers could only hope to reach the modest target of 3,500 guns per year by being supplied with English-made locks.\textsuperscript{217}

Nonetheless, American gunmakers did not reach their target of 3,500 firearms per year.\textsuperscript{218} As delays persisted, the new Secretary of War, Timothy Pickering, admitted that buying American-made guns was not only more expensive, but also less efficient.\textsuperscript{219} Regardless, he insisted to the Senate that the long-term advantages of patronizing American gunmakers far outweighed the disadvantages, especially as these gunmakers would certainly go out of business without government contracts.\textsuperscript{220} On Washington's orders, Pickering subsidized domestic production by ordering an additional 9,000 muskets "after the model of the French arms, which compose, by far, the greatest part of those in our magazines."\textsuperscript{221} He issued further interest-free advances and distributed English gunlocks even though the previous orders had not yet been met.\textsuperscript{222} They were all in serious denial.\textsuperscript{223}

The government had better luck with its own armories. Nonetheless, high levels of government support did not translate into satisfactory production levels. Springfield Armory, which aimed to produce 4,200 muskets per year between 1795 and 1799, manufactured 7,750 in its first five years—thirty-seven percent of its goal.\textsuperscript{224} In the first decade of the nineteenth century, Springfield Armory averaged just over five thousand guns of all kinds per year.\textsuperscript{225} Harpers Ferry could not meet that standard.\textsuperscript{226} As Merrit Roe Smith has written, "[p]roductivity at Harpers Ferry between 1801 and 1806 revealed few signs of growth," with an annual output of 1,700 arms a

\textsuperscript{218} See Timothy Pickering, Secretary of War, Address to the Senate (Dec. 12, 1795), in \textit{1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, supra} note 10, at 110.
\textsuperscript{219} See \textit{id.}
\textsuperscript{220} See \textit{id.}
\textsuperscript{221} \textit{Id.}
\textsuperscript{222} See \textit{id.}
\textsuperscript{224} See DEYRUP, \textit{supra} note 223, at 37.
\textsuperscript{225} See \textit{id.}
\textsuperscript{226} See \textit{id.}
President Thomas Jefferson, driven by his agrarian fantasies, initially hoped to find evidence that he could avoid the expense of supporting arms production. In 1803, with the intention of demonstrating that the American militia owned sufficient firearms, he instructed Secretary of War Henry Dearborn to conduct a careful census of firearms in America. The results disappointed Jefferson. In a country with 524,086 official militiamen, Dearborn found 183,070 muskets; 39,648 rifles; and 13,113 other firearms, for a total of 235,831 guns (there were also 11,882 sabers). That was enough guns for forty-five percent of the militia, one quarter of the white male population, and just 4.9 percent of the nation's total population.\footnote{228} Half of these guns were in the hands of the federal government, with about one-quarter in state arsenals. Dearborn's study was much more thorough than Henry Knox's 1793 effort, and was disturbing enough for Dearborn to make an additional meticulous count of all federal firearms in 1806 that validated his earlier findings.\footnote{229} Dearborn concluded that if the United States continued to rely on the militia for its defense, and if the people would not arm themselves, then the federal government would have to do so.

On this point at least, Jeffersonians and Federalists agreed. Though they disputed who in the militia should get the arms—the Federalists calling for a select militia—they did not question that the militia needed guns. Dearborn's numbers convinced a unified Congress to pass the 1808 Militia Act, the single most important piece of legislation promoting the development of a domestic gun industry.\footnote{230} This Act appropriated $200,000 a year "for the purpose of providing arms and military equipment for the whole body of the militia of the United States, either by purchase or manufacture."\footnote{231}

The Act further authorized the president to erect arsenals and arms

\footnote{227} SMITH, supra note 209, at 69.
\footnote{228} The calculations are based on: Henry Dearborn, Return of the Militia (Dec. 29, 1802), \textit{in} 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, supra note 10, at 159, 162; Henry Dearborn, Return of the Militia (Apr. 4, 1806), \textit{in} 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, supra note 10, at 199, 200-203; Henry Dearborn, Return of the Militia (Feb. 7, 1807), \textit{in} 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, supra note 10, at 210, 214; Letter from Henry Foxall to the Secretary of War (Aug. 1807), \textit{in} 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, supra note 10, at 215, 217.
\footnote{229} See sources cited supra note 228.
\footnote{231} Act of Apr. 23, 1808, ch. 55, § 1, 2 Stat. 490, 490.
manufactories "as he may deem expedient."232 "All the arms procured in virtue of this act, shall be transmitted to the several states . . . in proportion to the number of the effective militia in each state and territory."233

Over the next thirty years the federal government supervised several more censuses of firearms, an enterprise in keeping with the traditional English assize of arms. In addition, most states conducted similar surveys into the 1840s. Collectively, these censuses reveal a slow increase in the total number of arms available in the United States, though it would take the Civil War to finally provide arms sufficient for those men expected to serve in the militia.234 What is most intriguing about this process is that there seems to be no evidence of any objection to these censuses in any newspaper, journal, or legislative record. It would appear that the people of the United States did not question the right of their government to determine the number, condition, and location of firearms, even in private households. In the South, this governmental power bordered on a necessity, in light of the constant fear of slave uprisings.

Even Thomas Jefferson, the supposed champion of individual and states' rights, sought during his presidency to increase federal control over the militia and arms production. Seven of Jefferson's eight annual messages to Congress called for greater federal regulation of the militia.235 His republican colleagues in Congress shared his concern. The government armories at Springfield and Harpers Ferry were doing fairly well, producing between five and ten

232. Id. § 2, 2 Stat. at 490.
233. Id. § 3, 2 Stat. at 490.
thousand guns every year between them. But that was barely enough to keep the army in working firearms. Congress hoped that a concerted effort by the federal government to arm the militia would encourage gunmakers to expand their operations. Jefferson appointed Tench Coxe, purveyor of public supplies, to handle the procurements. In June 1808, Coxe took the unusual step of placing advertisements in most of the major newspapers in the country, calling for bids. Over the next five months, Coxe signed contracts with all but one of the gunmakers who replied to his advertisement (because his shop was too small). These nineteen gunmakers agreed to deliver a total of 82,200 muskets over the next five years. The single largest contract was for 10,000 muskets with Pennsylvania's Henry family, in their third generation of gunmaking. The government advanced nearly $100,000 to aid these gunmakers, not a single one of whom met their schedules. After two years, by which time 17,000 muskets were due, only 3,000 had been delivered. By the end of 1813, the government was to have spent one million dollars and acquired at least 85,000 muskets; it had spent half that amount and received 34,477 guns: only forty percent. Several gunmakers wanted to give up and get out of their contracts; even the Henry family bailed out after delivering just 4,246 guns. The new commissary general of purchases, Callender Irvine, willingly agreed to terminate all these contracts, especially after his inspection convinced him that the guns delivered had little value beyond what they would fetch as scrap.

236. See SMITH, supra note 209, at 342-47. 
237. See id. 
238. See Callender Irvine, Return of Muskets Delivered Under Contracts Made for the War Department by the Late Purveyor, from the Month of May, 1809, to October 7, 1812 (Dec. 12, 1812), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, supra note 10, at 328, 328. 
239. See HICKS, supra note 193, at 19-24. 
240. See id. at 32. 
241. See id. 
242. The calculations are based on: Expenses of Armories: Arms Manufactured in 1810 (Mar. 2, 1811), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, supra note 10, at 302, 302; Cannons, Small Arms and Other Munitions (Dec. 16, 1811), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, supra note 10, at 303, 303-07; Arms Provided for and Issued to the Militia (Dec. 24, 1812), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, supra note 10, at 327, 327-29; Contract Price of Arms for the Militia (Mar. 3, 1813), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, supra note 10, at 335, 337; Contracts for 1815 (Jan. 25, 1816), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, supra note 10, at 624, 624-25; Arms Delivered to the Several States—Militia Force—and the Number of Arms Made and Repaired at Public Armories (Feb. 24, 1818), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, supra note 10, at 677, 677-80; Contracts Made in the Year 1818 (Feb. 25, 1819), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, supra note 10, at 848, 848-60.
In short, gun production outside of the two national armories continued to be a matter of small-scale operations. Tench Coxe's report of American manufacturers in May 1813 listed a total of 148 gunmakers in eleven states—115 of them in Pennsylvania.\textsuperscript{243} He placed the total value of these enterprises at $593,993; an average capitalization of $5,165, but a mean of just over $1,000.\textsuperscript{244} Coxe did not discuss the manufacturing capabilities of America's gunmakers, even though there was a war. Instead, the poor quality of these guns captured his attention, leading him to suggest that it was about time for the government to establish adequate testing facilities.\textsuperscript{245}

At the very time that many Jeffersonians began questioning the capacity and ability of American gunmakers, others started wondering whether Washington had not in fact been right about the militia. In 1809, Connecticut's Benjamin Tallmadge, a member of the House of Representative's Committee on the Militia, issued the usual insistence on the value of the militia.\textsuperscript{246} In response, General Ebenezar Huntington, a Revolutionary War veteran and past commander of the Connecticut militia, stated roughly that "as soldiers [the militia] are not worth their rations."\textsuperscript{247} He did not believe that the government should waste its time arming the militia, as it did not take care of its arms, which were soon "destroyed with rust," and "I have no doubt might be considered a total loss in five years."\textsuperscript{248} Huntington returned to Knox's older idea of volunteer units, smaller and better trained, and committed to taking care of their arms.\textsuperscript{249} Without such reform, the militia would be little better than "food for powder on the day of battle."\textsuperscript{250}

Republicans came to realize that their ideology of a well-armed universal militia had no relation to reality. National survival had to take precedence over ideological purity. Maximillan Godefroy, a French veteran living in Maryland, published a pamphlet in 1807


\textsuperscript{244} See id.

\textsuperscript{245} See Digest of Manufactures, Cannon and Musket, \textit{2 AMERICAN STATE PAPERS: FINANCE, supra} note 243, at 687.

\textsuperscript{246} See Letter from Benjamin Tallmadge to General E. Huntington (Dec. 18, 1809), \textit{in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, supra} note 10, at 263.

\textsuperscript{247} Letter from General E. Huntington to Benjamin Tallmadge (Jan. 5, 1810), \textit{in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, supra} note 10, at 264.

\textsuperscript{248} Id.

\textsuperscript{249} See id.

\textsuperscript{250} Id.
arguing that the American resistance to all military skills, from shooting to marching, left the country no alternative but to turn to a professional army. 251 In America, Godefroy wrote, “military talents are repulsed, and military ideas rejected as useless.” 252 While Europe was developing a whole range of new military techniques, the United States clung to vain hopes that the militia would somehow save the nation. Many in Congress agreed with Representative Harmanus Bleeker of New York that “the militiaman is best employed at his plough.” 253

The most ardent Republicans came to understand that the militia needed guns in order to learn how to use them. In state after state, officials complained that they were not yet receiving the free arms promised under the 1808 Militia Act. 254 In 1809, Joseph Bloomfield of New Jersey began an angry letter to Congress by quoting the Constitution as requiring Congress to arm the militia. 255 He then added pointedly, “They have not done it. The National Legislature have neglected what they ought have done the moment it was in their power” to arm the militia. 256 He lambasted the idiocy of expecting individuals to arm themselves, a highly unlikely prospect. 257 In no state, Bloomfield declared, had even one-sixth of the militia succeeded in arming itself appropriately. 258 He lay the responsibility for the nation’s undefended condition squarely on Congress, which shirked its most fundamental duty. 259

The federal government could only do so much to overcome two centuries of reliance on Europe for firearms. In 1810, Secretary of the Treasury Albert Gallatin issued a report on manufacturers. 260 After fifteen years of government support, Gallatin listed guns under “manufactures of iron,” which “consist principally of agricultural implements,” adding that “all of the finer species” of such work is

251. See generally Maximillian Godefroy, Military Reflections, on Four Modes of Defence, for the United States with a Plan of Defence (1807).
252. Cress, supra note 17, at 162.
254. See Letter from Joseph Bloomfield to Benjamin Tallmadge (Dec. 29, 1809), in 1 American State Papers: Military Affairs, supra note 10, at 266.
255. See id. at 267.
256. Id.
257. See id.
258. See id.
259. See id.
imported from Britain. The two government arsenals reached a peak of 19,000 muskets that year, with another 20,000 guns made by private manufacturers nationwide—39,000 guns for a population of 7,202,014, more than one million of whom were supposed to be in the militia (enough guns for less than four percent of the militia). The government still had a long way to go if it hoped to meet the Constitution’s mandate in Article 1, Section 8, “To provide for organizing, arming, and disciplining, the Militia.”

V. GUNS AND SLAVERY

No contemporary can be found to argue that the Second Amendment hindered the states’ authority to regulate firearms. Nor were similar passages in state constitutions perceived as blocking such legislation. As Carl Bogus has reminded us, slavery played a key role in the South’s understanding of the Second Amendment. The Southern militia’s primary purpose was the preservation of white supremacy. The slave patrols, whose members were drawn from the militia rosters, handled routine policing. But slave insurrections pushed the militia to its limits, demonstrating that not even the fear of slave uprisings sufficed to motivate the majority of whites to own guns and practice their use.

The first great test of the Southern militia under the Constitution came in Virginia in 1800. In that first year of the new century, an African American named Gabriel rattled the South to its core with a vivid anticipation of the danger posed to the whites. Gabriel’s Rebellion also revealed a core paradox in the question of arms in the South: the need of the state to hold guns that would be easily accessible to the militia, but not to the slaves. These stored arms became the most tempting target for any revolutionary force. Thus,

261. See id.
262. See SMITH, supra note 209, at 75, 342-43.
263. U.S. CONST. art. I, § 8, cl. 15.
264. See generally Bogus, supra note 92.
268. See id.
269. See id.
Gabriel's first goal was to capture the militia arms stored in the capital, for his forces would be armed only with swords, knives, pikes, and what few muskets he could seize from the white planters.\textsuperscript{270} As soon as Governor James Monroe heard the rumors of the planned uprising, he ordered all the "publick arms"\textsuperscript{271} moved from the capital to the penitentiary under a guard of thirteen armed militiamen—a surprisingly small force, but all that was available at the time.\textsuperscript{272} The problem then became how to issue some of these arms to the militia units called up by Monroe.\textsuperscript{273} A general panic spread through much of Virginia at the start of Gabriel's uprising, and whites demanded immediate militia protection.\textsuperscript{274} The Suffolk militia, short of guns, appealed to the governor for aid.\textsuperscript{275} Monroe promised to supply arms, but then discovered that the state had insufficient guns even for the 500 militiamen so far ordered into action.\textsuperscript{276} The militia officers appealed repeatedly for aid, without success, finally arming their troops with whatever they could lay their hands on, primarily bladed weapons.\textsuperscript{277}

Most observers felt that only heavy rains and the early discovery of the uprising prevented a successful slave rebellion. As James Callender wrote Thomas Jefferson, the insurrection "could hardly have failed of success, . . . for after all, we could only muster four or five hundred men of whom no more than thirty had Muskets."\textsuperscript{278} Norfolk mayor Thomas Newton was delighted to hear that the militia had been called out, but complained that "they have not arms, and are on that account only equal to the slaves except in numbers."\textsuperscript{279} Mayor Newton insisted that it was the state's job to see that the militia was properly armed.\textsuperscript{280}

During the slave insurrection scare of 1802, Monroe reserved most of the state's arms for the Nineteenth Regiment of Richmond, charged with protecting the capital.\textsuperscript{281} That unit was fully armed with

\textsuperscript{270} See id. at 55-56.
\textsuperscript{271} Id. at 72.
\textsuperscript{272} See id.
\textsuperscript{273} See id. at 75-79.
\textsuperscript{274} See id.
\textsuperscript{275} See id. at 77.
\textsuperscript{276} See id.
\textsuperscript{277} See id. at 76.
\textsuperscript{278} Letter from James Callender to Thomas Jefferson (Sept. 13, 1800), \textit{in} THOMAS JEFFERSON PAPERS (on file with the Library of Congress).
\textsuperscript{279} EGERTON, supra note 267, at 77.
\textsuperscript{280} See id.
\textsuperscript{281} See Letter from James Monroe to Richard Adams (July 26, 1802), microformed on
“four hundred and twelve stands of public Arms.” Monroe felt that he had learned his lesson from Gabriel’s Rebellion, and that with the vast majority of his citizens “unarmed . . . they may become a prey to a very small force.” He therefore sought to ensure that the slave patrols were better armed and far more intrusive. The terror aroused in the white breast by Gabriel’s Rebellion saw an increase in interest in the militia across the South.

The Southern governments responded to their fear of slave insurrection by shifting more funds to arming their militia and by insuring that there was no individual right to bear arms. It seems almost too obvious to point out that the Second Amendment did nothing to prevent the various states from disarming those perceived as dangerous to public safety and passing laws forbidding the possession of guns by these people. Thus every Southern state not only forbade slaves from carrying firearms, but also outlawed the ownership of guns by free blacks. The only challenge to this legislation came in 1844. The North Carolina Supreme Court ruled unanimously that laws restricting the use of firearms by free blacks did not violate the Second Amendment.

VI. MADISON’S LESSON

Under the leadership of James Madison, the United States entered the War of 1812 grotesquely unprepared for a sustained conflict. Jefferson had allowed the United States Army’s total strength to fall to 2,400 men in 1807. As the war approached,
Congress authorized an army of 10,000, but recruiters had little luck finding that many men in America willing to serve. When Congress declared war in June, the U.S. Army consisted of 6,750 men. Wellington commanded about 46,000 men at the Battle of Salamanca the next month, while Napoleon led an army of 450,000 into Poland.

William King, the Assistant Inspector General of the U.S. Army, found the vast majority of federal arms "in infamously bad order." Matters were much worse among the militia. In his preliminary war message, President Madison called upon "the several states, to take effectual measures to organize, arm, and equip, according to law," their militia. They were in desperate need of help, with nearly every militia in the country appealing for arms and ammunition. Pennsylvania's adjutant general reported that his state's 99,414 men could take the field with 30,366 guns, both publicly and privately owned. In July 1813, the House Committee of Military Affairs stated a transparent truth: "[T]he war found the militia badly armed." General William Lenoir informed North Carolina's governor that "a considerable part of the 7,000 militiamen" who reported for service were "unarmed." He had no idea "how they are to be furnished with arms." The situation was worse in Vermont, Rhode Island, and New York. The latter state's Senator Obadiah German felt that "the evils attending upon calling a large portion of the militia into actual service for any considerable time, is almost incalculable." He correctly prophesied that the event "will teach you the impropriety of relying on them for carrying on the

290. See id.
291. See id.
296. See Pennsylvania Militia, WEEKLY REGISTER, Dec. 12, 1812, at 240.
297. Arming the Militia, Communicated to the House of Representatives (July 8, 1813), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, supra note 10, at 337, 338.
299. Id.
300. See id. at 72-77.
301. ANNALS OF CONG., 12th Cong., 2d Sess. 283 (1813).
war."

The historian Lawrence Delbert Cress has offered a more biting conclusion: "Ironically, the ideological tenets that had informed Republican critiques of Federalist policy over the previous decade would render the republic in the years preceding the War of 1812 virtually defenseless—this despite a clearly discernible sense that the nation's peacetime forces required significant reform."

The federal government did its best to make up for its previous complacency, rushing to supply modern, usable muskets to the army, and any kind of guns to the militia. The War Department gave priority to those militia it thought most likely to see battle, sending 5,000 muskets to Connecticut, 2,000 to New York, and 1,500 to Louisiana in the first year of the war. Repeatedly, militia officers reported that many of those receiving firearms appeared to have never handled one before.

The concerns of the War Department were well founded, for when the British did attack Washington, D.C. in August 1814, the militia crumbled. The British expeditionary force was tiny by European standards, a mixed force of 4,370 infantry, marines, and sailors, with just three artillery pieces. In theory, they faced an aroused populace able to field some 50,000 militia within a day's march of the capital. There were certainly enough registered members of the militia, but they had rarely mustered, let alone trained, and most were unarmed. The Virginia militia had no supply of flints, a necessity for actually firing a gun, while the governor of Pennsylvania could not call out the militia to protect Washington because the legislature had failed to pass a new militia law. Those who did show up did everything wrong; even reversing the famous mythology by forming themselves into neat ranks in open fields while the British fired at them from behind the cover of trees. Admiral Alexander Cochrane's forces easily defeated the nearly 12,000 United States militia men he encountered, including General

302. Id.
303. CRESS, supra note 17, at 152.
304. See Arming the Militia, Communicated to the House of Representatives (July 8, 1813), supra note 297, at 337.
306. See ELTING, supra note 289, at 207.
307. See id.
309. See ELTING, supra note 289, at 211-43.
John Stricker's beautifully uniformed Baltimore regiment of 3,000 men.310 Thousands of Americans quietly slipped away for home without ever firing a shot in defense of their nation's liberty.311 It was a sorry show, as smoke rose from the burning White House, and British sailors cavorted in the Capitol.

Many contemporaries thought the local militia units simply cowardly, but at least one regiment had a sound reason for not acting in defense of the capital city: they had almost no guns. Colonel George Minor testified before Richard M. Johnson's House committee investigating the fall of Washington, D.C. in October 1814. Minor, in command of Virginia's Sixtieth Regiment, arrived at Washington, D.C. with 600 infantry and 100 cavalry.312 He found his troops grievously short of arms, reporting personally to President Madison "as to the want of arms, ammunition &c."313 Madison sent him to General Armstrong, who told him that arms, &c. could not be had that night, and directed me to report myself next morning to Colonel Carbery, who would furnish me with arms, &c.; which gentleman, From early next morning, I diligently sought for, until a late hour in the forenoon, without being able to find him, and then went in search of General Winder.314 He found Winder and was told to wait.315 As a consequence, this regiment, described by General Winder as "wholly unarmed," never saw battle.316 As his capital burned, President Madison may have reflected on the failure of the federal government to successfully arm its citizens.

But few people in this first generation of constitutional government questioned the federal government's inherent authority to regulate and arm the militia. The Supreme Court cast aside the old Antifederalist position in Houston v. Moore317 and Martin v. Mott.318 Both decisions upheld the clearest reading of Article 1, Section 8 on
the Constitution as granting the federal government complete control over the militia. Justice Joseph Story quoted the Second Amendment in *Houston v. Moore* to demonstrate the need for Congress to regulate the militia.\(^{319}\) Justice Story wrote, "[A] rational interpretation, must construe this power as exclusive in its own nature, and belonging solely to Congress."\(^{320}\) Any law such as Pennsylvania’s that granted the state more authority over the militia when in national service would be disruptive and "repugnant to the constitutional laws" already passed by Congress.\(^{321}\) In *Martin v. Mott*, Justice Story held that Congress, as representative of the people, could be counted on to "guard against usurpation or wanton tyranny."\(^{322}\) The Second Amendment was read entirely within this context of the government’s need to regulate the militia. There was no dissent in either case.

**CONCLUSION**

Legislatures, whether local or national, worked on the assumption that they had a legitimate interest in passing acts to secure the public safety. As a consequence, measures that placed precise limitations on the use and possession of firearms passed largely unchallenged. On the one occasion when such legislation was overturned, in *Bliss v. Commonwealth*,\(^{323}\) the Kentucky Supreme Court ruled that state regulation of firearms violated the state’s militia amendment, which granted an explicitly individual right to bear arms.\(^{324}\) In response, the legislature immediately amended the state constitution to allow such legislation, rewriting the militia amendment to more closely match the federal Constitution’s Second Amendment.\(^{325}\) Otherwise, court after court agreed with the logic of Tennessee’s high court in *Aymette v. State*\(^{326}\) that "[t]he object, then, for which the right of keeping and bearing arms is secured, is the defence of the public"\(^{327}\) and that nothing in the Constitution limits

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\(^{319}\) Justice Story called it the Fifth Amendment in the opinion. *See Houston*, 18 U.S. (5 Wheat.) at 52.

\(^{320}\) *Id.* at 54.

\(^{321}\) *Id.* at 76.


\(^{323}\) 12 Ky. (2 Litt.) 90 (1822).

\(^{324}\) *See id.*

\(^{325}\) *See Bellesiles*, supra note 11, at 587.

\(^{326}\) 21 Tenn. (2 Hum.) 154 (1840).

\(^{327}\) *Id.* at 158.
the legislature "from passing laws regulating the manner in which these arms may be employed." \(^{328}\)

Such decisions validated a wide variety of gun regulations at the state and federal levels. Congress retained tight control over the sale of firearms and ammunition to the Indians, again needing no further justification than public safety. The Indian Intercourse Act of 1834 placed strict limitations on those selling any kind of arms to Indians and required a federal license to enter into the Indian trade. \(^{329}\) States worked to keep firearms out of the hands of those persons marked as unsafe, including blacks. \(^{330}\) And as always, political enemies had no right to bear arms. The new U.S. government and several state governments made that abundantly clear in a number of uprisings in the early national period, from the Whiskey Rebellion in 1794 through Dorr's Rebellion in 1842, as well as anything approximating a slave uprising. \(^{331}\)

Several states responded to the threat of concealed weapons. Not just pistols, but a variety of small, well-made bladed weapons like dirks and Bowie knives, as well as sword canes, could too easily be concealed and produced in the midst of an argument, to lethal effect. As the early American political scholar Benjamin Oliver wrote in 1832, the "cowardly and disgraceful" act of carrying concealed weapons transformed what might have been a barroom brawl into a deadly encounter. \(^{332}\) The Second Amendment, which Oliver held relevant only to the militia system, offered nothing "to prevent congress or the legislatures of the different states from enacting laws to prevent citizens from always going armed." \(^{333}\) Most state legislators agreed with Oliver's interpretation. As early as 1801, the Tennessee legislature made it illegal for anyone to "publicly ride or go armed to the terror of the people, or privately carry any dirk, large knife, pistol, or any other dangerous weapon, to the fear or terror of any person." \(^{334}\) Louisiana's 1813 act outlawing the carrying of concealed

\(^{328}\) Id. at 159; see also State v. Reid, 1 Ala. 612, 616 (1840) (declaring that neither the federal nor state constitutions "expressly nor by implication, denied to the Legislature, the right to enact laws in regard to the manner in which arms shall be borne").

\(^{329}\) See Act of June 30, 1834, ch. 161, § 12, 4 Stat. 729, 730.

\(^{330}\) See Bellesiles, supra note 100, at 247-62.

\(^{331}\) See Cornell, supra note 8, at 221-46.

\(^{332}\) Benjamin L. Oliver, The Rights of an American Citizen; With a Commentary on State Rights 177 (1970).

\(^{333}\) Id.

\(^{334}\) 1 Laws of the State of Tennessee, Including Those of North Carolina Now in Force in This State 1715-1820, at 710 (Edward Scott ed., 1821).
firearms allowed police officers to stop and search anyone suspected of carrying a concealed weapon.\textsuperscript{335} Several state constitutions forbade noncitizens from possessing firearms.\textsuperscript{336} This fear of concealed weapons accelerated in the 1830s as pistols became smaller. In 1832 Illinois instituted a $100 fine for anyone caught carrying "upon him any pistol, gun, knife, bludgeon, or other offensive weapon."\textsuperscript{337} Ohio's fine was $200.\textsuperscript{338} In 1837, Georgia's legislature forbade shopkeepers from selling or even stocking pistols and concealable bladed weapons.\textsuperscript{339} The Georgia Supreme Court later declared this statute unconstitutional in that it prohibited the carrying of weapons, but constitutional in its prescription of how they were carried.\textsuperscript{340}

Repeatedly, individuals directly involved in the ratification of the Second Amendment voted unhesitatingly to limit the rights of gun ownership. If one believes that actions reveal more of intentions than abstract language, then it is difficult to mistake the initial legal and political understanding of the Second Amendment. But maybe this is all irrelevant. Perhaps—and here is the second reason for ignoring this research—the original intention of the framers of the Constitution and the Bill of Rights should not enter into our civic deliberations. After all, as Jack Rakove convincingly established, the original meaning of the framers was that future generations should not be guided by eighteenth-century events and ideas.\textsuperscript{341} But that is not to negate the value of historical knowledge. I offer the modest suggestion that the historical context of a constitutional amendment is relevant, though not determinative, of its meaning. Any study of the historical context of the Constitution and Bill of Rights cannot escape the fact that they were drafted in the midst of a long-term perceived militia crisis. In the absence of police, the militia was expected to maintain internal order, responding to insurrections, whether by slaves or political radicals. With a feeble standing army, the

\textsuperscript{335} See Meinrad Greiner, The Louisiana Digest, Embracing the Laws of the Legislature of a General Nature Enacted from the Year 1804 to 1841, at 131 (1841).

\textsuperscript{336} See, e.g., Pa. Cons. Stat. (1790); Ky. Const. (1792); Miss. Const. (1817); Conn. Const. (1818); Me. Const. (1819).

\textsuperscript{337} Revised Laws of Ill. 202 (Greiner & Sherman 1833).

\textsuperscript{338} See Ohio Rev. Code Ann. § 1 (1859).

\textsuperscript{339} See Act of Dec. 25, 1837, ch. 1, §§ 1, 4, 1837 Ga. Laws 90, 90 ("An Act to guard and protect the citizens of this State against the unwarrantable and too prevalent use of deadly weapons.").

\textsuperscript{340} See Nunn v. State, 1 Ga. 243 (1846) (using Second Amendment to invalidate firearms regulation).

\textsuperscript{341} See Rakove, Declaring Rights, supra note 44, at 147-66.
leadership of the United States hoped that the militia could protect the nation’s security. But the militia could do neither. In a time of insecurity and uncertainty, the political leadership throughout the United States turned to the federal government to, as Article 1, Section 8 of the Constitution states, “provide for organizing, arming, and disciplining, the Militia.”\(^3\) The Second Amendment confirmed that commitment to organize and arm the militia. When they said that a well-regulated militia is necessary to the security of a free state, they meant it.

\(^{342}\) U.S. CONST. art. I, § 8, cls. 15-16.