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## The Ideological Origins of the Second Amendment

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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.

Since its ratification in 1791 the Second Amendment has remained in relative obscurity. Virtually ignored by the Supreme Court, the amendment has been termed "obsolete," "defunct," and an "unused provision" with no meaning for the twentieth century by scholars dealing with the Bill of Rights.<sup>1</sup> And yet, many Americans consider this amendment as vital to their liberties today as did the founders nearly two hundred years ago. Their sense of urgency arises from the current debate over gun control.

Disagreements over gun legislation reveal disparate perceptions of American society that rest upon, or inspire, dissimilar interpretations of the Second Amendment. Opponents of restrictive measures emphasize the free individual's rights and privileges and adamantly contend that the "right to bear arms" phrase constitutes the essence of the amendment. Their bumper stickers—modern day cockades—declare: "When guns are outlawed only outlaws will have guns," or "Hitler got his start registering guns." These simplistic ideas, symbolic of much deeper and more complex ideological beliefs, gain sustenance from a wide variety of popular sources. It is the National Rifle Association (NRA), however, that transforms this popular impulse into one of the most powerful and active lobbies in Washington. Its magazine, *The American Rifleman*, clearly states the issue: "The NRA, the foremost guardian of the traditional American right to 'keep and bear arms,' believes that every law-abiding citizen is entitled to the ownership and legal use of firearms."<sup>2</sup>

For their part, advocates of restrictive gun legislation emphasize collective rights and communal responsibilities. In order to protect society from the violence they associate with armed individuals, these people stress the "well regulated (pg.600) Militia" phrase within the Second Amendment. Irving Brant's *The Bill of Rights* typifies their position. Claiming that the Second

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<sup>1</sup> Edward Dumbauld, *The Bill of Rights: And What It Means Today* (Norman, Okla., 1957), 60, 62; Robert Allen Rutland, *The Birth of the Bill of Rights, 1776-1791* (Chapel Hill, 1955), 229.

<sup>2</sup> This message appears on the title page of each issue of the magazine.

Amendment, "popularly misread, comes to life chiefly on the parade floats of rifle associations," Brant contends that the amendment's true purpose was "to forbid Congress to prohibit the maintenance of a state militia." Therefore, by its very nature, "that amendment cannot be transformed into a personal right to bear arms, enforceable by federal compulsion upon the states."<sup>3</sup> The President's Commission on Law Enforcement and Administration of Justice (1967) reiterated this belief even more forcefully: "The U.S. Supreme Court and lower Federal courts have consistently interpreted this Amendment only as a prohibition against Federal interference with State militia and not as a guarantee of an individual's right to keep or carry firearms." Therefore, the commission concluded: "The argument that the Second Amendment prohibits State or Federal regulation of citizen ownership of firearms has no validity whatsoever."<sup>4</sup>

This bifurcation of the Second Amendment into its two separate phrases invariably rests upon appeals to history. Advocates of both sides draw upon the same historical data but interpret them differently in light of their present-day beliefs.<sup>5</sup> Opponents of gun control keep emphasizing the individualistic character of the founders whereas supporters of restrictive legislation keep insisting that these men were far more concerned with the collective behavior of Americans. Given this impasse, an attempt to understand the origins of the amendment within the perspective of the late eighteenth, rather than that of the late twentieth, century should provide useful insights into both the beliefs of the founders and the intent of the amendment.<sup>(pg.601)</sup>

During the last several decades many scholars dealing with the Revolution have labored to reconstruct the participants' view of their era as a primary means of understanding the period.<sup>6</sup> As a result we now recognize the importance of "republicanism," a distinctive universe of ideas and beliefs, in shaping contemporary perceptions of late-eighteenth-century American society. Within such a political culture thoughts regarding government were integrated into a much larger configuration of beliefs about human behavior and the social process. Drawing heavily upon the libertarian thought of the English commonwealthmen, colonial Americans believed that a republic's

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<sup>3</sup> Irving Brant, *The Bill of Rights: Its Origin and Meaning* (Indianapolis, 1965), 486-87.

<sup>4</sup> *The Challenge of Crime in a Free Society: A Report by the President's Commission on Law Enforcement and Administration of Justice* (Washington, 1967), 242. Sen. Edward Kennedy, too, claims that the "Supreme Court has repeatedly said that this amendment has nothing to do with the right to personal ownership of guns but only with the right of a state to establish a militia." Edward M. Kennedy, "The Need for Gun Control Legislation," *Current History*, 71 (July/Aug. 1976), 27. These observations state the case more definitively than the evidence warrants. The Supreme Court has touched upon the Second Amendment in four cases: *United States v. Cruikshank* (1876); *Presser v. Illinois* (1886); *Miller v. Texas* (1894); and *United States v. Miller* (1939). In only one of these cases, *United States v. Miller*, did the court relate gun ownership to the militia. Lower federal court and state court decisions regarding the Second Amendment are simply a labyrinth of judicial interpretation. For detailed analyses of these cases, see Robert A. Sprecher, "The Lost Amendment," *American Bar Association Journal*, 51 (June 1965), 554-57; *ibid.* (July, 1965), 665-69; Stuart R. Hays, "The Right to Bear Arms, a Study in Judicial Misinterpretation," *William and Mary Law Review*, 2 (no. 2, 1960), 381-406; Ronald B. Levine and David B. Saxe, "The Second Amendment: The Right to Bear Arms," *Houston Law Review*, 7 (Sept. 1969), 1-19; and Ralph J. Rohner, "The Right to Bear Arms: A Phenomenon of Constitutional History," *Catholic University of America Law Review*, 16 (Sept. 1966), 53-84.

<sup>5</sup> The following essays deal with identical material (English Bill of Rights, Sir William Blackstone, colonial declarations, and state bills of rights) and yet reach diametrically opposed conclusions. Peter Buck Feller and Karl L. Gotting, "The Second Amendment: A Second Look," *Northwestern University Law Review*, 61 (March-April 1966), 46-70; Lucilius A. Emery, "The Constitutional Right to Keep and Bear Arms," *Harvard Law Review*, 28 (March 1915), 473-77; and Rohner, "Right to Bear Arms," argue that the amendment supports the collective right of state militias to bear arms. However, Sprecher, "Lost Amendment"; Hays, "Right to Bear Arms"; Levine and Saxe, "Second Amendment"; and Nicholas Olds, "The Second Amendment and the Right to Keep and Bear Arms," *Michigan State Bar Journal*, 46 (Oct. 1967), 15-25, contend that it protects individual rights to keep arms.

<sup>6</sup> This literature is reviewed in Robert E. Shalhope, "Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism in American Historiography," *William and Mary Quarterly*, 29 (Jan. 1972), 49-80, and Robert E. Shalhope, "Republicanism and Early American Historiography," *ibid.*, 39 (April 1982), 334-56.

very existence depended upon the character and spirit of its citizens. A people noted for their frugality, industry, independence, and courage were good republican stock. Those intent upon luxury lost first their desire and then their ability to protect and maintain a republican society. Republics survived only through the constant protection of the realm of Liberty from the ceaselessly aggressive forces of Power. America would remain a bastion of Liberty, in stark contrast to the decadent and corrupt societies of Europe, only so long as its people retained their virility and their virtue.

The historical literature devoted to explicating American republicanism has grown immense. Among the strands of thought most commonly discussed as central to this persuasion two are immediately relevant to understanding the Second Amendment. These are the fear of standing armies and the exaltation of militias composed of ordinary citizens. There is, however, an equally vital theme contained in libertarian literature which, except in the work of J. G. A. Pocock, has been largely ignored in the recent literature dealing with republicanism. This is the dynamic relationship that libertarian writers believed existed between arms, the individual, and society. To gain a fuller comprehension of the origins of the Second Amendment it is essential therefore to understand the place of the armed citizen in libertarian thought and the manner in which this theme became an integral part of American republicanism.

In order to delineate libertarian beliefs regarding the relationship between arms and society it is necessary to start with the Florentine tradition upon which republican thought drew so heavily.<sup>7</sup> This tradition, articulated most clearly by Niccolò Machiavelli, idealized the citizen-warrior as the staunchest bulwark of a republic. For Machiavelli the most dependable protection against corruption was the economic independence of the citizen and his ability and willingness to become a warrior. From this developed a sociology of liberty that rested upon the role of arms in society: political conditions must allow the arming of all citizens; moral conditions must be such that all citizens would willingly fight for the republic; and economic conditions must provide the citizen-soldier a home and occupation outside the army. This theme, (pg.602) relating arms and civic virtue, runs throughout Machiavelli, and from it emerged the belief that arms and a full array of civic rights were inseparable. To deny arms to some men while allowing them to others was an intolerable denial of freedom. Machiavelli's belief that arms were essential to liberty—in order for the individual citizen to protect himself, to hunt, to defend his state against foreign invasion, to keep his rulers honest, and to maintain his republican character—provided an important foundation upon which subsequent republican writers could build.

With the passage of time the essential character of Florentine thought, which emphasized a connection between the distribution of arms within a society and the prevalence of aristocracy or republicanism, liberty or corruption, remained vital to many writers. Both Sir Walter Raleigh and Jean Bodin stressed the relationship between arms and the form of government and society that emerged within a nation. Indeed Raleigh enunciated several "sophisms" of the tyrant. Among these were: "To unarm his people of weapons, money, and all means whereby they may resist his power." The more subtle tyrant followed this rule: "To unarm his people, and store up their weapons, under pretence of keeping them safe, and having them ready when service requireth, and then to arm them with such, and as many as he shall think meet, and to commit them to such as are sure men."<sup>8</sup> For his part, Bodin, philosopher of the French monarchy, emphasized the essential difference between

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<sup>7</sup> The following discussion of Niccolò Machiavelli is drawn from J. G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton, 1975), esp. 199-213, 290-92.

<sup>8</sup> *The Works of Sir Walter Raleigh, Kt., Now First Collected: To Which Are Prefixed the Lives of the Author, by Oldys and Birch* (8 vols., Oxford, Eng., 1829), VIII, 22, 25.

democratic societies and monarchies regarding arms. He believed that monarchs courted disaster by arming the common people for "it is to be feared they will attempt to change the state, to have a part in the government." In a monarchy "the most usual way to prevent sedition, is to take away the subjects arms." Where democracy was the rule the general populace could be and should be armed.<sup>9</sup>

The English libertarian writers in the latter half of the seventeenth century amplified and shaped the Florentine tradition in response to changing circumstances. Marchamont Nedham declared that a republican society and government rested upon the popular possession of arms as well as on the regular election of magistrates and representatives. Convinced that free states could survive and remain virtuous only if their citizens were familiar with the use of arms, Nedham claimed that arms should not, however, be "in the hands of any, but such as had an Interest in the Publick."<sup>10</sup> The idea that only freemen—responsible citizens—should bear arms soon became a standard theme among libertarians.

Of all the commonwealthmen James Harrington made the most significant contribution to English libertarian attitudes toward arms, the individual, and society.<sup>11</sup> Harrington offered a crucial innovation to Machiavellian theory (pg.603) (perhaps *the* crucial innovation in light of later American attitudes). Accepting entirely the Machiavellian theory of the possession of arms as necessary to political personality, he grounded this basic idea upon the ownership of land. Like Machiavelli, Harrington considered the bearing of arms to be the primary means by which individuals affirmed their social power and political participation as responsible moral agents. But now landownership became the essential basis for the bearing of arms. Civic virtue came to be defined as the freeholder bearing arms in defense of his property and of his state.

Harrington's work provided an intellectual foundation for subsequent writers who linked the subject of arms to the basic themes of power and oppression which permeated libertarian thought. Andrew Fletcher's warning, "he that is armed, is always master of the purse of him that is unarmed," blended nicely with the libertarian's deep suspicion of authority.<sup>12</sup> The individual's need to protect himself from vicious fellow citizens and corrupt authorities—both banes of any republican society—also became clear. To accomplish this the responsible citizen must be armed.

John Trenchard and Thomas Gordon also integrated the idea of the armed citizen with the constant struggle libertarians perceived between Power and Liberty. Their *Cato's Letters* exclaimed: "The Exercise of despotick Power is the unrelenting War of an armed Tyrant upon his unarmed Subjects: It is a War of one Side, and in it there is neither Peace nor Truce." Rulers must always be restrained. An unarmed populace merely encouraged their natural tendency toward oppression: "Men that are above all Fear, soon grow above all Shame."<sup>13</sup>

Trenchard also collaborated with Walter Moyle in an attack upon standing armies which elaborated on the theme that citizens must jealously guard their liberties. Nations that remained free, warned Trenchard and Moyle, never maintained "any Souldiers in constant Pay within their Cities, or ever suffered any of their Subjects to make War their Profession." Those nations knew "that the Sword and Sovareignty always march hand in hand, and therefore they trained their own Citizens

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<sup>9</sup> Jean Bodin, *The Six Bookes of a Commonwealth*, ed. Kenneth Douglas McRae (Cambridge, Mass., 1962), 605, 542, 599-614.

<sup>10</sup> *Mercurius Politicus*, 103 (May 20 to May 27, 1652), 1609-13.

<sup>11</sup> The following discussion of James Harrington draws upon Pocock, *Machiavellian Moment*, 383-400.

<sup>12</sup> Andrew Fletcher, *The Political Works of Andrew Fletcher, Esq.* (London, 1737), 9.

<sup>13</sup> [John Trenchard and Thomas Gordon], *Cato's letters: Or, Essays on Liberty, Civil and Religious, and Other Important Subjects* (4 vols., London, 1755), I, 189, 255.

and the Territories about them perpetually in Arms, and their whole Commonwealths by this means became so many several formed Militias." Further, "a general Exercise of the best of their People in the use of Arms, was the only Bulwark of their Liberties; this was reckon'd the surest way to preserve them both at home and abroad, the People being secured thereby as well against the Domestick Affronts of any of their own Citizens, as against the Foreign Invasions of ambitious and unruly Neighbours." Arms were, however, "never lodg'd in the hands of any who had not an Interest in preserving the publick Peace.... In those days there was no difference between the Citizen, the Souldier, and the Husbandman."<sup>14</sup>

Throughout their essay Trenchard and Moyle reiterated the idea that citizens must be able to defend themselves against their rulers or they would (pg.604) lose their liberties and live in tyranny. "It's the misfortune of all Countries, that they sometimes lie under a unhappy necessity to defend themselves by Arms against the Ambition of their Governours, and to fight for what's their own." If those in government were heedless of reason, the people "must patiently submit to [their] Bondage, or stand upon [their] own Defence; which if [they] are enabled to do, [they] shall never be put upon it, but [their] Swords may grow rusty in [their] hands; for that Nation is surest to live in Peace, that is most capable of making War; and a Man that hath a Sword by his side, shall have least occasion to make use of it."<sup>15</sup>

The essays of Trenchard, Gordon, and Moyle subtly blended several distinct, yet related, ideas: opposition to standing armies, dependence upon militias, and support of the armed citizen. Thus, while the concept of the armed citizen was sometimes linked with that of the militia, libertarians just as often stressed this idea as an independent theme or joined it to other issues.

This latter tendency is evident in the writing of James Burgh, the libertarian most attractive to Americans. His *Political Disquisitions* provided a grab bag of ideas which Americans integrated into their vision of republicanism. Stressing the relationship between arms and power in a society, Burgh declared: "Those, who have the command of the arms in a country, says *Aristotle*, are masters of the state, and have it in their power to make what revolutions they please." Thus, "there is no end to observations on the difference between the measures likely to be pursued by a minister backed by a standing *army*, and those of a court awed by the fear of an *armed people*." For Burgh the very nature of society was related to whether or not its citizens had arms and were vigorous in their use. "No kingdom can be secured otherwise than by arming the people. The possession of arms is the distinction between a freeman and a slave. He, who has nothing, and who himself belongs to another, must be defended by him, whose property he is, and needs no arms. But he, who thinks he is his own master, and has what he can call his own, ought to have arms to defend himself, and what he possesses; else he lives precariously, and at discretion."<sup>16</sup>

A number of significant ideas came together in Burgh's *Disquisitions*. Like all libertarians he opposed a standing army and praised the militia as the bulwark of liberty. Then, going beyond these stock ideas, he clearly articulated the idea that the very character of the people—the cornerstone and strength of a republican society—was related to the individual's ability and desire to arm and defend himself against threats to his person, his property, and his state. An integral relationship existed between the possession of arms and the spirit and character of the people. For

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<sup>14</sup> [John Trenchard and Walter Moyle], *An Argument Shewing, That a Standing Army Is Inconsistent with a Free Government, and Absolutely Destructive to the Constitution of the English Monarchy* (London, 1697), 7.

<sup>15</sup> *Ibid.*, 12.

<sup>16</sup> [James Burgh], *Political Disquisitions: Or, an Enquiry into Public Errors, Defects, and Abuses* (3 vols., London, 1774-1775), II, 345, 476, 390.

this reason Burgh lamented the state to which English society had fallen. Having become a people interested only in luxury and commerce, Englishmen had surrendered their arms. Lauding the Scots ("bred up in hardy, active, and abstemious courses of life, they were always (pg.605) prepared to march") Burgh lamented that "the common people of *England*, on the other hand, having been long used to pay an army for fighting for them, had at this time forgot all the military virtues of their ancestors."<sup>17</sup>

Burgh's distress over the loss of virility and virtue in English society echoed that of his fellow libertarians since Harrington. These men related the downfall of English society to an increasingly luxury-loving people who freely chose to yield their military responsibilities to a professional army. Once armies were paid for by taxes, taxes were collected by armies, and the liberties of the English were at an end. True virtue sprang from the agrarian world of self-sufficient warriors. This was gone from England and with it all opportunity for a virtuous republic. There was, however, still some hope in the libertarians' minds: America was an agrarian society of self-sufficient husbandmen trained in arms. There the lamp of liberty might still burn brightly.

Richard Price drew the clearest contrast between the perceived decadence of England and the virtuous strength of America in his *Observations on the Importance of the American Revolution*. In that pamphlet he extolled the virtues of republican America, including the prevalence of the armed citizen, which he considered an integral part of America's strength. "Free States ought to be bodies of armed *citizens*, well regulated, and well disciplined, and always ready to turn out, when properly called upon, to execute the laws, to quell riots, and to keep the peace. Such, if I am rightly informed, are the citizens of America." In his view, "The happiest state of man is the middle state between the *savage* and the *refined*, or between the wild and the luxurious state. Such is the state of society in CONNECTICUT, and in some others of the *American* provinces; where the inhabitants consist, if I am rightly informed, of an independent and hardy YEOMANRY, all nearly on a level—trained to arms,—instructed in their rights—cloathed in home-spun—of simple manners—strangers to luxury—drawing plenty from the ground—and that plenty, gathered easily by the hand of industry." By contrast, "Britain, indeed, consisting as it does of *unarmed* inhabitants, and threatened as it is by ambitious and powerful neigh[b]ours, cannot hope to maintain its existence long after becoming open to invasion by losing its naval superiority."<sup>18</sup>

The conviction that Americans were a virtuous republican people—particularly when contrasted with decadent European populations—became a common theme in pamphlet literature on both sides of the Atlantic. George Mason boasted that "North America is the only great nursery of freemen now left upon the face of the earth." Matthew Robinson-Morris Rokeby, too, contended that while the flame of liberty in England was little more than "the last snuff of an expiring lamp," Americans were a "new and uncorrupted people." In addition, however, Rokeby linked the libertarian belief in a dynamic relationship between arms and a free society to his observations. Arguing that monarchs purposely kept their people unarmed, Rokeby exclaimed that the American (pg.606) colonies were "all democratical governments, where the power is in the hands of the people and where there is not the least difficulty or jealousy about putting arms into the hands of every man in the country." Europeans should be aware of the consequences of this and not "be ignorant of the strength and the force of such a form of government and how strenuously and almost wonderfully people living under one have sometimes exerted themselves in defence of their rights and liberties

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<sup>17</sup> *Ibid.*, 415.

<sup>18</sup> Richard Price, *Observations on the Importance of the American Revolution, and the Means of Making It a Benefit to the World* (London, 1784), 16, 69, 76.

and how fatally it has ended with many a man and many a state who have entered into quarrels, war and contests with them."<sup>19</sup>

The vision of their nation as a virile and uncorrupted society permeated the writings of Americans during and after the Revolution. And, like Machiavelli and Harrington before them, these American writers perceived a vital relationship between vigorous republican husbandmen and the possession of arms. Under the pseudonym "A British Bostonian," the Baptist preacher John Allen warned the British what would happen if they attempted "to make the Americans subject to their *slavery*." "This bloody scene can never be executed but at the expence of the destruction of England, and you will find, my Lord, that the Americans will not submit *to be* SLAVES, they know the use of the gun, and the military art, as well as any of his Majesty's troops at St. James's, and where his Majesty has one soldier, who art in general the refuse of the earth, America can produce fifty, free men, and all volunteers, and raise a more potent army of men in three weeks, than England can in three years."<sup>20</sup> Even Charles Lee, a British military man, observed in a widely circulated pamphlet that "the Yeomanry of America ... are accustomed from their infancy to fire arms; they are expert in the use of them:—Whereas the lower and middle people of England are, by the tyranny of certain laws almost as ignorant in the use of a musket, as they are of the ancient Catepulta."<sup>21</sup> The Continental Congress echoed this theme in its declaration of July 1775. "On the sword, therefore, we are compelled to rely for protection. Should victory declare in your favour, yet men trained to arms from their infancy, and animated by the love of liberty, will afford neither a cheap or easy conquest." Further, "in Britain, where the maxims of freedom were still known, but where luxury and dissipation had diminished the wonted reverence for them, the attack [of tyranny] has been carried on in a more secret and indirect manner: Corruption has been employed to undermine them. The Americans are not enervated by effeminacy, like the inhabitants of India; nor debauched by luxury, like those of Great-Britain."<sup>22</sup> In writing the *Federalist Papers* James Madison drew a similar contrast. Noting "the advantage of being armed, which the Americans possess over the people (pg.607) of almost every other nation," he observed that in Europe "the governments are afraid to trust the people with arms."<sup>23</sup> Years later Timothy Dwight testified to the strength and durability of this belief when he wrote that "to trust arms in the hands of the people at large has, in Europe, been believed ... to be an experiment fraught only with danger. Here by a long trial it has been proved to be perfectly harmless.... If the government be equitable; if it be reasonable in its exactions; if proper attention be paid to the education of children in knowledge and religion, few men will be disposed to use arms, unless for their amusement, and for the defence of themselves and their country."<sup>24</sup>

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<sup>19</sup> George Mason, "Remarks on Annual Elections for the Fairfax Independent Company," in *The Papers of George Mason, 1725-1792*, ed. Robert A. Rutland (3 vols., Chapel Hill, 1970), I, 231; Matthew Robinson-Morris Rokeby, *Considerations on the Measures Carrying on with Respect to the British Colonies in North America* (London, 1774), 133-35, 57.

<sup>20</sup> [John Allen], *An Oration, upon the Beauties of Liberty, or the Essential Rights of the Americans* (Boston, 1773), xiii-xiv.

<sup>21</sup> [Charles Lee], *Strictures on a Pamphlet Entitled, a "Friendly Address to All Reasonable Americans, on the Subject of Our Political Confusions." Addressed to the People of America* (Philadelphia, 1774), 12.

<sup>22</sup> *Journals of Congress* (13 vols., Philadelphia, 1800-1801), I, 148, 163.

<sup>23</sup> James Madison, "The Federalist No. 46 [45]," in *The Federalist*, ed. Jacob E. Cooke (Middletown, Conn., 1961), 321-22. This essay, originally published as number 45, appears as number 46 in the Cooke edition. For an explanation, see *ibid.*, xviii-xix.

<sup>24</sup> Timothy Dwight, *Travels in New-England and New-York* (4 vols., London, 1823), I, xiv.

It was Joel Barlow, however, who most eloquently articulated the vital role of arms in American republican thought. Barlow firmly believed that one of America's greatest strengths rested in "making every citizen a soldier, and every soldier a citizen; not only *permitting* every man to arm, but *obliging* him to arm." Whereas in Europe this "would have gained little credit; or at least it would have been regarded as a mark of an uncivilized people, extremely dangerous to a well ordered society," Barlow insisted that in America "it is *because the people are civilized, that they are with safety armed.*" He exulted that it was because of "their conscious dignity, as citizens enjoying equal rights, that they wish not to invade the rights of others. The danger [where there is any] from armed citizens, is only to the *government*, not to the *society*; and as long as they have nothing to revenge in the government (which they cannot have while it is in their own hands) there are many advantages in their being accustomed to the use of arms, and no possible disadvantage." In contrast, Barlow continued, European societies employed professional soldiers "who know no other God but their king; who lose all ideas of themselves, in contemplating their officers; and who forget the duties of a man, to practice those of a soldier,—this is but half the operation: an essential part of the military system is to disarm the people, to hold all the functions of war, as well the arm that executes, as the will that declares it, equally above their reach." Then, by integrating libertarian orthodoxy with Adam Smith's more recent observation that a people who lost their martial spirit suffered "that sort of mental mutilation, deformity and wretchedness which cowardice necessarily involves in it," Barlow revealed the essence of the role of arms in American republican thought: Any government that disarmed its people "palsies the hand and brutalizes the mind: an habitual disuse of physical forces totally destroys the moral; and men lose at once the power of protecting themselves, and of discerning the cause of their oppression." A man capable of defending himself with arms if necessary was prerequisite for maintaining the moral character to be a good republican. Barlow then deduced that in a democratic society with equal representation "the people will be universally armed: they will assume those weapons for security, which the art of war has (pg.608) invented for destruction." Only tyrannical governments disarmed their people. A republican society needed armed citizens and might remain vigorous and uncorrupted only so long as it had them.<sup>25</sup>

When Madison wrote the amendments to the Constitution that formed the basis of the Bill of Rights, he did not do so within a vacuum. Instead, he composed them in an environment permeated by the emergent republican ideology and with the aid of innumerable suggestions from his countrymen. These came most commonly from the state bills of rights and the hundreds of amendments suggested by the state conventions that ratified the Constitution. These sources continually reiterated four beliefs relative to the issues eventually incorporated into the Second Amendment: the right of the individual to possess arms, the fear of a professional army, the reliance on militias controlled by the individual states, and the subordination of the military to civilian control.

The various state bills of rights dealt with these four issues in different ways. Some considered them as separate rights, others combined them. New Hampshire, for example, included four distinct articles to deal with the militia, standing armies, military subordination, and individual bearing of arms. For its part, Pennsylvania offered a single inclusive article: "That the people have

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<sup>25</sup> Joel Barlow, *Advice to the Privileged Orders in the Several States of Europe: Resulting from the Necessity and Propriety of a General Revolution in the Principle of Government* (Ithaca, N.Y., 1956) 16-17, 45-46; Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (2 vols., London, 1776), II, 373. For an excellent discussion of Adam Smith's attitudes toward the relationship between martial spirit and the public character, see Donald Winch, *Adam Smith's Politics: An Essay in Historiographic Revision* (Cambridge, Eng., 1978), esp. 103-20.

a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power." Virginia, too, presented an inclusive statement: "That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State; that standing armies, in time of peace, should be avoided, as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power."<sup>26</sup>

The amendments suggested by the various state ratifying conventions were of a similar nature.<sup>27</sup> Examples include New Hampshire, which did not mention the militia but did state "that no standing Army shall be Kept up in time of Peace unless with the consent of three fourths of the Members of each branch of Congress, nor shall Soldiers in Time of Peace be quartered upon private Houses without the consent of the Owners." Then in a separate amendment: "Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion."<sup>28</sup> Maryland's convention offered five separate amendments dealing with these issues while Virginia's integrated them by (pg.609) stating: "That the people have a right to keep and bear arms; that a well regulated Militia composed of the body of the people trained to arms is the proper, natural and safe defence of a free State. That standing armies in time of peace are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the Community will admit; and that in all cases the military should be under strict subordination to and governed by the Civil power."<sup>29</sup> The New York convention, which offered over fifty amendments, observed: "That the People have a right to keep and bear Arms; that a well regulated Militia, including the body of the People *capable of bearing Arms*, is the proper, natural and safe defence of a free state."<sup>30</sup> The minority report of the Pennsylvania convention, which became a widely publicized Antifederalist tract, was the most specific: "That the people have a right to bear arms for the defence of themselves and their own State, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to and be governed by the civil power."<sup>31</sup>

On the specific right of individuals to keep arms, Madison could also draw upon the observations of Samuel Adams, then governor of Massachusetts, and his close friend and confidant Thomas Jefferson. For his part, Adams offered an amendment in the Massachusetts convention that read: "And that the said Constitution be never construed to authorize Congress to infringe the just liberty of the press or the rights of conscience; or to prevent the people of the United States who are peaceable citizens from keeping their own arms; or to raise standing armies, unless when necessary

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<sup>26</sup> Francis Newton Thorpe, ed., *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories and Colonies Now or Heretofore Forming the United States of America* (7 vols., Washington, 1909), IV, 2455-56, V, 3083, VII, 3814. All of the state bills of rights appear in this collection.

<sup>27</sup> These amendments are conveniently grouped together in Dumbauld, *Bill of Rights*, 173-205.

<sup>28</sup> *Ibid.*, 182.

<sup>29</sup> *Ibid.*, 178-79, 185. The Maryland amendments include minority proposals.

<sup>30</sup> *Ibid.*, 189. New York's was the only state amendment to distinguish between *keeping* and *bearing* arms. It allowed all citizens to possess arms, but only those with the capability to bear them were asked to do so.

<sup>31</sup> *Ibid.*, 174. For an excellent analysis of this report, see Merrill Jensen, ed., *The Documentary History of the Ratification of the Constitution* (3 vols., Madison, 1976-1978), II, 617-40.

for the defence of the United States, or of some one or more of them."<sup>32</sup> In his initial draft of a proposed constitution for the state of Virginia Jefferson did not mention a militia but did state that no standing army should exist except in time of actual war. Then, in a separate phrase, he wrote: "No freeman shall ever be debarred the use of arms." He amended this statement in his next two drafts to read: "No freeman shall be debarred the use of arms within his own lands or tenements."<sup>33</sup>

Madison and his colleagues on the select committee charged with creating a bill of rights were anxious to capture the essence of the rights demanded by so many Americans in so many different forms. To do this they eliminated many suggestions, reworded others, and consolidated as many as possible in order to (pg.610) come up with a reasonable number of amendments.<sup>34</sup> What became the Second Amendment resulted from this last process. The committee took the two distinct, yet related rights—the individual possession of arms and the need for a militia made up of ordinary citizens—and merged them into a single amendment. As with other amendments that combined various essential rights, it was the intent of the committee neither to subordinate one right to the other nor to have one clause serve as subordinate to the other.<sup>35</sup> This became obvious in the discussion of the amendment that took place on the floor of Congress.

Although brief, the discussion occasioned by the Second Amendment is instructive for its indication of congressional intent to protect two separate rights: the individual's right to possess arms and the right of the states to form their own militia. Elbridge Gerry made this clear when he attacked the phrase dealing with conscientious objectors, those "scrupulous of bearing arms," that appeared in the original amendment. Manifesting the standard libertarian distrust of government, Gerry claimed that the amendment under discussion "was intended to secure the people against the mal-administration of the Government; if we could suppose that, in all cases, the rights of the people would be attended to, the occasion for guards of this kind would be removed." However, Gerry was suspicious that the federal government might employ this phrase "to destroy the constitution itself. They can declare who are those religiously scrupulous, and prevent them from bearing arms."<sup>36</sup> This would be a return to European-style governments in which those in authority systematically disarmed the populace. Thomas Scott of Pennsylvania also objected to this phrase for fear that it "would lead to the violation of another article in the constitution, which secures to the people the right of keeping arms."<sup>37</sup> The entire thrust of this discussion, as well as one related to a militia bill also under consideration, was that congressmen distinguished not only between the militia and the right of the individual to possess arms but between the individual's *possession* of arms and his *bearing* of them. That is, they believed that all should have the right to possess arms but that all should not necessarily be responsible for bearing them in defense of the state. In the discussion over

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<sup>32</sup> William V. Wells, *Life and Public Services of Samuel Adams, Being a Narrative of His Acts and Opinions, and of His Agency in Producing and Forwarding the American Revolution* (3 vols., Boston, 1865), III, 267.

<sup>33</sup> *The Papers of Thomas Jefferson*, ed. Julian P. Boyd et al. (19 vols., Princeton, 1950-1974), I, 344, 353, 363.

<sup>34</sup> For an excellent analysis of this process, see Bernard Schwartz, *The Great Rights of Mankind: A History of the American Bill of Rights* (New York, 1977), 160-91.

<sup>35</sup> In their interpretations of the Second Amendment various authors have stressed the wording of the amendment. (See note 5 above.) It is clear, however, that James Madison and the committee worked toward succinctness. Indeed, Madison's original suggestion read: "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." Dumbauld, *Bill of Rights*, 207.

<sup>36</sup> *Ibid.*; *Annals of the Congress*, 1 Cong., 1 sess., Aug. 17, 1789, p. 778.

<sup>37</sup> *Annals of the Congress*, 1 Cong., 1 sess., Aug. 20, 1789, p. 796.

the militia bill, for example, one representative declared: "As far as the whole body of the people are necessary to the general defence, they ought to be armed; but the law ought not to require more than is necessary; for that would be a just cause of complaint." Another believed that "the people of America (pg.611) would never consent to be deprived of the privilege of carrying arms." Others even argued that those Americans who did not possess arms should have them supplied by the states.<sup>38</sup> This discussion clearly indicated that the problem perceived by the representatives was how to get arms into the hands of all American males between the ages of eighteen and forty-five, not how to restrict such possession to those in militia service.<sup>39</sup>

It is apparent from such discussions that Americans of the Revolutionary generation distinguished between the individual's right to *keep* arms and the need for a militia in which to *bear* them. Yet it is equally clear that more often than not they considered these rights inseparable. This raises the question of why so many Americans so often fused these rights as to make it logical to combine them in the Second Amendment. Here comments by Madison, George Washington, Dwight, and Joseph Story provide excellent insight.

In his forty-fifth number of the *Federalist Papers* Madison drew the usual contrast between the American states, where citizens were armed, and European nations, where governments feared to trust their citizens with arms. Then he observed that "it is not certain that with this aid alone [possession of arms], they would not be able to shake off their yokes. But were the people to possess the additional advantages of local governments chosen by themselves, who could collect the national will, and direct the national force; and of officers appointed out of the militia, by these governments and attached both to them and to the militia, it may be affirmed with the greatest assurance, that the throne of every tyranny in Europe would be speedily overturned, in spite of the legions which surround it."<sup>40</sup> Washington, in his first substantive speech to Congress, declared: "To be prepared for war, is one of the most effectual means of preserving peace. A free people ought not only to be armed, but disciplined; to which end, a uniform and well digested plan is requisite."<sup>41</sup> Writing early in the nineteenth century, Dwight celebrated the right of individuals to possess arms as the hallmark of a democratic society. Then, he concluded: "The difficulty here has been to persuade the citizens to keep arms, not to prevent them from being employed for violent purposes."<sup>42</sup> This same lament (pg.612) coursed through the observations of Story, whose *Commentaries* summed up the relationship between armed citizens and the militia as clearly as it was ever stated. In his discussion of the Second Amendment, Story wrote:

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<sup>38</sup> *Ibid.*, 1 Cong., 3 sess., Dec. 16, 1790, pp. 1806-07.

<sup>39</sup> This is the opinion of St. George Tucker, one of the leading jurists of the day. When he edited *Blackstone's Commentaries*, Tucker noted the master's observation that the right of the people to bear arms constituted one of the essential rights necessary to protect life, liberty, and property. His footnote to this section read: "The right of the people to keep and bear arms shall not be infringed. Amendments to C.U.S. [Constitution of the United States] Art. 4, and this without any qualification as to their condition or degree as is the case in the British government." In another note Tucker observed that "whosoever examines the forest, and game laws in the British code, will readily perceive that the right of keeping arms is effectually taken away from the people of England." Blackstone himself informs us "that the prevention of popular insurrections and resistance to government by disarming the bulk of the people, is a reason oftener meant than avowed by the makers of the forest and game laws." St. George Tucker, ed., *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* (5 vols., Philadelphia, 1803), I, 144, II, 412.

<sup>40</sup> Madison, "Federalist No. 46 [45]," 321-22.

<sup>41</sup> *Annals of the Congress*, 1 Cong., 2 sess., Jan. 8, 1790, p. 969.

<sup>42</sup> Dwight, *Travels in New-England*, I, xiv-xv.

The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them. And yet, though this truth would seem so clear, and the importance of a well regulated militia would seem so undeniable, it cannot be disguised, that among the American people there is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burthens, to be rid of all regulations. How it is practicable to keep the people duly armed without some organization, it is difficult to see. There is certainly no small danger, that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine all the protection intended by this clause of our national bill of rights.<sup>43</sup>

The observations of Madison, Washington, Dwight, and Story reveal an interesting relationship between the armed citizen and the militia. These men firmly believed that the character and spirit of the republic rested on the freeman's possession of arms as well as his ability and willingness to defend himself and his society. This was the bedrock, the "palladium," of republican liberty. The militia was equally important in their minds. Militia laws insured that freemen would remain armed, and thus vigorous republican citizens. In addition the militia served as the means whereby the collective force of individually armed citizens became effective. It was this that would cause those in power to respect the liberties of the people and would eliminate the need to create professional armies, that greatest single threat to a republican society. Thus, the armed citizen and the militia existed as distinct, yet interrelated, elements within American republican thought.

With the passage of time, however, American republicanism placed an increasing emphasis upon the image of the armed citizen. Caught up within a dialectic between virtue and commerce, Americans struggled to preserve their Revolutionary commitment to escape from corruption. Following Harrington's reasoning that commerce could not corrupt so long as it did not overwhelm agrarian interests, Americans believed that in order to accommodate both virtue and commerce a republic must be as energetic in its search for land as it was in its search for commerce. A vast supply of land, to be occupied by an armed and self-directing yeomanry, might nurture an endless reservoir of virtue. If American virtue was threatened by the increase in commercial activity following the Constitution of 1787, it could revitalize itself on the frontier by means of the armed husbandman.<sup>44</sup> (pg.613)

This belief is what gave point to Jefferson's observation that "our governments will remain virtuous for many centuries; as long as they are chiefly agricultural; and this will be as long as there shall be vacant lands in any part of America." Coupled with this, however, was Jefferson's libertarian

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<sup>43</sup> Joseph Story, *Commentaries on the Constitution of the United States; With a Preliminary Review of the Constitutional History of the Colonies and States before the Adoption of the Constitution* (3 vols., Boston, 1833), III, 746-47.

<sup>44</sup> This theme is developed in a wide range of literature. Outstanding examples include: Richard Slotkin, *Regeneration through Violence: The Mythology of the American Frontier, 1600-1860* (Middletown, Conn., 1973); Henry Nash Smith, *Virgin Land: The American West as Symbol and Myth* (Cambridge, Mass., 1950); John William Ward, *Andrew Jackson: Symbol for an Age* (New York, 1955); and Pocock, *Machiavellian Moment*, esp. 506-52. For an excellent analysis of the changing attitudes toward the militia and professional armies, see Charles Royster, *A Revolutionary People at War: The Continental Army and American Character, 1775-1783* (Chapel Hill, 1979).

inheritance: "What country can preserve its liberties if their rulers are not warned from time to time that their people preserve the spirit of resistance. Let them take arms."<sup>45</sup>

In the nearly two hundred years since the ratification of the Bill of Rights American society has undergone great transformations. As a consequence the number of people enjoying expanded civic rights and responsibilities, including the ownership of firearms, which Jefferson and others felt should be restricted to "freemen," has vastly increased. This has become the source of much controversy. Speaking for those alarmed by the presence of so many armed citizens, Sen. Edward Kennedy believes that "our complex society requires a rethinking of the proper role of firearms in modern America. Our forefathers used firearms as an integral part of their struggle for survival. But today firearms are not appropriate for daily life in the United States."<sup>46</sup> For his part, Edward Abbey, eloquent spokesman for individualism, fears that the measures suggested by Senator Kennedy to cope with today's "complex society" may be taking America in the direction of a worldwide drift toward totalitarianism. In his mind, throughout history whenever tyrannical governments existed and where the few ruled the many, citizens have been disarmed. "The tank, the B-52, the fighter-bomber, the state-controlled police and military are the weapons of dictatorship. The rifle is the weapon of democracy." Then, "If guns are outlawed, only the government will have guns. Only the police, the secret police, the military. The hired servants of our rulers. Only the government—and a few outlaws. I intend to be among the outlaws."<sup>47</sup>

Whether the armed citizen is relevant to late-twentieth-century American life is something that only the American people—through the Supreme Court, their state legislatures, and Congress—can decide. Those who advocate some measure of gun control are not without powerful arguments to advance on behalf of their position. The appalling and unforeseen destructive capability of modern weapons, the dissolving of the connection between an armed citizenry and the agrarian setting that figured so importantly in the thought of the revolutionary generation, the distinction between the right to keep arms and such measures as "registration," the general recognition of the responsibility of (pg.614) succeeding generations to modify the constitutional inheritance to meet new conditions—all will be serviceable in the ongoing debate. But advocates of the control of firearms should not argue that the Second Amendment did not intend for Americans of the late eighteenth century to possess arms for their own personal defense, for the defense of their states and their nation, and for the purpose of keeping their rulers sensitive to the rights of the people.

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<sup>45</sup> Thomas Jefferson to James Madison, Dec. 20, 1787, in *Papers of Jefferson*, ed. Boyd et al., XII, 442; Jefferson to William Stephens Smith, Nov. 13, 1787, *ibid.*, XII, 356.

<sup>46</sup> Kennedy, "Need for Gun Control Legislation," 26.

<sup>47</sup> For Edward Abbey's thoughts regarding the drift toward totalitarianism, see Edward Abbey, *Desert Solitaire: A Season in the Wilderness* (New York, 1968), 149-51. The quotations are drawn from Edward Abbey, "The Right to Arms," Edward Abbey, *Abbey's Road* (New York, 1979), 130-32.