

**FOR THE DEFENSE OF  
THEMSELVES  
AND THE STATE**

**THE ORIGINAL INTENT &**

**JUDICIAL INTERPRETATION**

**OF THE RIGHT TO KEEP AND BEAR ARMS**

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## PREFACE

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This work began in 1989 as a term paper for an undergraduate history class at Sonoma State University. With Professor Daniel Markwyn's encouragement, a 29 page paper on the original intent of the Second Amendment has become the most comprehensive history of the judicial interpretation of the right to keep and bear arms yet compiled—and even this volume is just a survey of this largely unexplored topic.

When I completed research on the original intent section of this book, I intended to write another sixty or seventy pages about judicial interpretation—how many decisions could there be? There were only a half dozen decisions by the U.S. Supreme Court, and a couple dozen state supreme court decisions in the entire history of the Republic—or so I thought. In fact, judicial interpretation of the right to keep and bear arms is not merely a field rich in material, it is positively fecund. This book includes a careful analysis of more than 200 decisions of the federal and state courts. To avoid giving a false impression of the history of judicial interpretation because of unintentional bias in selecting which decisions to study, I have gathered together *all* the decisions that I could locate.

Is this a comprehensive history of American gun control? No. The social and legislative history of gun control is a much more complex research topic than finding and analyzing the decisions of the courts. The comprehensive history of American gun control laws remains to be written. I have been continually startled at how little effort has been made to bring together the essential information required for even a survey of this fascinating topic. How early did the various states adopt laws prohibiting concealed carry of handguns? There is no central source for that information, and study of current penal codes for the various states is, at best, a first approximation of this information.

What influence did racism play in the passage of gun control laws during Reconstruction? There is strong evidence that it was a powerful factor—but it appears that this subject has not been examined in the detail it deserves. Were issues of social class a factor in the passage of discretionary permit issuance laws in the twentieth century? Don Kates' work in this area would seem to indicate so—but a detailed study remains to be done. Why was the National Rifle Association a major participant in the creation of the state gun control laws adopted in the 1920s and 1930s, commonly known as the Model Uniform

Firearms Act? How much actual criminal misuse of privately owned automatic weapons was there during the Roaring Twenties? Which provisions of the Gun Control Act of 1968 were intended as crime control, and which were intended to protect the economic interests of American firearms manufacturers? Why does Vermont, alone of the fifty states, remain without laws prohibiting concealed carry? These are all questions in need of detailed study, since gun control laws remain a major bone of contention in American society today. Before we pass or repeal laws, we need to understand how and why the current laws came about.

I am a partisan on the issue of gun control. I suspect it would be difficult to find anyone studying the history of such an emotionally charged and politically significant issue, who is not a partisan of one side or the other. But I am in the interesting position to have changed sides, partly because of my experiences, and partly because of my research.

I knew people who had lived under the Nazi terror. A teacher at my junior high school, Mirte de Boer, told us one day of her work with the Dutch Resistance during World War II, forging documents to help smuggle people out of the Nazi-occupied Netherlands. Then she told us of a friend whom she had helped to escape; but he just disappeared, somewhere between the Netherlands and Switzerland, and as she told us about him, tears welled up in her eyes.

Another slight acquaintance who worked where I bought ice cream cones as a child, was a concentration camp survivor with a number tattooed on her arm. Here was a tangible reminder of the horror of totalitarianism—treating a person like a piece of expensive machinery by giving her a serial number, instead of a name. She was fortunate—her value as a working asset exceeded her “scrap value,” and she survived the war.

At the time, the connection between this sort of savagery and the centralization of power was completely elusive to me. Unfortunately, my schooling had failed to educate me to an essential truth underlying the U.S. Constitution, admirably expressed by the noted Constitutional historian, Page Smith:

I can find no major flaw in the framers' view that since all people were tainted with original sin, i.e., disposed to pursue their own selfish interests rather than the common good, it was necessary to distribute power in such a way as to minimize the dangers of its being abused, and to protect all legitimate social and economic interests from appropriation or exploitation. If they overstated the degree of human depravity, that was certainly a far sounder approach than to overestimate man's natural goodness as the theoreticians of the French Revolution did. Our problem today is, more than ever, how to restrain and redistribute power. The Founders' formula—human selfishness times power equals corruption—has been verified thousands of times since they framed the Constitution.<sup>1</sup>

In 1979 a solicitation from the National Rifle Association arrived in my mailbox. Like many urban Baby Boomers, I had no exposure to hunting, gun ownership, or the rest of what is sometimes disparaged as “redneck culture.” Like many of my peers, influenced by my schooling and the popular press, my perceptions of gun owners and hunters were strongly negative; my answers to

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<sup>1</sup> Page Smith, *The Constitution: A Documentary and Narrative History*, (New York: William Morrow & Co., 1978), 531-2.

the NRA survey could only be considered cheeky and insulting. “Did I hunt? How often? What sort of game?” I responded, “Yes, daily, only people,” and stuffed the survey into the business reply envelope. That’ll show them!

“The only people that need guns are people that hang out with criminals,” I told myself. Like most of my urban contemporaries, I assumed—based on a steady drumbeat of conventional wisdom—that the Second Amendment was “about the National Guard—the militia.” Why did anyone want to own a gun?

Yet, within two years of my cheeky response to the NRA survey, the critical necessity of self-defense had turned my wife and I into handgun owners. (A number of acquaintances and friends of my wife and I during the period 1975-1980 were murdered, stabbed, raped, beheaded, robbed, or beaten.) I researched the laws that regulated the ownership and carrying of firearms, to make sure that I did not unintentionally become a criminal. In the midst of my research, I found myself face to face with California Military & Veterans Code §120—and suddenly, all the carefully inculcated notions about the meaning of the Second Amendment collapsed—I was a member of the militia, and nearly everything that I believed on the subject of the Second Amendment, was in need of more careful study.

Now, eleven years later, on the 200th anniversary of the ratification of the Bill of Rights, December 15, 1791, I find myself one of those crazy people who *actually* think the Second Amendment was intended to protect an individual right “to keep and bear arms”—and I encourage all who disagree to examine the evidence of original intent.

The latter three-quarters of this book examines the history of judicial interpretation of the right to keep and bear arms—and demonstrates that understanding original intent has not been enough to persuade the courts to uphold this right. Just as we find with the rest of the Bill of Rights, our courts have shown a frightening willingness to ignore arguments based on the literal text and original intent of the Second Amendment when issues of race, class, and cultural differences, have been raised. But along with justices who were no better than the society from which they were selected, there have been remarkable occupants of the bench with the courage to directly face the hard questions that the right to keep and bear arms raises.

Before we too quickly dispense with the protections of the Second Amendment, we owe it to future generations to examine the reasons why it was added to our Constitution, and make *quite* sure that those reasons no longer apply. When we look at the history of the twentieth century, where millions have been murdered by their own governments, we must ask ourselves: Do Patrick Henry’s words on the relationship between freedom and arms still apply?

Guard with jealous attention the public liberty. Suspect every one who approaches that jewel. Unfortunately, nothing will preserve it but downright force. Whenever you give up that force, you are inevitably ruined.<sup>2</sup>

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<sup>2</sup> Jonathan Elliot, *The Debates of the Several State Conventions on the Adoption of the Federal Constitution*, (New York: Burt Franklin, 1888), 3:45.





## ACKNOWLEDGMENTS

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The volume before you now represents not only my work, but also the help, suggestions, and legwork of many others, without whose assistance it would not have come together in its present form. Professor Daniel Markwyn's suggestions and pointers to primary sources have been invaluable in bringing together the rich variety of materials in the original intent chapters; even more important was his encouragement to tackle a task that was larger than either of us realized.

The process of locating up to date case law citations for the various states was a major undertaking; without the assistance of my many correspondents around the United States, this task would have been far more expensive in time and money. The following have been of assistance in locating these indispensable starting points for legal research: Kirk Webb (Colorado); Michael Plowinske (New York & Vermont); David Robinson (Tennessee); Spencer Garrett (Washington); Dave Chesler (Massachusetts); Joseph McConnell (Michigan); Mike Rose (Maryland); John Donahue (Maine); and Drew Betz (Ohio). Professor Joseph St. Sauver at the University of Oregon, Professor Preston Covey at Carnegie-Mellon University, and Jack Schudel, were kind enough to send me recent revisions to the Oregon, Pennsylvania, and Florida concealed weapons permit laws; Donald Newcomb sent me the *National Firearms Act* hearings. Andy Freeman provided me with Marcus Kavanagh's *The Criminal and His Allies*. Similarly, Wayne Warf's provision of Andrew Fletcher's works concerning the militia was much appreciated.

My colleagues Allan Clarke and Ron Kennemer looked over the manuscript at an early stage, and made useful suggestions. My wife Rhonda provided substantial assistance in locating information relating to slavery, civil rights, and racial fear, in addition to reviewing and thoroughly critiquing not only the writing, but also the organizational scheme of this book, and then assisting me in the grueling task of cutting it down to its current size. As the book reached its final form, Chris Hansen made a number of useful grammatical and stylistic suggestions. My children Hilary and James have, with good humor, accepted that all their father's spare time would be lost for a year.



## I. DEFINITIONS

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Two radically different interpretations of the Second Amendment are commonly espoused in the United States. One school asserts that the Second Amendment protected the right of individual States to maintain military forces independent of the national government, based on the philosophy of civic republicanism. Any individual right that was protected was only for the purpose of maintaining those state militias,<sup>1</sup> and is therefore irrelevant today, because those state militias have ceased to be a component of our national defense.<sup>2</sup> In the words of John Levin, one of the more direct proponents of a collective understanding of the Second Amendment:

Thus, after over three centuries, the right to bear arms is becoming anachronistic. As the policing of society becomes more efficient, the need for arms for personal self-defense becomes more irrelevant; and as the society itself becomes more complex, the military power in the hands of the government more powerful, and the government itself more responsive, the right to bear arms becomes more futile, meaningless and dangerous.<sup>3</sup>

The other school claims that the Second Amendment protects an individual right “to keep and bear arms,” derived from the emerging philosophy of classical liberalism. While acknowledging Revolutionary America’s concern about the dangers of standing armies, this school asserts that an individual right was also intended, and that the individual right was essential to maintaining a counterbalance to both federal and state governmental power.<sup>4</sup> In 1982, the Senate Subcommittee on the Constitution staff studied this question, and declared:

[T]he history, concept, and wording of the second amendment to the Constitution of the United States, as well as its interpretation by every major commentator and court in the first half-century after its ratification, indicates that what is protected is

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<sup>1</sup> David J. Steinberg, “Other Views of the Second Amendment”, in *The Right To Keep And Bear Arms*, 97th Congress, 2d Sess. (1982), 25.

<sup>2</sup> Warren E. Burger, “The Right To Bear Arms”, in *Parade*, January 14, 1990, 4-6.

<sup>3</sup> John Levin, “The Right To Bear Arms: The Development Of The American Experience”, *Chicago-Kent Law Review*, [Fall-Winter 1971], reprinted in *The Right To Keep And Bear Arms*, 129.

<sup>4</sup> David T. Hardy, “Historical Bases of the Right To Keep and Bear Arms”, in *The Right To Keep And Bear Arms*, 57-59.

an individual right of a private citizen to own and carry firearms in a peaceful manner.<sup>5</sup>

While the terms “republican” and “liberal” have clear-cut meanings to historians, the use of these terms can be quite confusing to the uninitiated, since the “republican” school of Second Amendment interpretation would doubtless find themselves at variance with many Republican politicians today, and the “liberal” school of Second Amendment analysis, with a few notable exceptions, would probably prefix the word “classical” before calling themselves liberals of any sort. Let us define these terms.

The *republican* school asserts that the right to keep and bear arms was an outgrowth of republicanism, intended to protect the society from the related evils of a standing army and tyranny. While the arms might be broadly distributed, they would still be possessed by the population for the purpose of collective action against a foreign army, or a domestic tyrant.

The *liberal* school asserts that the right was individual, a logical outgrowth of the right to self-defense. Such arms would be for the defense of the individual against private criminals; there was no need for a collective purpose or ownership.

The two positions are not necessarily mutually exclusive; a society might believe in both perspectives, or either, or neither. In practice, many of the advocates of the republican camp, throughout American history, have argued for the republican understanding, to the exclusion of the liberal understanding. In the modern era, there are scholars who argue that the republican understanding was the only one intended, and that even this reason is now obsolete. The historical dispute becomes simply this: did the Second Amendment include a right to keep and bear arms *only* for collective defense, or was an individual right included as well?

Is it possible, from examining contemporary documents, debates, and ideas, to determine which school is right? It appears, from the paucity of materials debating it, that the “right to keep and bear arms” was not controversial in 1780s America. By comparison, freedom of religion, the wisdom of standing armies in peacetime, and the morality of slavery were debated at great length. The lack of debate suggests that a consensus existed about the meaning of this right. Does the lack of debate show that there was consensus that this was an individual right? Or was the consensus that this was a collective right?

The Second Amendment is not just a dusty passage in the Constitution. A dramatic turnaround in attitudes about private ownership of firearms has been under way in the United States since the 1960s. At one time, gun ownership was the norm for nearly all classes and professions of Americans. Today, when private gun ownership is viewed by some segments of our society as not only a hazard to public safety, but evidence of mental disturbance,<sup>6</sup> and serious efforts are underway to severely limit the private ownership of not only handguns, but

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<sup>5</sup> Senate Subcommittee on The Constitution Staff, “History: Second Amendment Right To ‘Keep and Bear Arms’”, in *The Right To Keep And Bear Arms*, 12.

<sup>6</sup> Don Kates, Jr., “Handgun Prohibition and the Original Meaning of the Second Amendment”, in *Michigan Law Review*, 82 [November 1983], 208, note 17 quotes psychologist Joyce Brothers that “men possess guns in order to compensate for sexual dysfunction.” Kates also informs us that Dr. Brothers’ husband is among the New York City elite with a concealed handgun permit.

also some types of rifles and shotguns;<sup>7</sup> determining the original intent of the Second Amendment is more than an academic exercise.

Does a relationship exist between individual ownership of arms and resistance to tyranny? Is this a peculiarly Western idea, or peculiar only to this century? This relationship has been recognized in many cultures and centuries by those who sought to centralize power. Toyotomi Hideyoshi's efforts at centralizing power in sixteenth century Japan, and eliminating new opposition, included "the famous sword hunt of 1588 which disarmed the soldier-monks and the peasants, bound the latter firmly to the land, and henceforth distinguished clearly between the civilian population of peasants, merchants, and craftsmen and the military aristocracy which alone had the privilege to bear arms."<sup>8</sup>

Article 10 of the Mexican Constitution of 1857, like many of the other protections openly drawn from the U. S. Bill of Rights, guaranteed the right of all men "to possess and carry arms for their security and self-defense..." While debate about which "arms" were protected by this guarantee suggests that there was some anxiety about including all sorts of hand-carried arms, this provision survived debate as a broad individual guarantee.<sup>9</sup>

In our own century, the confiscation of arms by the Chinese Communists,<sup>10</sup> the confiscation of private arms in the various Soviet republics, and in modern Kuwait, first by the Iraqi occupation, then by the returning "legitimate" government, shows that the concern about private arms as a restraint on centralizing power retains its relevance today.<sup>11</sup> Perhaps the most dramatic example of tyranny, with its fear of popular uprising, is the disarmament of Germany and the occupied countries of Europe by the Nazis.<sup>12</sup> The Weimar Republic adopted a number of gun control laws intended to discourage the street violence of Nazis and Communists, and created a registration system for purchase of ammunition and handguns. As the chaos increased, the laws became sufficiently restrictive that the Nazis were able to use the existing licensing scheme to achieve their goals without changes to the statutes until

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<sup>7</sup> The highest profile law is California's "Assault Weapons Control Act." California's law attempted to prohibit new sales or transfers of several dozen brands of semiautomatic pistols, rifles, and shotguns, while inexplicably leaving functionally equivalent firearms off the restricted list. A bewildering array of similar restrictions have been passed by individual cities across the United States, as well as by New Jersey and Connecticut.

<sup>8</sup> Reinhard Bendix, *Kings or People: Power and the Mandate to Rule*, (Berkeley: University of California Press, 1978), 85-86.

<sup>9</sup> Wilfrid Hardy Callcott, *Church and State in Mexico: 1822-1857*, (Duke University Press: 1926; reprinted New York, Octagon Books: 1971), 287.

<sup>10</sup> Nien Cheng, *Life and Death In Shanghai*, (New York: Grove Press, 1986), 106.

<sup>11</sup> "Kuwait begins search for illegal weapons", *USA Today*, July 2, 1991, 4A. With respect to the relationship between widespread distribution of arms and democratization of post-war Kuwait, see "Underground in Kuwait", *Newsweek*, December 31, 1990, 43, and "The Liberation of the Emir", *Newsweek*, March 18, 1991, 26.

<sup>12</sup> Israel Gutman, "The Armed Struggle of the Jews in Nazi-Occupied Countries" in Leni Yahil, *The Holocaust*, transl. Ina Friedman and Haya Galai, (New York: Oxford University Press, 1990), 457-98, provides a detailed analysis of the political, social, and psychological factors, as well as the logistical problems of obtaining arms that severely hampered Jewish resistance to the Holocaust.

1938. Regulations adopted the day after *Kristallnacht* formally prohibited Jews from possessing firearms or ammunition.<sup>13</sup>

In spite of the apparent success of the Nazi gun control efforts, Albert Speer tells us that when, in 1939, he was drawing up the plans for Hitler's grandiose governmental complex in Berlin, Hitler's concern about popular discontent caused him to tell Speer:

"You know it is not out of the question that I shall some day be forced to take unpopular measures. These might possibly lead to riots. We must provide for that eventuality. All the buildings on this square must be equipped with heavy steel bulletproof shutters over their windows. The doors, too, must be of steel, and there should be heavy iron gates for closing off the square. It must be possible to defend the center of the Reich like a fortress."

This remark betrayed a nervousness he had not had before. The same feeling emerged when we discussed the location of the barracks for the bodyguard, which had meanwhile grown into a fully motorized regiment armed with the most modern equipment... "Suppose there should be some disturbances!" he said. And pointing to the four hundred foot wide avenue: "If they come rolling up here in their armored vehicles the full length of the street—nobody will be able to put up any resistance."<sup>14</sup>

This work's first three chapters seek to determine original intent of the Second Amendment. To that end, we will explore the common law origins of the right to keep and bear arms, Enlightenment perspectives on the bearing of arms, early state constitutional analogues to the Second Amendment, and the legislative history of the Second Amendment. The remaining chapters of this work trace the development of the different judicial interpretations (and misinterpretations) of "the right of the people to keep and bear arms," in the hopes of understanding how and why the original intent has been lost, confused, and in some cases, openly and intentionally discarded, in the intervening 200 years.

Determining original intent for the Second Amendment is prone to error because most studies of it have been conducted by parties with an eye to present day public policy and an axe to grind. To a lesser degree, this has been a problem in the various analyses of the judicial interpretation of the Second Amendment as well. In some cases, reading the primary sources cited (and miscited) by the various authors has demonstrated the hazards of relying on secondary sources, and the dangers of quoting out of context. As a consequence, the greatest possible care has been taken to quote entire paragraphs in the chapters on original intent and the seminal court decisions.

The Second Amendment consists of two clauses, joined by a comma: "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." A variety of scholars, republican and liberal, have interpreted this first clause as reflecting fears that a despotic government might use a standing army as an instrument of oppression.

<sup>13</sup> Jay Simkin and Aaron Zelman, "*Gun Control*": *Gateway to Tyranny*, (Milwaukee, Wisc.: Jews for the Preservation of Firearms Ownership, 1992), contains the full text (in German and with an English translation) of the various weapons laws and regulations adopted by the Weimar Republic and the Nazis from 1928 to 1938.

<sup>14</sup> Albert Speer, transl. Richard & Clara Winston, *Inside The Third Reich*, (New York: Macmillan Co., 1970), 158.

This interpretation of the first clause is not in dispute; Cromwell and his New Model Army were an example of the hazards of a standing army, and how easy it was for professional soldiers to impose a dictatorial reign on the population.<sup>15</sup>

As a consequence, we will not explore in any detail or make any attempt to prove that standing armies were regarded as, at best, a necessary evil by the Framers. We will not examine the ideals of an army composed of all able-bodied men, sharing equally in the obligations of collective defense. While fascinating for what they tell us about republican ideals in 1789, they are not in dispute; only the issue of whether an individual self-defense right was also included, remains controversial, and germane to this work.

That said, does it matter whether an individual self-defense right was included or not? Isn't individual ownership of arms protected, in either case? Does it matter whether the purpose is restraining the government, or restraining a common criminal? As we will see when we study the judicial history of the "right to keep and bear arms," a collective right could be regulated, or even, with enough stretching, forbidden to individuals, by arguing that the need no longer existed to restrain our own government. An individual self-defense right, on the other hand, creates considerably more complex problems of what constitutes legitimate regulation of arms.

An individual right to armed self-defense implies a right to carry arms appropriate to that purpose: a pistol, a knife, a sword, perhaps impact weapons. A right to arms for the purpose of resisting domestic tyranny, however, might allow the government considerable latitude in restricting the carrying of arms, and even prohibition of arms not appropriate to revolution. On the other hand, weapons specifically designed for short-range use against unarmed or lesser armed attackers (as might be appropriate for self-defense) are of no value for overthrowing a government.

What was the intent of the Second Amendment? In the process of researching the origins of the Second Amendment, many of the author's original assumptions were found to be without merit. The primary intent of the Second Amendment was to guarantee that the population retained the ability to resist domestic tyranny; maintaining a military force capable of defending the nation from invasion was a minor issue. By comparison, the various state analogs to the Second Amendment were (with a few exceptions) intended to guarantee a right to arms to protect against both domestic tyranny and private criminals. Underlying both federal and state guarantees, however, was the assumption that individual ownership of arms was a fundamental right of freemen.

Making sure that we understand the meaning of the words *arms*, *bear*, *militia*, and *well-regulated* is the first step towards understanding the Second Amendment. There is a natural tendency to do textual analysis of the Second Amendment using twentieth century denotations, and even worse, using twentieth century connotations. To be sure of correctly understanding original intent, we must find definitions contemporary with the Second Amendment and the Framers. Noah Webster's 1828 *An American Dictionary of the English*

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<sup>15</sup> Roy G. Weatherup, "Standing Armies And Armed Citizens: An Historical Analysis of The Second Amendment", *Hastings Constitutional Law Quarterly*, 2:1 [Winter 1975] reprinted in *The Right To Keep And Bear Arms*, 138.

*Language* is an excellent starting point, not only because his was a dictionary of *American* usage, but also because Webster was one of the pamphleteers involved in the public debate surrounding ratification of the Constitution.

The *Oxford English Dictionary* (OED) is another excellent resource; not only does it provide a comprehensive list of definitions, but also examples of usage from earliest known use, through the Revolutionary period, and into modern times. This provides an opportunity to see how such usage has changed with time. Samuel Johnson's dictionary would also be a fine contemporary resource, except that none of the terms of interest are defined within it.<sup>16</sup>

Finally, we will use the best sources of all—the definitions of these terms contained within the ratification debates, and within the pamphlets of Federalists and Antifederalists. When a definition is *clearly* established in such a source, and the definition is used consistently by all parties, this must take precedence over any dictionary definition.

Those three little words, “to bear arms,” contain a controversy with which we must first deal. Levin, arguing for a republican meaning for the Second Amendment, asserts that at the time of the Revolution, the phrase “to *bear* arms” indicated an organized military force, while “to *have* arms” indicated an individual's possession of such arms.<sup>17</sup> What evidence exists to prove or disprove Levin's claim?

One of the most importance sources to look to is William Blackstone, the noted eighteenth century English jurist, whose writings on English law formed the basis for legal schooling in the colonies throughout the Revolutionary period, and for many years into the nineteenth century. Blackstone asserted that personal security, liberty, and property were absolute rights, not dependent upon governmental grants, but “no other than either that *residuum* (remainder) of natural liberty, which is not required by the laws of the society to be sacrificed to public convenience: or else those civil privileges, which society hath engaged to provide, in lieu of the natural liberties so given up by individuals.”<sup>18</sup>

Blackstone also defined the “Right to bear arms” as:

The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defense, suitable to their condition and degree, and such as are allowed by law.... [I]t is indeed a public allowance, under due restrictions, 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.<sup>19</sup>

This is a statement of an *individual* right of a subject, and for “the natural right of resistance and self-preservation.” The “Right to bear arms,” in Blackstone's mind, appears to have protected an individual right, not a collective right.

Blackstone also used the phrase, “right of having and using arms” in a collective revolutionary sense, when the “liberties of Englishmen” were subject

<sup>16</sup> E. L. McAdam, Jr. and George Milne, ed., *Johnson's Dictionary*, (New York: Pantheon Books, 1963).

<sup>17</sup> Levin, 116. See also Steinberg, 26.

<sup>18</sup> William Blackstone, *Commentaries on the Laws of England*, edited by William Carey Jones, (San Francisco: Bancroft-Whitney Co., 1916), §173, 219.

<sup>19</sup> Blackstone, Jones ed., §199, 246.



to “tyranny and oppression,” and appeals to the courts and Parliament were unsuccessful “and lastly, to the right of having and using arms for self-preservation and defense.”<sup>20</sup>

Blackstone’s use of these phrases is completely contrary to Levin’s claimed meanings. It is possible that the rough and ready colonists on the American frontier were unaware of the fine distinction between “bear” and “have”; it strains one’s credulity to believe that a British judge, the foremost law commentator of his day, would fail to make this distinction in his magnum opus.

Noah Webster’s first edition of *An American Dictionary of the English Language*, published in 1828, showed several subtle variations on the verb “bear” in the sense of “carry” or “wear”; the closest sense to the one asserted by Levin is “to wear; to bear as a mark of authority or distinction; as, to bear a sword, a badge, a name; to bear arms in a coat.”<sup>21</sup> But there is nothing specific to military service in that definition, even though one example—“a badge”—is official in nature.

The OED shows a definition of “bear” that might include a military sense: “To carry about with one, or wear, ensigns of office, weapons of offence or defence. *to bear arms against*: to be engaged in hostilities with.” But only one definition is in any way specific to arms, and even there, only “*to bear arms against*” is specific to warfare or military service—the broader definition refers generally to weapons, not just in military service. These uses appear as early as *Beowulf*, in the ninth century, and as late as 1862. Under “arms,” however, the OED defines “to bear arms” as a figurative term for “to serve as a soldier, do military service, fight.”<sup>22</sup>

Further evidence that this distinction was not made in America is found in the constitutions adopted during the period 1776-1845. The constitutions of Connecticut (1818), Indiana (1816), Kentucky (1792 & 1799), Michigan (1835), Mississippi (1817), Missouri (1820), Ohio (1802), Pennsylvania (1776 & 1790), Republic of Texas (1838), State of Texas (1845), Vermont (1777, 1786, and 1793), all use the phrase “bear arms” and variants of the phrase, “in defence of themselves and the State.” This use in reference to individual self-defense strongly suggests that “bear arms” was not exclusively of a military or republican nature.

Several state constitutions adopted during the same period of time specify the “right to bear arms for the common defence” or a variant of it: Maine (1819), Massachusetts (1780), North Carolina (1776), Tennessee (1796 & 1834). If “to bear arms” contained within it the idea of military duty, excluding private use, there would seem to be no need for the phrase “for the common defence” as a qualifier.

The Pennsylvania minority report on ratifying the Constitution (to be discussed in more detail on page **Error! Bookmark not defined.**), requested an amendment with the language: “That the people have a right to bear arms

<sup>20</sup> Blackstone, Jones ed., §200, 247.

<sup>21</sup> Noah Webster, *An American Dictionary of the English Language*, I, (1828; reprinted New York: Johnson Reprint Corp., 1970), s.v. “Bear”.

<sup>22</sup> J. A. Simpson & E. S. C. Weiner, ed., *Oxford English Dictionary*, 2nd ed., hereinafter cited as OED, (Oxford: Clarendon Press, 1989), 2:21, 1:634.

for the defence of themselves and their own state, or the United States, or for the purpose of killing game...”<sup>23</sup> While it could be argued that the use of “bear arms” here was with reference to “defence of... their own state,” the references to self-defense and hunting provide evidence that the broader definition of “bear arms” was recognized.

Stephen Halbrook points to a Virginia game bill drafted by Thomas Jefferson, and proposed by James Madison that would have fined those “who hunted deer out of season, and if within a year ‘[the hunter] shall bear a gun out of his inclosed ground, unless while performing military duty,’ he shall be in violation of his recognizance.”<sup>24</sup> This use is evidence that to “bear a gun” included not only military duty, but also hunting.

In the many judicial opinions that we will explore starting in chapter five, there are statements and implications as to the meaning of the word “bear.” While less relevant to original intent, since they are further removed from the era in which the language was adopted, it is significant that the decisions which recognize that the phrase “to bear arms” was not exclusively military far exceed those which draw this distinction.<sup>25</sup> Even decisions that claimed to make such a distinction, such as *State v. Hill* (1874), were inconsistent: “the right to *bear* or *carry* arms,” “if they may at pleasure be *borne* and used in the fields, and in the woods”<sup>26</sup> (emphasis added) showed that while the Georgia Supreme Court claimed that “bear” meant military carrying exclusively, their own usage showed otherwise.

While the OED provides some evidence to back up Levin’s claim that “to bear arms” was military, the OED definitions are not exclusively military in nature, and the vast majority of the evidence—and the unanimous agreement of the evidence closest chronologically and geographically to the Framers—shows that it had a more general meaning of carrying arms, for *either* military or individual purposes.

Webster defined “arms” as: “In *law*, arms are any thing which a man takes in his hand in anger, to strike or assault another.”<sup>27</sup> Such arms must be something that an individual can pick up and move. A sword, a dagger, a pistol, a gun, a grenade, and a Molotov cocktail, all qualify as “arms.” An artillery piece, a helicopter gunship, or a nuclear missile launching submarine, would seem outside the definition, because they can not be taken “in his hand.”

The OED definitions for “arms” is more specific than Webster’s:

2. a. Instruments of offence used in war; weapons. *fire-arms*: those for which gunpowder is used, such as guns and pistols, as opposed to *swords*, *spears*, or *bows*. *small-arms*: those not requiring carriages, as opposed to *artillery*.

<sup>23</sup> “The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constitutents”, in John P. Kaminski & Gaspare J. Saladino, ed., *The Documentary History of the Ratification of the Constitution: Commentaries on the Constitution*, (Madison, Wis.: State Historical Society of Wisconsin, 1984), 3:19.

<sup>24</sup> Stephen F. Halbrook, “What The Framers Intended: A Linguistic Analysis of the Right To ‘Bear Arms’”, in *Law and Contemporary Problems*, 49:1 [Winter 1986], 153.

<sup>25</sup> There are only a very few decisions which have held that “to bear arms” is specifically military in nature: *Aymette v. State*, 2 Hump. (21 Tenn.) 154, 155 (1840); *English v. State*, 35 Tex. 473, 475 (1872), *State v. Hill*, 53 Ga. 472 (1874).

<sup>26</sup> *State v. Hill*, 53 Ga. 472, 475, 476 (1874).

<sup>27</sup> Webster, *An American Dictionary of the English Language*, I, s.v., “Arms”.

But all the examples cited in the OED of the usage of the word “arms,” from 1300 to 1870, conform to the definition given by Webster—those which can be taken in the hand.<sup>28</sup>

On the question of whether only long guns were considered part of the militia equipment that each man was to “provide himself,” rather than provided by the government, a section of the Militia Act of 1792 (introduced as HR-102, and debated by the First Congress) imposed the following requirement on every member of the militia serving as cavalry: “Each dragoon to furnish himself with... a pair of pistols, a sabre, and cartridge box to contain twelve cartridges for pistols.”<sup>29</sup>

As we will see starting in chapter five, the definition of arms protected by the Second Amendment and the state constitutional analogs has long been a subject of dispute, with different courts holding different opinions as to which weapons constitute “arms” within the sense of the Second Amendment. From the contemporary uses above, and from the dictionary definitions of the period, “arms” included not only military long guns, but handguns and other self-defense weapons as well.

The word *militia* is often assumed to mean, “National Guard.” But let us ask the Framers, “Who are the militia?” For a contemporary definition, we can look to George Mason’s speech at the Virginia constitution ratification convention of 1788:

MASON. Mr. Chairman, a worthy member has asked *who are the militia, if they be not the people of this country*, and if we are not protected from the fate of the Germans, Prussians, &c., by our representation? I ask, *Who are the militia? They consist now of the whole people, except a few public officers*. But I cannot say who will be the militia of the future day. If that paper on the table gets no alteration, the militia of the future day may not consist of all classes, high and low, and rich and poor; but they may be confined to the lower and middle classes of the people, granting exclusion to the higher classes of the people. If we should ever see that day, the most ignominious punishments and heavy fines may be expected. *Under the present government, all ranks of people are subject to militia duty*. Under such a full and equal representation as ours, there can be no ignominious punishment inflicted.<sup>30</sup> [emphasis added]

Earlier during the Virginia debates, Mason had equated “the people” and “the militia”:

An instance within the memory of some of this house will show us how *our militia* may be destroyed. Forty years ago, when the resolution of enslaving America was formed by an artful man, who was governor of Pennsylvania, *to disarm the people*; that it was the best and most effectual way to enslave them; but that they should not do it openly, but weaken them, and let them sink gradually, *by totally disusing and neglecting the militia*.<sup>31</sup> [emphasis added]

Francis Corbin, arguing for the Constitution before the same body, held that the concerns about standing armies were overstated, and made the same equation:

<sup>28</sup> OED, 1:634.

<sup>29</sup> Charlene Bangs Bickford & Helen E. Veit, ed., *Documentary History of the First Federal Congress 1789-91*, (Baltimore: Johns Hopkins University Press, 1986), 5:1465.

<sup>30</sup> Elliot, 3:425-6.

<sup>31</sup> Elliot, 3:380.

The honorable gentleman then urges an objection respecting the militia, who, he tells us, will be made the instrument of tyranny to deprive us of our liberty. Your militia, says he, will fight against you. *Who are the militia? Are we not militia? Shall we fight ourselves?* No, sir; the idea is absurd. We are also terrified by the dread of a standing army. It cannot be denied that we ought to have the means of defence, and be able to repel an attack.<sup>32</sup> [emphasis added]

The following exchange at the Virginia ratifying convention in 1788 also demonstrates that “militia” was recognized as constituting the whole people:

Mr. CLAY wished to be informed why the Congress were to have power to provide for calling forth the militia, to put the laws of the Union into execution.

Mr. MADISON supposed the reasons of this power to be so obvious that they would occur to most gentlemen. If resistance should be made to the execution of the laws, he said, it ought to be overcome. *This could be done only in two ways—either by regular forces or by the people.* By one or the other it must unquestionably be done. If insurrections should arise, or invasions should take place, *the people ought unquestionably to be employed, to suppress and repel them, rather than a standing army.* The best way to do these things was *to put the militia on a good and sure footing,* and enable the government to make use of their services when necessary.

Mr. GEORGE MASON. Mr. Chairman, unless there be some restrictions on the power of calling forth the militia, to execute the laws of the Union, suppress insurrections, and repel invasions, we may very easily see that it will produce dreadful oppressions. It is extremely unsafe, without some alterations. It would be *to use the militia to a very bad purpose,* if any disturbance happened in New Hampshire, to call them from Georgia. *This would harass the people* so much that they would agree to abolish the use of the militia, and establish a standing army.<sup>33</sup> [emphasis added]

Gov. Randolph, also at the Virginia ratifying convention asserted:

In order to provide for our defence, and exclude the dangers of a standing army, *the general defence is left to those who are the objects of defence. It is left to the militia,* who will suffer if they become the instruments of tyranny.<sup>34</sup> [emphasis added]

Alexander Contee Hanson, a member of the Maryland ratification convention, also discussed the meaning of “militia.” In his pamphlet in support of ratification of the Constitution, he argued that the concerns about standing armies were excessive, and that such standing armies were unavoidable. He concluded that the concerns are “a mere pretext for terrifying you,” and that:

It may well be material here to remark, that although a well regulated militia has ever been considered as the true defense of a free republic, there are always honest purposes, which are not to be answered by a militia. If they were, the burthen of the militia would be so great, that a free people would, by no means, be willing to sustain it. If indeed it be possible in the nature of things, that congress shall, at any future period, alarm us by an improper augmentation of troops, *could we not, in that case, depend on the militia, which is ourselves.*<sup>35</sup> [emphasis added]

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<sup>32</sup> Elliot, 3:112-3.

<sup>33</sup> Elliot, 3:378.

<sup>34</sup> Elliot, 3:401.

<sup>35</sup> Alexander Contee Hanson, *Remarks on the Proposed Plan of a Federal Government*, 21, in Paul Ford, ed., *Pamphlets On The Constitution of the United States*, (Brooklyn, N.Y.: 1888; reprinted New York: Da Capo Press, 1968), 234-5.

A committee of the Maryland ratifying convention, the same year as the Virginia convention, proposed ratification of the Constitution with a list of amendments, one of which is relevant to the Second Amendment.<sup>36</sup> Among these provisions: “That the militia shall not be subject to martial law, except in time of war, invasion, or rebellion.” In explaining why this amendment was considered so important, the committee argued:

This provision to restrain the powers of Congress over the militia, although by no means so ample as that provided by Magna Charta, and the other great fundamental and constitutional laws of Great Britain, (it being contrary to Magna Charta to punish a freeman by martial law, in time of peace, and murder to execute him,) yet it may prove an inestimable check; for all other provisions in favor of the rights of men would be vain and nugatory, if the power of subjecting *all men, able to bear arms*, to martial law at any moment should remain vested in Congress.<sup>37</sup> [emphasis added]

The ratifying convention refused to support the full list of proposed amendments. In response, the committee requested the convention to ratify the Constitution with what it considered the most important three amendments. The committee explained further its concern:

The first of these objections, concerning the militia, they considered as essential; for, to march beyond the limits of a neighboring state *the general militia, which consists of so many poor people that can illy be spared from their families and domestic concerns*, by power of Congress, (who could know nothing of their circumstances,) without consent of their own legislature or executive, ought to be restrained.<sup>38</sup> [emphasis added]

The general militia, then, was recognized by the Maryland convention as the adult freemen of Maryland.

Tench Coxe of Pennsylvania was a member of the Annapolis Convention in 1786 and the Continental Congress. His letters were among the first to appear in favor of ratification of the Constitution, and were widely reprinted in newspapers of the day.<sup>39</sup> Coxe admitted: “The apprehensions of the people have been excited, perhaps by persons with good intentions, about the powers of the new government to raise an army.”

After stating that the Constitution contained adequate restrictions on the funding and control of standing armies, Coxe argued that:

*The militia, who are in fact the effective part of the people at large*, will render many troops quite unnecessary. They will form a powerful check upon the regular troops, and will generally be sufficient to over-awe them—for our detached situation will seldom give occasion to raise an army, though a few scattered companies may often be necessary.<sup>40</sup> [emphasis added]

Richard Henry Lee was appointed to the Constitutional Convention, but declined to serve. His pamphlet against ratification of the Constitution was “one

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<sup>36</sup> Elliot, 2:549.

<sup>37</sup> Elliot, 2:552.

<sup>38</sup> Elliot, 2:554.

<sup>39</sup> Ford, *Pamphlets On The Constitution of the United States*, 133.

<sup>40</sup> Tench Coxe, *An Examination of the Constitution for the United States of America*, 20-21, in Ford, *Pamphlets On The Constitution of the United States*, 150-1.

of the most popular” of the time.<sup>41</sup> His anxious description of what might happen if “one fifth or one eighth part of the men capable of bearing arms, be made a *select militia*,” [emphasis added] suggests that the entire militia consisted of *all* men “capable of bearing arms.”<sup>42</sup> Even a “select militia” consisted of a much larger part of the population than the modern National Guard.

Further evidence of the identity of the militia as “the people,” and not just a select part of the population, can be found in James Madison’s *Federalist* 46. Madison sought to alleviate concerns about Federal power, and to that end, he pointed out that: “The only refuge left for those who prophecy the downfall of the State Governments, is the visionary supposition that the Federal Government may previously accumulate a military force for the projects of ambition...” Madison next asserted the political unlikelihood of such an event, but:

Extravagant as the supposition is, let it however be made. Let a regular army, fully equal to the resources of the country be formed; and let it be entirely at the devotion of the [Federal] Government; still it would not be going too far to say, that the State Governments with the people on their side would be able to repel the danger. The highest number to which, according to the best computation, a standing army can be carried in any country, does not exceed one hundredth part of the whole number of souls; or one twenty-fifth part of the number able to bear arms. This proportion would not yield in the United States an army of more than twenty-five or thirty thousand men. *To these would be opposed a militia amounting to near half a million of citizens with arms in their hands*, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence. It may well be doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops.<sup>43</sup> [emphasis added]

The “militia” was not a small professional military, but the entire male population of the country, “with arms in their hands.”

A less clear-cut statement is found in Alexander Hamilton’s *Federalist* 8. Like Madison, Hamilton also sought to alleviate fears of a tyrannical federal government, and to that end, compared the nature of military establishments “in a country, seldom exposed by its situation to internal invasions,” such as the United States or Britain, and “one which is often subject to them, and always apprehensive of them,” such as the continental powers of Europe:

The smallness of the army renders the natural strength of the community an overmatch for it; and the citizens, not habituated to look up to the military power for protection, or to submit to its oppressions, neither love nor fear the soldiery: They view them with a spirit of jealous acquiescence in a necessary evil, and stand ready to resist a power which they suppose may be exerted to the prejudice of their rights. The army under such circumstances, may usefully aid the magistrate to suppress a small faction, or an occasional mob, or insurrection; but it will be unable to enforce encroachments against the united efforts of the great body of the people.<sup>44</sup>

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<sup>41</sup> Ford, *Pamphlets On The Constitution of the United States*, 277.

<sup>42</sup> Lee, 25, in Ford, *Pamphlets On The Constitution of the United States*, 305.

<sup>43</sup> James Madison, “Federalist 46”, in Jacob E. Cooke, ed., *The Federalist*, (Middletown, Conn.: Wesleyan University Press, 1961), in Cooke, 320-1.

<sup>44</sup> Alexander Hamilton, “Federalist 8”, in Cooke, 47-48.

This alone does not prove that Hamilton saw the militia as equivalent to the general population—but just before this comparison, he explained why the issue of standing armies had only recently become an issue of concern:

The means of revenue, which have been so greatly multiplied by the [i]ncrease of gold and silver, and of the arts of industry, and the science of finance, which is the offspring of modern times, concurring with the habits of nations, have produced an [e]ntire revolution in the system of war, and have rendered disciplined armies, distinct from the body of the citizens, the inseparable companion of frequent hostility.<sup>45</sup>

There is other contemporaneous evidence that the Founding Fathers considered the militia to be equivalent to, if not, “the people,” at least to a very large part of the people. The same Congress that debated the Bill of Rights, also debated HR-102, the Militia Bill which became, in the Second Congress, the Militia Act of 1792. Its language required:

That each and every free able-bodied white male citizen of the respective States, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years, (except as hereinafter excepted) shall severally, and respectively, be enrolled in the Militia by the Captain or commanding officer of the company, within whose bounds such citizens shall reside... That every citizen, so enrolled and notified, shall, within six months thereafter, provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch with a box therein to contain not less than twenty-four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball; or with a good rifle, knapsack, shot-pouch and powder-horn, twenty balls suited to the bore of his rifle, and a quarter of a pound of powder; and shall appear so armed, accoutred, and provided, when called out to exercise or into service...<sup>46</sup>

This statute “remained in effect into the early years of the [twentieth] century as a legal requirement of gun ownership for most of the population of the United States.”<sup>47</sup>

Debate on the Militia Bill, on December 16, 1790, shows general agreement that “all from eighteen to forty-five ought to be armed.” Rep. Jackson stated “that he was of the opinion that the people of America would never consent to be deprived of the privilege of carrying arms. Though it may prove burdensome to some individuals to be obliged to arm themselves, yet it would not be so considered when the advantages were justly estimated.” Jackson then followed up this statement with a series of examples of the advantages that had resulted in Switzerland, France, and Ireland, from “putting arms into the hands of their militia.”

On the same day, a long discussion by members of the House centered on whether the government should provide arms for those too poor to purchase their own. Reps. Wadsworth and Sherman argued against such an action, because of the public expense involved, and “experience shows that public property of this kind, from the careless manner in which many persons use it, is soon lost.” Further, Rep. Sherman felt sure that, “there are so few freemen in

<sup>45</sup> Alexander Hamilton, “Federalist 8”, in Cooke, 47.

<sup>46</sup> Joseph Gales, ed., *Debates and Proceedings in the Congress of United States*, (Washington: Gales & Seaton, 1834), hereinafter cited as *Annals of Congress*, 2 Cong., May 8, 1792, 1392.

<sup>47</sup> Senate Subcommittee on The Constitution Staff, “History: Second Amendment Right To ‘Keep and Bear Arms’”, 7.

the United States who are not able to provide themselves with arms and accoutrements,” that it was unnecessary and improper for the government to do so. Rep. Bloodworth argued that since the whole society benefited from arming the poorest members of the militia, that “those who were benefited by them should be at the expense of arming them.”

When it was suggested that minors and apprentices should be armed at the public expense as well, Rep. Wadsworth argued against it on grounds that would seem incomprehensible to most people today:

The motion at first appeared to be in favor of poor men, who are unable to purchase a firelock; but now, it seems, minors and apprentices are to be provided for. *Is there a man in this House who would wish to see so large a proportion of the community, perhaps one-third, armed by the United States, and liable to be disarmed by them?* Nothing would tend more to excite suspicion, and rouse a jealousy dangerous to the Union. With respect to apprentices, every man knew that they were liable to the tax, and they were taken under the idea of being provided for by their masters; as to minors, their parents or guardians would prefer furnishing them with arms themselves, to depending on the United States when they knew they were liable to having them reclaimed.<sup>48</sup> [emphasis added]

Congress’ fear was not that the population would have arms; but that if the government provided the arms, it would have the authority to ask for them back, and doing so would be dangerous to the Union.

On December 22, 1790, the First Congress debated whether it should define which persons would be exempted from militia duty, or if the state legislatures should do so. As part of that debate, Rep. Williamson observed:

When we departed from the straight line of duty marked out for us by the first principles of the social compact, we found ourselves involved in difficulty. *The burden of the militia duty lies equally upon all persons*; and when we contemplate a departure from this principle, by making exemptions, it involves us in our present embarrassment.<sup>49</sup> [emphasis added]

Nor did this understanding of the militia as “all persons” disappear after the heady days of the new Constitution. On January 5, 1800, Rep. Randolph, in arguing for a reduction of the standing army, emphasized that standing armies were not only “useless and enormous expense,” but contrary to the spirit of the Constitution: “A people who mean to continue free must be prepared to meet danger in person, not to rely upon the fallacious protection of mercenary armies.”<sup>50</sup>

Presidential Inaugural Addresses in the first decades of the Republic provide additional evidence of the meaning of “militia.” President James Madison’s First Inaugural Address in 1809 continued the policy of articulating the hazards of standing armies, by asserting that the obligations of the President included “to keep within the requisite limits a standing military force, always remembering that an armed and trained militia is the firmest bulwark of republics—that without standing armies their liberty can be never be in danger, nor with large ones safe...”

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<sup>48</sup> *Annals of Congress*, 1 Cong., December 16, 1790, 1806-9.

<sup>49</sup> Elliot, 4:423.

<sup>50</sup> Elliot, 4:411-2.



This statement, of course, could be interpreted to refer to a select militia, or the general militia. That it still meant a general militia may be deduced from the First Inaugural Address of Madison's hand-picked successor, James Monroe, in 1817:

But it ought always to be held prominently in view that *the safety of these States and of everything dear to a free people must depend in an eminent degree on the militia*. Invasions may be made too formidable to be resisted by any land and naval force which would comport either with the principles of our Government or the circumstances of the United States to maintain. *In such cases recourse must be made to the great body of the people*, and in a manner to produce the best effect. It is of the highest importance, therefore, that they be so organized and trained as to be prepared for any emergency. [emphasis added]

President Andrew Jackson continued this understanding of the role of the militia, and its contents, in his First Inaugural Address (1829):

But the bulwark of our defense is the national militia, which in the present state of our intelligence and population must render us invincible. As long as our Government is administered for the good of the people, and is regulated by their will; as long as it secures to us the rights of person and of property, liberty of conscience and of the press, it will be worth defending; and so long as it is worth defending a patriotic militia will cover it with an impenetrable aegis. Partial injuries and occasional mortifications we may be subjected to, *but a million of armed freemen, possessed of the means of war*, can never be conquered by a foreign foe. [emphasis added]

That Jackson still had in mind the entire free male population of the country, and not a select militia, can be determined from the count; the total popular vote in the election in which Jackson was elected President was just over a million. That Jackson expected them to have their own arms for the purposes of warfare, may be inferred from, "possessed of the means of war..." This phrase would be meaningless if the arms were issued by the government at the outbreak of hostilities.

President Franklin Pierce's Inaugural Address of 1853 continued this recognition that the militia were a body quite separate from a standing army: "The Army as organized must be the nucleus around which in every time of need the strength of your military power, the sure bulwark of your defense—a national militia—may be readily formed into a well-disciplined and efficient organization."<sup>51</sup>

Current U.S. law still recognizes this organic relationship between the people and the militia, describing, "The militia of the United States" as consisting of "all able-bodied males at least 17 years of age and... under 45 years of age who are, or who have made a declaration of intent to become, citizens of the United States and of female citizens of the United States who are commissioned officers of the National Guard." The "organized militia... consists of the National Guard and the Naval Militia; and... the unorganized militia, which consists of the members of the militia who are not members of the National Guard or the Naval Militia."<sup>52</sup> The current National Guard was organized

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<sup>51</sup> Davis Newton Lott, *The Presidents Speak: The Inaugural Address of the American Presidents from Washington to Kennedy*, (New York: Holt, Rinehart & Winston, 1961), 26, 36, 56, 58, 106.

<sup>52</sup> 10 USC §311. Similar provisions exist in many state codes—see California Military & Veterans Code, §§120-123.

under Congress' power to "raise and support armies," and *not* under the "organizing, arming and disciplining the Militia" provision, since the militia "can be called forth only 'to execute the laws of the Union, suppress insurrections and repel invasions.'"<sup>53</sup>

In *Perpich v. Department of Defense* (1990), the U.S. Supreme Court provided a history of the process by which the National Guard was "federalized" in 1916, so as to eliminate questions of the constitutionality of sending National Guard units abroad. National Guardsmen are members of organized militias of the various states, and members of the U. S. Army, although not members of both at the same time. When the President orders a National Guard unit into federal service, they are no longer members of the organized militia, but members of the Regular Army.<sup>54</sup>

While not a definition of "militia," the U.S. Supreme Court in *U.S. v. Verdugo-Urquidez* (1990), recognized that "the people" referred to in the Second Amendment has the same meaning as it does in the rest of the Bill of Rights, and that the Second Amendment's protections are not limited to those who are active members of the militia:

Contrary to the suggestion of *amici curiae*<sup>55</sup> that the Framers used this phrase "simply to avoid [an] awkward rhetorical redundancy," ... "the people" seems to have been a term of art employed in select parts of the Constitution. The Preamble declares that the Constitution is ordained and established by "the People of the United States." The Second Amendment protects "the right of the people to keep and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "the people." See also U.S. Const., Amdt. 1, ("Congress shall make no law ... abridging ... *the right of the people* peaceably to assemble"); Art. I, §2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year *by the People of the several States*") (emphasis added). While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.<sup>56</sup>

Dictionaries give an answer consistent with the use of the word we have found in the quotations above. Both Webster's 1828 *Dictionary* and the OED contain definitions of "militia":

The body of soldiers in a state enrolled for discipline, but not engaged in actual service except in emergencies; as distinguished from regular troops, whose sole occupation is war or military service. The militia of a country are the able bodied men organized into companies, regiments and brigades, with officers of all grades,

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<sup>53</sup> Senate Subcommittee on The Constitution Staff, "History: Second Amendment Right To 'Keep and Bear Arms'", 11.

<sup>54</sup> *Perpich v. Department of Defense*, 110 S.Ct. 2418, 2423, 2424 (1990). The limitation that militia could not be forced to serve overseas was in effect as early as the fourteenth century, and was clearly still in effect as late as Henry VIII's reign. A. V. B. Norman and Don Pottinger, *English Weapons & Warfare: 449-1660*, (New York: Dorset Press, 1979), 178, 77-8.

<sup>55</sup> "Friends of the court": legal briefs submitted by people and groups not a direct party to the suit.

<sup>56</sup> *U.S. v. Verdugo-Urquidez*, 110 S.Ct. 1056, 1060, 1061 (1990).

and required by law to attend military exercises on certain days only, but at other times left to pursue their actual occupations.<sup>57</sup>

As expected, the OED provides a more complete set of definitions, of which only two refer to animate objects. Definition 3a: “A military force, esp. the body of soldiers in the service of a sovereign or a state; in later use employed in more restricted sense...., to denote a ‘citizen army’ as distinguished from a body of mercenaries or professional soldiers.” Definition 4b is listed as a specifically American usage: “The whole body of men declared by law amenable to military service, without enlistment, whether armed and drilled or not’ (*Cent. Dict.* 1890).”<sup>58</sup>

Federalists and Antifederalists in state ratifying conventions, the language of the Militia Act of 1792, current federal and state laws, at least one U.S. Supreme Court decision (*Perpich*), and contemporary dictionaries, *all* agree that the militia was *not* a standing army, not a “select militia” like the National Guard, but the adult free male citizens of the country.

What does “well-regulated” mean? Webster’s first definition of “well-regulated” refers to governmental regulation. But the second definition includes: “To put in good order; as, to *regulate* the disordered state of a nation or its finances.”<sup>59</sup>

The OED’s principal definitions of “well-regulated” include examples of governmental regulation, but also an example from 1812 where the sense is “properly adjusted,” such as a clock or sundial. For the word “regulated,” the second OED definition is, “Of troops: Properly disciplined,” with the note that such use is rare, and only a 1690 example is given.<sup>60</sup>

Andrew Fletcher of Saltoun was one of the political philosophers of the Scottish Enlightenment, and was highly regarded by at least some of the American Revolutionaries.<sup>61</sup> Fletcher’s “A Discourse of Government With Relation to Militias” uses the expressions “well-regulated militias” and “ill-regulated militia.” The context does not provide a clear definition, but it appears that “properly disciplined” is what Fletcher meant by “well-regulated.”<sup>62</sup>

Perhaps the best definition, from the standpoint of determining original intent, would be to find such a use of the phrase “well-regulated” from one of the Framers. We are not disappointed. Alexander Hamilton, in *Federalist* 29, pointed to the economic consequences of drilling the entire militia sufficiently to “[e]ntitle them to the character of a well regulated militia.”<sup>63</sup> Certainly, the militia of that time were “regulated” in the sense of being governmentally controlled and directed; Hamilton’s meaning would seem to be “properly

<sup>57</sup> Webster, *An American Dictionary of the English Language*, II, s.v. “Militia”.

<sup>58</sup> OED, 9:768.

<sup>59</sup> Webster, *An American Dictionary of the English Language*, II, s.v. “Regulate”.

<sup>60</sup> OED, 13:524.

<sup>61</sup> Edmund S. Morgan, “Slavery and Freedom: The American Paradox”, *Journal of American History*, 59 [June, 1972], 5-29, reprinted in Stanley N. Katz, John M. Murrin, and Douglas Greenberg, ed., *Colonial America: Essays in Politics and Social Development*, 4th ed., (New York: McGraw-Hill, Inc., 1993), 270.

<sup>62</sup> Andrew Fletcher, *Selected Political Writings and Speeches*, edited by David Daiches, (Edinburgh: Scottish Academic Press, 1979), 16-17.

<sup>63</sup> Alexander Hamilton, “Federalist 29”, in Kaminski & Saladino, 3:320.

trained.” President James Polk’s Inaugural Address of 1845 uses the phrase, “well-regulated self-government among men” in the sense of “properly adjusted.”<sup>64</sup> Indeed, even today, the process by which the barrels of a double-barreled shotgun are made to shoot to the same point is called “regulating a shotgun”—a distinctly non-governmental process, but one that results in a shotgun that can be properly used.

In modern debates about the constitutionality of restrictive gun laws, it is common for “well-regulated” to be thrown out as a red herring, in some way intended as proof that the Framers intended firearms instead of militias to be “well-regulated,” in the sense of being strictly controlled. The meaning of “well-regulated,” at least in the context in which it is used in the Second Amendment, is ambiguous, but the bulk of the evidence suggests “well-disciplined.” This does not preclude the notion that the militia was to be under the direction and control of the government—until such time as that government needed to be overthrown—as we will shortly see. Regardless of the meaning of “well-regulated militia,” we will find, as we examine the history of judicial interpretation of the Second Amendment and its state analogs, only a very few courts have argued that “the right of the people” was limited to active members of a state “well-regulated militia....”

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<sup>64</sup> Lott, 90.