No. 07-290

IN THE
Supreme Court of the United States

DISTRICT OF COLUMBIA, *et al.*,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF AMICI CURIAE JACK N. RAKOVE, SAUL CORNELL, DAVID T. KONIG, WILLIAM J. NOVAK, LOIS G. SCHWOERER ET AL. IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amici Curiae, listed in the Appendix, are professional historians. They have all earned Ph.D. degrees in history, hold academic appointments in university departments of history, and specialize in the American Revolution, the Early Republic, American Legal History, American Constitutional History, Anglo-American Legal History, or related areas. Amici curiae have an interest in the Court having an informed understanding of the history that led to the adoption of the Second Amendment.

INTRODUCTION AND SUMMARY OF ARGUMENT

The central question is whether the Second Amendment protects a private right to keep handguns and other firearms, independent of an individual's membership in a state-regulated militia. As a problem for constitutional historians, the question can be elaborated and restated in this way: Did the framers and ratifiers of the Amendment believe they were constitutionally entrenching an individual right to keep arms for personal protection? Or did they conceive the

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, other than the Roger Williams University School of Law, which paid for the printing of this brief through Professor Bogus' research account. This brief is filed with the written consent of the parties, reflected in letters on file with the Clerk, Amici complied with the conditions of those consents by providing seven days advance notice of their intention to file this brief.

Amendment to achieve a different end, by affirming that a "well-regulated militia" of citizen-soldiers would preserve "the security of a free state," principally by lessening the need for a republican government to depend on a standing army?

Historians can best assess these claims by reconstructing the context within which the adopters of the Amendment acted. Recovering that context involves more than snatching a line from Blackstone's *Commentaries* or Madison's 46th *Federalist*, or ringing endless changes on the references to hunting and fowling in the *Dissent* of the Anti-Federalist minority in the Pennsylvania ratification convention. It instead involves explaining how a popular right to keep and bear arms figured in the ratification debates of 1787-1788; how that debate was in turn shaped by the Militia Clause of Art. I, § 8; and why that clause appeared to threaten key Anglo-American political ideas dating to the Glorious Revolution of 1688-1689. Setting the context for the Second Amendment also requires exploring analogous provisions in the parliamentary Bill of Rights of 1689 and the declarations of rights that accompanied the first state constitutions.

Once explored, this context establishes that the private keeping of firearms was manifestly not the right that the framers of the Bill of Rights guaranteed in 1789. Though Anglo-American political tradition did indeed value the idea of an armed populace, it never treated private ownership of firearms as an individual right. The right stated in the seminal English Bill of Rights of 1689 was vested not in individuals but in Parliament, which remained free to determine "by law" which Protestant

subjects could own which weapons and how they could be used. Nor did the first American constitutions and declarations of rights include clauses protecting private use of firearms.

The right to keep and bear arms became an issue in 1787-1788 only because the Constitution proposed significant changes in the governance of the militia, an institution previously regulated solely by state law. Anti-Federalists argued that Congress would abuse its proposed authority to organize, arm, and discipline the militia by allowing that venerated institution to atrophy from neglect and lack of funding. A national government that could command permanent armed forces with its own resources would gain an engine for tyranny. Republican political thinking had long regarded standing armies as a danger to liberty, and a militia of citizen soldiers as one of its greatest bulwarks. Anti-Federalists rehearsed these arguments, and several ratification conventions—notably Virginia and New York—adopted resolutions affirming that a right to keep and bear arms, when tied to service in the militia, merited constitutional protection. Nothing in the ratification debates of 1787-1788, however, indicated that the exercise of this right required limiting the customary police powers of state and local government.

Federalist supporters of the Constitution dominated the First Congress that met in the spring of 1789. In framing the Second Amendment, they simultaneously sought to assuage the expressed Anti-Federalist concern about the maintenance of the militia while preserving congressional authority over its organization, arming, and discipline. They rejected language that would have

modified that authority, including a qualifying provision, proposed by the House of Representatives, defining the militia as "composed of the body of the people." Acceptance of that definition would impair congressional authority to determine how extensive membership in the militia should be.

Nothing in this argument challenges the idea that eighteenth-century Americans had ready access to firearms, or that they valued the concept of a well-armed citizenry. Individuals were legally free to purchase and keep weapons as they could other property; but like other forms of property, the keeping of firearms was subject to extensive legal regulation. What is at dispute is whether legal rights of private ownership were what the Second Amendment constitutionally entrenched. During this period, Americans were hardly shy about identifying and discussing such fundamental rights as representation, trial by jury, or freedom of conscience, or the natural rights to life, liberty, and property. The fact that references to the keeping of firearms are so few and terse, or that the modern academic controversy over the Second Amendment has been forced to squeeze so much modern interpretive blood from so few evidentiary turnips, is itself an indicator of how minor a question this was at the time. The same cannot be said about the role of the militia in the constitutional order. That was the subject that was patently in dispute in 1787-1789, and that is why the exceptional preamble to the Second Amendment is a true guide to its original meaning.

ARGUMENT

EVEN AFTER THE PARLIAMENTARY BILL OF RIGHTS OF 1689 ALLOWED CERTAIN CLASSES OF PROTESTANT SUBJECTS TO KEEP ARMS, BRITISH CONSTITUTIONAL DOCTRINE AND PRACTICE SUBJECTED THE LIMITED RIGHT THEREIN RECOGNIZED TO EXTENSIVE LEGAL REGULATION AND LIMITATION.

The closest English antecedent to the American notion of a right to bear arms appears in the Bill of Rights, the parliamentary reenactment in December 1689 of the Declaration of Rights that the new monarchs, William and Mary, accepted seven months earlier after the Glorious Revolution forced James II to vacate his throne. Knowledgeable Americans were familiar with the Bill of Rights and the circumstances of its creation. Americans saw the English document as part of a common constitutional tradition, a binding pledge by the Crown to acknowledge the legal supremacy of Parliament and thereby respect the rights of the people.

That link between parliamentary supremacy and popular rights is critical to understanding the import of Article VII of the Bill of Rights, which provided "That the Subjects which are Protestants may have Armes for their defence Suitable to their Condition and as allowed by Law." The formal grievance that Article VII answered was that James II had violated settled law "By causing several good Subjects being Protestants to be disarmed at the same time when Papists were both armed and Employed contrary to Law." Bill of Rights (1689) *reprinted* in 5 The Founders' Constitution 1-2 (Philip Kurland and Ralph Lerner, eds. 1987). The authors of the Bill of Rights were reacting to the efforts of Charles II and James II to maintain Stuart rule through a

standing army increasingly officered and manned by Irish Catholics. Commissioning Catholics as military officers did indeed violate the Test Act, which required officeholders to swear an oath denying Catholic doctrine on transubstantiation. In the paranoiac atmosphere of the 1680s, James's open practice of Catholicism and the birth of his male heir made the fear of a Catholic restoration all the more ominous.

The arms-bearing right that the Bill of 1689 affirmed, then, was a response to this specific situation, tied to the belief that an armed Protestant population would safeguard the realm against a Catholic restoration. It did not establish a general right of all persons to keep weapons, and especially firearms, for purposes of individual defense. An earlier version of Article VII could be read to grant the right to all Protestants. But that expansive possibility was checked when the House of Lords added the crucial qualifying language, "Suitable to their Condition and as allowed by Law." Lois Schwoerer, *To Hold and Bear Arms: The English Perspective,* 76 Chi.-Kent L. Rev. 30-48 (2000). The first qualification tracked a long history of legislation making the possession of weapons, and again especially firearms, dependent on the holders' social and economic status. The second qualification was a reference to the Game Law of 1671, which allowed lords of manors to appoint gamekeepers to "take and seize all such guns" used by "divers disorderly persons" to hunt and trap "game intended to be preserved" for the higher classes of English society. 6 English Historical Documents 466-467 (Andrew Browning, ed., 1988). Adoption of the Bill of Rights did not affect Parliament's capacity to regulate who could or could not possess firearms. In fact, when a

new Game Act was adopted in 1693, the House of Commons rejected (169-65) a proposal allowing "every Protestant to keep a musket in his House for his defence not withstanding this or any other Act." Many members voting had sat in Parliament in 1689; they evidently did not read Article VII as establishing a broad-gauged right all Protestants could claim. Schwoerer, *Hold and Bear Arms*, *supra* at 50-51.

The notion that Article VII made ownership of firearms a fundamental right immune to substantive regulation fails for a broader reason. The lasting constitutional significance of the Bill of Rights was not only to identify certain rights of the subject that merited protection, but also to lay down the basic premises that shaped British constitutionalism thereafter: that the monarch could not make law simply by royal edict, but that he must rule *lawfully*, with the consent of Parliaments freely elected and frequently assembled. The concept of parliamentary supremacy, as exercised through the king-in-Parliament, was the great principle the Bill of Rights vindicated. The liberty Englishmen cherished would be secured by confirming that a Parliament respectful of their rights and representative of society would have sovereign authority to make law. Article VII endorsed the idea that well-to-do Protestants might keep arms against the threat of a Catholic restoration, but as the formula "according to law" made clear, this imposed no limit on the reach of parliamentary power.

That understanding also informed a much-cited passage from Sir William Blackstone's *Commentaries* (1765).

> "The fifth and last auxiliary right of the subject … is that of having arms for their defence, suitable to their condition, and such as are allowed by law," Blackstone wrote, citing the Bill of Rights. This was "indeed, a publick allowance under due restraints, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression."

1 William Blackstone, Commentaries *139. Notwithstanding the reference to "self-preservation," this passage cannot be construed to assert an unregulated private right of self-defense, for two reasons. First, Blackstone's corpus of five "subordinate" or "auxiliary" rights involve the subject's relation to public authority, respectively through the constitution of Parliament; the limitation on royal prerogative; access to courts of justice; the right to petition; and finally, the right to arms as a security against oppression. *Id.* at *136-139. Second, the phrases "suitable to their condition, and such as are allowed by law," and "under due restraints" denote the regime of parliamentary regulation that the Bill of Rights made the fundamental principle of British constitutionalism. Blackstone was an unequivocal defender of that regime. "So long therefore as the English constitution lasts," Blackstone wrote in the very next chapter, "we may venture to affirm, that the power of parliament is absolute and without control."

Id. at 157. Whatever principle the Bill of Rights stated always lay within the power of Parliament to apply and regulate, and thus to modify or limit. In this sense, the Bill of Rights did not establish a catalogue of rights in the modern, positivist, constitutionally-entrenched sense of the term. Like the clauses of Magna Carta, all of its provisions were subject to modification, control, and repeal by subsequent Parliaments. So long as Parliament sat, Blackstone envisioned no situation under which the auxiliary right of resistance could be invoked. *Id.*

The First American Bills Of Rights Made No Mention Of A Private Right To Keep Arms

One application of parliamentary sovereignty was the program of colonial legislation adopted after 1765. As the Declaratory Act of 1766 stated, the colonists were subject to parliamentary jurisdiction "in all cases whatsoever." 27 Danby Pickering, The Statutes at Large From Magna Carta to the End of the Parliament of Great Britain 19-20 (London, John Archdeacon, 1767). Americans rejected that claim by declaring independence. But in doing so they did not repudiate the general conception of legislative supremacy, which remained the leading principle of the new state constitutions adopted with independence, and that principle embraced a robust conception of the reach of legislative authority. *See generally*, Gordon S. Wood, Creation of the American Republic, 1776-1787 at 162-163 (1969).

Nor did the declarations of rights that eight states concurrently adopted effectively limit legislative power. In only two states (Pennsylvania in 1776, Massachusetts

in 1780) were they made part of the actual constitutions. These declarations operated not as legally binding commands but rather as statements of republican principles or common law protections. They have also been faulted for being less comprehensive than modern readers might expect them to have been.[2]

Even so, these early declarations indicate which rights the first state constitutions deemed fundamental. It is noteworthy that none made any reference to the private ownership and personal use of firearms. There is no direct equivalent in the American declarations to the selective Protestant "subjects" invoked in the Bill of Rights of 1689.[3] What appear instead are statements, either bundled together in one article or linked in successive articles, affirming the virtue of a well-regulated militia, the danger of standing armies, and the importance of maintaining civilian control over the military.

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[2] In January 1787, to compensate for the omission of such a declaration from its 1777 constitution, the New York legislature approved An Act Concerning the Rights of Citizens of this State. None of its thirteen articles mentioned a right to keep and bear arms. 19 Documentary History of the Ratification of the Constitution 504-06 (John Kaminski and Gaspare Saladino, eds., 1976-) (hereafter DHRC). Six months later, the Continental Congress adopted the Northwest Ordinance. Its supplemental six articles constituted a bill of rights but made no mention of a right to arms. 1 Founders' Constitution *supra* at 28-29.

[3] Section 43 of the Pennsylvania constitution does grant "inhabitants ... liberty to fowl and hunt in seasonable times on the lands they hold, and on all other lands therein not inclosed; and in like manner to fish in all boatable waters, and others not private property."

None of the modest variations among the formulae used by different states suggest that the right to bear arms vested in individual citizens for private purposes. Virginia refers to "a well-regulated Militia, composed of the body of the people, trained to arms." Delaware and Maryland simply refer to "a well regulated militia." More intriguing are the clauses stating the purposes for which arms may be borne: "for the defence of the State" (North Carolina, Art. XVII); "for the common defence" (Massachusetts, Art. XVII); and most striking, "for the defence of themselves and the state" (Pennsylvania, Art. XIII). 7 Sources and Documents of United States Constitutions 403 (William F.Swindler ed., 1978) (N.C.) (Mass. vol. 5 at 95; Pa. vol. 8 at 279). The first two clearly have no bearing on a private right, free of legal regulation. Although the Pennsylvania clause appears open to a broader interpretation, two considerations render this reading improbable. First, the opening clause of Article XIII immediately preceded two other clauses reiterating the usual condemnation of standing armies and endorsement of civilian supremacy. The Article as a whole is thus concerned with military matters. Second, and contextually more important, the Pennsylvania variant needs to be read against the colony's unique history. Since the mid-1750s, a political impasse between the proprietary governor and the assembly, and the influence of Quaker pacifism on provincial governance, effectively prevented the colonial government from maintaining a militia. Residents of frontier counties exposed to Indian attack during the Seven Years War and Pontiac's rising of 1763 petitioned the provincial government to organize militia and provide the resources necessary to sustain it. These efforts failed, and Pennsylvania had no militia at all during the two decades

preceding independence. Unlike most colonies, its legal assembly continued to meet into the spring of 1776, but without mobilizing a provincial militia against the British threat. As a result, extra-legal committees arose in Philadelphia that were strongly supported by the province's voluntary militia units. These committees demanded the drafting of a new state constitution that would coerce military service from every citizen. When the constitution writers of 1776 used the phrase "for the defence of themselves," they accordingly were referring not a personal right of self-defense but to the community's capacity to protect itself against the threats raised either by Native Americans or the British army. Nathan Kozuskanich, *Defending Themselves: The Original Understanding of the Right to Bear Arms*, Rutgers L.J. (forthcoming 2008).

The sole noteworthy reference to a private right to arms in 1776 appears in the draft Virginia constitution that Thomas Jefferson prepared while marooned in Philadelphia writing the Declaration of Independence. His list of Rights Private and Public included: "No freeman shall ever be debarred the use of arms [within his own lands or tenements]." The bracketed phrase did not appear in the first draft of this document, and may indicate Jefferson's uncertainty about the extent of the right. 1 Papers of Jefferson 344, 353, 363 (Julian Boyd ed. 1950).

The lack of discussion of an individual right to firearms is unsurprising. Their ownership and use were not major issues in eighteenth-century America, as they arguably remained in contemporary Britain. There debate still raged over the revision and enforcement of

game laws, with a landed aristocracy trying to protect its traditional privileges, against poachers and others who could use the protein illegal hunting provided. *See* E. P. Thompson, Whigs and Hunters: The Origin of the Black Act (1975). No such aristocratic order or tradition existed in America, which was probably the most protein-rich society in the world. Americans could legally obtain and use firearms as they could other property, subject to the regulation to which all property was liable.

It is equally unsurprising that the militia remained an object of constitutional concern in 1776. The American revolutionaries were conscious heirs of a radical Whig tradition that regarded standing armies as a bane to liberty, and which celebrated the idea of a citizens militia as the optimal form of military organization for a republic. *See* generally "No Standing Armies!" The Antiarmy Ideology in Seventeenth-century England (1974). This was a staple theme of eighteenth-century political writing, and its lessons were reinforced when Britain sent its standing army to Boston, first to enforce the Townshend duties (1768-1770) and then to compel obedience to the Coercive Acts of 1774. The latter led to the outbreak of civil war in April 1775, when the militia organized by the Massachusetts Provincial Congress resisted the British march on Concord.

By proposing to transfer authority over the militia from the states to Congress, the Constitution radically challenged conventional republican thinking about the nature of the militia.

Individual ownership of firearms was not an issue at the Federal Convention of 1787. The records of its deliberations contain no reference to whether the government—national, state, or local—could regulate possession of firearms. The Framers adhered to the general concept of "internal police" that had shaped American thinking about federalism since 1776, if not earlier. Under this understanding, the states retained broad and exclusive legislative authority to regulate most facets of daily life—ownership and use of property, rules of inheritance, criminal law, and all the aspects of communal health, welfare, and safety. Pennsylvania's Declaration of Rights of 1776 expressed this value by affirming that "the people of this State have the sole, exclusive and inherent right of governing and regulating the internal police of the same." 5 Founders' Constitution *supra* at 6.The Framers no more imagined that the Constitution would abridge the states' power to regulate firearms than they thought it would impinge their authority to control noxious substances.

The one issue addressed at the 1787 Convention that could affect citizens' access to firearms concerned the militia. Under the Articles of Confederation, its regulation remained solely under state control. But complaints about its training, discipline, and performance persisted throughout the war for independence. In a "Sketch for a Peacetime Establishment" (May 1783), Washington proposed

uniform standards of training for the militia in every state, and further argued that an effective militia could only be formed from a select body of young men, as opposed to the larger mass of adult males legally eligible for service. 26 Writings of George Washington 389-390 (John Fitzpatrick, ed., 1931-1944). Similar proposals were made in the Report on a Military Peace Establishment drafted by a congressional committee chaired by Alexander Hamilton. 3 Papers of Alexander Hamilton 393-396 (Harold Syrett, ed., 1962). *See* Don R. Higginbotham, *The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship*, 55 Wm. & Mary Q. 40-44 (1998).

Militia reform, though not the most pressing issue facing the Federal Convention of 1787, was part of the Federalist agenda for strengthening the national security powers of the Union. *Id.* at 43-44. Unlike many of the legislative powers enumerated in Article I, Section 8, congressional governance of the militia sparked significant discussion at Philadelphia. An extended debate on August 18 found the Framers divided over the practicability of dividing power over the militia between national and state governments. Several delegates insisted that that the states would never cede their traditional authority over training and disciplining the militia. But others, including General Charles Pinckney and James Madison, argued for the importance of "uniformity ... in the regulation of the Militia throughout the Union." 2 Records of the Federal Convention of 1787 at 330-333 (Max Farrand, ed., 1966).

The militia question was then referred to a grand committee of one member from each state. Its report of

August 21 presented the clause that would finally be adopted, which empowered Congress "To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." *Id.* at 352.

When this clause was debated on August 23, several delegates again criticized the proposed scope of congressional jurisdiction over the militia. But their reservations were rebutted by other delegates, led by Rufus King, speaking for the committee, and Madison, who insisted that the only effective militia would be one ultimately controlled by Congress. This discussion included important comments on how the militia would be armed. Madison wondered whether King's initial definition of "*arming*, [as] specifying the kind size and caliber of arms" would exclude Congress "furnishing arms" to the states. King replied that "*arming* meant not only to provide for the uniformity of arms, but included authority to regulate the modes of furnishing, either by the militia themselves, the State Governments, or the National Treasury." Several efforts to weaken the proposed clause in the interest of preserving greater state control over the militia proved futile. Madison and others argued that "The states neglect their militia now," and would do no better after the Constitution gave the national government greater resources for national defense. Nine states approved the proposed change; only Connecticut and Maryland dissented. *Id.* at 384-388.

The Constitution authorized Congress "to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." Though this clause was uncontroversial and occasioned no debate, *id.* at 390, it, too, demonstrates that the Framers contemplated converting the militia into a national institution. That commitment in turn explains why the militia question became a significant element in the public debate over ratification of the Constitution.

Anti-Federalist objections to the Militia Clause preponderantly evoked the traditional fear of standing armies and its corollary endorsement of the value of the militia

This radical shift in jurisdiction over the militia would have been controversial by itself, but it became even more so when coupled with giving Congress independent authority to maintain an army and navy. Anti-Federalists steeped in the literature of the age knew that this amounted to the creation of a standing army, that dreaded enemy to the liberty of the people. From the start of the ratification debates, they sought to modify those clauses. Within a fortnight of the adjournment of the Federal Convention, the Virginia Anti-Federalist Richard Henry Lee urged the Continental Congress to endorse a "Bill of Rights" that would declare, *inter alia*, "That standing Armies in times of peace are dangerous to liberty," and should only be raised with a two-thirds vote in both houses of Congress. 13 DHRC at 239. Lee identified a number of fundamental rights deserving recognition, but said nothing about firearms.

The best antidote to standing armies, Anti-Federalists argued, was a militia drawn from the body of the citizenry. The survival of that venerated institution was exactly what the Constitution would threaten if Congress abused its power by failing to keep the militia well-armed, by making service onerous, or by recruiting a "select militia" not drawn from the body of the people. On the other side, leading Federalists held to the Framers' view that a state-governed, mass militia would lack the training and discipline needed to turn citizens into battle-ready soldiers. In *Federalist* 29, Hamilton forthrightly argued that a "well-regulated" militia must be a select one, because it would be impossibly expensive and burdensome to subject the whole body of the male citizenry to the training required.

Discussion of citizens' access to firearms during the ratification debates of 1787-1788 focused nearly exclusively on the comparative merits and risks of a standing army or the militia. The hackneyed idea that standing armies were inimical to liberty was reinforced by the charge that a distant national government could rule as extensive a country as the United States only through armed force. Militia service was also treated as a matter of civic duty, for a key element in republican thinking reaching as far back as Machiavelli treated the *obligation* to bear arms in defense of one's country as one of the rights and privileges that distinguished republican *citizens* from the *subjects* of other polities that slavishly relied on hireling soldiers lacking intrinsic loyalty to the regime.[4]

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[4] This point merits far more development than it can receive here, for it illustrates how republican thinking conceived of rights

(Cont'd)

As at the Federal Convention, these exchanges treated the militia not as the disembodied mass of the people, but as a legal institution subject to concurrent national and state administration. That was the meaning of James Madison's oft-quoted remark in *Federalist* 46, noting that half a million armed Americans would overmatch any force a national government bent on tyranny could field. Those armed citizens would act not as a spontaneous, self-deputized force, but as members of an institutional militia "united and conducted by governments possessing their affections and confidence." *Id.* at 334-335. Here, as on other issues, the dominant way in which the ratifiers constructed the danger of tyranny lurking in the Constitution was to imagine a struggle between national and state governments, and manifestly not a conflict between the people, on the one hand, and the combined power of the two levels of the federal system on the other. The preeminent Anti-Federalist charge against the Constitution was that it would bring about a "consolidation" of all effective power in the national government, leaving the states as hollow jurisdictions. Jack Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution, 148, 181-184 (1996). Federalists replied, as Madison's 45th and 46th Federalists

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(Cont'd)

not solely as something to be protected against abuse by the state, but in the very different language of the civic duties of citizens. The right to serve on a jury was thus regarded as being at least as important, and arguably more so, than the right to be tried by one. The relation between this civic conception of rights and the right to keep and bear arms is developed in Saul Cornell, A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America (2006).

essays particularly argue, by identifying all the political and structural advantages that would favor the state governments.

The central question was thus whether Congress would make the militia completely its creature, depriving the states of any residual authority over its use or even existence, and leaving it dependent on federal largesse for its arms. The fullest discussion of these concerns took place at the Virginia convention in Richmond in June 1788. Anti-Federalist Patrick Henry insisted that congressional power over the militia was plenary and exclusive. 10 DHRC 1276. George Mason similarly imagined how the militia might be disarmed: not by the federal government confiscating weapons, but rather, "Under various pretences, Congress may neglect to provide for arming and disciplining the militia, and the State Governments cannot do it, for Congress has an exclusive right to arm them." *Id.* at 1270. Federalist leaders Madison, George Nicholas, and John Marshall replied strenuously that power over the militia was indeed concurrent, and that the states remained free to arm their own militia and use them for internal security. *Id.* at 1273, 1280, 1306-1308. "If Congress neglect our militia," the future Chief Justice observed, "we can arm them ourselves." *Id.* at 1308. This was a critical point in a state where the militia was the first line of defense against the ever-present danger of slave rebellion. *See* Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. Davis L. Rev. 309 (1998).

Because the Virginia convention was so evenly divided, Federalists accepted a proposal to recommend constitutional amendments to the first Congress.

This was where the antecedent wording of the Second Amendment can be found, closely followed by the similar language adopted by New York two weeks later.[5] Both begin by declaring "That the people have a right to keep and bear arms;" both then declare "that a well regulated Militia [Virginia: composed of the body of the people trained to arms; New York: including the body of the People *capable of bearing arms*] is the proper, natural and safe defence of a state." The Virginia article adds further statements condemning standing armies and upholding civilian supremacy over the military. The New York declaration tracks these two provisions closely in a following article, but after first inserting an additional article declaring "That the militia should not be subject to Martial Law, except in time of War, Rebellion or Insurrection." *Id.* at 1553; Linda Grant DePauw, The Eleventh Pillar: New York State and the Federal Constitution 294 (1966).

Text and context both establish that the dominant issue throughout the period of ratification was the future status and condition of the militia, not the private rights of individuals. Even when Anti-Federalists spoke of the militia being disarmed, their expressed concern was not the specter of federal confiscation or prohibition of private weapons, but rather that the national government might neglect to provide arms. They worried that militiamen might be subject to military justice, or marched to faraway locations, to their personal

[5] In New York, it is not part of the amendments proposed in the second part of the instrument of ratification but rather appears in the first part, which stated the delegates' understanding of the Constitution they were accepting.

inconvenience and the insecurity of their own communities. Above all, Anti-Federalists worried that by allowing the traditional militia to atrophy, Congress would rely increasingly on its own permanent army, to the overall detriment of the public liberty the Revolution had been fought to establish.

Explicit Anti-Federalist references to a private right to arms were conspicuously few in number and failed to generate political support.

In contrast to the numerous discussions of the militia during the ratification debates, explicit references to the private ownership of firearms were few and scattered. The three noteworthy statements come from the Pennsylvania, Massachusetts, and New Hampshire conventions. Only the last commanded the support of a majority of delegates, and presents a formula unique to the discussions of 1787-1788. The twelfth constitutional amendment that New Hampshire recommended for future consideration read: "Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion." Neil H. Cogan, Complete Bill of Rights 181 (1997). In Massachusetts, an omnibus rights-protecting amendment that the convention *rejected* stated "that the said Constitution be never construed to authorize Congress . . . to prevent the people of the United States, who are peaceable citizens, from keeping their own arms." 6 DHRC 1453, 1469-1471.

Finally, the minority Anti-Federalist delegates to the Pennsylvania ratifying convention included in their published *Dissent* this proposed amendment:

> "7. That the people have a right to bear arms for the defense of themselves and their own state, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals."

The next proposed amendment followed section 43 of the state constitution in stating that the people "shall have liberty to fowl and hunt in seasonable times, on the lands they hold" as well as navigable waters and other unenclosed lands. 2 DHRC 597-598. *See also* Cornell, A Well-Regulated Militia, *supra*, at 50-52, 55-58.

These two articles are often offered as evidence that the Founders thought of the right to bear arms as ensuring a private right to possess weapons, as did the court below. Pet. App. 27. But that reading is incorrect. First, the dissenters who endorsed this proposal comprised only a third of the Pennsylvania convention. Second, as previously noted, the reference to "the defense of themselves and their own state" had particular connotations in Pennsylvania, tied not to an individual's right to defend his home, but to the colonial government's failure to organize effective militia units prior to independence. Third, the proposed formula against "disarming" leaves ample room for police-power regulation by recognizing "real danger of public injury from individuals" as a legitimate basis for public action.

What constitutes a "real danger" time and circumstance must determine, but even the dissenters conceded that whatever right individuals retain must be judged against the danger of "public injury." Fourth, the dissenters appeared disinclined to push this right too far. There is no further discussion of the private use of firearms in the explanatory passages of the *Dissent*.

Fifth, and most important, these two clauses fell still-born on the larger debate that continued to rage for months. One early response was witheringly sarcastic. Why not add this further clause, Noah Webster asked: "That Congress shall never restrain any inhabitant of America from eating and drinking, *at seasonable times*, or prevent his lying on his *left side*, in a long winter's night, or even on his back, when he is fatigued by lying on his *right*." 15 DHRC at 199. Had Anti-Federalists continued to want to push for the constitutional protection of firearms, ample time remained to muster support in the nine states yet to act on the Constitution. Once published, however, these clauses of the *Dissent* were politically inert. If the Pennsylvania dissenters tried to place the question of a private right to arms before the body politic, their fellow Americans declined their summons. Far from being the key to a constitutional puzzle, the *Dissent* was an exception to the true rule: that such debate as occurred over a right to keep and bear arms always took place within the context of the future status of the militia.

James Madison's Original Draft of the Second Amendment does not Support an Individual Rights Interpretation

In drafting the amendments that evolved into the Bill of Rights, James Madison had no reason to place a private right to firearms on his agenda. Madison worked from a pamphlet compiling all the amendments proposed by the states, and only New Hampshire had spoken explicitly of individuals being disarmed. Taking the Virginia and New York recommendations as his model, Madison again made the militia the urgent question to confront. In culling the amendments, Madison rejected anything that implied a structural change in the Constitution, limiting the proposals he introduced in the House of Representatives on June 8 largely to matters of rights.

Madison was primarily but not exclusively concerned with protecting individual rights, and this placed him at the leading edge of American thinking during this period. He was arguably the first major thinker to recognize how the protection of rights in a republic differed from a monarchy. There, the problem was to protect the people as a whole against the concentrated power of the state. In a republic, by contrast, the chief problem was to protect individuals and minorities against popular majorities wielding power through the legislature. Rakove, Original Meanings, 310-318, 330-336. But as the eventual Tenth Amendment demonstrates, Madison also intended to rebut Anti-Federalist charges of "consolidation" by affirming the reserved powers of the states and people, in a manner akin to the Second Amendment. Because he understood that the states

would retain their traditional police powers, Madison would naturally have included the power to regulate firearms among those still belonging to the states.[6]

Advocates for an individual rights view of the Amendment often make much of a single line in an outline of Madison's June 8 speech, to wit: "They relate 1st to private rights." Some lines later, after the fresh heading "Bill of Rights—useful not essential" and the immediately subsequent comment "fallacy on both sides—espec[iall]y as to English Decl[aratio]n of Rights," Madison made a passing reference to "arms to Protestts." 12 Papers of James Madison 193-194 (Robert Rutland ed., 1962-1991). This elliptical material is cited as proof that Madison conceived the right "to keep and bear arms" primarily in private, individual terms. There are several difficulties with this view. One is that "1st" need not mean *exclusively* or *solely*; it may simply be a general statement identifying the first of many aspects of his amendments. Moreover, this line appears to refer to the amendments generally; it is not specifically related to the right to bear arms provision. The subsequent reference to "arms to Protestants" clearly refers to the English Bill of Rights of 1689. The passage in Madison's June 8 speech that corresponds to this portion of the outline indicates that Madison was reiterating his long-standing misgivings about the value of bills of rights as "paper" or "parchment barriers." *Compare* Speech of

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[6] Only four years earlier, he had introduced a bill, originally drafted by Jefferson as part of the comprehensive revision of Virginia laws, to prohibit hunters who had violated the ban on deer hunting from the "bearing of a gun [not arms]" beyond their own lands. 2 Papers of Jefferson *supra* at 443-444

June 8, 1789, *id*. at 203, with Letter to Jefferson of Oct. 17, 1788,11 Papers of Madison 297.

In his speech, Madison did not discuss the right to bear arms. Nor was it part of the proposal he later described "as the most valuable on the whole list": to insert in article I, section 10 a clause forbidding the states to violate "the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." (12 Papers of Madison, 208, 344)

Madison's original version of the Second Amendment tracked the wording of the Virginia convention, but with some changes.

> The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person. Complete Bill of Rights, *supra* at 169.

Adding the phrase "well armed" responded to the concern that the militia might atrophy from joint neglect by Congress and the states. Madison omitted the references to standing armies and civilian supremacy in the Virginia and New York recommendations. The Constitution fully covered both principles with its provisions for biennial military appropriations, delegation of enumerated powers over national security to Congress, and the designation of the president as commander-in-chief. The final clause was derived from a similar provision recommended by the Maryland

convention. *Id.* at 181. Its presence confirms that the principal subject was the militia. That clause was also the sole subject of the recorded House debate on the entire article.

THE FINAL REVISIONS OF THE SECOND AMENDMENT REFLECTED THE FEDERALISTS' DETERMINATION TO PRESERVE CONGRESSIONAL AUTHORITY OVER THE ORGANIZATION OF THE MILITIA.

The House select committee reviewing Madison's proposals revised this language in three noteworthy ways. First, it improved his syntax by turning the reference to the militia into a strong preamble, rather than leaving it dangling between the "keep and bear arms" and "religiously scrupulous" sections. Second, the committee dropped the phrase "well armed." Most important, it inserted the phrase "composed of the body of the people" after "militia," thereby moving "the people" vested with the right closer to the republican ideal of the adult male citizenry. *Id.* at 169-170.

In this form, the amendment went to the Senate as Article 5 in the House resolutions of August 24. There three changes took place. One was minor: "best security of a free State" was altered to "being necessary to the security of a free State." *Id.* at 175-176. Two were substantive. The Senate eliminated the clause exempting religious dissenters, in effect preserving a discretionary congressional authority over the composition of the militia. More important, and to similar effect, it deleted the House-added modifier "composed of the body of the people." *Id.* at 174, 176.

Proponents of the individual right interpretation see this last alteration as sloppy editing not meant to alter the amendment's intended meaning. *E.g.*, Malcolm, To Keep and Bear Arms, *supra* at 161. That view wholly ignores the character of the Senate that did the editing. Only two Anti-Federalists sat in the inaugural Senate session, and their twenty Federalist colleagues included men like Rufus King, a shaper of the original militia clause of the Constitution, and Hamilton's father-in-law, General Philip Schuyler. These Federalists shared Washington's and Hamilton's view that the defense needs of the nation required a militia system not constitutionally yoked to the impracticable idea of keeping "the body of the people" trained to arms. The amendment, as revised, would still assuage Anti-Federalist concerns by stating a principled commitment to the value of a militia. But it would not hinder Congress in using its best judgment to determine how to organize, arm, and discipline an effective militia. The Senate had no credible motive to weaken the substantive delegation of power in Article I, Section 8, which acceptance of the House language arguably might do.

On September 9 the Senate considered and rejected another substantive alteration of the article, most likely proposed by the two Anti-Federalists, William Grayson and R. H. Lee. This one would have revived the anti-standing army and civilian supremacy clauses, while requiring two-thirds votes in Congress to maintain a "standing army or regular troops" in peacetime. Complete Bill of Rights, *supra* at 173-174. The House had previously rejected a similar amendment offered by the South Carolina Anti-Federalist, Aedanus Burke. *Id.* at 172. These rejected proposals again confirm that

the context within which Congress considered the eventual Second Amendment was solely a military one.

On September 9 the Senate considered and rejected one other amendment: to insert "for the common defense" immediately after "keep and bear arms." *Id.* at 174-175. This action has sometimes been explained as assuring that the amendment would protect an individual right by eliminating a qualification. Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 Ga. L. Rev. 35 (1996). In the absence of recorded debate, or even knowledge of who moved the amendment, two other explanations are more compelling. One is that the phrase was superfluous, redundant of the militia's manifest purpose. Second, and more important, the adoption of such a qualification could conflict with the Militia Clauses of Article I, implying that other authorized uses of the militia, such as the suppression of insurrections, had become constitutionally suspect. Federalists intent on preserving the authority of Congress over the use of the militia would have seen this amendment as a problematic limiting qualification.

THE SECOND AMENDMENT IS BEST UNDERSTOOD AS AN AFFIRMATION OF FEDERALISM VALUES, WHICH HELPS TO EXPLAIN WHY THE "INSURRECTIONIST" THEORY OF ITS ORIGINS IS FALLACIOUS.

In endorsing the value of a well-regulated militia, led by officers appointed by the state governments, the framers of the Second Amendment affirmed that the militia would be a "partly federal, partly national" institution in the sense in which James Madison used

that phrase in *Federalist* 39. The Militia Clause vividly illustrates the "compound" nature of the American constitutional republic. Both levels of government would have a share in controlling the militia; both would act directly on the citizens who formed it; and the line between national and state authority would be a matter for political determination. For their part, citizens had a civic duty to participate in the militia, if national and state law required them to do so. But both levels of government would have to reckon with the preferences of citizens in deciding what those duties would be. The actual history of the militia soon demonstrated that the people's aversion to serving in a well-regulated militia outweighed the Federalists' desire to turn it into a more effective, combat-ready outfit. In practice Congress regularly thwarted efforts by both Federalist and Republican administrations to fulfill the nationalizing promise of the Militia Clause.

There is a second federal dimension to the origins of the Second Amendment. Outside the question of whether militia members would be armed at national, state, or personal expense, there was no credible basis upon which the national government could regulate possession of firearms. Insofar as these were subject to regulation, state and local governments would be the necessary agents as they regulated all other forms of property. The existing regime of police power regulation was tolerant of private ownership of weapons, but not so lax as to prohibit states or localities from determining, for example, when the private keeping of gunpowder or the public carrying of firearms threatened public safety. Not even the most paranoid Anti-Federalist imagined that the national government would have the incentive

or means to interfere with this traditional form of regulation.

Federalism also identifies a critical weakness in current academic notions of the "insurrectionist" origins of the Amendment, which hold that it was conceived to preserve a right of popular resistance to tyrannical government. Here again, Madison's comparison of the authority and political resources of national and state governments in *Federalist* 45 and 46 captures an eighteenth-century reality that modern readers can easily overlook. If the national government were to act despotically, it would have to encroach upon or commandeer the residual, constitutionally recognized authority of the states. If, for example, it sought to confiscate privately owned firearms for purposes other than those associated with the militia, the states could be expected to challenge that usurpation, and a militia composed of the community and directed by the state governments would come to their support, rather than be supinely dragooned into national service. The insurrectionist theory presumes what those at the time could not have fathomed: that national and state governments, both elected by the people, would collude to deny the people their fundamental rights.

An "insurrectionist" Second Amendment fails a second test of historical plausibility. As noted, the Constitution authorized Congress to mobilize the militia to "suppress Insurrections." The Republican Guarantee Clause of Article IV further empowered the national government, "on Application" by a state, to intervene within it "against domestic Violence." The clear inspiration for this provision was Shays's Rebellion in

Massachusetts, which occurred only months before the Federal Convention met, an upheaval that profoundly influenced the Federalist movement. Under the Articles of Confederation, Congress lacked authority to lend military assistance to the Massachusetts government as it sought to suppress that uprising. These two clauses were the Framers' direct answer to the deficit of authority that the Massachusetts rebellion exposed. It beggars the historical imagination to think that the same Federalist congressmen who wrote the Second Amendment were intent on protecting a popular right to insurrection.

A HISTORICALLY-GROUNDED ANALYSIS OF WHAT WAS ACTUALLY DEBATED IN 1787-1789 CAN ONLY CONCLUDE THAT THE STATUS OF THE MILITIA WAS ALWAYS WHAT WAS IN DISPUTE, AND NOT THE PRIVATE RIGHTS OF INDIVIDUALS.

Historians can best contribute to the resolution of contemporary constitutional disputes by recovering and reconstructing the context within which the adopters of particular clauses thought and acted. The process of recovering and reconstructing what the past was like must pay close attention to the value of particular *texts*, the statements that bear most directly on the matter in dispute. But equally important, it must also convey a sense of *context*, which requires locating particular pieces of historical evidence within a framework that best allows us to evaluate their probative value. The historian's recurring complaint about "law office history," as it is colloquially disparaged, is that it routinely indulges in the selective and uncritical use of quotations, stripped from the context in which they were uttered, and given meanings that contemporaries would

have been astounded to learn they carried. *See, e.g.*, Don Higginbotham, *The Second Amendment in Historical Context,* 16 Const. Comment. 221 (1999). Because of the exceptional passions surrounding the Second Amendment, this one realm of constitutional controversy appears more susceptible to this kind of misuse than any other. A vast and sometimes vituperative literature has grown up around this subject, and sorting out claims and counterclaims can require heroic efforts.

The central argument of this brief is that throughout the period when the Second Amendment took shape, the status of the militia under the new Constitution indeed defined the controlling framework for discussing the people's right to keep and bear arms. The evidence sustaining this claim is easy to find in the voluminous records of the ratification debates, and the explanation for its salience is equally easy to provide. The benefits of a citizens' militia and the corresponding dangers of a hireling army were stock themes of the political literature Americans imbibed during the eighteenth century. When the Framers applied lessons drawn from the Revolutionary War to the national defense related clauses of Article I, they provoked predictably critical reactions from their Anti-Federalist opponents. The idealized image of a militia of citizen soldiers had deep roots in Anglo-American political culture, and as the distinguished historian Bernard Bailyn has observed, on this point as on others, the Anti-Federalists faithfully followed the radical Whig legacy that led the colonists to revolt a decade earlier. Bernard Bailyn, Ideological Origins of the American Revolution 331-351 (enlarged ed., 1992).

By contrast, explicit references in the same voluminous records to the ownership of firearms for private purposes are conspicuously few. That is one reason why a handful of quotations figure so prominently in the modern controversy, often cited to support points at odds with their intended meaning. More important, when Pennsylvania Anti-Federalists sought to elevate the use of firearms for private purposes into a right deserving constitutional recognition, their proposal fell on deaf ears. Had Americans felt that the Constitution threatened private access to firearms, nothing prevented this claim from becoming another of the many persistently sustained charges that Anti-Federalists leveled against the Constitution. But that is exactly what did not happen. Instead, it was the militia question that the Virginia and New York conventions debated seven months later, endorsing the recommendations that Madison and his colleagues carefully pared. The debate, in short, was always about the militia and its public purposes, never about a private right. That is why the unique justificatory preamble to the Second Amendment is a true guide to its meaning, and not rhetorical persiflage.

This brief takes no position on how well armed Americans were, something historians are still trying to gauge. It assumes that many Americans owned firearms and expected them to remain relatively easy to obtain. What this brief does argue, however, is that these private aspects of the ownership of firearms never crossed the threshold of constitutional significance in 1787-1789.

Historians are often asked what the Founders would think about various aspects of contemporary life. Such questions can be tricky to answer. But as historians of the Revolutionary era we are confident at least of this: that the authors of the Second Amendment would be flabbergasted to learn that in endorsing the republican principle of a well-regulated militia, they were also precluding restrictions on such potentially dangerous property as firearms, which governments had always regulated when there was "real danger of public injury from individuals." 2 DHRC at 624.

CONCLUSION

For all the foregoing reasons, the judgment of the United States Court of Appeals for the District of Columbia should be reversed.

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Appendix

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